Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2006-1

Ottawa, 6 January 2006

TELUS Communications Inc. - Application with respect to Telecom Decision CRTC 2005-6 - Location of competitor point of presence

Reference: 8661-T66-200508038

*In this Decision, the Commission **approves** a request by TELUS Communications Inc. that the Commission clarify that a competitor must have a point of presence located in Canada in order to be eligible for Competitor Digital Network (CDN) services. The Commission **denies** Bell Canada's related request to exempt cross-border circuits from the CDN service.*

Background

1. In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002 (Decision 2002-34), the Commission directed the major incumbent local exchange carriers (ILECs) to develop a competitor digital network access (CDNA) service. The CDNA service made the ILECs' digital network access (DNA) and associated link facilities available to competitors at rates less than retail DNA service rates. The Commission prohibited simple resale of the CDNA service in order to avoid distortions in the retail DNA market. Simple resale was defined by the Commission as resale without added value, including rebilling.

2. In *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005 (Decision 2005-6), the Competitor Digital Network (CDN) service was approved on a final basis. The Commission maintained the prohibition on simple resale, and the CDN service was made available to registered Canadian carriers and all registered resellers (competitors). The Commission also noted in that decision that if traffic carried on a CDNA access leased by a competitor terminated at the competitor's network site within the territory of the ILEC that provided that facility, the ILEC would be able to determine that the competitor's traffic ultimately terminated at the competitor's network site.

3. However, in Decision 2005-6, the Commission did not continue to require that competitor traffic carried on a CDNA access must terminate at a competitor's network site within the territory of the ILEC that provided the access. Specifically, the Commission found at paragraph 251 that "*…a competitor should not be prevented from using CDN services, notwithstanding that the traffic may ultimately terminate at a POP [point of presence] outside the territory of the ILEC that provides the CDN services.*"

4. The Commission adopted this approach for the CDN service after noting that facilities-based competitors provided services using facilities and services leased from ILECs and other suppliers in combination with self-supplied facilities and services. The Commission considered that this approach promoted facilities-based competition and that accordingly, it would be inappropriate to restrict the use of CDN services when the competitor network site at which CDN traffic terminated was outside the territory of the ILEC providing the CDN service.

5. The Commission also stated in paragraph 252 of Decision 2005-6 that if the POP was outside the territory of the ILEC that provided the CDN services, the ILEC would not know whether the traffic ultimately terminated on the competitor's network. The Commission therefore determined it would be appropriate to require that each competitor using the CDN service provide an affidavit with respect to its compliance with the prohibition on simple resale, and that this affidavit should include the attestation that the route or pathway associated with each leased access facility included as part of CDN services ultimately connects at the POP.

6. The Commission further found that audits of competitor compliance with respect to the simple resale prohibition should be undertaken only where circumstances were warranted.

Application

7. On 5 July 2005, the Commission received an application from TELUS Communications Inc. (TELUS) requesting that the Commission clarify that a competitor must have a POP located in Canada to be eligible for CDN services.[1] TELUS noted that in Decision 2005-6, the Commission was silent on whether a POP was required to be located in Canada.

8. TELUS argued that the requirement for a competitor to have a POP in Canada was necessary to uphold the prohibition against simple resale and to advance facilities-based competition.

9. TELUS submitted that the requirement in Decision 2005-6 that the route or pathway associated with each leased access facility included as part of the CDN service ultimately connected at a competitor POP was key to the Commission's prohibition on simple resale.

10. TELUS submitted further that without a POP in Canada, a competitor would violate the simple resale prohibition because it would simply re-bill and re-brand digital network services provided by the ILECs without the addition of any value that would come from combining ILEC facilities with its own facilities.

11. TELUS argued that if all of a competitor's POPs were located outside of Canada, audits of compliance would be difficult, if not impossible in foreign jurisdictions, and thus the prohibition on simple resale could not be effectively enforced.

[1] In paragraph 117 of Decision 2005-6, the Commission defined a POP as any competitor location that the competitor has designated as an interconnection site, and may or may not contain a switch.

12. TELUS further argued that the Commission's objective in Decision 2005-6 of promoting facilities-based competition also required that a competitor have a POP in Canada. TELUS submitted that, without this requirement, foreign entities, among others, could obtain discounted CDN services without having any facilities in Canada. TELUS submitted that such an outcome would be inconsistent with the Canadian telecommunications policy objective of enhancing the efficiency and competitiveness of Canadian telecommunications.

13. TELUS submitted that section 12 of the *Interpretation Act* supported the conclusion that a competitor POP was required in Canada for CDN eligibility.[2]

Process

14. Comments were filed by Rogers Telecom on 19 July 2005, MTS Allstream Inc. (MTS Allstream) on 27 July 2005, Bell Canada on 2 August 2005, and MCI Canada on 5 August 2005.

15. TELUS filed reply comments on 12 August 2005.

Positions of parties

16. MTS Allstream and Rogers Telecom supported TELUS' application. MTS Allstream argued that the ILECs should adopt and use a common tariff definition of a competitor POP to include the specific condition that the POP was to be located in Canada. Rogers Telecom argued that the ILECs' CDN tariffs should include a condition restricting CDN service to telecommunications service providers with a Canadian POP.

17. Bell Canada and MCI Canada opposed TELUS' application. Bell Canada argued that in Decision 2005-6, the Commission had ruled that CDN circuits could terminate at locations outside the territory of the ILEC that provided the CDN service without restricting CDN circuits to originate and terminate in Canada. Bell Canada argued further that it was not necessary for a competitor to have a POP in Canada to uphold the prohibition against simple resale. Bell Canada submitted that such a requirement would impose additional costs and delays on all parties, including the ILECs, who would have to determine the location of the competitor POP in order to ensure that the circuit was CDN-eligible.

18. With respect to the enforcement of the simple resale prohibition, Bell Canada argued that the existing affidavit process was effective and sufficient.

19. Bell Canada submitted that, contrary to TELUS' argument, requiring a POP in Canada would not promote facilities-based competition, but would deny the benefits of competitive choice to competitors that did not have a POP in Canada. Bell Canada requested that, if the Commission were to find that competitors must have a POP in Canada in order to obtain CDN services,

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[2] Section 12 of the *Interpretation Act* provides that every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

the Commission should also require that competitors pay retail DNA rates, not CDN rates, for cross-border circuits, which it stated typically included an access component and a transport component that would or would not be forborne. Bell Canada argued this requirement would be necessary in order to ensure that the ILEC on whose network the circuit originated was not disadvantaged vis-à-vis other domestic competitors.

20. Bell Canada further argued that TELUS' application was a veiled application that the Commission review and vary Decision 2005-6, and that TELUS had failed to demonstrate that the circumstances identified by the Commission as examples in which there may be substantial doubt as to the correctness of a decision, had been met.[3]

21. MCI Canada argued that TELUS' application contradicted Decision 2005-6 in which CDN services were made available to all competitors. MCI Canada further argued that requiring all resellers to have a POP in Canada created an artificial and unnecessary barrier to entry for resellers.

22. MCI Canada further submitted that the outcome sought by TELUS would be inconsistent with Canada's obligations regarding market access under Article XVI of the General Agreement on Trade in Services (GATS). MCI Canada argued that under Canada's Schedule of Specific Commitments to the GATS Schedule, Canada had committed to ensuring market access to resellers and had placed no restrictions on the entry of these service providers in the market for circuit-switched and packet-switched data transmission services. In MCI Canada's view, had Canada wished to restrict reseller entry into the market, it would have been required to include an inscription to that effect in its Schedule.

23. MCI Canada submitted that there was nothing in the *Interpretation Act* or any other statute in Canada which required the Commission to insert a condition in the CDN tariffs that required competitors to have a POP in Canada.

TELUS' reply

24. TELUS submitted that Bell Canada's argument regarding additional costs and delays ignored the Commission's finding in Decision 2005-6 in which the Commission required an affidavit from competitors precisely because the ILECs would not necessarily know where a competitor's traffic ultimately terminated. TELUS further argued that, contrary to Bell Canada's submission, ILECs were not required to verify that a CDN circuit terminated at a competitor POP, and that therefore no additional costs or delays would be incurred if competitors were required to have a POP in Canada.

25. TELUS submitted that, contrary to Bell Canada's argument, the affidavit with respect to simple resale was not a substitute for a competitor having a POP in Canada, but was necessary because an ILEC could not know if a competitor's traffic ultimately terminated on the competitor's network if its POP was outside of the ILEC's territory.

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[3] These circumstances, which are set out in *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998, are: (a) an error in law or in fact; (b) a fundamental change in circumstances or facts since the decision; (c) a failure to consider a basic principle which had been raised in the original proceeding; or (d) a new principle which has arisen as a result of the decision.

26. With respect to the position of Bell Canada and MCI Canada, TELUS submitted that access to CDN rates without establishing a POP in Canada (or any other facilities) could only be a detriment to facilities-based competition, as it would make it possible for entities to receive CDN rates without investing in facilities in Canada. TELUS submitted that, as a result, resellers would be permitted to enter the market and offer service entirely on the basis of discounted and resold ILEC inputs.

27. TELUS argued that its application was not an application to have the Commission review and vary Decision 2005-6 as it was not requesting that the Commission reverse itself, but rather that the Commission clarify its position with respect to the location of a competitor's POP.

28. In reply to MCI Canada's submissions with respect to the GATS, TELUS submitted that Article XVI of the GATS, on which MCI Canada had relied, was broadly worded and should be read in context. TELUS noted that GATS Article XVI:1 read as follows:

> With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule [of Specific Commitments].

29. TELUS submitted that under GATS Article XVI, Canada was bound to accord to foreign service suppliers treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in Canada's Schedule. TELUS argued that its interpretation of Decision 2005-6 did not offend this provision because all suppliers were treated symmetrically.

30. Further, TELUS submitted that GATS Article XVI:1 should be read in light of GATS Article XVI:2, which provided the following:

> In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, *are defined as*:
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> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
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> (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
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> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.[italics in original]

31. TELUS argued that the GATS jurisprudence on this point provided no support for the argument advanced by MCI Canada. According to TELUS, GATS Article XVI:2 were exhaustive of the type of market access limitations that were not permitted. Accordingly, in TELUS' view, it was permissible to maintain limitations other than those mentioned in GATS Article XVI:2, and there was no legal requirement that such limitations be inscribed in a country's Schedule.

32. TELUS argued that because a Canadian POP restriction did not fit within any of the limitations described in GATS Article XVI:2, it was not a limitation prohibited by GATS Article XVI:1 and the imposition of such a restriction would not be incompatible with Canada's commitments under that GATS Article; nor was it a limitation required to be included in Canada's Schedule.

Commission's analysis and determinations

33. The Commission considers that TELUS' application does not constitute an application to review and vary Decision 2005-6, but is a request for clarification regarding the location of a competitor's POP.

34. The Commission notes that in the proceeding that led to Decision 2005-6, issues with respect to the location of a competitor's POP focused on whether, for a leased access circuit to be eligible for CDN rates, the competitor's POP to which the circuit in question connected and the associated circuit to the end-customer should be in the same ILEC wire centre area and ILEC territory.

35. Bell Canada argued that requiring a POP in Canada would impose additional costs and delays on all parties, including ILECs, who would have to determine the location of the competitor POP in order to ensure that the circuit was CDN-eligible. The Commission notes, however, that TELUS correctly observed that ILECs are not required to determine the location of the competitor POP. The Commission further notes that, contrary to Bell Canada's submission, ILECs would not be required to determine the location of the competitor POP if a POP is required in Canada. The Commission, therefore, agrees with TELUS' submission that Bell Canada's argument did not take account of the Commission's determination that it was appropriate to impose the affidavit requirement because an ILEC would not necessarily know whether the traffic ultimately terminated on the competitor's network if the competitor's POP was located outside that ILEC's territory.

36. Consistent with its finding in Decision 2002-34, the Commission prohibited simple resale of the CDN service in Decision 2005-6 to avoid distortions in the retail DNA service market. In Decision 2005-6, the Commission defined simple resale as resale without adding value, and noted that simple resale included rebilling.

37. Given that the Commission's jurisdiction is limited to Canada, the Commission considers that the prohibition on simple resale set out in Decision 2005-6 was with respect to simple resale that occurs within Canada.

38. The Commission further considers that the connection of a CDN facility leased by a competitor to that competitor's POP is a key means by which the Commission may be satisfied that a competitor is adding value to the leased facility. In this connection, the Commission notes that the affidavit requirement associated with the simple resale prohibition requires each competitor to attest that the route or pathway associated with each leased access facility included as part of CDN services ultimately connects at the POP.

39. In the Commission's view, if a reseller does not have a POP in Canada and the relevant POP is located outside of Canada, the process of adding value is, by definition, taking place outside of Canada. In these circumstances, the Commission considers that the leased facility in Canada would not be subject to added value in Canada, and, hence, would be subject to simple resale in Canada, contrary to the prohibition in Decision 2005-6.

40. With respect to the enforcement of the prohibition on simple resale, the Commission agrees with TELUS' submission that, if a competitor did not have a POP in Canada, an audit of a competitor's affidavit of compliance with the prohibition on simple resale would be extremely difficult, if not impossible, due to, among other things, the issue of extra-territorial jurisdiction.

41. The Commission also notes Bell Canada's submission that requiring a competitor to have a POP in Canada would not promote facilities-based competition because, in Bell Canada's view, a foreign competitor would not likely establish a Canadian POP when it could obtain resold CDN circuits from non-ILEC competitors in Canada. However, the Commission considers that the availability of ILEC DNA facilities at CDN rates is only one among several factors that a competitor would consider in determining whether to establish a POP in Canada.

42. The Commission notes TELUS' submission that not requiring a competitor to have a POP in Canada in order to use the CDN service would undermine the Commission's policy objective of facilities-based competition because resellers would be permitted to enter the market and offer service solely on the basis of discounted and resold ILEC inputs. The Commission further notes that, when it finalized the CDN service, it found that the requirement to offer CDN services would advance facilities-based competition and ensure that telecommunications services are provided in a manner consistent with the Canadian telecommunications policy objectives in the *Telecommunications Act*.[4] In the Commission's view, facilities-based competition will be promoted if competitors have a POP in Canada.

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[4] Paragraph 169 of Decision 2005-6.

43. With respect to MCI Canada's submission that the outcome sought by TELUS would be inconsistent with Article XVI of the GATS, the Commission considers that TELUS' arguments in its reply comments, as set out above, are persuasive.

44. In light of the above, the Commission **approves** TELUS' application and clarifies that a competitor is required to have a POP in Canada for the purpose of the CDN service. The Commission further clarifies that the requirement in Decision 2005-6 that each competitor's affidavit attest that the route or pathway associated with each leased access facility included as part of CDN services "ultimately connects at the POP" should read: "ultimately connects at the POP in Canada". The Commission directs Bell Canada, Aliant Telecom Inc., MTS Allstream and Saskatchewan Telecommunications to issue revised tariff pages for the CDN service to reflect the requirement that a competitor have a POP in Canada.

45. The Commission notes Bell Canada's request that if competitors must have a POP in Canada in order to obtain CDN services, the Commission should require competitors to pay retail DNA rates, not CDN rates, for cross-border DNA circuits. Bell Canada argued this requirement would be necessary in order to ensure that the ILEC in whose territory the circuit originates was not disadvantaged vis-à-vis other domestic competitors.

46. The Commission notes that the purpose of the proceeding that led to Decision 2005-6 was to consider the relative competitive position of ILECs and competitors when they provide retail customers with services that use DNA facilities as an input. As noted, the Commission concluded in Decision 2005-6 that, in the absence of the CDN service, the ILECs had an undue or unreasonable competitive advantage relative to competitors with respect to the use of DNA facilities. The Commission therefore required that ILECs make their DNA facilities available to competitors as the CDN service.

47. Consistent with Decision 2005-6, the Commission considers that competitors would be unduly disadvantaged if cross-border circuits were exempted from the CDN service as proposed by Bell Canada, and further considers that the current CDN service does not represent an undue competitive disadvantage for Bell Canada.

48. Accordingly, the Commission **denies** Bell Canada's request to exempt cross-border circuits from the CDN service.

Secretary General