



Telecom Decision CRTC 2006-49

Ottawa, 3 August 2006

The Quebec Coalition of Internet Service Providers – Part VII application regarding Internet services

Reference: 8622-Q18-200513566

In this Decision, the Commission disposes of a Part VII application by the Quebec Coalition of Internet Service Providers in which it requested Commission assistance to address certain provisioning and rate issues associated with Bell Canada's asymmetric digital subscriber line services.

Introduction

1. The Quebec Coalition of Internet Service Providers (QCISP) filed an application, dated 18 November 2005, pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* and sections 24, 25, 27, 35, 37, 39, 48, 51, 60, and 61 of the *Telecommunications Act* (the Act), in which it requested that the Commission take the following actions with respect to Bell Canada's retail and competitor asymmetric digital subscriber line (ADSL) services:
 - invalidate the \$100 early contract termination fee applied by Bell Canada to its retail ADSL customers, which has had a negative effect on the ability of the QCISP's members to acquire customers;
 - declare that a 12-month promotional rate for retail ADSL Internet service cannot be renewed repeatedly without consideration of the promotional rate in the approval of the mark-up associated with the rate for the comparable competitor service;
 - allow network interconnection using a high-speed service provider interface (HSSPI) in a suitable support structure outside of the Bell Canada central office (CO) by competitors using Gigabit Ethernet over fibre optics to a point of interconnection (POI) in the outside plant, similar to that available under incumbent cable carrier (ICC) third-party Internet access (TPIA) service;
 - make a near-essential finding for Bell Canada's General Tariff item 5400 – ADSL Access Service (General Tariff item 5400), the ADSL access component of General Tariff item 5410 – Gateway Access Service (GAS), and General Tariff item 5420 – High Speed Access Service (HSA service);
 - declare that the highest mark-ups for Bell Canada's General Tariff item 5400, GAS, and HSA service are those that Bell Canada deems acceptable for its own comparable retail service offerings within each band and direct Bell Canada to adjust the tariffed rates accordingly; and

- require Bell Canada to file updated Phase II cost studies associated with General Tariff item 5400, GAS, and HSA service based on 2005 data and direct Bell Canada to reflect the results in revised tariff pages.

Process

2. The Commission received comments from Bell Canada, MTS Allstream Inc. (MTS Allstream), Primus Telecommunications Canada Inc. (Primus), and Cybersurf Corp. (Cybersurf) dated 19 December 2005. The QCISP submitted reply comments dated 28 December 2005.

The application

3. The QCISP submitted that enforcement of *Forbearance from retail Internet services*, Telecom Order CRTC 99-592, 25 June 1999 (Order 99-592), would end the anticompetitive conduct by Bell Canada in the provisioning of ADSL-based retail Internet services that was irreparably harming its members.
4. In support of this view, the QCISP cited facts and percentages from the Commission's 2001-2005 annual *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets – Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*,¹ which collectively indicated a decline in Internet service provider (ISP) market share and revenues between 2001 and 2005.
5. The QCISP submitted that as a result of ISP customers taking advantage of the lite high-speed Internet services² offered by the incumbent local exchange carriers (ILECs), there had been a reduction in dial-up Internet users and that this reduction was one of the main causes of the decline in ISP market share and revenues between 2001 and 2005.
6. The QCISP submitted that it was concerned that the recurring promotional rate for Bell Canada's retail ADSL Internet services could result in a margin-squeeze for its members' Internet services. The QCISP also submitted that this margin-squeeze could prevent its members from effectively competing against Bell Canada in the Internet services market.

Positions of parties

7. MTS Allstream and Cybersurf also noted the decline in market share for small ISPs. MTS Allstream submitted that the lack of growth and innovation observed in the competitor Internet services market was largely due to the rates and the service structure of Bell Canada's competitor ADSL access services. In this regard, Cybersurf submitted that the market share statistics and cost information provided by the QCISP in support of its application were consistent with Cybersurf's experience as a competitor.
8. In contrast, Bell Canada submitted that the Canadian Internet services market exhibited all the characteristics of a vigorously competitive market. Bell Canada also submitted that the ICC ISPs were formidable competitors in the retail Internet services market, including the

¹ <http://www.crtc.gc.ca/eng/publications/reports.htm#monitoring>

² For the purposes of this Decision, "lite high-speed Internet services" refers to Internet access speeds of 1Mbps or less.

Quebec retail Internet services market, where the QCISP's members predominantly operated. Bell Canada further submitted that it considered Vidéotron ltée (Vidéotron) as a price setter in the Quebec Internet services market. In this regard, Bell Canada noted that Vidéotron had consistently been the first to market in terms of promotional offerings, forcing Bell Canada to adjust its pricing to remain competitive.

9. Bell Canada submitted that it was not engaged in predatory pricing; rather, the low prices in the retail Internet services market were evidence of a competitive marketplace. In response to the QCISP's suggestion that the decline in dial-up users in the ISP market was evidence of Bell Canada's anti-competitive behaviour, Bell Canada submitted that customer migration from dial-up to broadband services was, instead, evidence of natural market evolution.

Request for changes to terms of retail high-speed Internet services

10. MTS Allstream submitted that the remedies proposed by the QCISP with regard to the ongoing promotional rates for retail ADSL Internet services and the \$100 early contract termination fee would amount to imposing conditions on a forborne service. MTS Allstream also submitted that these remedies would have the undesirable effects of increasing retail Internet services prices and of potentially slowing growth and innovation. MTS Allstream further submitted that, in the absence of similar remedies being imposed on the ICCs, the ILECs would be placed at a competitive disadvantage.
11. Bell Canada noted that early contract termination fees in tariffs were commonplace and were either identified in the tariff or set out in the general Terms of Service associated with the company's service offerings. Bell Canada also noted that, in the case of forborne services, it was commonplace for discounts to be offered in exchange for term and/or volume commitments.
12. Bell Canada submitted that in order to grant the QCISP's request to invalidate Bell Canada's early contract termination fees, the Commission would have to overturn findings that it had made in a succession of Internet forbearance decisions and later confirmed in successive proceedings initiated by the Independent Members of the Canadian Association of Internet Providers (IMCAIP) in the current decade.

Request to extend HSSPI outside the CO

13. With respect to the QCISP's request to allow network interconnection in a suitable support structure outside of the CO, Bell Canada noted that the interface to a POI located in a support structure might only be feasible in some instances, notably where space and capacity were available and where conditions were suitable for such equipment to be placed in the support structure in question. Bell Canada submitted that on a mutually agreed-upon basis, it would be willing to enter into interconnection arrangements at a POI located outside the CO.

Request for reclassification of General Tariff item 5400, GAS, and HSA service

14. Bell Canada disagreed with the QCISP's claim that General Tariff item 5400, GAS, and HSA service should be declared near-essential services. Bell Canada submitted that these services did not satisfy the Commission's criteria for classification as a near-essential service, as

established in *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8). Bell Canada further submitted that ISPs could self-supply ADSL service, either by building their own parallel networks (by co-locating their own ADSL equipment in Bell Canada's COs and subscribing to the ADSL Loop Administration and Support component of General Tariff item 5400) or by using an ICC TPIA service.

Request for re-rating of tariff components and modified tariff structure

15. In support of its request that the mark-ups for Bell Canada's General Tariff item 5400, GAS, and HSA service be lowered to levels that Bell Canada had deemed acceptable for its own retail Internet services operations within each band, the QCISP argued that once an ISP's additional operating costs were added to the rates for GAS or HSA service, the ISP was unable to generate sufficient profit to maintain a viable business.
16. MTS Allstream submitted that competitors had been unable to replace the revenues lost from the declining dial-up market with other Internet services revenues due to the uneconomic rates that competitors paid to Bell Canada for the GAS and HSA service. Further, MTS Allstream submitted that these access components were only one of the inputs of a competitor's Internet services, and once they were combined with the other components necessary to provision retail Internet services, it was difficult to offer competitive pricing for any retail ADSL service in Bell Canada's territory.
17. MTS Allstream and Cybersurf submitted that Bell Canada's GAS and HSA service rates were too high relative to the rates charged to their customers for the corresponding retail service. MTS Allstream also submitted that the Commission should review the rating structure for the GAS and HSA service, and that many of the GAS and HSA service problems identified by the QCISP would be addressed if Bell Canada's tariffs included a reasonable mark-up over costs but did not differentiate by class of customer (i.e., residential or business) or by access speed. Cybersurf also submitted that although GAS and HSA service were classified as Category II Competitor Services, Cybersurf has not seen the development of any significant alternative sources of ADSL services in the marketplace.
18. In response to QCISP's request that General Tariff item 5400, GAS and HSA service be re-rated, Bell Canada noted that since these were Category II Competitor Services, the services were priced not only on the basis of Bell Canada's costs, but also on the basis of alternatives available in the marketplace. Bell Canada submitted that it would be inappropriate for the service components of General Tariff item 5400, GAS and HSA service, other than those components already subject to Category I Competitor Service rating treatment, to be subject to mandated mark-ups when the alternatives to these services (e.g., ICC TPIA) were not subject to that same costing treatment.
19. Bell Canada noted that the Commission gave GAS and HSA service rates final approval in *Bell Canada – Gateway Access Service and High Speed Access Service*, Telecom Order CRTC 2005-62, 17 February 2005 (Order 2005-62), and that the final rates were negotiated with a broad spectrum of industry participants as represented by IMCAIP.

Request for cost study updates

20. The QCISP, supported by Primus, submitted that the cost studies that Bell Canada filed with the Commission dated 19 November 2004 in support of GAS and HSA service did not reflect current ADSL equipment costs. Further, the QCISP noted that Bell Canada had not disputed that these cost studies were out of date. In support of its request for updated ADSL cost studies, the QCISP provided evidence from major manufacturers of the downward pricing of ADSL equipment over the past several years. In the view of the QCISP, updating the GAS and HSA service cost studies would yield substantial decreases for General Tariff item 5400, GAS, and HSA service rates, even if the mark-ups remained unchanged. Primus submitted that if these new cost studies demonstrated that Bell Canada's costs had decreased, they should also be used to determine new and lower rates for these services.

Commission's analysis and determinations

Request for changes to terms of retail high-speed Internet services

21. The Commission notes that in Order 99-592 the Commission conditionally forbore from regulating the retail Internet services offered by ILECs, including Bell Canada, that had utility segments and had implemented the split rate base regime. The Commission also notes that in Order 99-592 it retained powers under section 24 and subsections 27(2), 27(3), and 27(4) of the Act to, among other things, ensure that existing conditions regarding confidential competitive information continue to apply; to retain the power to impose conditions on the offering and provision of Internet services as may be necessary in the future; and to provide a safeguard against carriers granting any undue preference.
22. The Commission is not persuaded by the arguments presented by the interveners that the decline in the number of dial-up Internet services customers necessarily implies that Bell Canada has engaged in anti-competitive behaviour. Further, the Commission is of the view that the decline in ISP dial-up Internet services customers is primarily due to the migration of users from dial-up Internet services to ILEC and ICC lite high-speed Internet services. The Commission also notes that the lite high-speed Internet services market is subject to competitive pricing behaviour between ILECs and ICCs.
23. Accordingly, the Commission finds that the QCISP has not established that the state of competition in the retail Internet services market warrants the imposition of conditions pursuant to section 24 of the Act on the terms under which Bell Canada may offer retail Internet services. Further, the Commission finds that the QCISP submitted no evidence that supported a finding of undue preference or unjust discrimination to satisfy the requirements of subsection 27(2) of the Act.
24. In light of the above, the Commission **denies** the request by the QCISP to invalidate the \$100 early contract termination fee applied by Bell Canada to its retail ADSL customers, or to declare that a 12-month promotional rate for retail ADSL Internet service cannot be renewed.

Request to extend HSSPI outside the CO

25. The Commission notes the QCISP's request that the HSSPI functionality be extended to allow interconnection at a POI outside a CO. The Commission also notes that Bell Canada indicated that, on a mutually agreed-upon basis, it would enter into interconnection arrangements at a suitable support structure located outside the CO, as outlined in Decision 97-8. In light of this, the Commission considers that the request to extend the HSSPI functionality to allow interconnection at a POI outside a CO should be resolved through negotiations between the two parties. In the event that parties cannot arrive at a mutually acceptable negotiated solution, they may consult with the Commission for direction.

Request for reclassification of General Tariff item 5400, GAS, and HSA service

26. The Commission notes that the QCISP requested that Bell Canada's General Tariff item 5400 and the ADSL access components of the GAS and HSA service be reclassified as Category I Competitor Services. The Commission also notes that the bundled GAS and HSA service have been classified as Category II Competitor Services.
27. In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, as amended by Telecom Decision CRTC 2002-34-1, 15 July 2002, the Commission described a Category I Competitor Service as a competitor service that is in the nature of an essential service. Further, a Category I Competitor Service makes available a facility that is a critical input for competitors in light of its very limited competitive supply.
28. The Commission considers the nature of the facility in question and the circumstances relevant to its supply by competitors and third parties when it assesses whether to classify a competitor service as a Category I Competitor Service. A competitor service that does not meet the criteria for Category I Competitor Services is classified as a Category II Competitor Service.
29. The Commission is of the view that QCISP members have other options for the provision of high-speed Internet services to their customers. These include co-locating their own ADSL equipment in Bell Canada's COs and subscribing to the ADSL Loop Administration and Support component of General Tariff item 5400, or using ICC TPIA service.
30. In light of the above, the Commission **denies** the request by the QCISP to reclassify the components of General Tariff item 5400, GAS, and HSA service that are currently classified as Category II Competitor Services to Category I Competitor Services.

Request for re-rating of tariff components and modified tariff structure

31. With reference to MTS Allstream's request for a review of the rating structure for GAS and HSA service and Cybersurf's and the QCISP's requests for adjustments to the mark-ups of Bell Canada's GAS and HSA service, the Commission notes that in the proceeding that led to Order 2005-62, Bell Canada's GAS and HSA service rates received industry support and were approved on a final basis. The Commission considers that based on the record of the proceeding, interveners have not provided sufficient evidence to justify that these rates are no longer just and reasonable.

32. In light of the above, the Commission **denies** the request by MTS Allstream, Cybersurf, and the QCISP for a review of Bell Canada's GAS and HSA service rate structure and the mark-ups associated with those services.

Request for cost study updates

33. The Commission notes that the primary rationale for the QCISP's request for an update of the ADSL cost studies was an article, dated 23 June 2005,³ that indicated that ADSL equipment costs had decreased significantly between March 2000 and June 2005. The Commission further notes that Bell Canada filed its cost studies for GAS and HSA service in 2003. Based on the QCISP's data, the Commission estimates that the cost reductions of ADSL equipment between 2003 and 2005 were much less than the cost reductions between 2000 and 2003. The Commission considers that a review of the cost studies would not yield material decreases with respect to the overall cost of the GAS and HSA service.
34. The Commission notes that the current GAS and HSA service rates are the product of an industry negotiation process and that parties to this process took into account the relationship between rates for GAS and HSA service and the retail Internet services rates.
35. In light of the above, the Commission **denies** the QCISP's request for Bell Canada to file updated Phase II cost studies associated with General Tariff item 5400, GAS, and HSA service.
36. In light of the above, the Commission **denies** the QCISP's application.

Secretary General

³ http://www.dslprime.com/News_Articles/2005%20news_articles.htm

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