



Telecom Decision CRTC 2004-34

Ottawa, 21 May 2004

FCI Broadband – Request to lift restrictions on the provision of retail digital subscriber line Internet services to business customers

Reference: 8622-F18-200312819

In this decision, the Commission directs Bell Canada, Aliant Telecom Inc. (Aliant Telecom), Saskatchewan Telecommunications (SaskTel) and TELUS Communications Inc. (TCI), upon request, to provide their respective retail digital subscriber line (DSL) Internet service (IS) to any business competitive local exchange carrier (CLEC) primary exchange service (PES) customer who is being served by a local loop leased from any of them and who would otherwise qualify for the service. The Commission further directs Bell Canada, Aliant Telecom, SaskTel, and TCI to issue amended DSL access line tariffs removing the restriction that their DSL access services are only available to competitive service providers in association with an end-customer's incumbent local exchange carrier-provided business PES.

In Call-Net Enterprises Inc. – Request to lift restrictions on the provision of retail digital subscriber line Internet services, Telecom Decision CRTC 2003-49, 21 July 2003 (Decision 2003-49), noting that MTS Communications Inc. (MTS) was not a party to the proceeding, the Commission considered on a preliminary basis that the determinations set out in that decision should apply to MTS. The Commission permitted MTS to show cause as to why it should not be subject to those determinations. At the time that the Commission makes its determination with respect to the application of Decision 2003-49 to MTS, the Commission will decide, based on the record of this proceeding, whether the determinations in this decision also applies to MTS.

The application

1. The Commission received an application dated 24 September 2003 from Futureway Communications Inc., doing business as FCI Broadband, pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* and the *Telecommunications Act* (the Act). FCI Broadband requested that the Commission direct Bell Canada, and the other incumbent local exchange carriers (ILECs) where applicable, to provide or continue to provide retail digital subscriber line (DSL) service to business customers who had subscribed to primary exchange service (PES) from a competitive local exchange carrier (CLEC) over a leased loop, where the customer desired the DSL service and was otherwise eligible to receive this service.
2. The Commission received comments from Call-Net Enterprises Inc. (Call-Net) on 20 October 2003, Primus Telecommunications Canada Inc. (Primus Canada) on 23 October 2003, TELUS Communications Inc. (TCI), Allstream Corp. (Allstream), and Microcell Solutions (Microcell) on 24 October 2003, and Aliant Telecom Inc. (Aliant Telecom),

Bell Canada, MTS Communications Inc. (MTS), and Saskatchewan Telecommunications (SaskTel) (collectively, the Companies) on 27 October 2003. FCI Broadband filed reply comments on 25 November 2003.

3. FCI Broadband noted that in *Call-Net Enterprises Inc. – Request to lift restrictions on the provision of retail digital subscriber line Internet services*, Telecom Decision CRTC 2003-49, 21 July 2003 (Decision 2003-49), the Commission directed Aliant Telecom, Bell Canada, SaskTel and TCI (collectively, the incumbents) to provide retail DSL Internet services (IS) to CLECs' residential PES customers, whose telephone service was provided via local loops leased from those incumbent carriers.
4. FCI Broadband stated that its application was not a request to review and vary Decision 2003-49, but rather, a request to have the conclusions set out by the Commission in that decision applied to the business market. FCI Broadband indicated that it would not re-argue each of the points raised by Call-Net in its application, emphasizing that the concerns highlighted by Call-Net regarding the residential market were equally applicable to the business market.
5. FCI Broadband noted as an example that, similar to the residential market, small business customers who chose to switch their local exchange service to Call-Net would have to switch not only their higher speed IS but also their e-mail addresses. FCI Broadband argued that this was a major operational risk for business customers. FCI Broadband submitted that, in its experience with the small to medium-sized business market, many prospective customers refused its services when they realized that they would not be able to retain their Sympatico higher speed account and their e-mail addresses. FCI Broadband further submitted that in some instances a multi-line business would retain a single Bell Canada business line for its higher speed connection, which resulted in situations in which customers received separate invoices from Bell Canada and FCI Broadband for local telephone services. FCI Broadband noted that it was unable to provide the Commission with firm statistics on this matter but submitted that it was a significant issue for the company and one that would continue to be magnified as its customer base grew. FCI Broadband stated that as a result, as an operational practice, it asked every potential business customer in advance whether it had Sympatico higher speed service.
6. FCI Broadband submitted that the operational, technical, market and competitive factors considered by the Commission in Decision 2003-49 were equally applicable in the business market. Moreover, FCI Broadband noted the concern by the Commission in Decision 2003-49 that an ILEC's refusal to supply retail DSL IS to a CLEC's PES customers made it more difficult for CLECs to obtain and retain PES customers, thereby impairing competitive entry into the PES market during the critical period in the transition to competition, and argued that this applied equally to the business market.
7. FCI Broadband stated that, for all the reasons provided in Decision 2003-49, it was requesting that the Commission issue an order directing Bell Canada (and the rest of the ILECs where applicable) to provide or continue to provide retail DSL service to business customers who had subscribed to a PES from a CLEC over a leased loop, where the customer desired the DSL service and was otherwise eligible to receive the service.

Position of parties

8. Microcell, Call-Net, Allstream and Primus Canada supported FCI Broadband's application.
9. Microcell agreed with FCI Broadband's submission that the concerns highlighted by Call-Net in its application were equally applicable to the business market. Microcell submitted that the Commission's unjust discrimination rationale in Decision 2003-49 for mandating the provision of stand-alone DSL was in no way dependent on whether a given retail DSL IS customer was a business or residential customer.
10. Call-Net and Allstream submitted that the findings and principles of Decision 2003-49 applied to all PES customers, including business DSL customers, and that the incumbent carriers were mandated as a result of Decision 2003-49 to make their retail DSL-based services available on a stand-alone basis to a CLEC's business local customer that was served on an unbundled leased loop.
11. Call-Net submitted that the Commission's findings in Decision 2003-49 regarding the non-compliance with subsection 27(2) of the Act, were not limited to residential customers. In support of this view, Call-Net and Allstream noted that in Decision 2003-49 the Commission stated that "the ILECs' refusal to provide retail DSL IS to existing or potential CLEC PES customers who would otherwise qualify for the service, and who would receive the service if they were ILEC PES customers, is discriminatory and preferential."
12. Call-Net stated that after fully reviewing the incumbents' claim that the discrimination and preference were neither unjust nor undue, the Commission concluded, again without limitation to "residential" customers, "that the ILECs' refusal to provide retail DSL IS and retail DSL Lite IS to a CLEC's PES customers served by local loops leased from the ILECs, who would otherwise qualify for the service, constitutes unjust discrimination against CLECs and undue preference toward the ILECs, contrary to subsection 27(2) of the Act."
13. Call-Net further noted that some ILECs had commenced to revise their tariffs to remove the restrictions in question for both residential and business customers, and took the view that the proposed revisions were made to bring them in compliance with the determination in Decision 2003-49.
14. Both Call-Net and Allstream submitted that the Commission should clarify that Decision 2003-49 applies to all PES customers and not only to residential customers. Call-Net submitted that because the implementation directive in the decision specifically referred to CLECs' residential local telephone service customers, Decision 2003-49 should be clarified to avoid enforcement loopholes in the future.
15. The Companies and TCI submitted that FCI Broadband's application should be denied.
16. TCI submitted that the provision of stand-alone DSL service to business customers was never at issue in the proceeding that led to Decision 2003-49. TCI argued that in Call-Net's application that led to Decision 2003-49, Call-Net did not present specific evidence relating to business

customers, interveners did not address non-residential PES customers in their responses, and the Commission did not make any determinations relative to business customers. TCI submitted that, accordingly, there was no evidence in the proceeding leading to Decision 2003-49 upon which FCI Broadband could rely.

17. The Companies and TCI submitted that FCI Broadband's request and its claim of harm were unsupported by any evidence. According to the Companies and TCI, the application disclosed no evidence that the current restrictions had impaired any competitors from attracting business customers to their service offerings, or that in the absence of the requested relief it would be more difficult for CLECs to obtain and retain business PES customers.
18. The Companies submitted that the widespread availability of CLEC DSL IS offerings to business customers confirmed that competitors did not face barriers which warranted Commission intervention. The Companies submitted that competitors such as Allstream, Call-Net, LondonConnect Inc., TCI and others currently offered DSL services and successfully competed in many of the same business markets as the Companies without the benefit of the directives sought by FCI Broadband. TCI submitted that reports by the Commission, Industry Canada and the Canadian Association of Internet Providers demonstrated that the current level of competition available to higher speed IS business customers was robust. TCI argued that a case could not credibly be made that business customers were disadvantaged by the lack of an ILEC stand-alone higher speed IS in the business market.
19. The Companies submitted that FCI Broadband's application was unnecessary because once the changes to their retail IS for residential PES customers were implemented, as required by Decision 2003-49, the Companies would also be able to provide service to business PES customers who would otherwise qualify for ILEC retail IS.

Reply comments

20. FCI Broadband submitted that the Companies' statement that once the changes required by Decision 2003-49 had been implemented, the Companies would also be able to provide service to business customers, confirmed FCI Broadband's argument that there were no unique operational and technical obstacles to provisioning this service to CLEC PES customers in the business market.
21. With respect to TCI's submission that a case could not be made that business customers were disadvantaged by the lack of an ILEC stand-alone DSL higher speed IS in the business market, FCI Broadband submitted that the issue in this application, as in Decision 2003-49, was not one of customer disadvantage or possible discrimination against customers, but a matter of unjust discrimination against CLECs and undue preference toward ILECs.

Commission analysis and determination

22. The Commission notes that Decision 2003-49 did not apply to business PES customers. The scope of the proceeding that led to Decision 2003-49 was limited to residential customers and the relief sought by Call-Net and the Commission's decision related only to residential customers. The question raised by FCI Broadband's application, whether ILECs should be

required to provide retail DSL service to business customers who have subscribed to PES from a CLEC over a leased loop, was not addressed in Decision 2003-49 and the Commission considers that the findings and principles set out in Decision 2003-49 do not automatically apply to business PES customers.

23. In Decision 2003-49, the Commission found that an ILEC's refusal to provide retail DSL IS and retail DSL Lite IS to a CLEC's PES customers served by local loops leased from the ILEC, who would otherwise qualify for the service, constituted unjust discrimination against CLECs and undue preference toward the ILEC, contrary to subsection 27(2) of the Act. The Commission also found that an ILEC's tariff provisions that specify that its DSL access services were only available to competitive service providers in association with an end-customer's ILEC-provided residential PES, constituted unjust discrimination against CLECs and undue preference toward the ILEC, contrary to subsection 27(2) of the Act.
24. As noted in Decision 2003-49, the Commission's analysis of an allegation concerning a contravention of subsection 27(2) of the Act is conducted in two phases. The Commission first determines whether the conduct in question is discriminatory or preferential, and where it so determines, it then decides whether the discrimination is unjust or the preference is undue or unreasonable.
25. In Decision 2003-49, the Commission considered that its previous determinations involving undue preference and unjust discrimination, where an ILEC required a customer as a condition of obtaining an ILEC service to obtain another service from the ILEC, rather than from a competitive service provider, were relevant to that case. The Commission considered that an ILEC's refusal to provide retail DSL IS to existing or potential residential CLEC PES customers who would otherwise qualify for the service, and who would receive the service if they were an ILEC PES customers, was discriminatory and preferential.
26. In Decision 2003-49, the Commission found that the discrimination against CLECs was unjust and the preference toward ILECs was undue in light of the following considerations:
 - operational and technical reasons submitted by the ILECs did not justify the ILECs' refusal to supply retail DSL IS to the CLECs' residential PES customers, served by local loops leased from the ILECs, who would otherwise qualify for the service; and
 - competitive DSL IS providers faced barriers to enter into the DSL IS market as a result of co-location costs, transport costs and the margins available when providing retail residential DSL IS. In addition, the ILECs' increasing deployment of fibre electronics at remotes made it more difficult for competitors to expand their networks.
27. The Commission is of the view that these previous determinations are equally relevant in this instance and that an ILEC's refusal to provide retail DSL IS to existing or potential business CLEC PES customers who would otherwise qualify for the service, and who would receive the service if they were an ILEC PES customer, is also discriminatory and preferential.

28. In Decision 2003-49, the Commission was also mindful of the fact that at the end of 2001, the incumbent local telephone companies held over 96% of total local lines, over 97% of total local revenues and were successful in attracting 924,000 DSL IS customers by year-end 2001. The Commission noted that the marketing data filed by Call-Net demonstrated that a significant percentage of Call-Net's customers who cancelled the company's PES or who declined to switch to Call-Net's PES cited the unavailability of Bell Canada's retail DSL IS as a reason. In light of these factors and the barriers to the competitive provision of DSL IS, the Commission considered that the incumbent local telephone companies' refusal to supply retail DSL IS to a CLEC's PES customers made it more difficult for CLECs to obtain and retain PES customers, thereby impairing competitive entry into the PES market during that critical period in the transition to competition.
29. The Commission notes the Companies' submission that once the changes required by Decision 2003-49 have been implemented, the Companies would also be able to provide that service to the CLECs' business customers. The Commission also notes that TCI did not submit that there were any unique operational or technical issues in providing retail DSL IS to business CLEC PES customers. The Commission considers that in this instance operational and technical reasons do not justify an ILEC's refusal to supply retail DSL IS to a CLEC's business PES customers.
30. The Commission considers that competitive DSL IS providers face the same barriers to enter the retail business DSL IS market as they do in the residential market as a result of co-location costs and transport costs. The Commission also considers that competitive DSL IS providers may face an additional barrier to enter the market as a result of the margins available. Similarly, the Commission is of the view that its concern expressed in Decision 2003-49, that ILECs' increasing deployment of fibre electronics at remotes makes it more difficult for competitors to expand their networks, is also a concern in the context of business customers.
31. The Commission notes that as of the end of 2002, as stated in the November 2003 *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets* (the GIC Report) the incumbent local telephone companies still held over 91% of business local revenues (excluding contribution)¹. In addition, 43% of the competitor's 2002 local lines were provided over leased loops and 33% were resold incumbent local telephone company local services². The Commission notes that the GIC Report did not identify the number of DSL customers the incumbent local telephone companies were successful in attracting by year-end 2002. However, the Commission notes that the incumbent local telephone companies had 91% of retail DSL IS revenues in 2002³. The Commission notes that while FCI Broadband was unable to provide any firm statistics, it stated that many prospective customers refused its services when they realized they would not be able to retain their Sympatico higher speed account. In light of the above, and the barriers to the competitive provision of DSL IS,

¹ The GIC Report, page 37.

² The GIC Report, page 46.

³ The GIC Report, Table 4.26.

the Commission is of the view that an ILEC's refusal to supply retail DSL IS to a CLEC's PES customers makes it more difficult for CLECs to obtain and retain business PES customers, impairing competitive entry into that market.

32. The Commission notes TCI's submission that there was significant competition for higher speed IS and therefore a case could not be made that business customers were disadvantaged by the lack of an ILEC stand-alone DSL higher speed service in the business market. The Commission agrees that the issue in this application, as in Decision 2003-49, is not one of customer disadvantage or possible discrimination against customers, but rather a matter of unjust discrimination against CLECs and undue preference toward the ILECs.
33. The Commission further notes the Companies' submission that the widespread availability of CLEC DSL IS offerings to business customers confirmed that the competitors did not face barriers that warranted Commission intervention and that competitors currently offered DSL services and successfully competed in many of the same business markets as the Companies without the benefit of the directives sought by FCI Broadband. The Commission notes FCI Broadband's concern is not that an ILEC's refusal to provide retail DSL IS to its PES customers makes it more difficult to compete in the DSL market, but rather that it makes it more difficult to compete in the PES market. The Commission is of the view that the number of competitive suppliers of DSL services is not relevant to the issue raised by FCI Broadband with regard to unjust discrimination against CLECs and undue preference towards ILECs in the PES market.
34. In light of the above, the Commission finds:
 - that an ILEC's refusal to provide retail DSL IS and retail DSL Lite IS to a CLEC's business PES customers served by local loops leased from the ILEC, who would otherwise qualify for the service, constitutes unjust discrimination against the CLEC and undue preference toward the ILEC, contrary to subsection 27(2) of the Act; and
 - that an ILEC's tariff provisions that specify that its DSL access services are only available to competitive service providers in association with an end-customer's ILEC-provided business PES, constitute unjust discrimination against the CLEC and undue preference toward the ILEC, contrary to subsection 27(2) of the Act.
35. Accordingly, the Commission directs Bell Canada, Aliant Telecom, SaskTel and TCI, upon request, to provide their respective retail DSL IS to any business CLEC PES customer who is being served by a local loop leased from any of them and who would otherwise qualify for the service.
36. The Commission further directs Bell Canada, Aliant Telecom, SaskTel, and TCI, within 45 days of the date of this decision, to issue amended DSL access line tariffs removing the restriction that their DSL access services are only available to competitive service providers in association with an end-customer's ILEC-provided business PES.

37. In Decision 2003-49, noting that MTS was not a party to that proceeding, the Commission considered on a preliminary basis that the determinations set out in that decision should apply to MTS. The Commission permitted MTS to show cause as to why it should not be subject to those determinations. At the time that the Commission makes its determination with respect to the application of Decision 2003-49 to MTS, the Commission will decide, based on the record of this proceeding, whether the determinations in this decision also apply to MTS.

Secretary General

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