



Telecom Decision CRTC 2004-18

Ottawa, 18 March 2004

FCI Broadband's request for co-location power rebates

Reference: 8661-F18-200310219

In this decision, the Commission directs Bell Canada to issue rebates for co-location power retroactive adjustments to eligible co-locators in its territory, for the period from 29 November 2000 to 11 September 2002.

1. The Commission received an application on 7 August 2003 from Futureway Communications Inc. (doing business as FCI Broadband), filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*. FCI Broadband requested that the Commission direct the incumbent local exchange carriers (ILECs) to immediately issue credits for the co-location power retroactive adjustments referred to in *Co-location arrangements for interconnecting Canadian carriers*, Telecom Decision CRTC 2002-55, 11 September 2002 (Decision 2002-55). FCI Broadband specified that it was seeking credits for only the amounts associated with the period 29 November 2000 to 11 September 2002¹ inclusive.
2. FCI Broadband submitted that its application was a new application, rather than an application to review and vary Decision 2002-55.

Process

3. The Commission received comments from TELUS Communications Inc. (TCI) and Bell Canada opposing the application, on 4 September 2003 and 8 September 2003, respectively.
4. Allstream Corp. (Allstream) filed comments in support of the application on 8 September 2003.
5. FCI Broadband filed reply comments on 18 September 2003.

Background

6. In Order 2000-1073, the Commission made the following companies' co-location power rates and charges interim: Bell Canada, Island Telecom Inc., Maritime Tel & Tel Limited, MTS Communications Inc., NBTel Inc., NewTel Communications Inc., Saskatchewan Telecommunications, TCI and TELUS Communications (B.C.) Inc. This determination was in response to a Part VII application for general relief filed on 17 July 2000 by the Coalition for Better Co-Location.

¹ This period represents the time from the date that co-location power rates were made interim in *CRTC approves interim co-location power rates and charges*, Order CRTC 2000-1073, 29 November 2000 (Order 2000-1073), to the date that the Commission approved Bell Canada's reduced single-tier power rates, on an interim basis, in Decision 2002-55.

7. On 15 February 2002, Bell Canada filed Tariff Notice 6653, proposing to reduce its existing single-tier co-location power rates and introduce a two-tier rate structure, to provision 48 Volt DC power, for new co-location power arrangements². The Commission is currently considering this application.
8. On 9 April 2002, the Commission received comments from Call-Net Enterprises Inc., on behalf of itself, AT&T Canada Inc., GT Group Telecom Services Corp., and Futureway Communications Inc. (collectively, the Coalition) pursuant to Bell Canada's Tariff Notice 6653 application. The Coalition requested that interim approval of the reduced single-tier rate structure proposed by Bell Canada for both existing and new co-location power arrangements be granted without further regulatory process. The Coalition also requested that the Commission confirm that the final rates would be adjusted retroactively to 29 November 2000.
9. In Decision 2002-55, the Commission:
 - i) approved the Coalition's request for interim approval of the single-tier rate structure proposed by Bell Canada in Tariff Notice 6653, for both new and existing co-location power arrangements, effective 11 September 2002;
 - ii) directed Bell Canada to provide a report identifying the billed monthly power demand for each co-locator, by rate element, for the period from 29 November 2000 to 11 September 2002;
 - iii) directed Bell Canada to track, from 11 September 2002 until the Commission's final decision on Bell Canada's Tariff Notice 6653, the billed power demand by rate element for each co-locator involved in existing, new or incremental power arrangements; and
 - iv) stated that it considered it inappropriate to deal with the issue of retroactive adjustments from 29 November 2000, until it had reviewed all issues and cost estimates related to Bell Canada's Tariff Notice 6653.
10. On 21 February 2003, following the Commission's directive in Decision 2002-55, Bell Canada filed a confidential report that identified the billed monthly power demand for each co-locator, by rate element, for the period from 29 November 2000 to 11 September 2002.

Position of parties

11. FCI Broadband submitted that its application was properly filed as a new application, as opposed to a review and vary application. FCI Broadband further submitted that in *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998 (Public Notice 98-6), the Commission stated that where an application relates to the continuing correctness of a decision rather than its original correctness, the application will generally be

² Single-tier refers to a monthly rate per unit of power. Two-tier refers to a rate based on an initial capital payment and monthly payments related to power consumption.

treated as a new application. FCI Broadband argued that its application challenged the continuing correctness of the determination made in Decision 2002-55 not to issue power rebates until the Commission issued its ruling on final co-location power rates and structures. FCI Broadband submitted that it was the passage of time that rendered the original decision inappropriate.

12. FCI Broadband submitted that the Commission's ruling in Decision 2002-55 clearly set the expectation that credits would be forthcoming. The company further submitted that the procedural delay surrounding the co-location power proceeding had resulted in a situation where competitors had gone without the credits to which they were rightfully entitled and where the ILECs had been able to retain and use those funds to further their competitive efforts. FCI Broadband asserted that the credits represented a substantial sum for FCI Broadband and for other eligible co-locators.
13. FCI Broadband specified that it was only seeking credits for the amounts associated with the period from 29 November 2000 to 11 September 2002 inclusive and stated that credits for any further rate adjustments could be established when co-location power rates were granted final approval.
14. FCI Broadband asserted that the Commission already had the information necessary to order co-location power credits, noting that Bell Canada's proposed rate structure had been before the Commission since 12 August 2002.
15. Allstream noted that nearly a year had passed since Decision 2002-55 was issued and that no determination had been made with respect to the final co-location power rates. Allstream submitted that any further delay in issuing the rebates owed to competitors would be punitive.
16. Both Bell Canada and TCI argued that FCI Broadband's application was a request to review and vary Decision 2002-55. Bell Canada and TCI submitted that FCI Broadband had not met the criteria for a review and vary application. In their view, FCI Broadband had presented no new information that the Commission was not aware of at the time of the proceeding leading to Decision 2002-55, nor had it challenged the correctness of the Commission's determination in this matter.
17. Bell Canada submitted that the application was premised on the assumption that the Commission had already made a determination that retroactive adjustments, for the period in question, were warranted. Bell Canada argued that this was not the case.
18. Bell Canada submitted that, instead of expending any effort on dealing with FCI Broadband's application, it would be more appropriate for the Commission to complete the Tariff Notice 6653 proceeding. In the company's view, this approach would be a more efficient use of resources and would result in a more equitable and timely solution for all involved parties.
19. TCI noted that the determinations in Decision 2002-55 applied only to Bell Canada and that the Commission had not approved any interim rates for TCI's power rates other than adjustments resulting from *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002. TCI submitted that it was not necessary to order

the ILECs to issue credit adjustments for power rates until the Commission had fully dealt with the issues of the Tariff Notice 6653 proceeding and had issued a final determination on the ILECs' power rates.

Commission analysis and determination

20. Regarding the question of whether FCI Broadband's application is a new application or a review and vary application, the Commission stated in Public Notice 98-6 that where an application essentially relates to the continuing correctness of a decision rather than its original correctness, the application would generally be treated as a new application. The Commission further stated in Public Notice 98-6 that when new facts or circumstances have arisen that render the original decision inappropriate or obsolete in light of them, the application would be treated as a new application.
21. The Commission considers that FCI Broadband's application relates to the continuing correctness of a decision rather than its original correctness. The Commission also considers that the passage of time since the issuance of Decision 2002-55 constitutes a change in circumstances that calls into question the continuing correctness of the decision to defer the payment of retroactive rebates. Accordingly, the Commission concludes that FCI Broadband's application is a new application.
22. The Commission notes that FCI Broadband is seeking credits for only the amounts associated with the period from 29 November 2000 to 11 September 2002. The Commission further notes that this period represents the time from the date that co-location power rates were made interim, in Order 2000-1073, to the date that the Commission approved Bell Canada's reduced single-tier power rates, on an interim basis, in Decision 2002-55.
23. The Commission notes that, in Decision 2002-55, it considered it inappropriate to deal with the issue of retroactive adjustments until it reviewed all issues and cost estimates related to Tariff Notice 6653. The Commission, however, now considers that the unforeseen lengthy delay in concluding the review of Tariff Notice 6653 is a factor which must be taken into consideration.
24. The Commission notes that in Tariff Notice 6653, Bell Canada proposed reduced rates due to reduced service costs. The Commission considers it unlikely that the approved final co-location power rates for existing co-location arrangements would be higher than the approved interim rates. In light of the above, the Commission considers it appropriate to apply Bell Canada's lower proposed single-tier rates retroactively to 29 November 2000, the date that Bell Canada's co-location power rates were made interim.
25. Based on the power demand information submitted by Bell Canada on 21 February 2003, the Commission notes that the rebates represent substantial sums for eligible co-locators. The Commission is of the view that the eligible co-locators affected should not be penalized due to unforeseen procedural delays. The Commission therefore finds it appropriate for Bell Canada to issue immediate rebates for co-location power retroactive adjustments to eligible co-locators in its territory, for the period from 29 November 2000 to 11 September 2002.

26. The Commission considers that, at this time, this decision is applicable to Bell Canada only. The question of whether TCI should issue co-location power rebates will be dealt with by the Commission following a determination with respect to the rates filed by TCI.
27. Accordingly, the Commission directs Bell Canada:
- i) to determine which co-locators are eligible for co-location power rebates, based on the power demand information it submitted to the Commission on 21 February 2003;
 - ii) to calculate the co-location power rebates, for the period 29 November 2000 to 11 September 2002, based on the interim single-tier rate structure and provide these calculations to eligible co-locators and to the Commission, within 30 days of the date of this decision; and
 - iii) to issue rebates within 30 days of providing the calculations to eligible co-locators and the Commission, unless the co-locator disputes the amount of the rebate. Any unresolved disputes may be brought before the Commission for mediation.

Secretary General

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