



Telecom Decision CRTC 2008-116

Ottawa, 11 December 2008

Regulatory policy

Forbearance framework for new non-essential wholesale services

Reference: 8640-B2-200807167

In this Decision, the Commission denies a request by Bell Canada et al. to apply a forbearance framework that would generally result in immediate forbearance for new wholesale services upon a finding by the Commission that the service in question should be classified as non-essential.

Introduction

1. The Commission received an application by Bell Canada, Bell Aliant Regional Communications, Limited Partnership (Bell Aliant), Saskatchewan Telecommunications, and Télébec, Limited Partnership (collectively Bell Canada et al.), dated 15 May 2008, requesting that the Commission establish a framework under which any new wholesale service that it classified as "non-essential" would be granted forbearance effective immediately.
2. Bell Canada et al. filed the application subsequent to Telecom Decision 2008-17, in which the Commission set out a revised regulatory framework for wholesale services. In that Decision the Commission defined the term "essential service" and classified all existing wholesale services within one of six categories – essential, conditional essential, conditional mandated non-essential, public good, interconnection, and non-essential subject to phase-out – based on the attributes of each service. The Commission provided two definitions of an essential service: one that applies to existing services and another that applies to future applications.
3. The Commission received comments from Distributel Communications Limited (Distributel), MTS Allstream Inc. (MTS Allstream), Primus Telecommunications Canada Inc. (Primus), Rogers Communications Inc. (RCI), and TELUS Communications Company (TCC). The public record of this proceeding, which closed on 26 June 2008, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
4. The Commission has identified the following two issues to be addressed in its determinations:
 - I. Is the proposed forbearance framework for new non-essential wholesale services appropriate?
 - II. If not, what is the appropriate process with respect to forbearance for new non-essential wholesale services?

I. Is the proposed forbearance framework for new non-essential wholesale services appropriate?

5. In its application, Bell Canada et al. proposed that, except for interconnection or public good considerations, any new non-essential service should not be mandated and forbearance from regulation should be effective immediately upon a Commission finding of non-essentiality. In response to comments from interested parties, Bell Canada et al. agreed that there could be other circumstances under which it would be appropriate to mandate a new non-essential service – specifically, if that service were required in relation to new essential services or to new non-essential services classified as interconnection or public good services, and if its functionality was not provided by existing services.
6. In support of their proposal, Bell Canada et al. submitted that the rationale for a transition period prior to forbearance for services classified as non-essential subject to phase-out, as defined in Telecom Decision 2008-17, does not apply to new non-essential wholesale services. In this regard, Bell Canada et al. submitted that, generally, a new non-essential service is not required by competitors, does not substantially contribute to downstream competition, and is practically or feasibly duplicable by competitors.
7. Bell Canada et al. submitted that its proposed forbearance framework would advance the policy objectives of the *Telecommunications Act* (the Act) and align with the Governor in Council's *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction).
8. TCC supported the application but submitted that the wholesale services framework set out in Telecom Decision 2008-17 was only intended to apply to existing wholesale services. In TCC's view, regulation of any new wholesale service should only be considered if the Commission has before it unequivocal evidence of market failure. According to TCC, the onus should be on the parties seeking regulation to make the case that the service should be regulated.
9. Distributel, MTS Allstream, Primus, and RCI opposed Bell Canada et al.'s application. Although some of these parties agreed that there were circumstances under which a new non-essential service should be forborne from regulation, most disagreed that forbearing from regulating new non-essential services would be appropriate without a complete review of the circumstances surrounding the proposed service.

Commission's analysis and determinations

10. The Commission notes that, contrary to TCC's submission, the wholesale services framework set out in Telecom Decision 2008-17 does address the treatment of new wholesale services. In this regard, the Commission notes that paragraph 37 of that Decision specifically addresses this matter.
11. In Telecom Decision 2008-17, the Commission classified as non-essential subject to phase-out those services for which there was evidence of duplication on the part of competitors or for which parties to the proceeding had not established a competitive requirement. Further, the

Commission determined that services assigned to this category warranted forbearance pursuant to subsections 34(1) and 34(3) of the Act and that forbearance will become effective at the end of the applicable transition period.

12. The Commission considers that there may be circumstances, other than the circumstances identified by Bell Canada et al., in which a new non-essential service should be mandated. The Commission notes that to the extent that a service is mandated, it would not qualify for forbearance.
13. The Commission considers that Bell Canada et al.'s proposed framework assumes that a finding of non-essentiality is the same as a finding in favour of forbearance. In the Commission's view, the factors relevant to a finding of non-essentiality are not necessarily the same as those relevant to the matter of forbearance.
14. Further, the Commission considers that a determination as to whether a proposed new wholesale service found to be non-essential should, nonetheless, be mandated or forborne should be made on the basis of a review of the circumstances applicable to the service in question, including comments from interested parties. In this regard, the Commission notes that Bell Canada et al.'s proposed framework would exclude such a review and require that the Commission make a forbearance determination without having the opportunity to consider the circumstances specific to whether forbearance for the service in question is appropriate.
15. In light of the above, the Commission does not consider that Bell Canada et al.'s proposed forbearance framework for new non-essential services is appropriate and, therefore, **denies** their application.

II. What is the appropriate process with respect to forbearance for new non-essential wholesale services?

16. Under Bell Canada et al.'s proposal for implementing their forbearance approach, if an incumbent local exchange carrier (ILEC) decided to create a new wholesale service, it would file a service description and provide justification about why the proposed service is not essential. If, after reviewing the service, the Commission agreed that it was non-essential and not a public good or interconnection service requiring regulation, it would issue a forbearance determination effective immediately. Finally, where the ILEC wished to launch the service prior to the Commission's forbearance determination, the ILEC would accompany its application with a tariff notice requesting interim approval.
17. RCI submitted that Bell Canada et al.'s proposal was inconsistent with: (1) the principles underpinning Telecom Decision 2008-17, (2) section 34 of the Act, and (3) the Policy Direction. RCI submitted that the onus should continue to remain on the ILEC to establish that forbearance would be appropriate.
18. Primus submitted that the Commission had already established the appropriate framework for the treatment of a new wholesale service in Telecom Decision 2008-17. According to Primus, the Commission should continue to apply that process to any new wholesale service.

Commission's analysis and determinations

19. The Commission considers that if an ILEC believes that a proposed new wholesale service should be forborne, it should submit a forbearance application, with detailed rationale, at the same time it seeks Commission approval for the proposed classification of the service in question. The classification request should be supported by a detailed description of the proposed service and placed on the public record. This will allow interested parties to make meaningful submissions on both the classification issue and, where applicable, on the forbearance matter.
20. Where the Commission is persuaded that a new non-essential service should be forborne, it is likely that the scope of forbearance granted to such a service would be the same as that granted to services assigned to the non-essential subject to phase-out category established in Telecom Decision 2008-17. Further, depending on the circumstances, there may be no need to establish a transition period before forbearance becomes effective.
21. The Commission considers that its determinations in this Decision will achieve the telecommunications policy objectives set out in paragraphs 7(b), (c), and (f) of the Act, which are, respectively, to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective.
22. Further, the Commission considers that its determinations in this Decision are consistent with the Policy Direction in that market forces cannot be relied upon to achieve the above objectives absent Commission assessment of whether forbearance is justified in light of circumstances specific to the new service in question. The Commission also considers that requiring such an assessment is efficient and proportionate to its purpose, interferes minimally with competitive market forces, and neither deters economically efficient entry nor promotes economically inefficient entry into the market.

Secretary General

Related document

- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008

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