



Telecom Regulatory Policy CRTC 2009-19

Route reference: Telecom Decision 2008-17

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Bell Canada et al.'s application to review and vary Telecom Decision 2008-17 with respect to negotiated agreements

File number: 8662-B2-200807133

In this decision, the Commission amends aspects of the regulatory policy set out in Telecom Decision 2008-17. Specifically, the Commission approves Bell Canada et al.'s application to review and vary Telecom Decision 2008-17 so as to permit on a forbore basis, as set out in this decision, negotiated agreements for conditional essential and conditional mandated non-essential services.

Introduction

1. On 15 May 2008, Bell Canada submitted an application on behalf of itself; Bell Aliant Regional Communications, Limited Partnership; Saskatchewan Telecommunications; and Télébec, Limited Partnership (collectively, Bell Canada et al.) requesting that the Commission review and vary the determination in paragraph 127 of Telecom Decision 2008-17 so as to permit negotiated agreements between incumbent local exchange carriers (ILECs) and competitors for conditional essential services and conditional mandated non-essential services at rates or on terms that differ from the services' tariffed rates and terms (negotiated agreements).
2. Bell Canada et al. also requested that the Commission forbear from regulating conditional essential and conditional mandated non-essential services when these services are provided through a negotiated agreement on the same basis that it forbore, in Telecom Decision 2008-17, from regulating non-essential services that are subject to phase-out when provided through a negotiated agreement.
3. The Commission notes that cable carriers provide third-party Internet access service, which was found to be a conditional mandated non-essential service in Telecom Decision 2008-17. In this decision, the Commission also determines whether to permit forbore negotiated agreements between cable carriers and competitors. ILECs and cable carriers are collectively referred to in this decision as incumbent carriers.
4. The Commission received comments from Cybersurf Corp. (Cybersurf), Distributel Communications Limited (Distributel), Primus Telecommunications Canada Inc. (Primus), MTS Allstream Inc. (MTS Allstream), Rogers Communications Inc. (RCI), and TELUS Communications Company (TCC).

5. The 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".
6. In Telecom Public Notice 98-6, the Commission set out the criteria to consider review and vary applications. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example, due to one or more of the following: i) an error in law or in fact, ii) a fundamental change in circumstances or facts since the decision, iii) a failure to consider a basic principle which had been raised in the original proceeding, or iv) a new principle which has arisen as a result of the decision.
7. The Commission has identified that the issue to be addressed in this decision is whether there is substantial doubt as to the correctness of the Commission's determination in Telecom Decision 2008-17 to prohibit negotiated agreements for conditional essential and conditional mandated non-essential services and, if so, whether such agreements should be permitted on a forbore basis.

Background

8. In Telecom Decision 2008-17, the Commission determined that, pursuant to subsection 34(1) of the *Telecommunications Act* (the Act) and effective 3 March 2008, sections 25, 29, and 31, and subsections 27(1), 27(5), and 27(6) of the Act do not apply to a non-essential service that is subject to phase-out that is provided pursuant to a negotiated agreement entered into during that service's phase-out period. During the phase-out period, the Commission also retained section 24 of the Act to ensure that confidentiality of customer information continues to be protected and to impose future conditions upon the forbore services, as warranted. The Commission further retained subsections 27(2) and 27(4) of the Act to permit it to address any cases of unjust discrimination or undue preference, and subsection 27(3) of the Act with respect to compliance with powers and duties not forbore from in that decision.

Application

9. Bell Canada et al. submitted that the Commission made four errors when it did not permit, on a forbore basis, negotiated agreements for conditional essential and conditional mandated non-essential services.
10. First, Bell Canada et al. submitted that the Commission's determination that negotiated agreements should not be permitted for these services violated subparagraphs 1(a)(i) and 1(a)(ii) of the Governor in Council's Policy Direction to the Commission (the Policy Direction)¹ as it does not provide maximum reliance on market forces, is not least intrusive regulation and, in particular for non-essential services, is not proportionate to its purpose. Bell Canada et al. submitted that the services' tariffs would remain in place as a backstop in the event that parties did not reach a negotiated agreement, and that concerns with respect to unjust discrimination by the incumbent carrier between competitors could be addressed by retaining

¹ The Governor in Council issued *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006.

subsections 27(2) and 27(4) of the Act when forbearing from regulating negotiated agreements. Bell Canada et al. submitted further that the logic for permitting negotiated agreements for non-essential services that are subject to phase-out equally applies to conditional essential and conditional mandated non-essential services (first alleged error).

11. Second, Bell Canada et al. submitted that it is an error of law not to have permitted forborne negotiated agreements for conditional mandated non-essential services because, in their view, a non-essential service is, by definition, subject to competition sufficient to protect the interests of users as required by subsection 34(2) of the Act (second alleged error).
12. Third, Bell Canada et al. submitted that the Commission erred because it did not explain why it prohibited negotiated agreements for conditional essential and conditional mandated non-essential services. Bell Canada et al. submitted that negotiated agreements would provide benefits that mitigate against the purported undueness of such arrangements, including benefits to the wholesale customer, stimulating end-user demand and strengthening competition (third alleged error).
13. Fourth, Bell Canada et al. submitted that the Commission violated subparagraph 1(b)(i) of the Policy Direction because it did not specify the policy objective advanced by precluding off-tariff agreements for the services in question (fourth alleged error).

Positions of parties

14. Cybersurf, Distributel, MTS Allstream, Primus, and RCI (collectively, opposing parties) opposed the application. They generally submitted that the Commission's determination does not violate the Policy Direction, and that the Policy Direction does not override sections 25 and 27 of the Act. Opposing parties also generally submitted that the reason for permitting forborne negotiated agreements for non-essential services that are subject to phase-out does not apply to other wholesale service categories. Cybersurf, MTS Allstream, and RCI also submitted that, unlike non-essential services that are subject to phase-out, conditional essential and conditional mandated non-essential services do not themselves meet the criteria for forbearance.
15. Opposing parties generally submitted that, in mandating the provision of conditional essential and conditional mandated non-essential services, the Commission found that market forces would not achieve the telecommunications policy objectives of the Act, and that regulation is required until market conditions change. Cybersurf submitted that Bell Canada et al. did not address the issue of market power and did not cite market conditions that would support the forbearance requested. RCI submitted that permitting negotiated agreements for these services presents a significant competitive risk that outweighs concerns for flexibility.
16. Opposing parties also generally expressed concern with respect to the potential for incumbent carriers to discriminate unjustly among competitors and submitted that competitors and incumbent carriers would not have equal bargaining power in negotiations with respect to the services that are the subject of Bell Canada et al.'s application.

17. Cybersurf expressed concern that, if Bell Canada et al.'s application is approved, over time the tariffs for conditional essential and conditional mandated non-essential services may not include service features or attributes that would be available from an incumbent carrier through a negotiated agreement. Cybersurf submitted that incumbent carriers should continue to be required to update these service tariffs to reflect service changes in order that competitors would have an on-going baseline for pricing and service attributes.
18. Cybersurf requested that, if Bell Canada et al.'s application is approved, an incumbent carrier that enters into a negotiated agreement with a customer should be required to file with the Commission all agreements it has with that customer. Cybersurf submitted that competitors would not have the information necessary to demonstrate that an incumbent carrier was violating subsection 27(2) of the Act and that compliance could be assessed only after the Commission investigated a complaint.
19. With respect to Bell Canada et al.'s second alleged error, Distributel and MTS Allstream submitted that the essential service test and the test for forbearance are very different. Opposing parties generally submitted that a Commission finding that a service is non-essential does not mean that service is subject to competition sufficient to permit forbearance pursuant to subsection 34(2) of the Act.
20. With respect to Bell Canada et al.'s third alleged error, Distributel and RCI submitted that the Commission did provide reasons, in paragraphs 125 to 127 of Telecom Decision 2008-17, for its refusal to permit negotiated agreements for the services in question.
21. With respect to Bell Canada et al.'s fourth alleged error, Primus submitted that it was clear from Telecom Decision 2008-17 that the Commission had not ignored the Policy Direction. Primus referred to the Commission's references to the Policy Direction throughout Telecom Decision 2008-17.
22. TCC supported Bell Canada et al.'s application. TCC submitted that negotiated agreements would permit wholesale arrangements that would be more responsive to competitors' needs and would encourage increased reliance on market forces, consistent with the Policy Direction.

Bell Canada et al.'s reply

23. Bell Canada et al. submitted that the Commission's primary rationale in Telecom Decision 2008-17 for prohibiting negotiated agreements for conditional essential and conditional mandated non-essential services was its concern that such agreements could result in arrangements that were unduly preferential or unjustly discriminatory. Bell Canada et al. noted that the Commission had the same concern with respect to negotiated agreements for non-essential services that are subject to phase-out and that it had retained subsection 27(2) of the Act when forbearing with respect to these agreements. Bell Canada et al. submitted that retaining subsection 27(2) to address allegations of unduly preferential negotiated agreements on an *ex post* basis would be a proportional and non-intrusive way to address this concern.

24. Bell Canada et al. submitted further that the Commission should reject Cybersurf's request that incumbent carriers file updated costing and tariff information, as well as its request that incumbent carriers file all forborne negotiated agreements. Bell Canada et al. submitted that acceptance of Cybersurf's request would represent unnecessary regulation based on an assumption of improper behaviour by the incumbent carriers. Bell Canada et al. submitted that retaining subsection 27(2) of the Act when forbearing with respect to negotiated agreements would provide the Commission with the required authority in the event that there was reasonable evidence of impropriety. Bell Canada et al. also submitted that the flexibility of permitting negotiated agreements for the services in question would apply only to services and service elements that are tariffed.

Commission's analysis and determinations

25. The Commission notes that, if it were to permit negotiated agreements for conditional essential and conditional mandated non-essential services on a forborne basis, such agreements could relate only to rates, terms, and conditions for those services, service elements, and features that have received prior tariff approval, and would provide for negotiated rates, terms, and conditions in relation to these tariffed services, service elements, and features. With respect to the concern generally expressed by opposing parties that the bargaining power of competitors and incumbent carriers is unequal, the Commission notes that, if negotiated agreements were to be permitted for conditional essential and conditional mandated non-essential services, tariffs for the wholesale services in question would remain in place for competitor use.
26. With respect to the concern expressed by opposing parties, and by the Commission in Telecom Decision 2008-17, that permitting negotiated agreements for conditional essential and conditional mandated non-essential services could result in unduly preferential or unjustly discriminatory arrangements contrary to subsection 27(2) of the Act, the Commission notes Bell Canada et al.'s submission that, if the Commission were to permit forborne negotiated agreements for these services, it could retain its powers under subsections 27(2), 27(3), and 27(4) of the Act to permit it to address any allegations of undue preference or unjust discrimination with respect to these agreements.
27. The Commission also notes the submissions of opposing parties that, in mandating conditional essential and conditional mandated non-essential services, the Commission considered that market forces could not be relied on to achieve the telecommunications policy objectives of the Act. The Commission notes that, as opposing parties also submitted, the wholesale services under consideration in this decision differ significantly from non-essential services that are subject to phase-out in that the Commission mandated the provision of conditional essential and conditional mandated non-essential services until such time as the conditions described in Telecom Decision 2008-17 are satisfied. In contrast, for non-essential services that are subject to phase-out, in Telecom Decision 2008-17 the Commission either found evidence of duplication or found that competitors did not indicate that they required these services.

28. In these circumstances, the Commission considers that permitting forbore negotiated agreements for conditional essential and conditional mandated non-essential services at rates and on terms different from tariffed rates and terms would raise greater concerns with respect to the potential for undue preference or unjust discrimination, contrary to subsection 27(2) of the Act, than forbore negotiated agreements permitted in Telecom Decision 2008-17 for non-essential services that are subject to phase-out.
29. The Commission notes that, when it forbore in Telecom Decision 2008-17 with respect to negotiated agreements for non-essential services that are subject to phase-out, it did not require that ILECs file the negotiated agreements with the Commission. The Commission considers, however, that if it were to permit forbore negotiated agreements with respect to conditional essential and conditional mandated non-essential services, in view of the greater concerns with respect to the administration of subsection 27(2) of the Act associated with these agreements, it would be necessary to allow for public review of these agreements. Accordingly, forbearance in relation to the tariffing requirement of such an agreement would be conditional on the incumbent carrier filing the negotiated agreement with the Commission for the public record. The Commission further considers that information in an agreement that would identify the incumbent carrier's wholesale service customer or any customer of that wholesale service customer would not be required for the public record.
30. In Telecom Decision 2008-17 the Commission noted that the option of negotiated agreements for services that it found in that decision to be non-essential subject to phase-out would give competitors greater opportunity to rearrange their provisioning arrangements during the phase-out period for those services. The Commission notes that opposing parties generally submitted that the reason for permitting forbore negotiated agreements for non-essential services that are subject to phase-out does not apply to the mandated services that are the subject of Bell Canada et al.'s application. However, the Commission considers that incumbent carriers and competitors should have the opportunity to reach negotiated agreements with respect to conditional essential and conditional mandated non-essential services if incumbent carriers were also required to file these agreements with the Commission for the public record.²
31. In view of the foregoing, the Commission considers that relying solely on tariffs for conditional essential and conditional mandated non-essential services would not be consistent with the requirements set out in subparagraphs 1(a)(i) and 1(a)(ii) of the Policy Direction that the Commission should rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives of the Act and, when relying on regulation, should use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to achieve these objectives.

² The Commission expressed the view in Telecom Decision 2008-17, for conditional essential and conditional mandated non-essential services, but not for essential, public good, and interconnection services, that changes in market conditions for conditional essential and conditional mandated non-essential services at a point in the future could result in it no longer being necessary to mandate these services.

32. Further, pursuant to subsection 34(1) of the Act, the Commission may make a determination to refrain from exercising certain powers and performing certain duties where it finds that to do so would be consistent with the policy objectives of the Act. The Commission finds, as a question of fact, that to refrain, conditional on the incumbent carrier filing the forbore negotiated agreement for the public record, from the exercise of its powers and the performance of its duties, to the extent set out below, with respect to the regulation of a conditional essential or conditional mandated non-essential service to the extent that it is included in a negotiated agreement would be consistent with the telecommunications policy objectives set out in paragraphs 7(c), 7(f), and 7(h) of the Act.³ The Commission has also reached this finding under subsection 34(1) on the basis that each such conditional essential and conditional mandated non-essential service will continue to be tariffed.
33. The Commission notes that such a forbore negotiated agreement could involve the provision of one or more conditional essential and conditional mandated non-essential services and services that are non-essential subject to phase-out at rates and on terms different from tariffed rates and terms, as well as forbore services and tariffed services provided at tariffed rates and terms.
34. The Commission considers that it is appropriate to retain its powers, pursuant to section 24 of the Act, to ensure that the confidentiality of customer information continues to be protected. Accordingly, the Commission directs carriers to incorporate, where appropriate, the existing conditions regarding the disclosure of confidential customer information to third parties into all contracts and any other arrangements for the provision of the services forbore from regulation in this decision. The Commission considers that it is also appropriate to retain sufficient powers under section 24 of the Act to impose future conditions on these forbore services, as warranted.
35. The Commission also considers that it is appropriate to retain its powers pursuant to subsections 27(2) and 27(4) of the Act. As a necessary consequence of its retention of section 24 and subsection 27(2), the Commission also considers it necessary to retain subsection 27(3) of the Act as it pertains to the exercise of its powers under those sections. Further, the Commission considers it necessary to retain its powers under subsection 27(3) of the Act with respect to compliance with the other powers and duties not forbore from in this decision.
36. Pursuant to subsection 34(3) of the Act, the Commission finds that forbearance, to the extent set out in this decision, with respect to the regulation of conditional essential and conditional mandated non-essential service, to the extent that it is included in a negotiated agreement, will not likely impair unduly the establishment or continuance of a competitive market for the provision of the conditional essential or conditional mandated non-essential service in question.

³ As set out in section 7 of the Act, the Canadian telecommunications policy objectives include: 7(c) "to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications"; 7(f) "to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective"; and 7(h) to respond to the economic and social requirements of users of telecommunications services.

37. In light of the above, the Commission finds that there is substantial doubt as to the correctness of its determinations in Telecom Decision 2008-17 to prohibit negotiated agreements for conditional essential and conditional mandated non-essential services, and not to allow for such agreements on a forbearance basis, as set out in this decision.
38. In the Commission's view, permitting forbearance negotiated agreements for conditional essential and conditional mandated non-essential services to the extent set out in this decision would be consistent with subparagraphs 1(a)(i) and 1(a)(ii) of the Policy Direction.
39. The Commission also considers that requiring negotiated agreements to be filed with the Commission for the public record would be a regulatory measure that would be efficient and proportionate to its purpose and would interfere with the operation of market forces to the minimum extent necessary to meet the policy objectives of the Act, consistent with subparagraph 1(a)(ii) of the Policy Direction.
40. The Commission specifies that permitting forbearance negotiated agreements for conditional essential and conditional mandated non-essential services as set out in this decision advances the policy objectives set out in paragraphs 7(c), 7(f), and 7(h) of the Act and that its determinations neither deter economically efficient competitive entry nor promote economically inefficient entry.
41. In view of the Commission's determination on Bell Canada et al.'s first alleged error, the Commission finds that it is not necessary to make a determination on the other errors alleged by Bell Canada et al.
42. Accordingly, the Commission reviews and varies its determination in paragraph 127 of Telecom Decision 2008-17 so as to permit negotiated agreements for conditional essential and conditional mandated non-essential services on a forbearance basis as set out in this decision.

Declaration under subsection 34(4) of the Act and implementation

43. Pursuant to subsection 34(4) of the Act, the Commission declares that, effective the date of this decision, sections 25, 29, and 31, and subsections 27(1), 27(5), and 27(6) of the Act do not apply with respect to a tariffed conditional essential or conditional mandated non-essential service, to the extent that it is provided pursuant to a negotiated agreement, conditional on the incumbent carrier filing a copy of that agreement with the Commission for the public record within two days of the date it is entered into.
44. To implement these determinations, the Commission directs each incumbent carrier to issue, within 30 days of the date of this decision, revised tariff pages for each conditional essential and conditional mandated non-essential service as defined in Telecom Decision 2008-17, in order to include the following provision:

Because the Commission has forborne, in Telecom Regulatory Policy CRTC 2009-19, with respect to the regulation of this service as set out in that decision, the company may also provide the service in this tariff at rates and on terms different from the tariffed rates and terms pursuant to an agreement entered into between the company and a competitor that has been filed with the Commission for the public record.

Conclusion

45. In light of the above, the Commission **approves** Bell Canada et al.'s request to review and vary Telecom Decision 2008-17 so as to permit, on a forborne basis as set out in this decision, negotiated agreements for conditional essential and conditional mandated non-essential services.

Secretary General

Related documents

- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>