



Telecom Regulatory Policy CRTC 2009-428

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Canadian ownership and control review policy

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In this decision, consistent with the Policy Direction, the Commission details a new framework with respect to Canadian ownership and control reviews under the Telecommunications Act and the Canadian Telecommunications Common Carrier Ownership and Control Regulations. The Commission finds that a flexible approach with respect to ownership and control reviews is appropriate and develops a four-type framework that will apply to all future ownership and control reviews.

Introduction

1. In *Call for comments – Canadian ownership and control review procedure under section 16 of the Telecommunications Act*, Telecom Notice of Consultation CRTC 2009-303, 22 May 2009, the Commission invited parties to comment on the circumstances under which it would be appropriate to hold a multi-party public process to review a common carrier's compliance with the Canadian ownership and control requirements of the *Telecommunications Act* (the Act) and the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* (the Regulations).
2. The Commission received submissions from Bell Canada, the Canadian Cable Systems Alliance Inc. (CCSA), Ciel Satellite Limited Partnership (Ciel), Globalive Wireless Management Corporation (Globalive), MTS Allstream Inc. (MTS Allstream), the Public Interest Advocacy Centre (PIAC), Rogers Communications Inc. (RCI), Shaw Communications Inc. (Shaw), TELUS Communications Company (TCC), and Vishal Malik.
3. The public record of this proceeding, which closed on 15 June 2009, is available on the Commission's website at www.crtc.gc.ca under “Public Proceedings” or by using the file number provided above.

Background

4. The Commission conducts ownership and control reviews pursuant to a legislative scheme that includes the Act and the Regulations (collectively, the Ownership and Control Regime). Section 16 of the Act establishes that a Canadian carrier is eligible to operate as a telecommunications common carrier if it is a Canadian-owned and controlled corporation, subject to the exceptions contained in subsection 16(5) of the Act. The Act and the Regulations establish that in addition to *de jure* ownership and control, a common carrier must be Canadian-controlled in fact.

5. While the Ownership and Control Regime details the eligibility rules with respect to what constitutes Canadian ownership and control, the Regime does not set out the procedure to be followed in conducting a review of a carrier's eligibility. In the past, the Commission has generally conducted ownership and control reviews on a confidential, bilateral basis, between the carrier under review and the Commission. This type of review has normally not resulted in a public record or the release of public reasons.

Should the approach of conducting ownership and control reviews pursuant to the Ownership and Control Regime on a confidential, bilateral basis be maintained in all instances?

6. Shaw submitted that the Commission should conduct ownership and control reviews in a manner that allows for public notice, public participation, and the release of public reasons, in order to provide certainty to the industry. Similarly, RCI submitted that reviews should be conducted via a streamlined public process and that reasons should be released where a review involves novel facts or issues. Bell Canada and TCC proposed that ownership and control reviews should be conducted on a public, multi-party basis where compliance with section 16 of the Act is to be assessed in respect of a new carrier, or where the governance or ownership structure of an existing carrier undergoes substantial modifications or significant restructuring.
7. The CCSA, Ciel, Globalive, MTS Allstream, PIAC, and Vishal Malik (collectively, Globalive et al.) submitted that multi-party reviews were unnecessary and would cause undue delay, and that the Commission should in all cases continue with its practice of conducting ownership and control reviews on a confidential, bilateral basis. MTS Allstream further submitted that the Commission should issue public reasons with respect to positive determinations of ownership and control reviews, in order to provide guidance and certainty to the industry.

Commission's analysis and determinations

8. As noted above, the Commission has generally conducted ownership and control reviews on a confidential, bilateral basis. In the attachment to a letter from the Secretary General of the Commission to AT&T Canada Long Distance Services Company, dated 16 October 1996 (the Unitel decision), the Commission first examined the legal requirements with respect to the procedure to be followed in conducting ownership and control reviews.
9. In that decision, it was determined that the Commission was under no legal duty to conduct ownership and control reviews on a public or multi-party basis. In particular, it was determined that neither the Ownership and Control Regime, nor the administrative law duty of procedural fairness, imposed such a duty on the Commission. The Commission further determined that on the facts of that case, a public review process involving third-party participation was unnecessary.

10. The Commission notes that there has been a significant passage of time since the release of the Unitel decision, during which the telecommunications landscape has evolved considerably. Further, the Commission notes that against that backdrop, the corporate finance industry has created ever more complex corporate structures, financing instruments, and arrangements which figure prominently in the establishment of new carriers and in the changes to the ownership or governance structures of existing carriers.
11. The Commission considers that where a review pursuant to the Ownership and Control Regime involves complex or novel ownership or governance structures, particularly those involving complex or novel financing arrangements, the public interest may be served in some instances by conducting that review via a public, multi-party process or a process that results in a public record and public decision. While the Commission is under no legal obligation to conduct such reviews, it considers that doing so may in some instances provide substantive precedents and a level of much needed certainty to all industry players. For example, a public decision would afford industry players and the general public with a better understanding of the Commission's interpretation of the Ownership and Control Regime.
12. The Commission also notes that while the consideration of the indicators of control remains constant across all reviews, it is unlikely that the same indicators will be at issue in every case, as the ownership or governance structure and capitalization of each carrier are unique. Ownership and control reviews will need to vary in order to address the relative complexity or novelty of the ownership or governance structure of the carrier under review. The Commission notes that not all reviews will require a public or multi-party process. In this regard, the Commission also notes its obligations under *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction), which requires the Commission to adopt practices that enable it to act in a more efficient, informed, and timely manner.
13. Based on the foregoing, the Commission considers it necessary to establish a flexible framework that is consistent with the above-mentioned obligations set out in the Policy Direction and the industry's need for precedents. The Commission considers that a review framework, consisting of four types of ownership and control reviews, would provide a differentiated scheme that would allow the Commission to discharge its duties under the Ownership and Control Regime as a function of the characteristics of a carrier's ownership or governance structure. The Commission therefore establishes the following ownership and control review framework, consisting of four types of reviews:

Type 1: Confidential, bilateral review

Type 2: Written, bilateral review, resulting in the release of a public record and decision

Type 3: Written, public, multi-party proceeding

Type 4: Oral, public, multi-party proceeding

	Oral Component	Multi-party	Public Record	Public Decision
Type 1	No	No	No	No
Type 2	No	No	Yes	Yes
Type 3	No	Yes	Yes	Yes
Type 4	Yes	Yes	Yes	Yes

14. The Commission is of the view that the approach of conducting reviews on a confidential, bilateral basis (Type 1 review) will continue to be the process most often employed. This type of review provides the appropriate balance between efficiency and sufficient thoroughness for reviews of routine ownership or governance structures that offer little in precedential value, as the issues raised are neither complex nor novel. Under this type of review, the Commission will simply review a carrier's documentary evidence and make a confidential determination.
15. A written, bilateral review resulting in the release of a public record and decision (Type 2 review) will be undertaken where an ownership or governance structure is of a complex or novel nature, such that in the Commission's view its determination will hold precedential value to industry players and the general public. This type of review will be carried out in the same manner as a Type 1 review, with a public decision and examination file released upon the conclusion of the Commission's review.
16. A written, public, multi-party proceeding (Type 3 review) will be undertaken where an ownership or governance structure is of a complex or novel nature, such that in the Commission's view its determination will hold precedential value to industry players and the general public and the Commission further considers that the evidentiary record would be improved by third-party submissions. Under this type of review, documentation filed by the carrier under review will be available for public comment. At the conclusion of the review process, a public decision will be issued.
17. Finally, in exceptional circumstances, the Commission will hold an oral, public, multi-party proceeding (Type 4 review) where an ownership or governance structure is of a complex or novel nature, such that in the Commission's view its determination will hold precedential value to industry players and the general public, where the Commission considers that the evidentiary record would be improved by third-party submissions, and the Commission further considers that the appearance of parties would more easily allow the Commission to complete and test the evidentiary record. Under this type of review, documentary evidence filed by the carrier under review will be available for public inspection. Third parties will have an opportunity to file written submissions and request to provide oral submissions on that evidence. At the conclusion of the review process, a public decision will be issued.

18. The Commission will provide public notice that a review is being undertaken where it proceeds with a Type 2, 3, or 4 review.
19. The Commission notes the concerns of Globalive et al. to the effect that a public process would cause unnecessary delay and that certain parties might seek to persuade the Commission to routinely conduct the more time-intensive reviews in order to benefit competitively. The Commission considers that the flexible framework established in this decision will enable it to employ the most appropriate process for each carrier under review, thereby allowing the Commission to reach an informed decision while making use of the most efficient process possible. Moreover, the Commission determines that where the review of a carrier's ownership and control is conducted via a Type 3 or Type 4 review, such a proceeding is to be conducted as expeditiously as possible. Where a third party seeks to appear in relation to a Type 4 review of a carrier's eligibility under the Ownership and Control Regime, that third party must demonstrate the value of their oral participation to the Commission and why its written participation would be insufficient. The Commission will only permit third-party oral participation where it considers that such participation would serve the public interest.

Conclusion

20. The Commission considers that the flexibility provided by the above framework is necessary in order for it to effectively carry out its mandate under the Ownership and Control Regime, as it addresses the variability that exists from one ownership or governance structure to another. The Commission further considers that the above framework will allow the Commission to strike the appropriate balance between the need for efficient decision making with the need for a coherent regulatory process.

Secretary General

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