



Telecom Decision CRTC 2012-143

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Dryden Municipal Telephone System – Application requesting forbearance from the regulation of wide area network services

File number: 8640-D3-201113167

In this decision, the Commission forbears, with some conditions, from the exercise of its powers and the performance of its duties in relation to the provision of future wide area network services provided by Dryden Municipal Telephone System.

Introduction

1. The Commission received an application by Dryden Municipal Telephone System (DMTS), dated 26 September 2011, requesting forbearance from the regulation of wide area network (WAN) services in its operating territory.
2. The Commission received an intervention regarding DMTS's application from MTS Allstream Inc. (MTS Allstream). The public record of this proceeding, which closed on 7 November 2011, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Background

3. Subsection 34(1) of the *Telecommunications Act* (the Act) provides that the Commission may refrain from regulating a service or class of services when it finds that such forbearance is consistent with the Canadian telecommunications policy objectives. In addition, subsection 34(2) of the Act requires the Commission to forbear when it finds that the market for the service in question is or will be subject to sufficient competition to protect the interests of users. However, subsection 34(3) of the Act provides that the Commission shall not forbear if it finds that to do so would be likely to impair unduly the establishment or continuance of a competitive market for that service.
4. In Telecom Decision 94-19, the Commission established a framework for considering whether or not to forbear from regulation pursuant to section 34 of the Act. In that decision, the Commission noted that the first step in assessing whether it is appropriate to forbear involves defining the relevant market, which is essentially the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase. The Commission also

established a number of criteria to be examined when determining whether a market is competitive. These criteria include the market shares of the dominant and competing firms, demand and supply conditions, the likelihood of entry into the market, barriers to entry into the market, and evidence of rivalrous behaviour.

5. In Order 2000-553, the Commission provided a definition of WAN services¹ and granted forbearance from regulation of current and future WAN services provided by most large incumbent local exchange carriers (ILECs). In subsequent decisions, the Commission granted similar forbearance to the remaining large ILECs, as well as other small ILECs.

Should the Commission forbear from regulating DMTS's WAN services?

a) Definition of WAN services and access to WAN access and transport services

6. DMTS noted that it did not currently offer WAN services, but intended to make such services available on a going-forward basis. As a result, DMTS proposed the same service definition and scope of the market adopted in Order 2000-553.

Commission's analysis and determinations

7. The Commission finds that it is appropriate to characterize the market for WAN services as a regional one (that is, the entirety of DMTS's serving territory), consistent with its characterizations in Order 2000-553.
8. The Commission also determines that it is appropriate to apply the WAN service definition set out in Order 2000-553 to DMTS's WAN services that are the subject of this decision.

b) Evidence of a competitive market as defined by section 34 of the Act

9. DMTS requested forbearance for its WAN services, submitting, with supporting documentation, that there is enough evidence of sufficient competition in the WAN services market in DMTS's operating territory to allow the Commission to forbear from the regulation of these services. Specifically, DMTS submitted that Bell Aliant Regional Communications, Limited Partnership and Bell Canada; Shaw Business Solutions; TBayTel; and WireIE offer WAN or WAN-equivalent services in and around DMTS's operating territory. DMTS added that customers also have the option of operating their own WAN with products sold by various equipment vendors.

¹ The Commission stated that forborne WAN services do not include asynchronous transfer mode (ATM)-based carrier interconnection services, or ATM services that provide public switched telephone network (PSTN) interconnection or call control capabilities equivalent to interconnection with the PSTN. Further, the Commission indicated that WAN access is a value-added enhanced service (using either ATM, Ethernet, or token ring protocols) available to WAN customers, and is part of WAN service. Finally, the Commission determined that the market for WAN services was national or regional in scope, rather than route-specific as in the case of private line services.

10. DMTS submitted that it could not provide market-share estimates for WAN services in its territory because it is not currently offering these services, and therefore has no market share or market power.
11. DMTS also submitted that there are no significant barriers to entry for competitors because all WAN services use industry-standard interfaces, making interoperability between customer-owned equipment and the network a non-issue.
12. MTS Allstream submitted that it did not oppose DMTS's application, but that underlying network elements that are required for the competitive provision of WAN services, including Ethernet access services, must be accessible at tariffed rates.
13. In particular, MTS Allstream argued that the Commission's finding that the WAN retail market in the large ILECs' territories was sufficiently competitive to warrant forbearance of WAN services was predicated on competitors having continued access to the ILECs' underlying network access and transport elements.
14. DMTS submitted that WAN forbearance should not be predicated on access to WAN access and transport services given the competitive conditions that already exist within its territory, and since such services are in the process of being phased out by the large ILECs.²

Commission's analysis and determinations

15. The Commission notes that both national and regional competitive WAN service providers operate in DMTS's territory. The Commission considers that there are numerous competitive suppliers, low barriers to entry, and knowledgeable customers that can easily switch WAN service providers. The Commission therefore considers that DMTS has no incentive to engage in anti-competitive, below-cost pricing. Accordingly, in the Commission's view, the conditions for forbearance, as noted in Telecom Decision 94-19, exist in DMTS's territory with respect to WAN services.
16. The Commission notes that the current competitive presence in DMTS's territory took hold without wholesale access to the company's access and transport services. Therefore, the Commission does not consider it necessary to require DMTS to make available these underlying services as a condition of forbearance of WAN services.
17. In light of the above, the Commission finds, as a question of fact and pursuant to subsection 34(2) of the Act, that the provision of WAN services in DMTS's territory is sufficiently competitive to protect the interests of users so as to warrant forbearance to the extent set out in this decision.

² In Telecom Decision 2008-17, the Commission classified WAN access and transport services as "non-essential subject to phase-out." Services in this category are those that the Commission has determined do not meet the definition of an essential service and that have not been classified as conditional mandated non-essential, public good, or interconnection services. The term "phase-out" means phasing out mandated access at the end of the transition period. The Commission notes that this decision does not currently apply to DMTS.

18. The Commission also finds, as a question of fact and pursuant to subsection 34(3) of the Act, that to refrain from regulating WAN services, to the extent set out in this decision, is unlikely to impair unduly the continuance of a competitive market for that class of services.
19. The Commission also finds, as a question of fact and pursuant to subsection 34(1) of the Act, that to refrain from exercising its powers and performing its duties with respect to WAN services in DMTS's territory, to the extent set out in this decision, is consistent with the Canadian telecommunications policy objectives set out in the Act, specifically those in paragraphs 7(c) and 7(f).³

c) Extent of forbearance

Section 24

20. The Commission considers it necessary to retain its powers with respect to section 24 of the Act to ensure that the confidentiality of customer information continues to be protected. The Commission notes that DMTS's Terms of Service, which ensure the confidentiality of customer information for regulated services, do not apply to forborne services. The Commission therefore directs DMTS, as a condition of providing WAN services, to abide by the existing conditions regarding disclosure of confidential customer information to third parties with respect to the services forborne from regulation in this decision.
21. The Commission also directs DMTS, as a condition of providing WAN services, to incorporate, where appropriate, the existing conditions regarding disclosure of confidential customer information to third parties into all contracts and any other arrangements for services forborne from regulation in this decision.
22. Finally, the Commission considers that it is also appropriate to retain sufficient powers under section 24 of the Act to impose future conditions relating to the provision of WAN services.

Section 25

23. Based on the record of this proceeding, the Commission considers it appropriate not to require DMTS to file tariffs and obtain the Commission's approval for the services forborne from regulation in this decision. Accordingly, the Commission will refrain from the exercise of all its powers and the performance of all its duties under section 25 of the Act with respect to WAN services provided by DMTS.

³ The cited policy objectives of the Act are
7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and
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.

Section 27

24. The Commission considers that there is no need to apply the regulatory standards for “just and reasonable” rates to rates that are set in a competitive market. Accordingly, the Commission will refrain from the exercise of its powers and the performance of its duties under subsection 27(1) of the Act with respect to the services granted forbearance in this decision. The Commission will also refrain from the exercise of its powers and the performance of its duties under subsection 27(5) of the Act, since that subsection relates to subsection 27(1) with respect to which forbearance is granted. In addition, the Commission will refrain from the exercise of its powers and the performance of its duties under subsection 27(6) of the Act, since it does not wish to limit the pricing of the services forborne from regulation.
25. However, in view of DMTS’s position as an incumbent service provider with respect to access and transport services and facilities in its operating territory, the Commission considers it necessary to retain its powers under subsections 27(2) and (4) of the Act in order to ensure that the company does not unjustly discriminate against other service providers or customers, or confer upon itself an undue or unreasonable preference with respect to the provision of WAN services forborne from regulation in this decision.
26. The Commission also considers it necessary to retain its powers under subsection 27(3) of the Act with respect to compliance with the powers and duties it has retained in this decision.

Section 29

27. The Commission considers it appropriate that DMTS no longer be required to obtain the Commission’s approval to enter into agreements with other telecommunications common carriers regarding WAN services forborne from regulation in this decision. Accordingly, the Commission will refrain from the exercise of all its powers and the performance of all its duties under section 29 of the Act with respect to WAN services forborne from regulation in this decision.

Section 31

28. The Commission considers it appropriate that DMTS be able to limit its liability in respect of WAN services in the same way as an unregulated service provider would. Accordingly, the Commission will refrain from the exercise of all its powers and the performance of all its duties under section 31 of the Act with respect to WAN services forborne from regulation in this decision.

Declaration pursuant to subsection 34(4) of the Act

29. In light of the above, the Commission declares that, pursuant to subsection 34(4) of the Act and effective the date of this decision, sections 24, 25, 27, 29, and 31 of the Act do not apply to DMTS’s current and future WAN services, except for the following:

- conditions pursuant to section 24 of the Act set out in this decision with respect to the confidentiality of customer information;
- any future condition that the Commission may impose, pursuant to section 24 of the Act, with respect to WAN services;
- the Commission's powers under subsections 27(2) and (4) of the Act regarding unjust discrimination and undue preference with respect to the provision of WAN services; and
- the Commission's powers under subsection 27(3) of the Act with respect to compliance with powers and duties it has retained in this decision.

Compliance with the Policy Direction

30. The Commission considers that forbearance of DMTS's WAN services is consistent with the Policy Direction⁴ requirements that the Commission should (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives; (ii) when relying on regulation, 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 meet the policy objectives; and (iii) when relying on regulation, use measures that neither deter economically efficient competitive entry nor promote economically inefficient entry. The Commission also considers that its determinations in this decision will advance the policy objectives set out in paragraphs 7(c) and 7(f) of the Act.

Secretary General

Related documents

- *Revised regulatory framework for wholesale services and definition of essential services*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Forbearance granted for telcos' wide area network services*, Order CRTC 2000-553, 16 June 2000
- *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994

⁴ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006