



Telecom Regulatory Policy CRTC 2012-359

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Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application for revised filing requirements associated with wholesale negotiated agreements

File number: 8663-B54-201200501

In this decision, the Commission modifies the regulatory filing requirement for incumbent carriers' negotiated agreements for conditional essential and conditional mandated non-essential wholesale services. Carriers are required to only file a general summary of such agreements with the Commission for the public record.

Introduction

1. In Telecom Decision 2008-17 (the Essential Services decision), the Commission, among other things, established a revised regulatory framework for wholesale services and assigned these services to six categories.¹ Incumbent carriers² were permitted to enter into off-tariff negotiated agreements³ with competitors only for wholesale services in the non-essential subject to phase-out category.
2. In Telecom Regulatory Policy 2009-19, the Commission permitted incumbent carriers to negotiate off-tariff agreements for conditional essential and conditional mandated non-essential wholesale services, provisional on the incumbent carrier filing the negotiated agreement with the Commission for the public record.⁴ The Commission stated that, in view of concerns with respect to the administration of subsection 27(2)⁵ of the *Telecommunications Act* (the Act) in relation to off-tariff agreements for conditional essential and conditional mandated non-essential services, it was necessary to allow for public review of such agreements.

¹ The six wholesale services categories are essential, conditional essential, conditional mandated non-essential, public good, interconnection, and non-essential subject to phase-out.

² Incumbent carriers refer to the incumbent local exchange carriers (ILECs) and cable carriers subject to the Essential Services decision.

³ Parties may conclude agreements at rates, terms, and conditions that are different than Commission-approved tariffs, although the underlying services remain regulated. These agreements will provide benefits to both competitors and consumers.

⁴ Information that would identify the incumbent carrier's wholesale service customer or any customer of that wholesale service customer is not made public.

⁵ No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

Application

3. On 18 January 2012, Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and Bell Canada (collectively, the Bell companies) filed an application requesting that the Commission eliminate the requirement for incumbent carriers to file such negotiated agreements with the Commission for the public record or, in the alternative, that it be replaced with a requirement to file the agreements in confidence. In their application, the Bell companies submitted that the current filing requirement does not represent maximum reliance on market forces as required by the Policy Direction⁶ and interferes in a direct manner in the normal operations of the market.
4. The Commission received submissions from the Canadian Network Operators Consortium Inc. (CNOC); MTS Inc. and Allstream Inc. (MTS Allstream);⁷ the Public Interest Advocacy Centre (PIAC); Primus Telecommunications Canada Inc. (Primus); and TELUS Communications Company (TCC).
5. The public record of this proceeding, which closed on 1 March 2012, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Should the requirement to file negotiated agreements for conditional essential and conditional mandated non-essential wholesale services for the public record be modified?

6. The Bell companies submitted that the current filing requirement unduly interfered with the normal operation of the market for the services at issue and that the measure was not proportionate to its purpose. The Bell companies also submitted that the obligation to file negotiated agreements for the public record effectively penalizes the competitor that had expended considerable effort and resources to negotiate an agreement because it allowed other competitors to take advantage of the work completed in order to reach similar agreements without having to expend the same effort and resources. The Bell companies argued that this behaviour operates so as to impede their ability to negotiate agreements tailored to take into account the specific requirements of a given competitor. The Bell companies also argued that, as such, the filing requirement operated as a disincentive to the execution of such negotiated agreements.
7. In support of their position, the Bell companies noted that in the three years for which negotiated agreements for conditional essential and conditional mandated non-essential services were permitted, only seven such agreements had been finalized and filed publicly by the carriers, including five by Bell Canada and zero by Bell Aliant. The Bell companies indicated that over a similar period, they entered

⁶ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁷ As of early 2012, MTS Allstream Inc. became known as two separate entities, namely MTS Inc. and Allstream Inc.

into over fifty agreements relating to services in the non-essential subject to phase-out category, as defined in the Essential Services decision. The Bell companies noted that no such filing requirements were imposed for negotiated agreements containing other wholesale services, such as those in the non-essential subject to phase-out and interconnection⁸ categories, and argued that there was no reason to treat agreements pertaining to conditional essential and conditional mandated non-essential services any differently.

8. The Bell companies argued that the existence of tariffs for the services subject to the negotiated agreements under consideration acted as a significant back-stop limiting a carrier's bargaining power and that the Commission could address concerns regarding undue preference or unjust discrimination on an *ex post* basis.
9. MTS Allstream, CNOC, and PIAC opposed the Bell companies' application. They generally submitted that the current obligation to file and disclose the negotiated agreements with the Commission for these services continues to be necessary for the Commission or competitors to assess whether any given agreement contravenes subsection 27(2) of the Act. These parties generally agreed that the current measure is minimally intrusive and achieves the intended result of preventing undue preference and unjust discrimination considering that no such claims have been filed with the Commission in three years.
10. CNOC and PIAC argued that reluctance from competitors to enter into negotiated arrangements for these services stems from agreements not being sufficiently attractive from a commercial perspective. They further argued that the requirement to file agreements publicly does not force incumbent carriers to sign the same agreement with every wholesale customer. CNOC and PIAC submitted that filing agreements on a confidential basis would not represent an appropriate safeguard as it would be subject to no oversight by the industry and would inappropriately shift responsibility to the Commission.
11. TCC supported the Bell companies' application. Primus supported the application in part, proposing that the Commission modify the current regulatory requirement to only require the incumbent carriers to file a general summary of the agreement on the public record that would
 - a) indicate the existence of the negotiated agreement;
 - b) identify each service element that deviated from the tariff;
 - c) identify the conditional essential and conditional mandated non-essential services subject to the agreement;
 - d) provide notice of whether services that are forborne or classified as non-essential subject to phase-out are also subject to the agreement, without identifying the specific services; and
 - e) indicate the reasons that the negotiated agreement deviated from the tariff.

⁸ In Telecom Regulatory Policy 2012-24, off-tariff agreements for wholesale services included in the interconnection category were permitted.

12. Primus submitted that under its proposal, the measure would be more proportionate to the purpose, which is to provide protection against undue preference or unjust discrimination, and would rely on market forces to the maximum extent feasible. Primus stated that such notice, though general and absent of specific terms and conditions negotiated, would provide notice to all competitors that another party has reached a negotiated agreement regarding certain services allowing competitors to approach the incumbent carrier to negotiate a similar agreement. Should a competitor believe that an incumbent carrier has acted in a manner that is contrary to the undue preference/unjust discrimination prohibition, it could still seek recourse through the Commission.

Commission's analysis and determinations

13. The Policy Direction states, in its relevant parts, that the Commission should (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and (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.
14. The Commission notes that, in Telecom Decision 2009-19, it determined that permitting forborne negotiated agreements for conditional essential and conditional mandated non-essential services could raise material concerns with respect to the potential for undue preference or unjust discrimination. In that decision, the Commission concluded that public disclosure of such agreements would further the proper administration of subsection 27(2) of the Act.
15. The Commission considers that concerns with respect to the potential for undue preference or unjust discrimination remain. In this regard, the Commission agrees that the presence of tariffs limits a carrier's bargaining power when negotiating agreements, but considers, based on the record of this proceeding, that such tariffs do not, by themselves, remove a carrier's ability to favour one competitor over another when negotiating and concluding off-tariff agreements for conditional essential and conditional mandated non-essential services.
16. The Commission notes that it has traditionally administered its authority under subsection 27(2) of the Act on a complaint-driven basis. However, the Commission considers that without the obligation to file off-tariff negotiated agreements for conditional essential and conditional mandated non-essential services publicly, it would likely be difficult for competitors to assess whether any given agreement could contravene subsection 27(2) of the Act, if they are left unaware of the existence, at a minimum, of these negotiated agreements.
17. Notwithstanding the above, the Commission considers that the record of this proceeding demonstrates that the current filing and disclosure requirement for off-tariff negotiated agreements for conditional essential and conditional mandated non-

essential services is likely interfering with the operation of market forces given the limited number of negotiated agreements for these services.

18. The Commission considers that adopting the proposal put forth by Primus would provide interested persons with part of the information necessary for the administration of subsection 27(2) of the Act while limiting interference in the operation of market forces.
19. In light of the above, the Commission modifies the existing requirement to require incumbent carriers to file only a general summary of negotiated agreements for conditional essential and conditional mandated non-essential services with the Commission for the public record. The general summary is to contain the information set out in paragraph 11 of this decision.
20. The Commission considers that the requirement to file a general summary of negotiated agreements containing the information set out in paragraph 11 of this decision serves to better foster a competitive environment for the provision of services in question resulting in the advancement of a number of policy objectives, including the objective set out in paragraph 7(c) of the Act. The Commission further considers that in reducing the level of market interference resulting from the previous requirement, adoption of the revised requirement also serves to foster the policy objective set out in paragraph 7(f) of the Act.⁹ In light of the above, the Commission considers that the present decision is consistent with the Policy Direction.
21. The Commission notes that, in the Essential Services decision, it indicated that a review of the regulatory requirements regarding mandated wholesale services will take place in 2014. The Commission considers that a review of the filing requirements for off-tariff negotiated agreements for all wholesale services could occur at that time.

Secretary General

Related documents

- *Network interconnection for voice services*, Telecom Regulatory Policy CRTC 2012-24, 19 January 2012
- *Bell Canada et al.'s application to review and vary Telecom Decision 2008-17 with respect to negotiated agreements*, Telecom Regulatory Policy CRTC 2009-19, 19 January 2009
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008

⁹ 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; 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.