



Telecom Decision CRTC 2012-622

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Ottawa, 9 November 2012

Cogeco Cable Inc. – Application regarding Quebec small ILECs granting themselves an undue preference

File number: 8622-C6-201208471

In this decision, the Commission finds that the Quebec small ILECs have subjected Cogeco to an unreasonable disadvantage by not having implemented local competition as directed in previous Commission decisions. The Commission denies the relief requested by Cogeco and will instead issue a Notice of Consultation regarding the potential withholding of subsidy payments for the Quebec small ILECs until local competition has been implemented.

Introduction

1. Following formal signed expressions of interest from TELUS Communications Company (TCC) and Cogeco Cable Inc. (Cogeco) to interconnect¹ with CoopTel, Téléphone Guèvremont inc., Téléphone Milot inc., and Sogetel inc. (the Quebec small ILECs) in their respective territories, the Commission issued several decisions² (hereafter referred to as the local competition decisions), in which it directed the Quebec small ILECs to implement local competition in their operating territories by 23 July 2012.
2. Following the local competition decisions, the Quebec small ILECs pursued various avenues of appeal, including an application before the Commission to stay certain portions of the local competition decisions, an application for leave to appeal before the Federal Court of Appeal, and a petition before the Governor in Council, seeking to have the terms and conditions associated with the implementation of local competition modified. All of these various legal recourses were denied.
3. Local competition has yet to be implemented in the Quebec small ILECs' territories.

The application

4. On 17 July 2012, Cogeco filed a Part 1 application claiming that it has been, and continues to be, subject to an unreasonable competitive disadvantage because the Quebec small ILECs have delayed the implementation of local competition.

¹ While Cogeco Câble Québec s.e.n.c. is to be the telecommunications service provider offering competitive telephone services, the interconnection between it and the Quebec small ILECs is to be provided by TCC.

² Telecom Decisions 2012-36, 2012-37, 2012-40, and 2012-42.

5. As a form of relief, Cogeco requested that the Commission direct the Quebec small ILECs to (1) announce that competitive telephone services are forthcoming, and (2) provide consumers with Cogeco's contact information, one month before implementing local competition.
6. The Commission received interventions from Rogers Communications Partnership (RCP) and the Ontario Telecommunications Association (OTA). The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Issues

7. The Commission has identified the following issues to be addressed in its determinations:
 - I. Are the Quebec small ILECs subjecting Cogeco to an unreasonable disadvantage by not implementing competition pursuant to the Commission's local competition decisions, in violation of subsection 27(2) of the *Telecommunications Act* (the Act)?
 - II. If the Quebec small ILECs are subjecting Cogeco to an unreasonable disadvantage, should the Commission grant the requested relief?
- I. Are the Quebec small ILECs subjecting Cogeco to an unreasonable disadvantage by not implementing competition pursuant to the Commission's local competition decisions, in violation of subsection 27(2) of the Act?**
8. The Commission's analysis of an allegation of undue preference or unreasonable disadvantage under subsection 27(2) of the Act is conducted in two phases:
 - a. The Commission first determines whether the conduct in question constitutes a preference or a disadvantage; and
 - b. Where it so determines, it then decides whether the disadvantage is unreasonable or the preference is undue.
9. The burden is on the applicant to demonstrate that the conduct is discriminatory or preferential. Pursuant to subsection 27(4) of the Act, the respondent has the onus of establishing that the discrimination is not unjust or that any preference is not undue or unreasonable.

Positions of parties

10. Cogeco submitted that the Quebec small ILECs had an obligation to pursue interconnection activities in parallel with their appeals, so that they would be able to implement local competition by 23 July 2012 if that requirement was not modified. Cogeco argued that, by failing to implement local competition by the prescribed deadline, the Quebec small ILECs have granted themselves the relief that was refused to them in the course of their various appeals.

11. Cogeco submitted that the delays in implementing local competition by the Quebec small ILECs have and continue to prevent Cogeco from offering triple-play bundles (telephone, Internet, television) in territories where it currently offers Internet and broadcasting services, while the Quebec small ILECs have been able to offer triple-play bundles in these same territories for years.
12. Cogeco submitted that it continues to experience market share loss in the Quebec small ILECs' territories because it is unable to compete on a level playing field.
13. The Quebec small ILECs submitted that they are not responsible for any implementation delays. They claimed that if implementation delays caused Cogeco to be at a competitive disadvantage, it is due to delays caused by TCC with respect to network interconnection with the Quebec small ILECs. Accordingly, the Quebec small ILECs argued that TCC should be held responsible for the delays in local competition implementation.
14. The OTA opposed Cogeco's application, while RCP supported Cogeco's application in its entirety.

Commission's analysis and determinations

a. Was the conduct in question discriminatory or preferential?

15. The Commission notes that in its local competition decisions, it directed the Quebec small ILECs to provide information and assistance to Cogeco and TCC in the negotiation process in order to implement local competition by no later than 23 July 2012. The Commission considers that the responsibility to ensure that local competition was implemented in time resides with the Quebec small ILECs.
16. The Commission notes that network interconnection is a critical activity in the implementation of local competition, requiring both financial resources and appropriate lead times to successfully implement. In this regard, the Commission notes that, in Telecom Decision 2012-188, it indicated that while the Quebec small ILECs would be required to invest in facilities and incur costs before their various legal recourses were exhausted, there were mechanisms available to compensate the Quebec small ILECs should the Commission's determinations be varied.
17. The Commission notes that the Quebec small ILECs have confirmed on the record of this proceeding that they decided not to begin major interconnection activities until all of their various legal recourses were exhausted.
18. In the Commission's view, the decision by the Quebec small ILECs to delay investment in facilities until all of their legal recourses had been exhausted is the primary reason for the delays associated with implementing local competition. Furthermore, it considers the Quebec small ILECs did not provide convincing evidence to support their claim that TCC was the cause of interconnection delays which resulted in the failure to adhere to the local competition implementation deadline of 23 July 2012.

19. The Commission considers that the delay caused by the Quebec small ILECs and the consequent inability of Cogeco to offer local telephone service in the Quebec small ILECs' operating territories, including the inability to offer triple-play bundles as the Quebec small ILECs are currently able to do, constitutes a disadvantage.
20. The Commission considers that this delay has hindered Cogeco's competitive presence in the Quebec small ILECs' territories and has limited Cogeco's potential revenues by preventing it from offering local telephone service and triple-play bundles to its existing broadcasting and Internet service customers.

b. Was the discrimination unjust, or was the preference undue or unreasonable?

21. Having found that the Quebec small ILECs' decision to delay the implementation of local competition disadvantaged Cogeco, the Commission notes that the onus is on the Quebec small ILECs to establish that the disadvantage was not unreasonable.
22. The Commission notes that the Quebec small ILECs focused on the argument that any disadvantage was due to TCC and did not address this aspect of the test. Given this, and the admission by the Quebec small ILECs that they would not undertake major interconnection activities until all of their various legal recourses were exhausted, despite the fact that mechanisms were available to provide compensation if necessary, the Commission finds that the Quebec small ILECs have not met their burden of demonstrating that the disadvantage was not unreasonable.
23. In light of the above, the Commission finds that the Quebec small ILECs did, and continue to, subject Cogeco to an unreasonable disadvantage by not having implemented local competition by 23 July 2012, contrary to the Commission's local competition decisions, and in violation of subsection 27(2) of the Act.

II. If the Quebec small ILECs are subjecting Cogeco to an unreasonable disadvantage, should the Commission grant the requested relief?

24. Cogeco requested that the Commission direct the Quebec small ILECs to make an announcement that: (a) communicates that competitive telephone services are coming in their territories; (b) outlines the benefits of local competition to customers; (c) explains the reasons why Cogeco's offering of telephone services has been delayed; and (d) provides the date by which Cogeco will be able to begin operating as a competitor, inviting interested customers to communicate directly with Cogeco for more details on services and offers.
25. Cogeco suggested that the announcement, to be drafted by the Commission, should be inserted in billing invoices, posted on the Quebec small ILECs' websites, and published in local and regional newspapers.

Positions of parties

26. Cogeco submitted that the Quebec small ILECs have engaged in a misinformation and propaganda campaign against Cogeco and the implementation of local competition. It

argued that the requested relief is both just and reasonable, and that it is a corrective measure in response to the repeated disregard of the Commission's decisions, the Government's Policy Direction, and the integrity of the regulatory process.

27. The Quebec small ILECs submitted that the requested relief is highly inappropriate and inconsistent with the Policy Direction, as it does not rely on market forces to the maximum extent feasible, nor does it amount to the use of measures that are efficient and proportionate to their purpose. They argued that granting Cogeco's requested relief would place the financial viability of the Quebec small ILECs, as well as the viability of sustained local competition in their territories, at further increased risk.

Commission's analysis and determinations

28. The Commission is not convinced that the requested relief is appropriate in the circumstances.
29. The Commission considers that some aspects of the requested relief would amount to free publicity for Cogeco's services, which the Commission finds inappropriate considering Cogeco's resources compared to those of the Quebec small ILECs. Moreover, the Commission notes that while the Quebec small ILECs will have to dedicate resources in order to make any announcements through billing inserts or in local and regional newspapers, there was no evidence presented to demonstrate the cost/benefit of granting such relief.
30. In addition, the Commission considers that its policy goal, as well as a goal of Cogeco, is to have local competition implemented in the Quebec small ILECs' territories as soon as possible. Accordingly, the Commission is of the view that the remedy granted should be one that directly encourages the timely implementation of local competition by the Quebec small ILECs. There is no evidence to demonstrate that the various communication activities proposed by Cogeco would achieve this goal.
31. Absent any other proposed relief on the record of this proceeding, the Commission considers that it would be appropriate to consider alternate remedies for the unreasonable disadvantage caused to Cogeco that would actually serve to advance the implementation of local competition. In this regard, the Commission is of the preliminary view that the withholding of subsidy payments due to the Quebec small ILECs until local competition is fully implemented may by an appropriate way to encourage the timely implementation of local competition.
32. In light of the above, the Commission denies the relief requested by Cogeco.
33. Today the Commission is also issuing Notice of Consultation 2012-623 seeking comments on the Commission's preliminary view that, starting 31 January 2013, payments of subsidies to the Quebec small ILECs that have not yet implemented local competition should be withheld until local competition has been implemented in their territories.

Secretary General

Related documents

- *Proceeding to consider whether the Commission should withhold subsidy payments to the Quebec small ILECs that have not yet implemented local competition*, Telecom Notice of Consultation CRTC 2012-623, 9 November 2012
- *ACTQ/OTA – Application to stay certain portions of Telecom Regulatory Policy 2011-291 and related matters*, Telecom Decision CRTC 2012-188, 30 March 2012
- *Sogetel inc. – Implementation of local competition for Cogeco Cable Inc.*, Telecom Decision CRTC 2012-42, 24 January 2012
- *Téléphone Milot inc. – Implementation of local competition for Cogeco Cable Inc.*, Telecom Decision CRTC 2012-40, 24 January 2012
- *Téléphone Guèvremont inc. – Implementation of local competition for Cogeco Cable Inc.*, Telecom Decision CRTC 2012-37, 24 January 2012
- *CoopTel – Implementation of local competition for Cogeco Cable Inc.*, Telecom Decision CRTC 2012-36, 24 January 2012