



Telecom Decision CRTC 2014-398

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Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference

The Commission finds that there were clear instances of unjust discrimination and undue preference by Rogers Communications Partnership with respect to (i) the imposition of exclusivity clauses in its wholesale mobile wireless roaming agreements with certain new entrants, and (ii) the wholesale mobile wireless roaming rates it charged certain new entrants. Consequently, the Commission prohibits exclusivity provisions in wholesale mobile wireless roaming agreements between Canadian carriers for service in Canada. Since the implementation of section 27.1 of the Telecommunications Act mitigates the risk of future unjust discrimination with respect to wholesale mobile wireless roaming rates, the Commission will not put in place a remedy in this regard.

Introduction

1. Roaming service allows a mobile wireless carrier's retail customers to automatically access voice, data, and text services by using a visited carrier's network (also referred to as a host network) when they travel outside their home carrier's network footprint. For this access to take place, the home carrier and the visited carrier must enter into a wholesale mobile wireless roaming agreement (wholesale roaming agreement). These agreements for wholesale roaming services may be one-way (i.e. one carrier's customers can roam on the wireless network of the other carrier) or two-way/reciprocal (i.e. each carrier's customers can roam on the other carrier's wireless network). They may be for domestic or international roaming services.
2. Mobile wireless carriers are subject to conditions of licence imposed by Industry Canada under the *Radiocommunication Act* in order to use the spectrum needed to provide mobile wireless services.¹ Among other things, the conditions of licence require mobile wireless carriers to provide wholesale roaming services at commercially negotiated rates, terms, and conditions. If mobile wireless carriers are unable to successfully negotiate a wholesale roaming agreement within 60 days of a

¹ CPC-2-0-17 – [Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements](#) (Issue 2, March 2013)

roaming proposal, they may have recourse to arbitration in accordance with *Industry Canada's Arbitration Rules and Procedures*.²

Background

3. Since the mid-1990s, the Commission has forborne from regulating mobile wireless services except with respect to its powers under section 24 and subsections 27(2), 27(3), and 27(4)³ of the *Telecommunications Act* (the Act). As a result of forbearance, mobile wireless carriers are not, among other things, required to obtain prior Commission approval of the rates, terms, and conditions for mobile wireless services, including wholesale roaming. However, the Commission has retained the power to impose conditions on the offer and provision of services (section 24) and to make findings of undue preference or unjust discrimination (subsections 27(2), (3), and (4)).
4. In mid-2013, Commission staff undertook a fact-finding exercise to assess the impact of wholesale roaming agreements on the competitiveness of the Canadian wireless industry and the choices available to Canadians. As part of that exercise, on 30 August 2013, Commission staff requested information on roaming services from certain Canadian mobile wireless carriers, including copies of their wholesale roaming arrangements with other Canadian and U.S.-based carriers. Commission staff also met with representatives from some Canadian mobile wireless carriers to obtain additional information and clarification.
5. Based on the information obtained through the fact-finding exercise, the Commission found that some Canadian mobile wireless carriers were charging or proposing to charge significantly higher rates for wholesale mobile wireless roaming services to other Canadian mobile wireless carriers than to U.S.-based carriers. For instance, the rates that some Canadian carriers contracted to pay or were being asked to pay were many times higher than those that U.S.-based carriers paid, particularly with respect to data services. Further, some Canadian carriers were subject to more restrictive terms and conditions than those that applied to U.S.-based carriers.
6. These disparities in wholesale mobile wireless roaming rates, terms, and conditions gave rise to concerns that certain Canadian mobile wireless carriers may be subject to unjust discrimination or undue preference, contrary to subsection 27(2) of the Act.

² CPC-2-0-18 – [Industry Canada's Arbitration Rules and Procedures](#) (Issue 2, March 2013)

³ The cited provisions are

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

27(2) 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.

27(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.

27(4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

Consequently, the Commission launched the current proceeding on 12 December 2013 to consider whether or not, as a question of fact, there is a situation of unjust discrimination or undue preference with respect to wholesale roaming agreements in Canada.

7. The Commission also announced that it would launch a second proceeding to examine the wholesale mobile wireless market more broadly and to determine whether it is sufficiently competitive (the second wireless proceeding). This proceeding was launched, through Telecom Notice of Consultation 2014-76, in February 2014.
8. On 28 March 2014, the Minister of Finance tabled Bill C-31, *An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*, which included a proposed amendment to the Act to establish caps to prevent Canadian carriers from charging other Canadian carriers more for wholesale mobile wireless roaming services than they charge their own customers for mobile voice, data, and text services. Bill C-31 received Royal Assent on 19 June 2014, and these caps now form part of a new section of the Act: section 27.1.

Proceeding

9. The Commission received interventions from the Bell companies,⁴ Rogers Communications Partnership (RCP), and TELUS Communications Company (TCC) (collectively, the national wireless carriers); Bragg Communications Inc. carrying on business as Eastlink, Data & Audio-Visual Enterprises Wireless Inc. (Mobilicity), Quebecor Media Inc. on behalf of Videotron G.P., and Globalive Wireless Management Corp. (WIND) (collectively, the new entrants); MTS Inc., Saskatchewan Telecommunications, and TBayTel (collectively, the regional wireless carriers); the Competition Bureau; Lynx Mobility (Lynx); and Benjamin Klass, the Canadian Network Operators Consortium Inc. (CNOC), Fibernetics Corporation, Mobilexchange Ltd., the Public Interest Advocacy Centre (PIAC),⁵ and Vaxination Informatique (together, the other interveners). Submissions were also received from members of the general public.
10. The public record of this proceeding, which closed on 5 June 2014, is available on the Commission's website at www.crtc.gc.ca or by using the file numbers provided above.

⁴ Bell Aliant Regional Communications, Limited Partnership (in respect of its subsidiaries KMTS; NorthernTel, Limited Partnership; and Télébec, Limited Partnership); Bell Mobility Inc.; Northwestel Inc.; and the members of the Comcentric Group (Brooke Telecom Co-operative Ltd., Bruce Telecom, Hay Communications Co-operative Limited, Huron Telecommunications Co-operative Limited, Mornington Communications Co-operative Limited, Quadro Communications Co-operative Inc., and Tuckersmith Communications Co-operative Limited)

⁵ PIAC, the Consumers' Association of Canada, the National Pensioners Federation, and the Council of Senior Citizens Organizations of British Columbia presented their interventions together.

11. The wholesale roaming agreements filed on the record of this proceeding, as well as several portions of the parties' interventions, were filed in confidence. While confidential information cannot be disclosed in this decision, the Commission has analyzed and taken into account the full record of this proceeding in making its determinations.

Issues

12. This decision addresses the following issues:

- Is there, as a question of fact, a situation of unjust discrimination or undue preference with respect to the rates and other terms in wholesale roaming agreements in Canada?
- If so, what is the appropriate remedy?

Unjust discrimination or undue preference with respect to wholesale roaming agreements in Canada

13. Several parties, including the new entrants, Lynx, and the other interveners, alleged that the national wireless carriers are unjustly discriminating against other carriers or granting themselves an undue preference by engaging in one or more of the following activities:

- charging or proposing to charge wholesale mobile wireless roaming rates for voice, data and text services that are many times higher than
 - the rates they charge U.S.-based mobile wireless carriers;
 - the rates they charge other Canadian mobile wireless carriers;
 - the rates they charge their own retail customers for these services; and/or
 - their costs for providing wholesale mobile wireless roaming services; and/or
- imposing or proposing to impose other restrictive terms in wholesale roaming agreements, including terms with respect to exclusivity⁶ and seamless roaming.⁷

14. These parties generally argued that the national wireless carriers are able to engage in unjustly discriminatory and unduly preferential behaviour because they are in a significantly better bargaining position than the new entrants and small mobile wireless carriers. This difference in bargaining positions results from the fact that

⁶ In the current context, a term with respect to exclusivity usually prevents the recipient of wholesale mobile wireless roaming services from entering into an agreement for these services with another carrier providing service in the same service area.

⁷ Seamless roaming provides for the uninterrupted flow of a voice call that transitions from a home network to a visited network or vice versa.

smaller carriers must enter into wholesale roaming agreements with the national wireless carriers in order to offer their own retail customers national wireless coverage, which in turn is necessary for them to be able to attract retail customers and remain competitive.

15. Several parties noted that in 2008-09, following the Industry Canada auction of spectrum licences for advanced wireless services (the AWS auction), most new entrants could enter into roaming agreements with only one national carrier, for network technology reasons. Most new entrants sought wholesale mobile wireless roaming over networks based on Global System for Mobile Communications (GSM) technology. This decision was based on many factors, including the availability of handsets, particularly smartphones that operate exclusively on these networks. As WIND pointed out, RCP was the only wireless operator in Canada whose network allowed roaming using GSM at that time; therefore, most of the new entrants that acquired spectrum in the AWS auction concluded roaming agreements with RCP.
16. The new entrants submitted that their current wholesale roaming agreements raise their costs, thereby adversely affecting their ability to compete in the retail market. They also submitted that arbitration is not an appropriate recourse to counter the imbalance in bargaining positions, as it is expensive and time consuming. They added that there are no guidelines to determine whether rates are commercially reasonable.
17. According to the Competition Bureau, the national wireless carriers can use wholesale roaming agreements as a strategic tool to ensure that new entrants are not, and do not become, effective competitors. The Bureau submitted that if new entrants are not able to compete effectively, there is a significant risk that they will either become niche players with little competitive effect or simply exit the Canadian mobile wireless market.
18. The national wireless carriers denied that they had engaged in any unjust discrimination or undue preference with respect to (i) the rates they charged for wholesale mobile wireless roaming services, or (ii) other terms in their wholesale roaming agreements, such as exclusivity and seamless roaming.
19. According to the national wireless carriers, wholesale roaming agreements with U.S.-based mobile wireless carriers cannot be compared to agreements with other Canadian mobile wireless carriers, as the former are generally two-way agreements and the latter are generally one-way agreements. In addition, they argued that domestic and international markets cannot be compared. Similarly, they submitted that retail mobile wireless rates cannot be compared to wholesale mobile wireless roaming rates because a national carrier's retail customers remain on their home network and do not access a visited network, and are therefore not roaming.
20. The national wireless carriers argued that any differences in wholesale mobile wireless roaming rates are based on a number of factors, including reciprocity, traffic volume, traffic balance, access to vast or unique geographic coverage, the timing of

the wholesale roaming agreement, and whether the agreement is part of a broader relationship such as a joint-build or network sharing arrangement.

21. With respect to other terms, the national wireless carriers generally argued that exclusivity typically results in lower rates. They also submitted that seamless roaming is not widely provided to international partners.
22. The national wireless carriers stated that if new entrants believe that any wholesale mobile wireless roaming rates and other terms are not commercially reasonable, they can request arbitration according to *Industry Canada's Arbitration Rules and Procedures*, which is subject to tight timelines. They also submitted that there are currently multiple options available to new entrants for wholesale roaming.

Commission's analysis and determinations

23. 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:
 - it must first determine whether the conduct in question is discriminatory or constitutes a preference; and
 - where it so determines, it must then decide whether the discrimination is unjust or the preference is undue.

Phase 1: Determination of discrimination or preference

24. With respect to the first part of the test, wholesale mobile wireless roaming services provide the same functionality, regardless of whether they are provided (i) domestically or to U.S.-based carriers, or (ii) pursuant to one-way or two-way wholesale roaming agreements. Consequently, the Commission considers that, notwithstanding the differences in how they are provisioned, these services can be compared to determine whether there is discrimination or preference under subsection 27(2) of the Act. In the Commission's view, the different circumstances and trade-offs reflected in wholesale roaming agreements are relevant in determining whether any discrimination or preference is unjust or undue.
25. The Commission has reviewed all the wholesale roaming agreements filed on the record of the current proceeding and has found that the rates included in these agreements varied widely. The Commission **concludes** that this variation in rates constitutes discrimination and/or preference within the meaning of the Act.
26. Further, the Commission notes that RCP has entered into exclusive wholesale roaming agreements with certain new entrants but not with other mobile wireless carriers. The Commission **concludes** that the inclusion of exclusivity clauses in RCP's wholesale roaming agreements with certain new entrants constitutes discrimination and/or preference within the meaning of the Act.

Phase 2: Unjust/undue nature of discrimination/preference

27. Discrimination or preference in and of itself is not contrary to the Act; the discrimination must be unjust or the preference undue. Given the time and cost required to build out mobile wireless networks, if new entrants are to compete effectively with national wireless carriers that have broad network coverage, they must enter into wholesale roaming agreements with those carriers in order to provide national mobile wireless coverage to their retail customers. This situation could create a significant imbalance in bargaining positions between national wireless carriers and smaller mobile wireless carriers, including new entrants.
28. Following the AWS auction, new entrants had no choice but to enter into wholesale roaming agreements with RCP because, given the technology involved, RCP had the only national network available in Canada on which new entrants' customers could roam.
29. The Commission notes that the rates that RCP charged certain new entrants were significantly higher than the rates it charged many large U.S.-based mobile wireless carriers and other Canadian mobile wireless carriers, particularly with respect to wholesale mobile wireless data roaming services. The Commission recognizes that factors such as reciprocity, timing of the agreement, geographic coverage offered to the roaming partner, and traffic volume would explain some differences in the wholesale roaming rates that RCP charged other carriers. However, the Commission considers that these factors do not justify the magnitude of those differences.
30. With respect to exclusivity, based on the record of this proceeding, exclusivity clauses are not common in current wholesale roaming agreements. The Commission considers that the inclusion of exclusivity clauses in RCP's agreements with certain new entrants was a result of RCP's stronger bargaining position. These clauses have prevented mobile wireless carriers from being able to negotiate more favourable rates, terms, and conditions with other mobile wireless carriers that have put in place compatible networks.
31. In light of the above, the Commission **finds** that, contrary to subsection 27(2) of the Act, RCP engaged in unjust discrimination and undue preference with respect to (i) the wholesale mobile wireless roaming rates it charged certain new entrants for voice, data and text services, and (ii) the imposition of exclusivity clauses in its wholesale roaming agreements with certain new entrants.

Appropriate remedy

32. Several of the new entrants asked that an interim remedy be put in place, until the conclusion of the second wireless proceeding, to protect new entrants against irreparable harm. They asked that interim wholesale mobile wireless roaming rates be set at retail rates for access to a national wireless carrier's network. Several parties, including the new entrants, Lynx, and some of the other interveners, submitted that a permanent remedy should take the form of a regulated wholesale tariff or rate cap.

33. The Bell companies and TCC argued that if the Commission finds that a carrier has unjustly discriminated against another carrier or conferred an undue preference on itself in a wholesale roaming agreement, that finding cannot be attributed to any other carrier and the remedy should be limited to that agreement only.
34. The regional wireless carriers argued that universally applied caps regarding wholesale mobile wireless roaming rates would significantly disadvantage them, as the national wireless carriers would be able to access their networks at rates that are not sufficient to support ongoing investment in rural and remote communities.
35. PIAC submitted that any wholesale roaming framework should apply universally to all wireless carriers to ensure fairness, certainty, and predictability, and that the Commission should engage in ongoing oversight of wholesale roaming agreements.

Commission's analysis and determinations

36. Section 27.1 of the Act,⁸ which came into force during the course of this proceeding, establishes caps for all Canadian mobile wireless carriers on wholesale mobile wireless roaming rates for voice, data and text services based on the retail rates for those services. The Commission is responsible for enforcing this section.
37. The Commission considers that the implementation of section 27.1 of the Act reduces the risk of future unjust discrimination with respect to wholesale mobile wireless roaming rates. It also provides most new entrants with relief that is similar to the interim remedy they proposed. Therefore, the Commission **concludes** that, for the

⁸ 27.1(1) The amount charged during a year by a Canadian carrier to a second Canadian carrier for roaming services with respect to the transmission of all domestic wireless voice calls and the domestic portion of all international wireless voice calls shall not exceed the amount determined by the formula A/B where A is the first Canadian carrier's total retail revenues from the provision of wireless voice call services to its Canadian subscribers, for calls both originating and terminating in Canada, for the preceding year; and B is the number of minutes provided for those calls for the preceding year.

(2) The amount charged during a year by a Canadian carrier to a second Canadian carrier for roaming services with respect to the transmission of wireless data in Canada shall not exceed the amount determined by the formula A/B where A is the first Canadian carrier's total retail revenues from the provision of wireless data services in Canada to its Canadian subscribers for the preceding year; and B is the number of megabytes provided for those data services for the preceding year.

(3) The amount charged during a year by a Canadian carrier to a second Canadian carrier for roaming services with respect to the transmission of all domestic wireless text messages and the domestic portion of all international wireless text messages shall not exceed the amount determined by the formula A/B where A is the first Canadian carrier's total retail revenues from the provision of wireless text message services to its Canadian subscribers, for text messages both originating and terminating in Canada, for the preceding year; and B is the number of those text messages for the preceding year.

(4) The Canadian carrier shall not charge the second Canadian carrier any other amount in relation to the provision of the roaming services referred to in subsections (1) to (3).

(5) The amount established by the Commission that a Canadian carrier can charge to a second Canadian carrier for roaming services prevails over an amount determined under any of subsections (1) to (3) to the extent of any inconsistency.

purposes of this proceeding, it will not put in place a remedy for unjust discrimination with respect to wholesale mobile wireless roaming rates.

38. With respect to exclusivity provisions in wholesale roaming agreements, the Commission considers that to address the finding of unjust discrimination and undue preference with respect to RCP, it is necessary and appropriate to prohibit such provisions in RCP's agreements with other mobile wireless carriers. Further, to ensure that other carriers do not engage in such behaviour, the Commission considers it necessary and appropriate to prohibit exclusivity provisions in all wholesale roaming agreements between Canadian mobile wireless carriers. In the Commission's view, this prohibition will also promote wholesale competition in the mobile wireless industry in Canada.
39. Accordingly, pursuant to section 24 of the Act, the Commission **determines** that the offering and provision of roaming services by Canadian mobile wireless carriers is subject to the condition that such carriers are prohibited from applying exclusivity provisions in wholesale roaming agreements with other Canadian mobile wireless carriers. Exclusivity clauses in current wholesale roaming agreements between Canadian carriers are therefore rendered inapplicable as of the date of this decision.

Other issues

40. The Commission notes that there were claims of unjust discrimination or undue preference with respect to other terms and conditions in wholesale roaming agreements, such as seamless roaming. Several parties also suggested regulating wholesale mobile wireless roaming rates.
41. Since these issues are under consideration in the second wireless proceeding, the Commission considers that it would be more appropriate to address them in that proceeding. In particular, in that proceeding, the Commission is exploring the possibility of reasserting its jurisdiction to apply certain provisions of the Act that are currently forborne. The Commission notes that if it were to reassert its jurisdiction with respect to rate regulation and establish rates for wholesale mobile wireless roaming services, these rates would prevail over the caps set by section 27.1 of the Act.⁹

Consistency with the Policy Direction

42. The Commission considers that the determination made in this decision with respect to exclusivity is consistent with the Policy Direction¹⁰ for the reasons set out below.
43. The Policy Direction states that the Commission, in exercising its powers and performing its duties under the Act, shall implement the policy objectives set out in

⁹ Ibid.

¹⁰ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

section 7 of the Act, in accordance with paragraphs 1(a), (b), and (c) of the Policy Direction.

44. The regulatory measure under consideration in this decision relates to terms for wholesale roaming agreements. Therefore, subparagraphs 1(a)(i) and (ii) and subparagraphs 1(b)(i), (ii), and (iv) of the Policy Direction apply to the Commission's determination in this decision.
45. In compliance with subparagraph 1(b)(i) of the Policy Direction, the Commission considers that the policy objectives set out in paragraphs 7(b), (c), (f), and (h)¹¹ of the Act are advanced by the regulatory measure established in this decision.
46. Consistent with subparagraphs 1(a)(i) and (ii) of the Policy Direction, the Commission considers that prohibiting exclusive wholesale roaming agreements is efficient and proportionate to its purpose, and interferes with the operation of market forces to the minimum extent necessary to meet the policy objectives cited above. As noted above, the Commission also considers that prohibiting exclusive wholesale roaming agreements will promote wholesale competition in the mobile wireless industry.
47. Consistent with subparagraph 1(b)(ii) of the Policy Direction, the Commission considers that the prohibition of exclusive wholesale roaming agreements will not deter economically efficient competitive entry into the market nor promote economically inefficient entry.
48. Consistent with subparagraph 1(b)(iv) of the Policy Direction, the Commission considers that its determination, as it relates to network interconnection arrangements or regimes for access to networks, is technologically and competitively neutral and does not artificially favour either Canadian carriers or resellers.

Secretary General

Related documents

- *Review of wholesale mobile wireless services*, Telecom Notice of Consultation CRTC 2014-76, 20 February 2014, as amended by Telecom Notice of Consultation CRTC 2014-76-1, 25 April 2014

¹¹ 7(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(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

(h) to respond to the economic and social requirements of users of telecommunications services.

- *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, Telecom Notice of Consultation CRTC 2013-685, 12 December 2013