



Telecom Decision CRTC 2016-245

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Bell Canada - Application to review and vary certain determinations set out in Telecom Regulatory Policy 2015-326 concerning disaggregated wholesale high-speed access

*The Commission **denies** a request from Bell Canada to review and vary certain determinations made in Telecom Regulatory Policy 2015-326. In that decision, the Commission determined, among other things, that large incumbent local exchange carriers and Cablecos in Ontario and Quebec would be mandated to transition from an aggregated to a disaggregated wholesale high-speed access service model.*

Background

1. In Telecom Notice of Consultation 2013-551, the Commission initiated a proceeding to review issues related to wholesale services and their associated policies. In that proceeding, the Commission examined, among other things, the appropriateness of the previously established wholesale service categories, mandating any new or forborne wholesale services, and whether its existing wholesale service policies appropriately balanced incentives for innovation and investment in the construction of telecommunications network facilities.
2. At the time of that proceeding, competitors had access to mandated aggregated wholesale high-speed access (HSA) services. These services have enabled competitors to lease a package of both the access facilities they need to connect to customer locations, and transport facilities, through which large amounts of traffic can be sent and received, without requiring them to invest substantially in their networks.
3. In Telecom Regulatory Policy 2015-326, the Commission determined, among other things, that the model by which incumbent local exchange carriers (ILECs)¹ and Cablecos² are mandated to provide wholesale HSA services would transition from an aggregated to a disaggregated wholesale HSA service model, and that the transition would begin in Ontario and Quebec where demand is greatest. With disaggregated

¹ Telecom Regulatory Policy 2015-326 applies to the following ILECs: Bell Canada, MTS Inc., Saskatchewan Telecommunications, and TELUS Communications Company.

² In Telecom Regulatory Policy 2015-326, Bragg Communications Incorporated, operating as Eastlink; Cogeco Cable Inc.; Rogers Communications Partnership (RCP); Shaw Cablesystems G.P.; and Videotron G.P. were collectively referred to as the Cablecos.

wholesale HSA services,³ incumbents provide the end-user last-mile access, but competitors must either self-supply (i.e. build their own facilities) or lease transport capacity from other carriers in order to route end-user traffic onto their networks.

Application

4. The Commission received an application from Bell Canada, dated 20 October 2015, in which the company requested that the Commission review and vary certain aspects of Telecom Regulatory Policy 2015-326. Bell Canada alleged that the Commission had erred both in fact and in law in its determinations surrounding the implementation of disaggregated wholesale HSA services (referred to by the company as Disaggregated Broadband Service in its application). More specifically, Bell Canada submitted that the Commission erred in fact by linking the introduction of disaggregated wholesale HSA services to additional investment in alternate transport facilities, and erred in law because mandating incumbents to provide disaggregated wholesale HSA services to all competitors does not comply with the Policy Direction.⁴
5. With respect to the alleged error of fact, Bell Canada requested that the Commission modify Telecom Regulatory Policy 2015-326 such that (i) disaggregated wholesale HSA services are only available to a competitor that deploys its own transport facility to the designated point of interconnection (POI) at an ILEC's central office or a Cableco's head-end (referred to in this decision as the "self-supply condition"), and (ii) the competitor subscribing to a disaggregated wholesale HSA service must be the provider of the high-speed services delivered to the end-users accessed through the service (referred to in this decision as the "no resale condition").
6. On the second matter raised by the company, Bell Canada submitted that the Commission had erred in law because the introduction of mandated disaggregated wholesale HSA services contravenes the Policy Direction because it is too broad a regulatory measure. More specifically, the measure (i) does not rely on market forces to the maximum extent possible or interfere with these market forces to the minimum extent possible, and (ii) deters economically efficient competitive entry. As such, Bell Canada requested that the Commission modify Telecom Regulatory Policy 2015-326 such that disaggregated wholesale HSA services are not available to entities with annual revenues in excess of \$500 million in Canada or abroad (referred to in this decision as the "revenue condition").
7. The Commission received interventions regarding Bell Canada's application from Allstream Inc. (Allstream); Bragg Communications Incorporated, operating as Eastlink (Eastlink); the British Columbia Broadband Association (BCBA); the Canadian Network Operators Consortium Inc. (CNOC); the City of Calgary;

³ Disaggregated wholesale HSA services provide high-speed paths between a competitor's end-customer premises and an interface on an incumbent carrier's network (at the ILEC central office or Cableco head-end) where the competitor connects and routes its end-customer's traffic onto its own network.

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

OpenMedia.ca (OpenMedia); Primus Telecommunications Canada Inc. (Primus); the Public Interest Advocacy Centre and the Consumers' Association of Canada (collectively, PIAC/CAC); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); Rogers Communications Canada Inc. (RCCI);⁵ Shaw Cablesystems G.P. (Shaw); TELUS Communications Company (TCC); and Vaxination Informatique (Vaxination).

8. The public record of this proceeding, which closed on 14 December 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

9. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.
10. The Commission has identified the following issues to be addressed in this decision:
 - Did the Commission err in fact by linking the introduction of mandated disaggregated wholesale HSA services to additional investment in transport facilities?
 - Should the Commission adopt Bell Canada's proposed self-supply or no resale conditions?
 - Did the Commission err in law by introducing too broad a regulatory measure to comply with the Policy Direction?
 - Should the Commission adopt Bell Canada's proposed revenue condition?

Did the Commission err in fact by linking the introduction of mandated disaggregated wholesale HSA services to additional investment in transport facilities?

Positions of parties

11. Bell Canada submitted that the Commission had based its decision to mandate disaggregated wholesale HSA services in part on the grounds that it could encourage

⁵ In the proceeding leading to Telecom Regulatory Policy 2015-326, submissions were received from RCP. On 1 January 2016, RCP ceased to exist. All of RCP's business activities, including its assets and liabilities, are now held by RCCI.

competitor investment in alternate transport facilities. Bell Canada argued that this conclusion is incorrect; in its view, the mandated introduction of disaggregated wholesale HSA services would trigger virtually no investment in additional transport facilities. As such, Bell Canada submitted that the Commission erred in fact by mistakenly linking the introduction of mandated disaggregated wholesale HSA services to additional investment in transport.

12. In support of its position, Bell Canada submitted that transport services are widely available due to incidences of competitor self-supply, and that the Commission itself had determined in Telecom Regulatory Policy 2015-326 that transport facilities are duplicable. Accordingly, Bell Canada argued that there would be little or no need for competitors to invest in new transport facilities in order to use its disaggregated wholesale HSA services. Bell Canada further submitted that one or more competitive transport alternatives are available from large central offices where it expects disaggregated HSA demand to be focused.
13. The BCBA, CNOC, Eastlink,⁶ PIAC/CAC, Primus, and Shaw generally disagreed with Bell Canada concerning the alleged error in fact on the grounds that (i) the incentives for competitors to invest in transport facilities were appropriately factored into the decision, and/or (ii) Bell Canada had misinterpreted or exaggerated the role that transport investment played in the Commission's determination to mandate access to disaggregated wholesale HSA services.
14. CNOC submitted that the transport market was appropriately factored into the Commission's analysis, noting that many incentives for competitors to invest in transport facilities are either created or bolstered by the determinations set out in Telecom Regulatory Policy 2015-326. The BCBA submitted that the incentive to invest in these facilities will be driven by comparative pricing between ILEC-owned and third-party-owned transport options and the cost of new infrastructure.
15. CNOC and Shaw noted that, while the Commission acknowledged that disaggregated wholesale HSA services could encourage investment in transport facilities, sustainable competition was the primary objective. PIAC/CAC submitted that Bell Canada overstated the role that encouraging transport investment played in the Commission's reasoning. Further, a number of parties to the proceeding submitted that Telecom Regulatory Policy 2015-326 was grounded in a well-developed and widely accepted legal test, i.e., the Essentiality Test,⁷ and that the Commission made

⁶ Eastlink disagreed with the error in fact as submitted by Bell Canada, but contended that the Commission had committed a separate and different error in fact in that the absence of a clear directive that competitors move from aggregated to disaggregated wholesale HSA services perpetuates a wholesale regulatory regime of ongoing regulation over non-essential aggregated service and contravenes the Policy Direction. By Commission staff letter dated 11 February 2016, Eastlink was informed that (i) these submissions represented a separate review and vary application and that not all parties had had an opportunity to comment on them, and (ii) as a result, the portions of its intervention related to these issues were out of scope and would not be considered as part of this proceeding.

⁷ As set out in paragraph 36 of Telecom Decision 2008-17, the Commission determined that to be essential, a facility, function, or service must satisfy all of the following conditions: (a) it is required as an input by competitors to provide telecommunications services in a relevant downstream market (the input component

no errors in fact or law by applying this test in accordance with key objectives and the relevant policy considerations.

16. OpenMedia submitted that it partly agreed with Bell Canada that the Commission committed an error in fact by linking the introduction of disaggregated wholesale HSA services with additional investment in transport, but submitted that it was premature to consider this issue, as the markup levels for the services were currently under consideration in the Telecom Regulatory Policy 2015-326 follow-up implementation process.
17. In reply, Bell Canada submitted that CNOC's assertions contained several inconsistencies regarding the incentives for competitors to build transport facilities. As an example, Bell Canada submitted that competitors would not have greater control over service offerings if they purchase transport from another supplier. Further, the company argued that there are already abundant transport facilities at key central offices where CNOC submitted it would be logical to self-supply.

Commission's analysis and determinations

18. The Commission's determinations in Telecom Regulatory Policy 2015-326 were based, in large part, on the application of the Essentiality Test. However, the outcome of the Essentiality Test was not the only factor informing the Commission's decisions, as it also made use of a set of policy considerations⁸ in making its determinations, thus enabling it to consider factors in addition to the Essentiality Test to determine whether to mandate a facility, function, or service. The Commission's overarching goal in that decision was to further the objectives identified in paragraph 14 of Telecom Regulatory Policy 2015-326,⁹ taking into account the Policy Direction¹⁰ and the policy objectives set out in section 7 of the Act.
19. Contrary to Bell Canada's submission, the Commission, in applying the innovation and investment policy consideration as part of its mandating criteria, merely noted that disaggregated wholesale HSA services could encourage competitor investment

of the Essentiality Test); (b) it is controlled by a firm that possesses upstream market power such that withdrawing mandated access, or denying access to the facility, would likely result in a substantial lessening or prevention of competition in the downstream retail market (the competition component of the Essentiality Test); and (c) it is not practical or feasible to duplicate the functionality of the facility (the duplicability component of the Essentiality Test). Also see paragraphs 33 to 46 of Telecom Regulatory Policy 2015-326.

⁸ In paragraph 51 of Telecom Regulatory Policy 2015-326, the Commission stated that it would apply the following policy considerations to inform, support, or reverse a decision to mandate the provision of a wholesale service: (i) public good; (ii) interconnection; and (iii) innovation and investment.

⁹ The objectives cited in paragraph 14 of Telecom Regulatory Policy 2015-326 are to (i) enhance the effectiveness of the wholesale service regime to facilitate vibrant and sustainable retail competition that provides Canadians with reasonable prices and innovative services of high quality that are responsive to their evolving social and economic requirements; (ii) incent efficient network investment to further the development of facilities-based competition; (iii) consider network efficiency, competitive neutrality, and technological neutrality when establishing wholesale regulations; and (iv) recognize differences in regional markets.

¹⁰ See paragraphs 256 to 262 of Telecom Regulatory Policy 2015-326.

in alternate transport facilities. More importantly, the Commission stated that it would enable competitors to become more innovative by giving them a greater degree of control over their service offerings. Accordingly, the allegation that transport investment was a basis for the Commission's decisions set out in Telecom Regulatory Policy 2015-326 is incorrect; rather, the Commission simply observed that it was a potential benefit of introducing disaggregated wholesale HSA services. Further, as the proper application of the Essentiality Test demonstrated, facilitating vibrant and sustainable retail competition and supporting facilities-based competition remained the chief goals of the Commission in reaching its determination to mandate disaggregated wholesale HSA services.

20. Bell Canada's submission also gives little regard for the complexity surrounding the business case for deploying transport facilities, particularly in conjunction with two of the wholesale framework's stated objectives: facilitating a sustainable competitive environment for retail services and the efficient development of facilities-based competition. Given that disaggregated wholesale HSA services are not available yet, it is unclear to what extent competitors will self-supply transport facilities. However, this in no way demonstrates that the Commission was mistaken in noting the potential for additional investment. Once the rates and terms of disaggregated wholesale HSA services are determined and the market has had time to develop economies of scale from increasing transport demand at select central offices or head-ends, the Commission expects that competitors or third parties may build facilities to use and/or lease to other service providers. Therefore, by mandating the essential component of HSA services (access) and letting market forces drive the duplicable component (transport), the Commission is facilitating a sustainable competitive environment for retail services and supporting facilities-based competition.
21. In summary, while the Commission noted that introducing disaggregated wholesale HSA services could positively impact alternate transport investment, Bell Canada's submission that the Commission's determination to mandate disaggregated wholesale HSA services was based on alternate transport investment is incorrect. The Commission introduced disaggregated wholesale HSA services in a manner that met the objectives of the wholesale framework and, in considering the various impacts it could have on innovation and investment, determined that there was no compelling reason to change the outcome of mandating the services.
22. In light of the above, the Commission considers that it did not err in fact on the basis alleged by Bell Canada. Accordingly, the Commission finds that Bell Canada has failed to demonstrate substantial doubt as to the correctness of the original decision based on an error in fact.

Should the Commission adopt Bell Canada's proposed self-supply or no resale conditions?

23. Given its finding above, it is not necessary for the Commission to examine Bell Canada's proposed modifications to Telecom Regulatory Policy 2015-326 intended to remedy the alleged error.

Did the Commission err in law by introducing too broad a regulatory measure to comply with the Policy Direction?

Positions of parties

24. In submitting that the Commission erred in law in Telecom Regulatory Policy 2015-326, Bell Canada argued that the introduction of disaggregated wholesale HSA services contravenes the Policy Direction because it does not rely on market forces to the maximum extent possible, it does not interfere with these market forces to the minimum extent possible, and it deters economically efficient competitive entry.
25. Bell Canada submitted that the Commission based its decision to mandate disaggregated wholesale HSA services, in part, on the grounds that there continue to be significant barriers to duplicating last-mile access facilities. In this regard, Bell Canada submitted that the Commission noted, whereas competitors cannot feasibly or practically duplicate last-mile HSA facilities on a scale sufficient to effectively compete with incumbent carriers within their serving regions, incumbents benefit from customer bases, established brands, economies of scale, pre-existing municipal agreements, greater access to capital markets, and existing infrastructure, including national fibre backbone networks. Therefore, Bell Canada argued that the Commission failed to distinguish between those providers who could (incumbents) and could not (competitors) economically and efficiently deploy their own access facilities under market forces.
26. TCC and Videotron supported Bell Canada's position.
27. The remaining interveners that commented on the alleged error in law submitted that Bell Canada had not satisfied the criteria established by the Commission to review and vary Telecom Regulatory Policy 2015-326. These parties argued that Bell Canada had misconstrued or ignored the Commission's determination in regard to the Essentiality Test finding that incumbent access networks were not duplicable in their respective serving territory for both competitors and out-of-territory incumbents, and did not provide evidence that Canadian out-of-territory incumbents or large foreign entities would use disaggregated wholesale HSA services to any significant extent.
28. CNOC, PIAC/CAC, Primus, and RCCI generally submitted that Bell Canada had failed to demonstrate that the Commission ought to have limited its decision to service providers below a certain size. PIAC/CAC was of the view that the Commission had based its decision on a well-developed and widely accepted legal

test and had made no errors in either law or fact by applying this test in accordance with key objectives and policy considerations.

29. CNOC submitted that the wholesale framework enunciated in Telecom Regulatory Policy 2015-326 is balanced, advances the policy objectives set out in section 7 of the Act, and is consistent with the Policy Direction. Further, it dismissed Bell Canada's concern that out-of-territory incumbents or large foreign entities would use disaggregated wholesale HSA services as a platform for access deployments, noting that neither incumbents nor large foreign entities are prevented from using aggregated wholesale HSA services, yet they have not to date made use of the service to any significant degree.
30. RCCI submitted that large and small companies face very similar challenges in constructing access facilities outside their existing facility footprints and that there is no evidence to the contrary and no justification for treating companies differently. Shaw submitted that Bell Canada misinterpreted the results of the Essentiality Test, adding that whether a service should be mandated or not is based on dominance in the market in question, not on the entity that subscribes to the service.

Commission's analysis and determinations

31. As noted earlier in this decision, the Commission's overarching goal in introducing disaggregated wholesale HSA services in Telecom Regulatory Policy 2015-326 was to further the objectives identified in paragraph 14 of that decision, taking into account the Policy Direction and the policy objectives set out in section 7 of the Act. As such, the Commission's decision to mandate disaggregated wholesale HSA services and its determinations on other wholesale wireline services were based on the application of the Essentiality Test, supplemented by policy considerations noted above.
32. Contrary to Bell Canada's position, the Commission application of the Essentiality Test, supplemented by the relevant policy considerations, was entirely consistent with the principles enunciated in the Policy Direction that regulatory measures made by the Commission should rely on market forces to the maximum extent possible, interfere with market forces to the minimum extent possible, and not deter economically efficient competitive entry.
33. In applying the Essentiality Test, the Commission first determined that the appropriate market was HSA services in each incumbent serving region. The Commission then determined that, in addition to meeting the input and competition components of the Essentiality Test, access facilities met the duplicability component (that is, they were not duplicable) while transport facilities did not. The key point is that the record showed no compelling evidence that a reasonably efficient competitor (including out-of-territory incumbents) had deployed, or were planning to deploy, competing access facilities on a sufficient scale to effectively compete with incumbents in their traditional operating territory. In making this determination, the Commission concluded that competitors and out-of-territory incumbents face similar

barriers to entry in duplicating access facilities. The Commission remains of the view that incumbents have very little incentive to deploy wireline access facilities outside their traditional serving territory due to the various barriers to entry, as well as the many advantages of incumbency identified in Telecom Regulatory Policy 2015-326.

34. In light of the above, the Commission considers that it properly took into account the Policy Direction in making its findings in Telecom Regulatory Policy 2015-326, and considers that it did not err in law on the basis alleged by Bell Canada. Accordingly, the Commission finds that Bell Canada has failed to demonstrate substantial doubt as to the correctness of the Commission's original decision on the basis of an error in law.

Should the Commission adopt Bell Canada's proposed revenue condition?

35. Given its finding that no error in law was made, it is not necessary for the Commission to examine Bell Canada's proposed modification to Telecom Regulatory Policy 2015-326 intended to remedy the alleged error.

Conclusion

36. In light of the foregoing, the Commission **denies** Bell Canada's application.

Secretary General

Related documents

- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015, as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Review of wholesale services and associated policies*, Telecom Notice of Consultation CRTC 2013-551, 15 October 2013, as amended by Telecom Notice of Consultation CRTC 2013-551-1, 8 November 2013
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008