



Telecom Decision CRTC 2016-60

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The Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Regulatory Policy 2015-177

*The Commission **denies** a request from the Canadian Network Operators Consortium Inc. to review and vary certain determinations made in Telecom Regulatory Policy 2015-177. In that decision, the Commission determined, among other things, that it would not be appropriate to mandate wholesale mobile virtual network operator access services, and that it would generally rely on market forces to enable a competitive market to develop for these services. The Commission also determined that it would not mandate general wholesale tariffs for tower and site sharing services at that time, and that it would instead rely on its existing statutory powers to address issues related to the rates, terms, and conditions for such services.*

Introduction

1. The mobile wireless services market is the largest and fastest-growing sector in the Canadian telecommunications industry. In 2014, mobile wireless services in Canada generated revenues of \$22 billion, which accounted for nearly half of the total telecommunications revenues in this country.¹ The retail market for wireless services offers Canadians a variety of wireless devices, plans, and packages. There are approximately 29 million mobile wireless service subscribers in Canada who rely on the voice, text, and data services available on their wireless devices for their communications needs.
2. In response to the growing demands for mobile wireless services, wireless service providers invested \$7.5 billion in their wireless network infrastructure in 2014, representing more than half of all network investments in the telecommunications sector.²
3. In Telecom Notice of Consultation 2014-76, the Commission initiated a public proceeding, which included an oral hearing, to determine whether the wholesale wireless services market was sufficiently competitive and, if not, what regulatory measures are required.

¹ Based on information in the 2015 CRTC *Communications Monitoring Report*.

² Also based on information in the 2015 CRTC *Communications Monitoring Report*. Wireless capital investments took a significant leap compared to 2013 due to the sale of the 700 megahertz spectrum held by Industry Canada.

4. That public proceeding led to Telecom Regulatory Policy 2015-177, in which the Commission found it necessary to mandate and regulate the Global System for Mobile communications (GSM)-based wholesale roaming services (wholesale roaming services)³ provided by certain wireless carriers. For other wholesale mobile wireless services, the Commission generally considered that continued reliance on market forces and its existing regulatory oversight remain appropriate.
5. The Commission's determinations set out in Telecom Regulatory Policy 2015-177 were intended to facilitate sustainable competition that provides benefits to Canadians, such as reasonable prices and innovative services, as well as continued innovation and investment in high-quality mobile wireless networks.

Application

6. The Commission received an application from the Canadian Network Operators Consortium Inc. (CNOc), dated 3 August 2015, in which CNOc requested that the Commission review and vary certain determinations made in Telecom Regulatory Policy 2015-177.⁴ CNOc submitted that multiple issues, including errors in law and in fact, raise substantial doubt as to the correctness of that decision, specifically with respect to the Commission's determination to not mandate wholesale mobile virtual network operator (MVNO)⁵ access services, as well as its determinations regarding tower and site sharing services.⁶
7. CNOc based its application, in part, on the revised wholesale services framework established by the Commission in Telecom Regulatory Policy 2015-326,⁷ which was released after the issuance of Telecom Regulatory Policy 2015-177.
8. CNOc requested that the Commission mandate access services for full MVNOs,⁸ as well as initiate a follow-up proceeding to determine whether tower and site sharing services should be mandated, and if so, on what terms and conditions.

³ Wholesale roaming services enable the retail customers of a wireless carrier (i.e. the home network carrier) to automatically access voice, text, and data services using a visited wireless carrier's network (i.e. the host network), including the radio access network (RAN), when they travel outside their home carrier's network footprint.

⁴ In that decision, the Commission established a regulatory framework for wholesale mobile wireless services.

⁵ An MVNO is a wireless service provider that does not own spectrum or operate its own RAN; instead, it relies on the spectrum and RAN of a wireless carrier and, in some cases, other facilities and/or services, to provide mobile wireless services to consumers.

⁶ Tower and site sharing arrangements enable a wireless carrier to install wireless equipment on other wireless carriers' towers or sites in areas where it holds spectrum licences. These arrangements (i) enable the wireless carrier to deploy its network in a cost-effective and efficient manner, and (ii) minimize the number of towers in communities.

⁷ In that decision, the Commission established a regulatory framework for wholesale wireline services.

⁸ An MVNO that supplies most of the components of a network apart from the RAN is referred to as a full MVNO.

9. The Commission received interventions regarding CNOC's application from Bell Mobility Inc. (Bell Mobility), Rogers Communications Partnership (RCP), and TELUS Communications Company (TCC) [collectively, the national wireless carriers]; MTS Inc., Saskatchewan Telecommunications, and TBayTel (collectively, the regional wireless carriers); Bragg Communications Incorporated, operating as Eastlink, Quebecor Media Inc., on behalf of Videotron G.P., and WIND Mobile Corp. (collectively, the new entrants); Cogeco Cable Inc. (Cogeco); the Canadian Internet Policy and Public Interest Clinic (CIPPIC); Mobilexchange Ltd.; OpenMedia Engagement Network (OpenMedia); and Vaxination Informatique.
10. The public record of this proceeding, which closed on 24 September 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Background

11. In light of the scope of CNOC's review and vary application with respect to MVNO access services, as well as tower and site sharing services, background information regarding these services is provided below.

MVNO access services

12. In Telecom Regulatory Policy 2015-177, the Commission recognized that the retail mobile wireless services market was generally competitive in many regions in Canada, but expressed concerns regarding the ability of smaller carriers to obtain access to wholesale mobile wireless services at reasonable rates, terms, and conditions. Given that the potential barriers to this access could impede certain key Commission objectives, including sustainable competition, the Commission found it necessary to review the regulatory and mandating status of certain wholesale mobile wireless services, including MVNO access services.
13. As part of its decision, the Commission applied the essential services test set out in Telecom Decision 2008-17,⁹ along with various policy considerations, to determine whether or not to mandate a particular wholesale mobile wireless service.
14. The Commission proceeded to examine wholesale roaming services and MVNO access services to determine whether regulatory intervention was required to ensure sustainable competition in the retail wireless services market. The Commission noted that wholesale roaming services provide incidental access to a host network by the end-customers of a wireless carrier when these end-customers are outside their home network's footprint. In contrast, wholesale MVNO access services provide an MVNO's end-customers with permanent access to the host network.

⁹ The essential services test includes an assessment of market power and its impact on downstream retail markets, as well as consideration of whether the underlying wholesale facility is duplicable.

15. The Commission first determined that the national wireless carriers possess market power in the provision of wholesale roaming services. Given the similarities between wholesale roaming services and MVNO access services, the Commission determined that a finding with respect to market power would be applicable to both services.
16. Next, the Commission applied the essential services test to wholesale roaming services and to MVNO access services concurrently, and found both types of services to be essential.
17. Finally, the Commission considered that its determination whether to mandate wholesale roaming services and MVNO access services should take into consideration the objectives that it had established for the mobile wireless services market, namely, continued innovation and investment in high-quality telecommunications facilities; sustainable competition that provides benefits, such as reasonable prices and innovative services, to Canadians; and the implementation of efficient regulatory measures with respect to wholesale mobile wireless services, along with continued reliance on market forces where appropriate.
18. For wholesale wireless roaming services, after having found that such services should be mandated for the national wireless carriers and in light of their forborne regulatory status, the Commission conducted an individual assessment of subsections 34(1), 34(2), and 34(3) of the *Telecommunications Act* (Act) to determine whether the mandated provision of the services should continue to be on a forborne or regulated basis. The Commission concluded that continued forbearance from the regulation of wholesale roaming services provided by the national wireless carriers would not be consistent with the Act, and directed the national wireless carriers to provide such services to other wireless carriers on a regulated basis in accordance with the rates, terms, and conditions set out in Telecom Regulatory Policy 2015-177.
19. For MVNO access services, the Commission found that mandating such services would, at that time, (i) significantly undermine the investments of other wireless carriers, such as the new entrants, particularly in non-urban areas, and (ii) likely discourage continued investments by such carriers since they could rely on the MVNO access services rather than investing in their own infrastructure. The Commission therefore considered that the provision of MVNO access services should continue to be driven largely by market forces. In addition, the Commission established certain regulatory measures to reduce the barriers faced by MVNOs to facilitate their commercial negotiations with wireless carriers.

Tower and site sharing services

20. In Telecom Regulatory Policy 2015-177, the Commission assessed whether further regulatory intervention was required regarding tower and site sharing services. Given the complexity associated with developing a record for tower and site sharing services (i.e. detailed information regarding thousands of towers and sites), the Commission was not in a position to determine whether a particular wireless carrier had market power in the provision of such services in a particular location, nor was it in a

position to determine whether these services would satisfy the essential services test. Accordingly, the Commission determined that the record of the proceeding that led to Telecom Regulatory Policy 2015-177 (the wholesale mobile wireless service proceeding) was insufficient to determine at that time whether (i) tower and site sharing services should be mandated, and (ii) if so, whether such services should be provided pursuant to approved rates, terms, and conditions. Consequently, the Commission found that tower and site sharing services should not be mandated at that time.

21. Nonetheless, the Commission recognized that there may be situations in which a limited supply of towers or sites would result in a wireless carrier having market power in the provision of tower and site sharing services. The Commission considered that in such circumstances, its existing statutory powers would be sufficient to address concerns related to the rates, terms, and conditions for tower and site sharing services.

Review and vary criteria

22. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it uses to assess review and vary applications that are filed pursuant to section 62 of 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

- an error in law or in fact;
- a fundamental change in circumstances or facts since the decision;
- a failure to consider a basic principle which had been raised in the original proceeding;
- a new principle which has arisen as a result of the decision.

Issues

23. The Commission has identified the following issues related to its determination to not mandate MVNO access services to be addressed in this decision:
 - Did the Commission err in fact by mischaracterizing the nature of full MVNOs or the potential impact that a determination to mandate full MVNO access services could have on overall wireless network investment?
 - Did the Commission err in law by not applying section 34 of the Act with respect to its determinations regarding MVNO access services?
 - Did the Commission fail to consider any principles associated with MVNO access services that were raised in the proceeding leading to Telecom Regulatory Policy 2015-177, or that later arose as a result of that decision?

- Would the Commission’s revised test for mandating wholesale services, established in Telecom Regulatory Policy 2015-326, affect its determination to not mandate MVNO access services?

24. The Commission has also identified the following issues related to its determinations regarding tower and site sharing services to be addressed in this decision:

- Did the Commission err in law by failing to either make a determination or order a follow-up process for tower and site sharing services?
- Did the Commission fail to consider the basic principle that its existing statutory powers and processes do not enable it to address issues regarding tower and site sharing services?
- Would the Commission’s revised test for mandating wholesale services, established in Telecom Regulatory Policy 2015-326, affect its determinations in Telecom Regulatory Policy 2015-177 regarding tower and site sharing services?

Did the Commission err in fact by mischaracterizing the nature of full MVNOs or the potential impact that a determination to mandate full MVNO access services could have on overall wireless network investment?

25. CNOC argued that the Commission mischaracterized the nature of full MVNOs by not differentiating them from other types of MVNOs, thereby ignoring the potential wireless network investments that such facilities-based carriers could contribute to the broader telecommunications system. CNOC argued that this mischaracterization materially influenced the Commission’s determination to not mandate MVNO access services, or at a minimum, full MVNO access services.¹⁰

26. OpenMedia argued that mandating full MVNO access services would be appropriate since full MVNOs contribute to sustainable competition, and given that such providers serve complementary markets to those served by the regional wireless carriers and the new entrants, thereby mitigating any potential investment concerns.

27. CIPPIC, CNOC, Cogeco, and OpenMedia argued that there was insufficient evidence on the record of the wholesale mobile wireless service proceeding to demonstrate that there would be a negative impact on overall wireless network investment if the Commission were to mandate MVNO access services, or at the very least full MVNO access services. The absence of sufficient evidence eliminated the principal rationale supporting the Commission’s determination to not mandate these services. These parties noted that the Commission had dismissed similar investment concerns when it determined that it would be appropriate to mandate certain wholesale wireline services in Telecom Regulatory Policy 2015-326.

¹⁰ Full MVNO access services represent a subset of MVNO access services, and are designed to meet the service needs of full MVNOs.

28. The national wireless carriers, the regional wireless carriers, and the new entrants generally argued that in making its determinations in Telecom Regulatory Policy 2015-177, the Commission was fully aware of the different types of potential MVNOs, including full MVNOs. These parties added that the Commission appropriately recognized the potential negative impact on overall wireless network investment that a determination to mandate full MVNO access services could entail. Some of these parties questioned whether full MVNOs could reasonably be considered “facilities-based carriers,” or whether they could meaningfully contribute to sustainable competition.
29. In support of its position with respect to the impact of mandating full MVNO access services on network investments, Bell Mobility submitted that full MVNOs would avoid up to 85% of the network investments generally required of wireless carriers.

Commission’s analysis and determinations

30. The Commission disagrees with CNOC that it mischaracterized the nature of full MVNOs in Telecom Regulatory Policy 2015-177. Indeed, in paragraph 43 of that decision, the Commission specifically articulated the distinguishing characteristics of full MVNOs and contrasted them with MVNOs that are branded resellers.
31. In that decision, the Commission addressed the benefits and risks associated with mandating the various types of MVNO access services, including full MVNO access services, collectively, rather than by individual service. This was because regardless of the type of MVNO, including full MVNOs, access to the RAN is a requirement; hence, the issue of whether the provision of this access should be mandated was, as noted above, the first matter to be determined. Accordingly, the Commission applied the essential services test to access services and found, based on the record of the wholesale mobile wireless service proceeding, that the MVNO access services provided by Bell Mobility, RCP, and TCC are essential. Next, the Commission analyzed the impacts on innovation, investment, and sustainable competition to determine whether MVNO access services should be mandated with respect to full MVNOs and other MVNOs.
32. The Commission recognized the importance of investment in wireless network infrastructure, and clearly stated that its analysis would be informed by its objective of securing continued innovation and investment in high-quality telecommunications facilities.
33. As set out in paragraphs 112 to 118 of Telecom Regulatory Policy 2015-177, the Commission received submissions from many parties, including CNOC, regarding the effect on network investment resulting from the entry of MVNOs (including full MVNOs) into the wireless services market if MVNO access services were mandated. For instance, some parties submitted that mandating full MVNO access services could encourage their introduction in the wireless services market, which would result in the introduction of innovative services and network investments by these providers in the order of tens of millions of dollars per full MVNO.

34. On the other hand, other parties – namely, the new entrants and the regional wireless carriers – submitted that the magnitude of their existing and planned investments in wireless networks, which are principally in the access component of the network (i.e. the RAN), would far exceed that of potential full MVNOs. Specifically, while full MVNOs may represent tens of millions of dollars in potential network investments, regional carriers and new entrants have already, and are generally expected to continue to, contribute hundreds of millions of dollars in network investments (excluding spectrum costs). Such network investments have, and are expected to, significantly improve the competitive landscape for wireless services across the country.
35. Given that a determination to mandate MVNO access services, or at a minimum full MVNO access services, could result in regional carriers or new entrants relying on mandated leased facilities instead of implementing their significant network investments themselves, the associated reductions in network investments would likely outpace any potential positive network investments made by full MVNOs or any other similar provider.
36. As a result, the Commission determined that mandating MVNO access services, including full MVNO access services, would significantly undermine wireless network investments as a whole, and that such services should not be mandated.
37. The Commission fully considered the various types of MVNOs, including full MVNOs, and their associated network investments, when rendering its determination to not mandate full MVNO access services. In light of the above, the Commission did not err in fact by mischaracterizing the nature of full MVNOs or the potential impact that a determination to mandate full MVNO access services could have on overall wireless network investment.

Did the Commission err in law by not applying section 34 of the Act with respect to its determinations regarding MVNO access services?

38. CNOC, Cogeco, and OpenMedia argued that the Commission had a duty to apply section 34 of the Act to its analysis with respect to MVNO access services, as it did with respect to wholesale roaming services. These parties generally argued that had the Commission conducted its analysis in this way, it would have concluded that forbearance from the regulation of MVNO access services was no longer appropriate, and it would have mandated MVNO access services, or at least full MVNO access services. CNOC submitted that the Commission's failure to conduct its analysis in this way constituted an error in law.
39. CNOC and OpenMedia also argued that the retail mobile wireless services market is not sufficiently competitive, and that the continued forbearance of MVNO access services has only caused the state of competition to worsen since the issuance of Telecom Regulatory Policy 2015-177. These parties argued that, at a minimum, mandating full MVNO access services is required to achieve the Canadian telecommunications policy objectives set out in the Act and to protect the interests of users of telecommunications services.

40. Several national wireless carriers, regional wireless carriers, and new entrants argued that in Telecom Regulatory Policy 2015-177, the Commission (i) implicitly performed a section 34 analysis with respect to MVNO access services, and (ii) concluded that forbearance from the regulation of these services would be consistent with section 34 of the Act. They argued that there remains ample evidence of vigorous competition for retail mobile wireless services, including dynamic market shares, a variety of choice of services, rivalrous behaviour, and continued innovation and investment in these services, demonstrating that there is no need for the Commission to mandate MVNO access services.

Commission's analysis and determinations

41. The questions of (i) whether it is appropriate for the Commission to mandate a wholesale service, and (ii) whether continued forbearance from the regulation of a wholesale service remains appropriate are two separate issues with different legal bases. Hence, these two issues rely on different analyses, although certain aspects of those analyses (e.g. the assessment of market power) are similar.
42. In short, the issue of whether to mandate a service is addressed by the application of the essential services test along with an assessment of the relevant policy considerations. The underlying legal basis is subsection 27(2) of the Act, since the Commission must determine whether, absent mandating the service, the provider of the service in question would be conferring an undue preference on itself or unjustly discriminating against other service providers. By contrast, the issue of whether to continue to forbear is addressed by the considerations set out in section 34 of the Act and the Commission's interpretation of that section over the years.
43. Accordingly, the first issue is whether a particular wholesale service should be mandated, and if the answer is yes, the next question is whether the service should be provided on a regulated or forborne basis.
44. In Telecom Regulatory Policy 2015-177, the Commission determined that wholesale roaming services should be mandated for the national wireless carriers pursuant to the application of the essential services test and the relevant policy considerations. Given that wholesale roaming services were forborne from regulation at the time, the Commission proceeded to analyze, pursuant to section 34 of the Act, whether it would be appropriate to maintain this forbearance, or whether the rates, terms, and conditions of those services provided by Bell Mobility, RCP, and TCC should be regulated.
45. Conversely, the Commission determined that the provision of MVNO access services, including full MVNO access services, should not be mandated, based on the application of its policy considerations. Accordingly, the Commission effectively determined that no undue preference or unjust discrimination would result from MVNO access services not being mandated. As such, there was no need for the Commission to determine whether, should a wireless carrier choose to provide MVNO access services, it should be required to do so based on approved rates, terms,

and conditions. The Commission considered that market forces should largely dictate the rates, terms, and conditions pursuant to which the services are offered. As a result, the Commission was not required to conduct a section 34 analysis.

46. In light of the above, the Commission did not err in law by not applying section 34 of the Act with respect to its determinations regarding MVNO access services, including full MVNO access services.

Did the Commission fail to consider any principles associated with MVNO access services that were raised in the proceeding leading to Telecom Regulatory Policy 2015-177, or that later arose as a result of that decision?

47. CIPPIC, CNOC, Cogeco, and OpenMedia argued that the Commission ignored certain principles and issues when it rendered its determination to not mandate MVNO access services. These issues included (i) the potential positive investments that full MVNOs could make, (ii) the need for regulation to support a competitive market for MVNO access services, (iii) the Commission's discretion in limiting the mandating of wholesale roaming services to national wireless carriers, and (iv) the impact of the Commission's determination to mandate wholesale roaming services on its subsequent determinations regarding MVNO access services.
48. The national wireless carriers, the regional wireless carriers, and the new entrants generally disagreed that the issues raised by CIPPIC, CNOC, Cogeco, and OpenMedia should be recognized as principles that the Commission should have considered, or argued that these issues were generally considered by the Commission when it rendered its determinations.

Commission's analysis and determinations

49. The Commission does not consider that the issues raised by the above-mentioned parties constitute "basic" or generally accepted principles. Further, the parties have not demonstrated that the Commission failed to consider the issues noted above.
50. For example, and as described above, the Commission's assessment that mandating MVNO access services could have a negative impact on overall wireless network investment necessarily included consideration of the potential positive investments that full MVNOs could make. On balance, however, the Commission determined that the benefits of mandating MVNO access services were outweighed by the impact on overall wireless network investment. Further, the Commission's determination to generally rely on market forces to enable a competitive market for MVNO access services necessarily included its consideration of the current state of competition in the wireless services market.
51. Further, it is clear from the Commission's determination that wholesale roaming services were to be mandated when provided by the national wireless carriers that the Commission was open to the possibility that MVNO access services could also have been limited to the national wireless carriers. Further, the Commission expected that its determinations regarding wholesale roaming services would allow smaller wireless

carriers such as the new entrants to become a viable alternative source of supply for MVNO services, demonstrating that it contemplated the interaction between these types of services when rendering its determinations. The Commission's determination to remove the MVNO restrictions applied to the wholesale roaming services offered by the national wireless carriers provides additional evidence of the Commission's consideration of this relationship.

52. In light of the above, there is no basis upon which to conclude that the Commission failed to consider any of the identified issues as principles when rendering its determination to not mandate MVNO access services.

Would the Commission's revised test for mandating wholesale services, established in Telecom Regulatory Policy 2015-326, affect its determination to not mandate MVNO access services?

53. CNOc argued that the revised test for mandating wholesale services established in Telecom Regulatory Policy 2015-326 would support mandating full MVNO access services, given that the essential services test remained the same, and that the additional policy considerations identified in the revised framework¹¹ would support mandating such services. OpenMedia also submitted that mandating MVNO access services would be consistent with the revised framework.
54. Certain national wireless carriers, regional wireless carriers, and new entrants argued that the framework established in Telecom Regulatory Policy 2015-326 was only intended to apply to wholesale wireline services. Others argued that the policy considerations identified in that framework would support not mandating MVNO access services.

Commission's analysis and determinations

55. In Telecom Regulatory Policy 2015-326, the Commission set out a revised framework for determining whether wholesale services should be mandated, based on the application of the essential services test,¹² in addition to an assessment of various policy considerations. The Commission indicated that it could determine not to mandate the provision of a wholesale service that meets the essential services test if its application of policy considerations led to this conclusion.
56. In that revised framework, the Commission identified as a policy consideration "innovation and investment," which entails the consideration of whether mandating or not mandating a particular wholesale service could affect the level of innovation and investment in advanced or emerging networks.

¹¹ In that decision, the Commission identified three policy considerations to inform, support, or reverse a decision to mandate the provision of a wholesale service, namely if mandating or not mandating the service would advance interests in public good, interconnection, as well as innovation and investment.

¹² Refer to paragraphs 34-46 of Telecom Regulatory Policy 2015-326 for a more fulsome description of how the essential services test was applied.

57. In Telecom Regulatory Policy 2015-177, the Commission determined not to mandate full MVNO access services because of the negative impact on overall investment and innovation, which would likely outweigh any positive investments made by full MVNOs.
58. Similarly, had the Commission applied the revised wholesale services framework established in Telecom Regulatory Policy 2015-326 when considering whether or not to mandate full MVNO access services, the “innovation and investment” policy consideration would have provided a proper basis not to mandate the provision of full MVNO access services.
59. In light of the above, the Commission finds no evidence to support the view that the revised wholesale services framework established in Telecom Regulatory Policy 2015-326 would have materially impacted the Commission’s determination to not mandate the provision of MVNO access services, including full MVNO access services.

Did the Commission err in law by failing to either make a determination or order a follow-up process for tower and site sharing services?

60. CNOC argued that the Commission’s failure to perform a market power assessment and the essential services test for tower and site sharing services in Telecom Regulatory Policy 2015-177 constituted a failure by the Commission to discharge its statutory duty. In CNOC’s view, because the Commission had acknowledged that there could be situations in which a carrier had market power over certain towers and sites, it was legally required to perform a full regulatory assessment for tower and site sharing services.
61. CNOC further submitted that if the Commission did not consider that the record of the wholesale mobile wireless service proceeding provided sufficient evidence to render a determination with respect to tower and site sharing services, it should have initiated a follow-up proceeding.
62. The national wireless carriers, the regional wireless carriers, and the new entrants generally argued that there was insufficient evidence on the record of the wholesale mobile wireless service proceeding for the Commission to perform the required assessments, and more importantly, to conclude that the existing regulatory framework for tower and site sharing services was ineffective.
63. TCC argued that the Commission had (i) taken into account the circumstances surrounding tower and site sharing services, including the relative benefit of examining each tower or site on an individual basis, and (ii) concluded that the benefits of this exercise would not be proportionate to the outcome, consistent with the Policy Direction.¹³

¹³ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

Commission's analysis and determinations

64. Although the Commission acknowledged in Telecom Regulatory Policy 2015-177 that there may be situations in which a wireless carrier could have market power over another wireless service provider with respect to tower and site sharing services, the potential for market power does not in itself demonstrate that there are specific cases of market power or that there has actually been an exercise or abuse of market power, to the detriment of end-users of that service.
65. In fact, the evidence submitted during the wholesale mobile wireless service proceeding demonstrated that multiple wireless carriers had the ability to self-supply or to successfully negotiate access to the towers and sites of other wireless carriers. In addition, given that the Commission's current powers under the Act allow it to impose conditions related to tower and site sharing services, as well as to make findings of unjust discrimination and undue preference with respect to the provision of these services, the Commission determined that no further regulatory intervention was required.
66. In light of the above, the Commission did not err in law as alleged by CNOC.

Did the Commission fail to consider the basic principle that its existing statutory powers and processes do not enable it to address issues regarding tower and site sharing services?

67. CNOC argued that there are clear indications that the Commission's existing powers and regulatory processes, such as its dispute resolution mechanisms, are insufficient to overcome the barriers to entry associated with tower and site sharing services, and that continued reliance upon these mechanisms was inappropriate.
68. The national wireless carriers, the regional wireless carriers, and the new entrants generally argued that the Commission's existing powers, in addition to Industry Canada's existing tower and site sharing regime, are sufficient to address any issues associated with these services.

Commission's analysis and determinations

69. Not only was no evidence provided in the wholesale mobile wireless service proceeding indicating a problem regarding competitive access to tower and site sharing services, no evidence has been provided since that proceeding to demonstrate that the Commission's existing powers have been, or will be, insufficient to address any issues associated with tower and site sharing services. For example, the Commission has not received any requests related to the rates, terms, and conditions for tower and site sharing services since the issuance of Telecom Regulatory Policy 2015-177.
70. In light of the above, the Commission did not fail to consider the basic principle that its existing statutory powers and processes do not enable it to address issues regarding tower and site sharing services.

Would the Commission’s revised test for mandating wholesale services, established in Telecom Regulatory Policy 2015-326, affect its determinations in Telecom Regulatory Policy 2015-177 regarding tower and site sharing services?

71. CNOC argued that the Commission’s test for mandating wholesale services, as revised by Telecom Regulatory Policy 2015-326, would support mandating tower and site sharing services, given that the policy consideration regarding “public good services” could be leveraged to support a determination to mandate tower and site sharing services, and that this would result in the establishment of terms and conditions for those services.
72. Certain national wireless carriers and new entrants disagreed with CNOC’s submission. Bell Mobility argued that the Commission’s test for mandating wholesale services set out in Telecom Regulatory Policy 2015-326 is irrelevant to the issue of mandating tower and site sharing services, given that such services are already mandated pursuant to Industry Canada’s conditions of licence.

Commission’s analysis and determinations

73. If the Commission were to apply the revised wholesale services framework established in Telecom Regulatory Policy 2015-326, it would not be in a position to conclude whether or not tower and site sharing services should be mandated, given the lack of evidence to support a market power or essential services test assessment for such services. This is a similar position to the one in which the Commission found itself in the proceeding leading to Telecom Regulatory Policy 2015-177.
74. As noted in Telecom Regulatory Policy 2015-326, the Commission may apply policy considerations – including the consideration related to the provision of “public good services” – to support different outcomes (e.g. to inform, support, or reverse a decision to mandate).
75. Further, even if the Commission had performed an analysis pursuant to Telecom Regulatory Policy 2015-326 and determined that tower and site sharing services should be mandated, it would have been open to the Commission to conclude that, rather than establishing rates, terms, and conditions for those services, negotiated agreements, as well as Commission-assisted dispute resolution, were the most appropriate regulatory approach to address these issues, as the Commission determined in Telecom Regulatory Policy 2015-177.
76. In light of the above, the Commission finds no evidence to support the view that the revised test for mandating wholesale services established in Telecom Regulatory Policy 2015-326 would materially impact the Commission’s determinations in Telecom Regulatory Policy 2015-177 regarding tower and site sharing services.

Conclusion

77. In light of all the above, the Commission finds that there is no substantial doubt as to the correctness of its determinations in Telecom Regulatory Policy 2015-177, and **denies** CNOC’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
- *Regulatory framework for wholesale mobile wireless services*, Telecom Regulatory Policy CRTC 2015-177, 5 May 2015
- *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; and Telecom Notice of Consultation CRTC 2014-76-2, 5 September 2014
- *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