



Telecom Decision CRTC 2017-300

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Northwestel Inc. – Request for forbearance from the regulation of Wholesale Connect service in the communities served by the Mackenzie Valley Fibre Link network

*The Commission **denies** an application by Northwestel for requesting forbearance from the regulation of its Wholesale Connect service in the communities served by the Mackenzie Valley Fibre Link network. The Commission considers that forbearance would not be in the public interest of users in the affected communities.*

Introduction

1. Wholesale Connect service is a tariffed wholesale access service provided by Northwestel Inc. (Northwestel) to transport telecommunications traffic across its network within its serving territory that is served by fibre or high-capacity microwave radio transport links.¹ Competitors can use Wholesale Connect service to connect their points of presence in Northwestel's operating communities and to provide telecommunications services to their end-users in those communities.
2. Recently, the Government of Northwest Territories (GNWT) launched the Mackenzie Valley Fibre Link (MVFL) network, which is a high-capacity fibre network owned by the GNWT that provides wholesale high-speed access services to sparsely populated remote communities in the Northwest Territories. It currently serves the communities of Fort Simpson, Wrigley, Tulita, Norman Wells, Fort Good Hope, and Inuvik (the MVFL communities).
3. Northern Lights General Partnership, a partnership between Northwestel and Ledcor Developments Ltd., a construction company, won the contract to design, build, maintain, and operate the MVFL network on behalf of the GNWT.

Application

4. On 6 February 2017, the Commission received a Part 1 application from Northwestel, in which the company requested that the Commission refrain, pursuant to section 34 of the *Telecommunications Act* (the Act), from exercising its powers and performing its duties under sections 25, 27, 29, and 31 of the Act in relation to the Wholesale Connect service provided by Northwestel in the MVFL communities.

¹ Within its serving territory (Yukon, Northwest Territories, Nunavut, and parts of British Columbia and Alberta), only 55 communities are currently served by Northwestel's fibre or high-capacity microwave radio transport links.

5. Northwestel claimed that (i) it does not possess substantial market power in the MVFL communities, (ii) the GNWT's transport services provided over the MVFL network are offered at very low rates that are comparable to those in the South, and (iii) future service providers can connect to the MVFL network for lower start-up costs than those that are available with Wholesale Connect service.
6. In response to Northwestel's application, the Commission received interventions from Iristel Inc. (Iristel), SSi Micro Ltd. (SSi), the First Mile Connectivity Consortium (FMCC), and the Government of Yukon (GY), all of which opposed the application. Overall, the interveners indicated that Northwestel's request for forbearance was premature. The Commission received a reply from Northwestel. The public record of this proceeding, which closed on 20 March 2017, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Should the Commission forbear from regulating Northwestel's Wholesale Connect service in the MVFL communities?

Background

7. Pursuant to section 34 of the Act, the Commission may forbear from the regulation of any service in cases where it finds that to do so would be consistent with the Canadian telecommunications policy objectives set out in section 7 of the Act. The Commission must forbear in cases where it finds that there is competition sufficient to protect the interests of users, and it must not forbear in cases where it finds that to do so would be likely to impair unduly the establishment or continuance of a competitive market for the service.
8. In determining whether there is competition sufficient to protect the interests of users, the Commission generally applies the criteria set out in Telecom Decision 94-19. In that decision, the Commission stated that the first step in assessing competitiveness is generally to define the relevant market, which forms the basis for the forbearance exercise. The relevant market is essentially defined as the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase.
9. Once the relevant market is defined, the next step is to determine whether market power exists. In Telecom Decision 94-19, the Commission defined market power as the ability of a provider to raise or maintain prices above those that would prevail in a competitive market. Low market power implies that the market is, or is likely to become, sufficiently competitive to protect the interests of users, thus enabling the Commission to forbear from regulating a specific service.
10. The Commission identified three factors to be assessed in determining market power: market share held by the dominant firm, demand conditions affecting customers' responses to a change in price, and supply conditions affecting the ability of other firms in the market to respond to a change in the price of the product or service. The Commission also clarified that while high market share is a necessary condition for

market power, it is not sufficient on its own; other factors, such as barriers to entry, bottlenecks, or the absence of rivalrous behaviour, enable a dominant firm to be anti-competitive.

11. In support of its application, Northwestel provided its assessment of market competitiveness for the Wholesale Connect service using the framework set out in Telecom Decision 94-19. The Commission's assessment based on that framework is set out below.

Relevant market

Positions of parties

12. Northwestel proposed to define the relevant product market as wholesale transport services that can make sufficient bandwidth available to provision voice, Internet, and data services. It submitted that the relevant geographic market should be defined as the MVFL communities, given that this is where the fibre transport facilities of the MVFL network compete with Wholesale Connect service.
13. SSi did not respond to Northwestel's proposed relevant market definition. Iristel agreed with Northwestel's product market definition but argued that if the geographic boundary were broadly defined to cover all the MVFL communities, the ability of consumers in that area to switch service suppliers in response to a sustainable price increase would decrease considerably. Iristel proposed to define the geographic market as each individual MVFL community.
14. Northwestel replied that its Wholesale Connect service would use the MVFL network, so service providers would have the same competitive choice in every MVFL community. Service providers could use Northwestel's service on the MVFL network or purchase it directly from the GNWT within a given location. Further, for a one-time fee, a service provider using the MVFL network would be able to connect additional MVFL point-of-presence locations into its primary transport link without having to contract for separate MVFL transport links.

Commission's analysis and determinations

15. The Commission considers the product market definition proposed by Northwestel to be appropriate.
16. Defining the geographic market requires assessing the ability and willingness of consumers (i.e. service providers) to switch suppliers (in this case, wholesale service providers) at one location in response to a price increase. Given that the configuration of Wholesale Connect service allows telecommunications service providers (TSPs) to connect additional MVFL locations into their transport links without having to contract for each link separately or be physically present in those locations, and given that the competitive alternatives in each MVFL community are homogeneous, the Commission considers that the geographic market definition should include all the MVFL communities.

17. Therefore, the relevant market is wholesale transport services that can make sufficient bandwidth available to provision voice, Internet, and data services in all the MVFL communities.

Market power

Positions of parties

18. With regard to market share, Northwestel submitted that the GNWT is expected to be the transport service provider of choice for any TSP seeking wholesale transport services in the MVFL communities, and Northwestel will not be dominant in the provision of transport services in those communities.

19. While the FMCC agreed that the GNWT will be the dominant provider of the transport service, it argued that Northwestel is affiliated with the GNWT due to Northwestel's contract to operate and maintain the MVFL network, and raised doubt about whether Northwestel and the GNWT are in fact competitors. This view was shared by SSi, Iristel, and the GY. The GY, supported by the FMCC, submitted that since Northwestel is the only provider of access from the MVFL network to the southern gateway at High Level, Alberta, it is doubtful whether there is sufficient competition.

20. With respect to demand conditions, Northwestel submitted that there would be no demand for its Wholesale Connect service in the MVFL communities, since the rates for that service are significantly higher than those for the GNWT's MVFL service.

21. Iristel submitted that the high costs and unique challenges of operating in the North restrict service providers from switching between wholesale transport service suppliers, reflecting poor demand conditions.

22. Northwestel noted that its Wholesale Connect service is sold on a month-to-month basis and that service providers can easily discontinue the service and migrate to the MVFL network.

23. With respect to supply conditions, Northwestel submitted that the MVFL network can accommodate all the supply needs of TSPs in the MVFL communities. It stated that the fibre capacity of the MVFL network exceeds Northwestel's entire capacity and can be expanded on a more cost-efficient basis.

24. Iristel submitted that the MVFL communities have poor supply conditions, given that they are in high-cost serving areas where any future supply expansion response will be constrained by the high cost of deploying additional facilities to increase network transport capacity. Iristel stated that it is the Commission's longstanding policy to regulate markets with two competing network platforms, submitting that this policy is a strong indication that two facilities-based options are insufficient to ensure sustainable competition where market power exists.

25. Northwestel submitted that there is rivalrous behaviour in the market, using the example that it purchases transport services from the GNWT due to its lower rates. The company also claimed that there are low barriers to entry in the market for wholesale transport services.
26. Iristel submitted that the assessment of barriers to entry should involve entry into the market for wholesale transport services. Iristel also submitted that extensive government funding was necessary to overcome the barriers to deploying an infrastructure project like the MVFL network in the North, where deployment costs are high. For this reason, Iristel argued, the MVFL network's existence does not constitute evidence that barriers to entry in the market for wholesale transport services are readily surmountable.
27. The GY submitted that Northwestel's request for forbearance for its Wholesale Connect service, on the basis that competition will occur using a facility that is constructed and operated by an entity that is affiliated with Northwestel, is not only insufficient to meet the Commission's standards, but also makes it likely that barriers to entry will be increased due to the nature of affiliate control of facilities.
28. The FMCC expressed concern that if Northwestel is granted forbearance, the company will eliminate its Wholesale Connect service in the MVFL communities due to the costs of the service, leaving the affected communities with only one communication link to the South. The FMCC submitted that there is value in service redundancy.

Commission's analysis and determinations

29. In the past, the Commission has recognized the unique circumstances for telecommunications companies operating in northern areas. Vast distances, low population density, and harsh climate contribute to short construction seasons, high investment costs, and low demand concentration, which in turn has limited the availability of competitive choice in these regions.
30. The MVFL network, which is subsidized by the GNWT and has only recently started offering services in the MVFL communities, is currently the only alternative to Northwestel's Wholesale Connect service. Northwestel has not demonstrated that the market is workably competitive nor that it has suffered competitive loss due to the MVFL network. Moreover, the MVFL network is operated and maintained by Northwestel. This relationship between the GNWT and Northwestel presents additional complexity for a market power analysis.
31. As part of the proceeding that led to Telecom Regulatory Policy 2016-496, parties argued that there is insufficient competition for transport services in some areas of the country, and they requested that the Commission review its forbearance frameworks for these services.² In its determinations, the Commission stated that it would perform a fact-finding exercise to collect more information on the availability of transport services to underserved areas. This exercise is now underway.

² Currently, there is no forbearance framework in place for transport services offered by Northwestel.

32. Considering (i) the unique operating conditions in the remote area where the MVFL network is located, (ii) the relationship between the GNWT and Northwestel regarding the MVFL network, and (iii) the early stage of the availability of an alternative to Northwestel's Wholesale Connect service in the MVFL communities, it is difficult to properly assess the level of competition and the market conditions for transport services in these communities. As a whole, the Commission considers that Northwestel's application for forbearance is premature for a proper assessment of market competitiveness.
33. The Commission finds, pursuant to subsection 34(2) of the Act and as a question of fact, that there is insufficient evidence on the record of this proceeding to demonstrate that the level of competition in the provision of wholesale transport services will protect the interests of users of these services in the MVFL communities. The Commission also finds, pursuant to subsection 34(1) of the Act, that forbearance from the regulation of these services would not be consistent with the policy objectives of the Act and, therefore, forbearance would not be in the public interest. As a result, the Commission **denies** Northwestel's request for forbearance from the regulation of Wholesale Connect service provided in the MVFL communities.

Policy Direction

34. The Commission is required, in exercising its powers and performing its duties under the Act, to implement the policy objectives set out in section 7 of the Act, in accordance with the Policy Direction.³ In compliance with subparagraph 1(b)(i) of the Policy Direction, the Commission considers that the policy objectives set out in paragraphs 7(a), (b), (c), (f), and (h) of the Act⁴ are advanced by the regulatory measures established in this decision.
35. Consistent with subparagraphs 1(a)(ii) and 1(b)(ii) of the Policy Direction, the Commission considers that the regulatory measures approved in this decision are (i) efficient and proportionate to their purpose, and minimally interfere with market forces; and (ii) neither deter economically efficient competitive entry into the market nor promote economically inefficient entry. In this regard, the Commission notes that declining to forbear with respect to Northwestel's Wholesale Connect service at this time protects the interests of users until the effects of the MVFL service on the market can be fully established.

³ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁴ The cited policy objectives are 7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; 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; 7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; 7(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and 7(h) to respond to the economic and social requirements of users of telecommunications services.

Secretary General

Related documents

- *Modern telecommunications services – The path forward for Canada’s digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016
- *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994