



Telecom Decision CRTC 2019-277

PDF version

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Mobile wireless review - Disclosure of information designated as confidential to the Commissioner of Competition

*The Commission directs parties to disclose to the Commissioner of Competition (the Commissioner) certain information filed in confidence on the record of the mobile wireless review proceeding. The information to be disclosed comprises all responses filed in confidence in relation to the Commission's requests for information dated 24 May 2019, with the exception of copies of network sharing agreements. Parties must disclose this information to the Commissioner by **9 August 2019**.*

Background

1. The Commission issued *Review of mobile wireless services*, Telecom Notice of Consultation CRTC 2019-57, 28 February 2019 to examine three key areas: competition in the retail market; the current wholesale regulatory framework, with a focus on wholesale mobile virtual network operators (MVNO) access; and the future of mobile wireless services in Canada, with a focus on reducing barriers to infrastructure deployment.
2. The Commissioner of Competition (the Commissioner) is participating in this proceeding as an intervener, pursuant to his mandate under the *Competition Act* to make representations to federal boards and tribunals in respect of competition.
3. On 16 December 2014, the *Telecommunications Act* (the Act) was amended to include a new provision concerning the disclosure of information designated as confidential (designated information) to the Commissioner during the course of a Commission proceeding. Specifically, subsection 39(4) states:

(4) If designated information is submitted in the course of proceedings before the Commission, the Commission may...

(b) disclose or require its disclosure to the Commissioner of Competition on the Commissioner's request if it determines that the information is relevant to competition issues being considered in the proceedings.

4. Pursuant to that provision, the Commissioner has made a request to have certain designated information disclosed to him.¹ The information in question was filed by several wireless carriers in response to requests for information (RFIs) that were issued by the Commission on 24 May 2019, and spans a range of market-related matters (e.g. pricing, plans, promotions, subscriber numbers, network investment, revenues and expenses).

Positions of parties

5. The Commissioner indicated that he intends to use the designated information to perform several economic studies, including an event study, a cross-section analysis, and a structural model, to assess the competitiveness of the mobile wireless market.² He plans to file these studies on the record during the next intervention phase, to assist the Commission in making its determinations. The Commissioner stated that his intended submissions will assist in providing the Commission with an understanding of past and present competition in the Canadian wireless markets, with a view to assessing what regulatory measures might be warranted and the implications resulting from different wholesale frameworks, including those governing MVNO access and the sharing of facilities.
6. For the most part, parties did not dispute the relevance to competition issues of much of the information that was being sought by the Commissioner. However, Bell Mobility Inc. (Bell Mobility), SSi Micro Ltd., and TELUS Communications Inc. (TCI) objected to the disclosure of certain confidential RFI responses on the basis that (i) this information is not strictly required for the specific studies that the Commissioner has stated he intends to perform in the context of this hearing, or (ii) the Commissioner has not justified its relevance in this regard. For instance, these parties argued, among other things, that information regarding unused spectrum, information or agreements related to network sharing, and information regarding capital expenditures are not relevant to the Commissioner's studies. Bell Mobility, in particular, also argued that forecasted information was not relevant and therefore not required.
7. Bell Mobility, Rogers Communications Canada Inc. (RCCI), TCI, and Videotron Ltd. (Videotron) raised concerns over the disclosure to the Commissioner of confidential information provided in response to RFI CRTC-206. These parties principally objected to the disclosure of copies of their network sharing agreements. They argued that these agreements are among the most sensitive and secure

¹ For more information regarding the procedural history of this request, refer to the Secretary General [letter](#) dated 24 May 2019.

² An event study would examine the impacts on competition of a one-time event, such as the entry of a new competitor following a spectrum auction. A cross-section analysis would compare competitive conditions in different parts of the country that have different characteristics (e.g. areas with four facilities-based carriers versus areas with three). A structural model would be used to consider how a specific change not comparable to past events (e.g. the introduction of an MVNO with certain characteristics) would affect outcomes in a market.

documents they possess and that, given their highly technical nature, access to these documents would add no value to the economic studies the Commissioner is planning to conduct.

8. TCI raised concerns over the disclosure of confidential information in situations in which the level of information provided by the various parties may have varied greatly, on the basis that the use of such information would result in an inaccurate market competition study. For his part, the Commissioner has indicated that he – and by extension the agency he heads, namely the Competition Bureau – has extensive experience in aligning multiple datasets from different companies.
9. TCI also raised concerns with respect to the provision of confidential information to third-party external experts, whom the Commissioner indicated he would retain to assist in performing his planned studies. Multiple parties sought the imposition of measures to ensure that the Commissioner uses any confidential information disclosed to him only to participate in the present proceeding.
10. Finally, throughout the process associated with the Commissioner's request, several carriers raised concerns about procedural fairness and asked that the Commission modify the procedural steps and dates in the proceeding in order to address these concerns. These parties generally asked for the opportunity to request further information from the Commissioner on his reports, followed by the opportunity to file rebuttals, including their own reports. Some parties argued that the oral hearing would need to be delayed until after the deadline for submitting such rebuttal reports. Bell Mobility argued that the Commission cannot rule on disclosure without simultaneously disposing of the procedural fairness issue.

Commission's analysis and determinations

11. In order for the Commission to exercise its discretion in determining whether disclosure is appropriate in this case, two prerequisites must be met.
12. First, the Commissioner must request the information, which he has done. In addition to his general request, made in a letter dated 8 March 2019 and reiterated in a letter dated 6 May 2019, he submitted, on 2 July 2019, a full list of the specific RFIs for which he is seeking disclosure. He explicitly confirmed that this request encompasses all the information that was submitted in confidence in response to the Commission's 24 May 2019 RFIs.
13. Second, the Commission must determine whether the information being sought is relevant to competition issues being considered in the proceeding. In this case, the information that is subject to the disclosure request spans a variety of subject matter areas:
 - spectrum holdings, licences, and usage
 - plans, including subscribers, revenues, and data usage
 - retail promotions

- price changes over time
- retail and wholesale revenues and expenses (historical and forecasted)
- number of towers and sites
- capital expenditure (historical and forecasted)
- network sharing
- MVNO activity
- average revenue per user (ARPU) and earnings before interest, taxes, depreciation, and amortization (EBITDA) over time
- switching, churn, and retention
- data overage
- customer data usage
- sales distribution channels

14. With respect to the parties' arguments that the information being sought is not necessary for the studies the Commissioner plans to undertake, the Commission considers that the requirement set out in the Act is broader than the manner in which these parties have characterized it: the information must simply be relevant to competition issues being considered in the proceeding. If it is relevant and the Commission elects to disclose it, it is up to the Commissioner to decide on the extent to which he can and will use this information in his analysis.
15. As to whether the information is relevant, the Commission's view is that all the information being sought is quite clearly relevant to the competition issues being considered in this proceeding. The subject matter areas listed above are self-explanatory in this regard, as they relate to key issues of competition policy, including retail and wholesale activities, financial performance, network coverage and expansion, and barriers to entry. This information is important to understanding market dynamics, defining relevant product and geographic markets, assessing competitiveness and the presence of market power, and ultimately determining what regulatory measures, if any, would be appropriate to improve competition.
16. However, the Act expressly states that the Commission "may" disclose or require the disclosure of information submitted in confidence. In order to exercise its discretion and make a determination in this regard, the Commission will weigh the benefits resulting from disclosure against the associated risks.
17. The most pertinent benefit to consider in this particular case is whether disclosing the information to the Commissioner would result in a more complete record. In the Commission's view, it would: the Commissioner is offering an in-depth analysis of relevant economic and competition issues as a federally appointed expert in these fields, supported by a specialized agency. The studies the Commissioner is proposing to conduct have the potential to add significant value to the record, as they will seek to explain past developments and assess what measures may be appropriate going

forward based on historical and forecasted data provided by the wireless carriers themselves.

18. Further, even if the specific information in question were not directly relevant to the Commissioner's proposed reports, as some parties have argued, it does not necessarily follow that the Commissioner's submissions will be restricted to these reports. Rather, it would be appropriate for him to seek to maximize the value of his contributions. Restricting disclosure to the minimum amount of information needed for the intended reports would not be consistent with this intention.
19. By contrast, the benefits of disclosing network sharing agreements to the Commissioner are not apparent. In its RFIs issued on 24 May 2019, the Commission requested that carriers describe any network sharing arrangements they have with other carriers and file copies of any related agreements on the record. Parties filed some of the descriptive information publicly and some in confidence, while the network sharing agreements themselves were all filed in confidence. As indicated above, several carriers have raised concerns about disclosing these agreements to the Commissioner.
20. Although the subject matter and the particular information filed in response to the RFIs is relevant, the Commission does not consider that the disclosure of the network sharing agreements themselves, given their highly technical nature, could meaningfully inform an economic study or contribute to a better understanding of the competitiveness of the mobile wireless marketplace. The Commission also recognizes that these agreements contain highly sensitive commercial and network information that the carriers are understandably reluctant to disclose unless absolutely necessary. For these reasons, in the Commission's view, requiring disclosure of network sharing agreements would be of very limited benefit to the record of the proceeding.
21. In terms of risk, with the exception of the disclosure of network sharing agreements, the Commission sees little risk to disclosure. Unlike a process in which a determination is being made with respect to public disclosure of confidential information, selective disclosure to the Commissioner does not raise the same concerns with respect to a party being directly harmed as a result of its sensitive information being made widely available (including to potential commercial competitors). The Commissioner has no financial stake in the outcome of the proceeding. Although he may advance positions contrary to those of certain parties, including parties whose confidential information he may have access to, he is not truly adverse in interest to any of the parties.
22. With respect to whether variances in datasets would impact the quality of the resultant reports or other conclusions drawn by the Commissioner in this proceeding, in the Commission's view this is a matter that goes to the weight to be given to the evidence produced. The Commission does not consider this argument to be relevant in assessing whether or not the information should be disclosed.

23. Regarding parties' concerns about any potential improper use or handling of confidential information by the Commissioner, his staff, or any external expert he uses, the Commission recognizes that the Commissioner's agency, the Competition Bureau, is an investigative body within the Canadian federal government that has both administrative and criminal law enforcement powers. It also has substantial and extensive experience in handling sensitive and confidential information. Accordingly, the Commission considers that the risk of inadvertent misuse or mishandling of the disclosed information is very low. As such, there is no need to impose specific conditions on the Commissioner to better ensure his compliance with applicable statutory obligations relating to the use of confidential information disclosed to him in this proceeding.
24. Further, given the Competition Bureau's extensive experience in handling sensitive and confidential information, the Commission expects the Commissioner to adopt appropriate measures to ensure that any confidential information provided to the agency's experts is appropriately protected and is used solely for the purpose of assisting the preparation of the Commissioner's submissions in the context of the current proceeding.
25. As noted above, the risk of inadvertent misuse or mishandling of the designated information is, in the Commission's view, very low. However, given the highly sensitive nature of the network sharing agreements filed with the Commission and the limited additional value that they would provide the Commissioner in the context of this proceeding, the Commission considers that these agreements should not be disclosed.
26. In light of all the above, the Commission concludes that, with the exception of copies of network sharing agreements, there are clear benefits to disclosing the designated information to the Commissioner, and that these benefits outweigh any risk that would be likely to result from such disclosure. Accordingly, the Commission **directs** parties to disclose to the Commissioner all designated information that he has requested,³ with the exception of copies of network sharing agreements,⁴ by **9 August 2019**. This direction to disclose includes all information that was filed in confidence in relation to network sharing agreements, but not the agreements themselves.
27. Regarding the procedural fairness arguments made by parties and the call for an additional process to address the Commissioner's analysis, the Commission considers that it would be premature to make a determination on these matters prior to receiving the Commissioner's proposed reports.

³ The Commissioner's request comprises all designated information contained in parties' responses to the RFIs posed in the appendix to the Commission's 24 May 2019 letter.

⁴ This applies to Bell Mobility, RCCI, Saskatchewan Telecommunications, TCI, and Videotron, pursuant to their responses to RFI CRTC-206. Bragg Communications Incorporated, carrying on business as Eastlink, and Shaw Cablesystems Limited were also asked to respond to RFI CRTC-206, but they submitted that they do not have any network sharing agreements.

Policy Direction

28. On 17 June 2019, the Governor in Council registered a new Policy Direction⁵ to guide the Commission in its implementation of the policy objectives set out in the Act (the 2019 Policy Direction).
29. The Commission considers that by ordering wireless carriers to disclose the designated information to the Commissioner, who occupies a specialized role created by Parliament and focused on competition, it will have a more comprehensive record upon which to ultimately make determinations that are consistent with the 2019 Policy Direction.

Secretary General

⁵ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, 17 June 2019