



Telecom Decision CRTC 2020-342

PDF version

Ottawa, 28 September 2020

Public record: 8662-C12-201912502

Requests to stay the implementation of Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services

*The Commission **approves** requests by Bell Canada and by Cogeco, Eastlink, RCCI, Shaw, and Videotron to stay the implementation of Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services until the Commission completes its review of that order.*

Background

1. Aggregated wholesale high-speed access (HSA) services are provided by Bell Canada; Bell MTS, a division of Bell Canada (Bell MTS); Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); Cogeco Communications inc. (Cogeco); Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); Shaw Cablesystems G.P. (Shaw); and TELUS Communications Inc. (TCI) [collectively, the wholesale HSA service providers] to enable competitors¹ to provide their own retail Internet services and other services to their end-users.
2. In Telecom Orders 2016-396 and 2016-448, the Commission reviewed the rates for aggregated wholesale HSA services proposed by the wholesale HSA service providers.
3. In Telecom Order 2019-288, the Commission set final rates for aggregated wholesale HSA services.
4. Bell Canada and Bell MTS, as well as Cogeco, Eastlink, RCCI, Shaw, and Videotron (collectively, the cable carriers), filed motions for leave to appeal with respect to Telecom Order 2019-288 with the Federal Court of Appeal (FCA). The FCA granted a stay of Telecom Order 2019-288 on 27 September 2019 pending the outcome of the court proceeding. In doing so, the FCA applied the criteria set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (*RJR-MacDonald*). These criteria are referred to as the RJR-

¹ For the purpose of this decision, “competitors” are the customers of wholesale HSA service providers.

MacDonald test.² Using the RJR-MacDonald test, the FCA found that (i) there was a serious issue to be tried, with no compelling arguments to the contrary; (ii) that the irreparable harm argument was not speculative and that implementing the order in question could result in a market distortion that could not be subsequently remedied by any court order; and (iii) that the balance of convenience favoured the status quo.

5. On 10 September 2020, the FCA denied the appeals, thereby removing the stay of Telecom Order 2019-288.

Applications

6. The Commission received an application from TCI, dated 13 November 2019, as well as an application from Bell Canada and a joint application from the cable carriers, both dated 13 December 2019, in which they requested that the Commission review and vary Telecom Order 2019-288.
7. In those applications, relief was requested in two broad categories:
 - Bell Canada and the cable carriers requested that the Commission further stay the implementation of the final rates set out in Telecom Order 2019-288 if and when the stay granted by the FCA is lifted, and
 - Bell Canada, the cable carriers, and TCI requested that the Commission make determinations on several review and vary requests.
8. The Commission received interventions regarding the applications from Allstream Business Inc. (Allstream), Bell Canada, the British Columbia Broadband Association (BCBA), the Canadian Network Operators Consortium Inc. (CNOC),³ the cable carriers, Distributel Communications Limited (Distributel), TCI, and TekSavvy Solutions Inc. (TekSavvy).
9. The Commission will address the review and vary requests at a later date. In this decision, it will address the requests to further stay the implementation of the final rates set out in Telecom Order 2019-288. Given that the review and vary applications were merged into a single proceeding, the Commission considers it appropriate to review both applications together.

² The RJR-MacDonald test sets out the following criteria: (i) there is a serious issue to be determined; (ii) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and (iii) the balance of convenience, taking into account the public interest, favours granting the interim relief. To be granted interim relief, an applicant must demonstrate that its application meets all three criteria in the RJR-MacDonald test.

³ The organization is now known as Competitive Network Operators of Canada.

Should the Commission approve Bell Canada's and cable carriers' requests to further stay the implementation of the final aggregated wholesale HSA service rates determined in Telecom Order 2019-288?

10. The Commission's general practice is to require that an applicant requesting relief demonstrate that its application meets all three criteria in the RJR-MacDonald test.

Criterion (i): A serious issue to be determined

Positions of parties

11. Bell Canada and the cable carriers submitted that the low standard for establishing a serious issue has been met, since there is substantial doubt as to the correctness of Telecom Order 2019-288, for the reasons expressed in their applications.
12. Bell Canada also submitted that the seriousness of the issues raised is further demonstrated by the number of parties that have raised concerns with Telecom Order 2019-288 and its effects.
13. Allstream, the BCBA, CNOc, Distributel, and TekSavvy opposed the proposed stay.
14. In particular, CNOc submitted that Bell Canada and the cable carriers simply referred to their respective applications as a whole and failed to meet the low standard of establishing a serious issue.
15. CNOc further submitted that the Commission established just and reasonable final rates for aggregated wholesale HSA services in accordance with subsection 27(1) of the *Telecommunications Act* (the Act) by exercising discretion in choosing the means for the setting of rates and any supporting costing methodology; therefore, the Commission's jurisdiction to approve such rates and to do so retroactively is unassailable.
16. Bell Canada replied that the scope of the Commission's jurisdiction and discretion is not, in and of itself, sufficient evidence that there is no serious issue to be tried and that the review and vary process is an example that serious issues may arise that warrant re-examination.

Commission's analysis and determinations

17. The threshold for finding that there is a serious issue to be tried is low. If an application is not clearly frivolous, it will generally meet the first criterion of the RJR-MacDonald test.
18. The applicants raised several complex questions in their respective applications, ranging from methodological to computational issues regarding the determinations set out in Telecom Order 2019-288, which affect (i) monthly capacity rates per 100 megabits per second (Mbps), (ii) monthly access rates per end-user, and

(iii) rates related to service charges. The Commission considers that these are legitimate questions being asked and that they are not frivolous.

19. In light of the above, the Commission finds that the applicants have met the first criterion of the RJR-MacDonald test.

Criterion (ii): Irreparable harm if the relief is not granted

Positions of parties

20. Bell Canada submitted that, if a stay is not granted, it will face irreparable harm
- in the form of unrecoverable retroactive payments made to competitors, and
 - to commercial interests, including permanent loss of revenue and market share in wholesale and retail markets.
21. The cable carriers submitted that, if a stay is not granted, they face irreparable harm to investment and retail markets until the Commission concludes a comprehensive review of the rate-setting methodology and its impact on the final wholesale HSA service rates.

Unrecoverable retroactive payments made to competitors

22. Bell Canada submitted that approximately 150 competitors subscribe to its wholesale HSA service. In the 12 months prior to the submission of its review and vary application, 14 competitors were disconnected for non-payment and 10 were sent overdue-invoice notices. Bell Canada submitted that distributing retroactive payments would likely result in funds that would not be recoverable, should the final rates be adjusted.
23. Further, Bell Canada submitted that many competitors are privately owned and could issue dividends; their distribution of funds to individuals could make the task of recovering amounts owed impossible. Bell Canada argued that this concern, which is similar to a concern in *Canadian Broadcasting Corporation and Astral Media Inc. v. SODRAC*, 2013 FCA 60 (*SODRAC*), reviewed by the FCA, was taken into consideration in granting a stay in that particular case.
24. Allstream submitted that Bell Canada's alleged harm is based upon two unrealistic assumptions: (i) that the rate reductions are completely overturned, and (ii) that every single competitor currently leasing aggregated wholesale HSA service from Bell Canada will suffer a business failure and will be unable to repay any amounts owed.
25. CNOC submitted that Bell Canada's claims that competitors will use retroactive payments to pay out shareholder dividends to the point of becoming insolvent is pure speculation without any substantiating evidence.

26. CNOC argued that, even if smaller competitors were at risk of not being able to pay amounts owed, their portions would be small and the risk of non-payment would be insignificant compared to the total amount of retroactive payments.
27. CNOC added that Bell Canada is experienced in collection activities relating to outstanding billings and, in the event of a small minority of cases remaining unresolved after collection efforts, Bell Canada would have a straightforward claim that it could choose to bring to the appropriate courts.
28. CNOC submitted that *SODRAC* is a clearly distinguishable case and includes unique circumstances (e.g. an intermediary that distributes funds) that do not exist with respect to Bell Canada's concern of unrecoverable retroactive payments.
29. Distributel submitted that Bell Canada's claims that competitors pose a financial risk are unfounded. In support, Distributel submitted that it has been operating since 1989 and that it is a far reach to suggest that the company would take retroactive payments and exit the market.
30. Bell Canada replied that the test for irreparable harm assesses the nature of the harm, as noted in *RJR-MacDonald*, not the quantum of that harm. Bell Canada further replied that any portion of retroactive payments that is unrecoverable would result in irreparable harm.

Permanent loss of revenue and market share in wholesale and retail markets

31. Bell Canada submitted that Telecom Order 2019-288 distorts the wholesale HSA service market by setting aggregated wholesale HSA service rates for cable carriers that are all lower than that of the aggregated wholesale HSA service offered by Bell Canada. Given this outcome, Bell Canada argued that competitors will be incentivized to buy the service from the cable carriers at lower prices.
32. Further, Bell Canada submitted that the final rates imposed in Telecom Order 2019-288 are below actual costs. Should Bell Canada choose to either keep wholesale customers by reducing its rates further or maintain the rates to minimize losses per end-user and allow the number of wholesale customers to erode, the consequences to Bell Canada's wholesale HSA service will be significant.
33. Regarding harm to retail markets, Bell Canada and the cable carriers submitted that final rates will result in competitors being able to undercut retail prices significantly, resulting in lost subscribers for the wholesale HSA service providers. Bell Canada further submitted that irreparable harm will occur because lost subscribers are difficult to recover and will likely migrate to other services, resulting in lost revenue across multiple product lines.
34. The cable carriers submitted that market share losses and losses to the public due to reduced investment are not quantifiable or recoverable.

35. The cable carriers also submitted that the final rates will result in competitors gaining market share by enabling them to set retail rates that prevent the recovery of speed-based costs. The cable carriers argued that this will, in turn, erode their ability to charge retail rates that recover speed-based investments. In support of this argument, they noted that competitors were able to offer retail rates in certain areas where Eastlink was providing service at rates that Eastlink was unable to match.
36. The cable carriers further submitted that, absent a stay until the completion of the review of the wholesale HSA service rate-setting methodology, significant distorting and destabilizing of Canadian wireline broadband service markets may occur, which would generate costly inefficiency and uncertainty for all stakeholders.
37. CNOC submitted that Bell Canada's claims of a distorted wholesale HSA service market, substantial losses, rates that are below actual costs, and erosion of the company's wholesale customer base do not constitute irreparable harm and are speculative. CNOC also submitted that mere financial losses do not give rise to irreparable harm.
38. CNOC argued that Bell Canada's claim that most, if not all, end-users subscribing to services provided through Bell Canada's wholesale HSA service will be lost to faster service offerings is not credible, since it does not take into consideration that a significant portion of Canadians do not currently subscribe to retail Internet services at speeds above 50 Mbps.
39. CNOC further argued that Bell Canada's claim that competitors will be incentivized to sell wholesale HSA services from the cable carriers at lower prices ignores the capacity costs incurred by competitors, which, for the cable carriers, is more than twice that of Bell Canada's monthly capacity rate per 100 Mbps.
40. CNOC submitted that Bell Canada's claim that end-users will migrate to competitors due to lower prices is unfounded. In support of this view, CNOC submitted that in the Competition Bureau Report,⁴ it was indicated that price is a significant factor in consumers' choice, but that other factors, in aggregate, are more important.
41. CNOC further submitted that, when the interim wholesale HSA service rates were revised, which included a significant reduction to monthly capacity rates per 100 Mbps, it resulted in no change to residential Internet service subscriber market share in 2016 and 2017.
42. CNOC argued that, contrary to Bell Canada's claim that lost subscribers will result in losses across multiple product lines, multiple product line subscribers are less likely to change service providers due to service contracts.

⁴ *Delivering Choice: A Study of Competition in Canada's Broadband Industry*, 7 August 2019

43. Allstream argued that the retroactive payments for Bell Canada will not cause irreparable harm to a large and diversified company, and that the situation is undoubtedly similar for the cable carriers.
44. Bell Canada replied that there were vastly different circumstances when the wholesale HSA service rates were made interim compared to when they were finalized, and an assumption cannot be made that market share will not substantially change with the implementation of the final rates from Telecom Order 2019-288.
45. Bell Canada agreed with CNOC that financial losses do not give rise to irreparable harm; however, irreparable harm includes situations where one party will suffer permanent market loss or irrevocable damage to its business reputation. Bell Canada argued that massive, and likely permanent, loss of customers without a stay meets the definition of irreparable harm.
46. Bell Canada added that higher-speed services do incur greater capacity costs than lower-speed ones. Bell Canada argued that, while users on higher-speed plans generate, on average, more traffic per second, they do not generate additional traffic proportional to the speed difference, resulting in total access plus usage cable-based rates being more attractive.

Irreparable harm to investments

47. The cable carriers submitted that foregoing a stay until the completion of the review of the rate-setting methodology will result in irreparable harm to investments. In support of this view, they filed the Brattle Report,⁵ which demonstrates that the final rates will significantly diminish the cable carriers' network investment capabilities and incentives, to the detriment of service, innovation, and competition.
48. The cable carriers also referred to the Competition Bureau Report, which, they submitted, provides concrete evidence of the negative impacts on profitability and investments as a result of differing regulatory treatments, particularly in high-cost rural and remote areas at the fringes of existing wireline networks. The cable carriers argued that Telecom Order 2019-288 will unquestionably increase these negative effects.
49. CNOC argued that the Brattle Report's conclusions were unfounded and, in support of this view, submitted the Chen Report,⁶ which concluded that the Brattle Report does not demonstrate reduced incentives to invest and suffered from flaws in assumptions.

⁵ *Analysis of the CRTC's Final Rates for Aggregated Wholesale High-Speed Access Services: Impact on Broadband Network Investment and Innovation*, 12 November 2019

⁶ *Assessment of an Expert Report by the Brattle Group Regarding Telecom Order CRTC 2019-288*, 31 January 2020

50. CNOC submitted that the Competition Bureau Report made a general observation that the negative impact of inappropriately set wholesale rates will most likely be strongest in areas where population is relatively sparse, and that the report took no position on whether the wholesale rates were set appropriately.
51. CNOC argued that there is no reason to believe that the negative impact of Telecom Order 2019-288 on the operating cash flows of the cable carriers, if there is any, will be smaller in areas where population is sparser. CNOC submitted that competitors focus their markets in highly populated areas and, as such, Telecom Order 2019-288 will have little impact on rural and remote areas.
52. The cable carriers replied that CNOC's criticism of the Brattle Report is misplaced and unfounded. In support of this view, they submitted the Brattle Rebuttal Report,⁷ which indicates that Telecom Order 2019-288 will drastically reduce revenues, resulting in less funding for investment.
53. The cable carriers further replied that the deployment of networks in rural and remote areas depends on, and is cross-subsidized in part by, revenues earned in urban areas. Therefore, a material reduction in revenue and operating margins in areas where competitors are concentrated will have a direct impact on the funds available for the expansion of broadband services to rural and remote areas.

Identified irreparable harm is not speculative

54. Bell Canada and the cable carriers submitted that the identified harm was not speculative and was confirmed by an Order of Justice Boivin at the FCA.⁸ Bell Canada further submitted that an Order of Justice de Montigny at the FCA⁹ supported this view.
55. The cable carriers argued that the irreparable harm is not speculative, since Eastlink already radically reduced its planned capital investments in 2019, and Videotron eliminated its highest-speed retail Internet access service. The cable carriers further submitted that Shaw recently announced that plans to launch a new higher-speed Internet service tier have been altered due to the final rates established in Telecom Order 2019-288, while other cable carriers were reassessing their capital plans.
56. The cable carriers submitted that no new evidence has been submitted that alters the conclusions reached by the Order of Justice Boivin.
57. CNOC submitted that Bell Canada did not demonstrate with evidence the alleged harms, and that speculative harms do not constitute irreparable harms.

⁷ *Reply to the Report, Assessment of an Expert Report by the Brattle Group regarding Telecom Order CRTC 2019-288*, 13 March 2020

⁸ Order in *Bell Canada v. BC Broadband Association* (22 November 2019), Ottawa 19-A-58/59 (FCA)

⁹ Order in *Bell Canada v. BC Broadband Association* (27 September 2019), Ottawa 19-A-58/59 (FCA)

58. CNOC and TekSavvy argued that there is no correlation between Telecom Order 2019-288 and Videotron's withdrawal of its highest-speed retail Internet access service, since reports on securities filings from Videotron indicated that the company had sufficient financing to cover committed cash requirements for capital investments.
59. CNOC submitted that the cable carriers' claims that investments will be reduced, thereby subjecting them to irreparable harm, is speculative and does not constitute irreparable harm.
60. CNOC added that the applications did not include any estimation of pecuniary harm and, similar to a previous application,¹⁰ did not demonstrate irreparable harm.
61. The cable carriers added that Videotron's withdrawal of its highest-speed retail Internet access service was due to Telecom Order 2019-288, and that the service was withdrawn so as to not materially impact cash requirements for investments.

Commission's analysis and determinations

62. The second criterion of the RJR-MacDonald test requires the party requesting a stay to demonstrate that it will suffer irreparable harm if its request is not granted, and that the harm is not speculative. This portion of the test requires analysis of the nature of the harm, rather than its magnitude. Harm is also more likely to be irreparable when there is a loss that is unquantifiable, that the applicant may not be able to recover, or that a final order may not be able to redress.
63. Regarding irreparable harm with respect to unrecoverable retroactive payments made to competitors, Bell Canada provided historical evidence to support its claim that some competitors may be financially unable to repay amounts owed as a result of changes to the approved final rates, should the Commission approve (in part or in full) the review and vary requests.
64. Although interveners raised the possibility that the unrecoverable retroactive payments portion related to at-risk competitors would be small and, therefore, the risk of non-payment would be insignificant compared to the total amount of retroactive payments, the Commission notes that the test for irreparable harm only requires an analysis of the nature of the harm. The Commission notes that the magnitude of the harm is instead considered at the third step of the test.
65. Regarding the prospects for Bell Canada to start collections processes for competitors that are unable to repay amounts owed, no evidence was submitted that the processes result in successful collections from competitors that were

¹⁰ In a [letter](#) dated 20 March 2019, the Commission considered that in an application for interim relief, CNOC did not provide any specific evidence quantifying its claims of irreparable pecuniary harm, such as estimates of the number of lost customers or lost revenues that its members would suffer in the absence of interim relief.

disconnected for non-payment. The Commission considers that the risk of not collecting from a competitor that was disconnected for non-payment is high and will likely result in retroactive payments that cannot be recovered. Given the above, the Commission considers that the harm identified is irreparable.

66. The Commission considers that the harm identified is not speculative in nature, since competitors disconnected for non-payment that were eligible for retroactive payments, however small or large, would likely not be in a position to repay amounts owed, and Bell Canada did provide evidence of the number of competitors that were disconnected for non-payment and those that were sent notices of non-payment within the previous 12 months.
67. The Commission thus finds that, with respect to unrecoverable retroactive payments, the applicants have demonstrated (i) irreparable harm, and (ii) that the harm is not speculative. Accordingly, the Commission considers that the applications have met the second criterion of the RJR-MacDonald test.
68. Given that the test has been met with respect to retroactive payments, the Commission considers that further analysis of the other harms submitted is not required.

Criterion (iii): Balance of convenience

Positions of parties

69. Bell Canada and the cable carriers submitted that the balance of convenience favours a stay, given that significant and irreparable harm will occur if a stay is not granted.
70. Bell Canada also submitted that no interests will be harmed if a stay is granted and that a stay will promote the public interest.
71. Bell Canada and the cable carriers argued that the implementation of Telecom Order 2019-288 is not time sensitive and that a brief delay could not cause any harm to competitors, given that over three years have elapsed between when the interim aggregated wholesale HSA service rates were established and the issuance of Telecom Order 2019-288.
72. Bell Canada further submitted that competitors gained significant market share during the period when the rates were interim, and that there is no evidence that any competitor will be prejudiced by a delay in receiving retroactive payments or by a delay in the implementation of the final rates.
73. Bell Canada added that a delay in making a one-time lump-sum payment pending litigation does not amount to serious harm, as determined by the FCA in *SODRAC*.
74. Regarding promoting the public interest, Bell Canada submitted that, in the event that the review and vary requests are successful and a stay is not granted, the wholesale HSA service providers will alter their capital spending in infrastructure,

resulting in a gap that will affect rural and remote Canadians the most. Bell Canada also submitted that the consequences to wholesale HSA service providers and to Canadians will be harmful and likely irreversible.

75. The cable carriers submitted that, absent a stay, the negative impacts of Telecom Order 2019-288 on them and on the public interest will irreparably damage effective and sustainable investment, innovation, and competition.
76. The cable carriers submitted that the Order of Justice Boivin found that the balance of convenience was in favour of maintaining the interim rates, and that no new evidence has been submitted that alters that conclusion.
77. The BCBA submitted that the final rates established in Telecom Order 2019-288 will not reduce infrastructure development in Canada and that rural operators continue to face aggressive competition from services offered by incumbent local exchange carriers in rural communities.
78. Allstream and TekSavvy submitted that competitors will face serious harm that outweighs the alleged harm to the applicants if Telecom Order 2019-288 is stayed. Allstream and TekSavvy also submitted that, while Bell Canada and the cable carriers face proportionately much smaller harm compared to the competitors, it is almost certainly not irreparable.
79. Distributel submitted that the benefits that competitors received from Telecom Order 2019-288 that are intended to be passed on to customers have yet to arrive due to delays in implementing the order.
80. CNOC submitted that Bell Canada and the cable carriers will, at worst, face negligible inconvenience absent a stay, while a stay will impose significant harm in the form of prolonging market distortions that have disadvantaged competitors for years, all while delaying retroactive payments to competitors. Specifically, CNOC argued that reverting to interim rates that were determined to not be just and reasonable will result in competitors continuing to pay rates that suppressed competitive market forces for years, thereby perpetuating market distortions.
81. Regarding the harm associated with delaying retroactive payments to competitors, CNOC argued that the payments date back to 2016, and that a stay would only increase this duration and subsequent retroactive payments, with no interest payable, and would impose significant opportunity costs, adding to the inconvenience that is already experienced by competitors.
82. CNOC further argued that the market dominance of Bell Canada and the cable carriers allows them to overcome any transient financial inconveniences, while competitors will be disproportionately affected.
83. CNOC submitted that the public interest favours a denial of the stay request, since some competitors immediately reduced retail rates in response to Telecom Order

2019-288. They noted that no fewer than 125,000 Canadians have sent letters requesting the implementation of the order.

84. CNOC argued that there is no credibility to claims that the public interest will be adversely affected by investment reductions. Such claims ignore the fact that other providers and government programs will make up for the reductions, if any, made by Bell Canada and the cable carriers.
85. Bell Canada submitted that the balance of convenience criterion, when everything else is equal, is a counsel of prudence to preserve the status quo.
86. Bell Canada argued that no intervener provided compelling evidence to support how they would be inconvenienced by maintaining the interim rates for a limited amount of time until the Commission makes its determinations on the applications, particularly since the interim rates have been in place for over three years.

Commission's analysis and determinations

87. The third criterion requires an assessment to be made as to which of the parties would suffer greater harm from granting or refusing to grant a stay pending the final determination of the issues. In addition, the assessment at this stage takes into account the public interest, and either party may raise arguments regarding harm caused to the public interest.
88. The Commission considers that Bell Canada has established that, absent a stay request, the company would face irreparable harm in the form of unrecoverable retroactive payments made to certain competitors. However, it did not quantify or provide an estimate of the retroactive payments that would be unrecoverable. The Commission notes that several interveners identified that residential high-speed Internet service subscriber market shares remained largely unchanged between 2016 and 2017, when interim rates for those services were revised. Therefore, the Commission is of the view that, while it examines the review and vary requests, the competitors' subscriber market share over a short period of time will likely not be negatively affected.
89. Competitors' subscriber market share over a longer period (2014 to 2018) grew annually.¹¹ The Commission considers that since the competitors, during the time that the rates were interim, have gained market share, a delay in implementing the final rates established in Telecom Order 2019-288 pending completion of the Commission's examination of the review and vary requests will likely not cause undue harm.

¹¹ Based on data provided in figure 9.1 of the Commission's 2019 *Communications Monitoring Report*.

90. With regard to concerns relating to delaying the one-time lump-sum payment pending litigation, the Commission considers that such a delay would not amount to serious harm.
91. The Commission considers that there is a public interest in implementing its decisions and that doing so generally leads to regulatory certainty. However, the FCA issued a stay on the implementation of the final rates set out in Telecom Order 2019-288, which was in place from September 2019 to September 2020. During that period, assessment of the review and vary requests has been ongoing and the final rates have not been implemented.
92. Accordingly, the Commission considers that keeping a stay in place would allow for a fulsome examination of the review and vary requests, and thereby result in a more certain final outcome, while avoiding additional disruptions to the market during this period.
93. Given that (i) Bell Canada and the cable carriers have demonstrated that a serious issue is to be determined; (ii) irreparable harm would occur absent a stay; (iii) competitors would not face greater harm if a stay were granted; and (iv) given that there is a public interest in regulatory certainty on this matter, the Commission considers that the balance of convenience favours granting a stay of Telecom Order 2019-288.
94. In light of the above, the Commission finds that the applicants have met the third criterion of the RJR-MacDonald test.

Conclusion

95. Given the Commission's findings that the applicants have met the three criteria in the RJR-MacDonald test, the Commission **approves** Bell Canada's and the cable carriers' requests to stay the implementation of the final rates established in Telecom Order 2019-288 pending its final determinations on the review and vary requests.

Policy Directions

96. The Governor General in Council recently issued the 2019 Policy Direction.¹² The 2019 Policy Direction provides that, when the Commission is exercising its powers and performing its duties under the Act, it should consider how its decisions can promote competition, affordability, consumer interests, and innovation.
97. Moreover, the Commission should, in its decisions, demonstrate its compliance with the 2019 Policy Direction and specify how those decisions can, as applicable, promote competition, affordability, consumer interests, and innovation.

¹² *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

98. The Commission considers that its determination in this order to stay the implementation of the final rates established in Telecom Order 2019-288 is consistent with subparagraphs 1(a)(i), (ii), (iii), and (v) of the 2019 Policy Direction, which state that the Commission should consider the extent to which its decisions
- encourage all forms of competition and investment;
 - foster affordability and lower prices, particularly when telecommunications service providers exercise market power;
 - ensure that affordable access to high-quality telecommunications services is available in all regions of Canada, including rural areas; and
- v. reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers.
99. In particular, the Commission considers that its determination to stay the implementation of the final rates established in Telecom Order 2019-288 (i) will result in no change to market conditions that have been in place since 2016, providing stability in competition and investments in the high-speed Internet service marketplace; and (ii) will ensure the rates for aggregated wholesale HSA services are properly reviewed to ensure they are just and reasonable.
100. Additionally, the 2006 Policy Direction¹³ requires that the Commission, in implementing the telecommunications policy objectives set out in section 7 of the Act (the policy objectives), rely on market forces to the maximum extent possible as the means to achieving the policy objectives. Further, when relying on regulation, the Commission should use measures that are efficient and proportionate to their purpose and interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.
101. The Commission considers that its determination to stay the implementation of the final rates established in Telecom Order 2019-288 is consistent with the 2006 Policy Direction, specifically subparagraphs 1(a)(ii) and 1(b)(iii), in that it ensures that the aggregated wholesale HSA service rates are properly reviewed to ensure they are just and reasonable, and prevents disruptions to the measures under which the market has operated since 2016, and does so efficiently and proportionately, and in a competitively neutral manner.

Secretary General

Related documents

- *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services*, Telecom Order CRTC

¹³ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, 14 December 2006

2019-288, 15 August 2019; as amended by Telecom Order CRTC 2019-288-1, 22 August 2019

- *Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access service*, Telecom Order CRTC 2016-448, 10 November 2016
- *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016