



Telecom Decision CRTC 2013-710

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Ottawa, 18 December 2013

Northwestel Inc. – Application to review and vary Telecom Decision 2012-644 regarding V-Connect service

File number: 8662-N1-201305821

In this decision, the Commission approves Northwestel's request to vary a portion of Telecom Decision 2012-644. The Commission also approves Northwestel's request to forbear from the regulation of satellite wide area network (WAN) services in Northwestel's operating territory.

Background

1. In Telecom Decision 2012-4, the Commission determined that Northwestel Inc.'s (Northwestel) V-Connect service¹ was not previously forborne, and directed Northwestel to file tariffs for that service. Then, in Telecom Decision 2012-644, the Commission denied a request from Northwestel to vary the finding that V-Connect service was not previously forborne. The Commission also determined that the relevant product market for V-Connect service was wide area network² (WAN) services. The Commission further determined that Northwestel possessed market power in its operating territory with respect to the provision of WAN services, including V-Connect service, and denied Northwestel's request for forbearance from the regulation of V-Connect service on a prospective basis.

The application

2. The Commission received an application from Northwestel, dated 5 April 2013, in which the company requested that the Commission review and vary the forbearance-related determinations it made in Telecom Decision 2012-644.
3. Northwestel submitted that the Commission had erred in Telecom Decision 2012-644 by not segmenting the WAN services market into two product markets: services provisioned over terrestrial facilities and services provisioned over satellite facilities. Northwestel further submitted that the market for satellite WAN services in its operating territory is sufficiently competitive and requested that the Commission forbear from the regulation of satellite WAN services, including its V-Connect service, in the company's operating territory.

¹ V-Connect service is a retail business service used to create wide area networks by providing site-to-site connections that can cover large geographic areas.

² Wide area networks are purchased mainly by medium- and large-sized businesses, governments, and associations and link the customer's local area networks at various locations.

4. The Commission received interventions regarding Northwestel's application from Ice Wireless Inc. and Iristel Inc. (collectively, Ice/Iristel) and TELUS Communications Company (TCC). The public record of this proceeding, which closed on 22 July 2013, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.
5. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would apply in considering whether to review and vary applications filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: i) an error in law or in fact, ii) a fundamental change in circumstances or facts since the decision, iii) a failure to consider a basic principle which had been raised in the original proceeding, or iv) a new principle which has arisen as a result of the decision.

Issues

6. The Commission has identified the following issues to be addressed in this decision:
 - I. Did the Commission err by not segmenting the product market for WAN services in Northwestel's operating territory into i) services provided using terrestrial facilities, and ii) services provided using satellite facilities?
 - II. If WAN services provisioned using satellite facilities in Northwestel's operating territory are a separate product market, should the Commission forbear from the regulation of Northwestel's satellite WAN services?
- I. Did the Commission err by not segmenting the product market for WAN services in Northwestel's operating territory into i) services provided using terrestrial facilities, and ii) services provided using satellite facilities?**
7. Northwestel submitted that the Commission made an error in fact in Telecom Decision 2012-644. Northwestel noted that paragraph 24 of Telecom Decision 2012-644 states the following:

...the Commission further considers that customers located in areas served by terrestrial facilities, or who may have locations in both terrestrially-served communities and remote communities served by satellite, are not likely to switch to a competitor that provisions its service exclusively over satellite facilities.

Northwestel submitted that this reasoning should have led to a determination that the relevant product market for WAN services in Northwestel's operating territory could be separated between WAN services provided using i) terrestrial facilities and ii) satellite facilities.

8. TCC opposed Northwestel's application, submitting that the Commission did not err in Telecom Decision 2012-644. TCC argued that V-Connect service must be treated as a single ubiquitous service, and not divided into two separate product markets. Further, TCC submitted that there is no practical or economical alternative to V-Connect service for customers with locations in both terrestrially served and satellite-served communities, since customers must use Northwestel for locations in terrestrially served communities. TCC further argued that using different suppliers for the terrestrial and satellite portions of WAN services would not be a practical alternative to a ubiquitous service.
9. In reply, Northwestel argued that TCC's assertion that there is no alternative to V-Connect service is unfounded. It submitted that it is common for national WAN service providers to have multiple network-to-network interfaces from various carriers in order to fill gaps in their retail WAN solutions, and that interconnecting with different carriers for the terrestrial and satellite portions of WAN services in Northwestel's operating territory is not different from what occurs in southern Canada. Northwestel also submitted that a satellite-based competitor could make arrangements with Northwestel for the terrestrial portion of the service when customers prefer a single interconnection.

Commission's analysis and determinations

10. In Telecom Decision 94-19, the Commission noted that the relevant product market is the smallest group of products in which a firm with market power can profitably impose a sustainable price increase. The definition of the relevant product market is based therefore on the substitutability of the services in question.
11. In Telecom Decision 2012-644, the Commission considered that the relevant product market for Northwestel's V-Connect service is that of WAN services. However, the Commission also noted that the rates for satellite V-Connect service are much higher than the rates for terrestrial V-Connect service for comparable speeds, and that the speed options available for terrestrial V-Connect service are far greater than those available for satellite V-Connect service. The Commission considered that customers located in areas served by terrestrial facilities, or who may have locations in both terrestrially served communities and communities served by satellite, are not likely to switch to a competitor providing service exclusively over satellite facilities.
12. The Commission considers that since customers are not likely to substitute satellite-provisioned WAN services for terrestrially provisioned WAN services, the product market for WAN services provisioned over satellite facilities in Northwestel's operating territory is a distinct product market from WAN services provisioned over terrestrial facilities.
13. In light of the above, the Commission determines that there is substantial doubt as to the correctness of its decision in regard to the relevant product market for Northwestel's WAN services, including V-Connect service. The Commission therefore varies Telecom Decision 2012-644 and determines that the relevant product

markets for Northwestel's V-Connect service are i) WAN services provisioned using terrestrial facilities and ii) WAN services provisioned using satellite facilities.

II. If WAN services provisioned using satellite facilities in Northwestel's operating territory are a separate product market, should the Commission forbear from the regulation of Northwestel's satellite WAN services?

14. Northwestel submitted the following:

- it does not have substantial market power in the satellite WAN services market in its operating territory;
- there is a competitor in the satellite WAN services market;
- competitors have the same opportunity to access satellite transport, since Telesat Canada (Telesat) is the backbone provider of satellite transport; and
- the satellite WAN services market in Northwestel's operating territory meets the Commission's forbearance criteria set out in Telecom Decision 94-19.

15. Ice/Iristel opposed forbearance from the regulation of Northwestel's satellite WAN services. Ice/Iristel submitted that Northwestel's operating territory lacks the cable provider-based competition and land-based competitive long-haul fibre transport that exists in southern Canada. As such, Ice/Iristel argued that it is premature to grant forbearance for these services offered by Northwestel.

16. In reply, Northwestel submitted that the extent of competition in its operating territory compared to that in southern Canada, and the lack of cable provider-based competitors, have no direct relevance to Northwestel's request for forbearance from the regulation of satellite WAN services.

Commission's analysis and determinations

17. The Commission may forbear under subsection 34(1) of the Act where it finds that such forbearance is consistent with the policy objectives set out in section 7 of the Act, and is required to forbear under subsection 34(2) of the Act where it finds that the market for the service or class of services in question is, or will be, subject to sufficient competition to protect the interests of users. Subsection 34(3) of the Act requires that the Commission shall not forbear if it finds that to do so would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services.

18. In Telecom Decision 94-19, the Commission established a framework to consider whether to forbear from regulation pursuant to section 34 of the Act. In that decision, the Commission noted that the first step in assessing whether it is appropriate to forbear involves defining the relevant market, which is essentially the smallest group of products and geographic area in which a firm with market power can profitably

impose a sustainable price increase. The Commission also established a number of criteria to be examined when determining whether a market is competitive. These criteria include the market shares of the dominant and competing firms, demand and supply conditions, the likelihood of entry into the market, barriers to entry into the market, and evidence of rivalrous behaviour.

19. In light of its determination set out in paragraph 13 above, the Commission considers that the relevant product market is satellite WAN services. The Commission further considers that the relevant geographic market for satellite WAN services is Northwestel's operating territory. The Commission notes that this definition of the geographic market is consistent with how the Commission defined the geographic market for the incumbent local exchange carriers' WAN services in Order 2000-553 and for Northwestel's WAN services in Telecom Decision 2012-644.
20. With respect to the market share criterion of the test, the Commission notes that high market share is a necessary but not sufficient condition for market power. The Commission considers that, based on the evidence filed in confidence in this proceeding, Northwestel's market share has decreased substantially over the last two years.
21. In terms of the demand conditions criterion, factors to be considered include the availability of practical substitutes for Northwestel's satellite WAN services, as well as the ability of customers to switch to another provider. The Commission notes that there is evidence in this proceeding of an alternate supplier successfully competing with Northwestel in the satellite WAN services market. In the Commission's view, the success of this competitor is evidenced by the decline in Northwestel's market share in the satellite WAN services market. The Commission considers that the presence of a competitor in the satellite WAN services market indicates that customers have the ability to switch to an alternative to Northwestel's satellite WAN services.
22. Regarding the supply conditions criterion, the Commission considers that the presence of a competitor in the satellite WAN services market indicates that there are supply alternatives to Northwestel's satellite WAN services. The Commission also considers that Northwestel's declining market share in the satellite WAN services market indicates that competitors have the ability to expand capacity.
23. With respect to barriers to entry, the Commission notes that Northwestel provisions its satellite WAN services using satellite capacity purchased from Telesat. The Commission considers that Northwestel does not control the facilities that competitors require to provide satellite WAN services, and competitors have the opportunity to purchase satellite transport from Telesat.
24. In regard to rivalrous behaviour, the Commission notes that there is evidence in this proceeding of a competitor expanding its scope of activities in the satellite WAN services market in Northwestel's operating territory. As such, the Commission considers that there is evidence of rivalrous and competitive behaviour in the satellite WAN services market in Northwestel's operating territory.

25. Based on its review of the evidence on the record of this proceeding, the Commission determines that Northwestel does not have significant market power in the satellite WAN services market in its operating territory.
26. In light of the above considerations, pursuant to subsection 34(1) of the Act, the Commission finds as a question of fact that to refrain from exercising its powers and performing its duties, to the extent set out in this decision, in relation to Northwestel's satellite WAN services would be consistent with the policy objectives set out in section 7 of the Act, specifically, those in paragraphs 7(c) and 7(f).³
27. Pursuant to subsection 34(2) of the Act, the Commission finds as a question of fact that Northwestel's satellite WAN services are subject to competition sufficient to protect the interests of users and therefore should be forborne to the extent set out in this decision.
28. Pursuant to subsection 34(3) of the Act, the Commission finds as a question of fact that to refrain from regulating Northwestel's satellite WAN services would be unlikely to unduly impair the continuance of a competitive market for these services.

Extent of forbearance

29. In light of the above findings, the Commission must determine the extent to which it is appropriate to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29, and 31 of the Act.

Section 24

30. The Commission finds it is appropriate to retain sufficient powers under section 24 of the Act to impose conditions, as discussed below and as needed in the future, relating to the provision of satellite WAN services.
31. The Commission directs Northwestel, as a condition of providing satellite WAN services, to ensure that the existing conditions regarding disclosure of confidential customer information to third parties continue to apply.
32. The Commission also directs Northwestel, as a condition of providing satellite WAN services, to incorporate, where appropriate, the existing conditions regarding disclosure of confidential customer information to third parties into all contracts and any other arrangements for services forborne from regulation in this decision.

Section 25

³ The cited policy objectives of the Act are 7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and 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.

33. Based on the record of this proceeding, the Commission considers it appropriate not to require Northwestel to file tariffs and obtain the Commission's approval for the services forborne from regulation in this decision. Accordingly, the Commission refrains from the exercise of all its powers and the performance of all its duties under section 25 of the Act with respect to Northwestel's satellite WAN services.

Section 27

34. The Commission considers that there is no need to apply the regulatory standards for "just and reasonable" rates to rates that are set in a competitive market. Accordingly, the Commission refrains from the exercise of its powers and the performance of its duties under subsections 27(1) and 27(5) of the Act. In addition, the Commission refrains from the exercise of its powers and the performance of its duties under subsection 27(6) of the Act, since it does not wish to limit the pricing of the services forborne from regulation.

35. However, the Commission considers it necessary to retain its powers under subsections 27(2) and 27(4) of the Act in order to ensure that Northwestel does not unjustly discriminate against other service providers or customers, or confer upon itself an undue or unreasonable preference with respect to the provision of satellite WAN services.

36. The Commission also considers it necessary to retain its powers under subsection 27(3) of the Act with respect to compliance with the powers and duties it has retained in this decision.

Section 29

37. The Commission considers it appropriate that Northwestel no longer be required to obtain the Commission's approval to enter into agreements with other telecommunications common carriers regarding satellite WAN services forborne from regulation in this decision. Accordingly, the Commission refrains from the exercise of all its powers and the performance of all its duties under section 29 of the Act with respect to satellite WAN services forborne from regulation in this decision.

Section 31

38. The Commission considers it appropriate that Northwestel have the ability to limit its liability in respect of satellite WAN services in the same way as a forborne service provider would, that is, without prior Commission approval. Accordingly, the Commission refrains from the exercise of all its powers and the performance of all its duties under section 31 of the Act with respect to satellite WAN services forborne from regulation in this decision.

39. In light of the above, the Commission declares, pursuant to subsection 34(4) of the Act, that sections 24, 25, 27, 29 and 31 of the Act do not apply to Northwestel's satellite WAN services, except with respect to

- the conditions set out in this decision pursuant to section 24 of the Act;
- any future condition that the Commission may impose, pursuant to section 24 of the Act;
- the Commission's powers under subsections 27(2) and 27(4) of the Act to guard against possible unjust discrimination, undue or unreasonable preference, or undue or unreasonable disadvantage; and
- the Commission's powers under subsection 27(3) of the Act with respect to compliance with powers and duties it has retained in this decision.

40. Forbearance takes effect on the date of this decision. The Commission directs Northwestel to issue⁴ revised tariff pages that reflect the determinations in this decision by **4 February 2014**.

Policy Direction

41. The Commission considers that the findings in this decision are consistent with the Policy Direction⁵ requirements that the Commission should (i) rely on market forces to the maximum extent feasible as the means of achieving the policy objectives; (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives; and (iii) when relying on regulation, use measures that neither deter economically efficient competitive entry nor promote economically inefficient entry.
42. Consistent with subparagraph 1(a)(i) of the Policy Direction, the Commission has, by granting forbearance for Northwestel's satellite WAN services, relied to the maximum extent feasible on market forces as the means of ensuring the achievement of the policy objectives set out in paragraphs 7(c) and 7(f) of the Act.
43. Consistent with subparagraph 1(a)(ii) of the Policy Direction, the Commission considers that the regulatory measures approved in this decision are efficient and proportionate to their purpose, and minimally interfere with market forces. Further, consistent with subparagraph 1(b)(ii) of the Policy Direction, the Commission considers that the findings in this decision will neither deter economically efficient competitive entry into the market nor promote economically inefficient entry.

Secretary General

⁴ Revised tariff pages can be submitted to the Commission without a description page or a request for approval; a tariff application is not required.

⁵ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

Related documents

- *Northwestel Inc. – Application to review and vary Telecom Decision 2012-4 regarding V-Connect service*, Telecom Decision CRTC 2012-644, 26 November 2012
- *SSi Micro Ltd. – Application regarding Northwestel Inc.'s backbone connectivity services*, Telecom Decision CRTC 2012-4, 5 January 2012
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Forbearance granted for telcos' wide area network services*, Order CRTC 2000-553, 16 June 2000
- *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994