



Telecom Decision CRTC 2017-299

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Northwestel Inc. – Request for forbearance from the regulation of operation and maintenance services provided to support the Government of Northwest Territories’ Mackenzie Valley Fibre Link network

*The Commission **denies** an application by Northwestel for forbearance from the regulation of the company’s service fees applied to the operation and maintenance of 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. In 2013, the Government of Northwest Territories (GNWT) launched an extensive bidding process for the design, construction, operation, and maintenance of the Mackenzie Valley Fibre Link (MVFL), a high-capacity fibre network that would stretch approximately 1,200 kilometres across the Northwest Territories, from McGill Lake to Inuvik. The MVFL’s key purpose would be to provide reliable, high-quality, high-speed telecommunications services, including Internet access and data transmissions, to sparsely populated remote communities in the Northwest Territories at rates comparable to those charged to businesses, public sector organizations, and residential users located in the South.
2. On 30 July 2014, the GNWT announced that Northern Lights General Partnership (NLGP), a partnership between Leducor Developments Ltd. and Northwestel Inc. (Northwestel), had won the competitive bid for designing, building, operating, and maintaining the MVFL. The rates in the contract between NLGP and the GNWT for the operation and maintenance of the MVFL are locked in for 20 years.

Application

3. On 10 August 2016, 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 service fees charged for operation and maintenance services provided by Northwestel, on behalf of NLGP, to the GNWT for the MVFL network.

4. Northwestel's request was based on its assertion that, absent forbearance, it will be required to provide details of the contract or pricing on the public record. Since the process of selecting the winning contract to operate and maintain the MVFL network was competitive, Northwestel claimed that forbearance would ensure that its ability to win future government contracts via competitive bidding and to form partnerships with other construction companies would not be undermined.
5. The Commission received an intervention from SSi Micro Ltd. (SSi), in which SSi opposed Northwestel's application and requested that Northwestel be directed to file a General Tariff for the operation and maintenance services. Northwestel and the GNWT replied to SSi's intervention. The GNWT supported Northwestel's application and requested that the Commission approve forbearance for the operation and maintenance services. The public record of this proceeding, which closed on 5 January 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 service fees applied to the operation and maintenance of the MVFL network?

Background

6. 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.
7. In determining whether there is competition sufficient to protect the interests of users, the Commission generally applies the criteria set out in *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (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.
8. 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.

9. The Commission identified three factors to be assessed when 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.
10. In support of its application, Northwestel provided its assessment of market competitiveness for the MVFL operation and maintenance services 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

11. Northwestel proposed to define the relevant product market as the operation and maintenance of the MVFL, and the relevant geographic market as the area where the MVFL is located, which is the Northwest Territories.
12. SSi noted that the purpose of the MVFL, as stated by the GNWT, is to serve government agencies and businesses, with a particular reference to the e-commerce and high-tech sectors, as well as the Inuvik Satellite Station Facility. In that context, SSi identified the relevant market as the offer of wholesale and retail services to the largest customers in the Northwest Territories, offered across a backbone that will hold a monopoly on terrestrial fibre in the areas it serves.

Commission's analysis and determinations

13. While the operation and maintenance services for the MVFL on behalf of NLGP/the GNWT could be considered as being part of a larger category of services for the operation of a customer-owned fibre facility, the MVFL network has distinct characteristics (e.g. high-bandwidth capacity, scale of traffic volumes, operating failure, outage restrictions) rendering it unique. Accordingly, the relevant product market is the operation and maintenance services for the MVFL network facilities.
14. Parties did not refute Northwestel's proposal that the geographic market be defined as the communities in the Northwest Territories where the MVFL is located (MVFL communities).¹ The Commission considers that this is an appropriate definition, given that the services in question will be provisioned and delivered in the area where the MVFL is located. Accordingly, the relevant geographic market is the MVFL communities.

¹ The MVFL currently serves the communities of Fort Simpson, Wrigley, Tulita, Norman Wells, Fort Good Hope, and Inuvik.

15. Therefore, the relevant market is the operation and maintenance services for the MVFL network facilities in the MVFL communities.

Market power

Positions of parties

16. With regard to market share, Northwestel submitted that in the case of the MVFL, the GNWT undertook an extensive contract award process, and the high participation rate in the bidding process (eight bidders participated and three of them qualified for the final phase) demonstrated the ability of other firms to enter the market due to its competitiveness. Moreover, Northwestel argued that the bidding process provided an opportunity for service providers to establish a presence in the region.
17. Northwestel summarized that the other bidders (which included SSi) or any other service provider not having presence in the North could simply enter the market, through a variety of means, at the end of the contract for the operation and maintenance of the MVFL.
18. SSi submitted that the existence of a number of interested and qualified bidders for the contract does not demonstrate that those bidders will necessarily be present in the market for telecommunications services when the facility is built. SSi added that, since Northwestel defined the relevant market as the operation and maintenance of the MVFL network, any entity winning the bidding contract would win 100% of the market share.
19. In reply, Northwestel argued that the relevant factor would not be the current market share of the product, but rather the GNWT's ability to receive competitive bids.
20. With respect to demand conditions, Northwestel submitted that the only customer in this case is the GNWT, which ran a proper request for proposals and narrowed the list down to three qualified bidders, demonstrating that there was availability of economically feasible and practical substitutes. At the conclusion of its 20-year contract with Northwestel, the GNWT should be able to switch to a different provider based on the outcome of another request for proposals.
21. SSi submitted that demand conditions in the communities served by the MVFL will be undermined by the availability of the MVFL services, since the services are an extension of Northwestel's monopoly transport services. SSi also requested that the Commission consider the bidding to be an event of the past, without reliable evidence concerning future competitive conditions enabling demand substitutability.
22. With respect to supply conditions, Northwestel submitted that the existence of a bidding process is clear evidence of available service supply from alternative sources. Further, Northwestel submitted that there is no concern about the ability of other firms to respond to supply conditions during the length of its contract with the GNWT. In addition, Northwestel considered that the market was free from bottleneck facilities or other barriers that would inhibit a competitor from successfully winning

the contract. Finally, Northwestel submitted that the evaluation process, whereby eight bidders participated and three made it to the final phase, demonstrates rivalrous market behaviour, and the same is expected at the time of contract renewal.

23. SSi conceded that the number of bidders interested in working with the GNWT to build the MVFL does provide evidence that firms other than Northwestel had considered entering the market. SSi submitted, however, that the barriers to market entry have not diminished as a result of NLGP's success in the process but have actually increased.

Commission's analysis and determinations

24. A thorough assessment of relevant market competitiveness, in this situation, cannot rely solely on the bidding process for the operation and maintenance of the MVFL network, but should also include an assessment of the current market situation. The latter should consider whether other suppliers are able to enter the relevant market, and how they could affect market conditions by means of demand, operations, and supply.
25. Regarding the bidding process, while the number of qualified bidders for the operation and maintenance services shows that there was some competition for the awarding of the contract, it is not clear to what extent future bidders would be in a comparable position to act as a substitute to Northwestel, considering the size and scope of the operation and maintenance services.
26. With respect to the current competitive market situation, given that Northwestel will have 100% market share during the 20-year contract period, other suppliers will be eligible to bid on operation and maintenance services only at the end of the contract, or if the GNWT terminates the contract prior to its end date. As such, it is not possible to assess the current demand and supply conditions, since there are no economically feasible and practical substitutes available to the customer (the GNWT) during the contract period.
27. With regard to Northwestel's concern that public disclosure of its rates for the operation and maintenance of the MVFL could limit its ability to form partnerships with construction companies and win future government contracts, and its position that forbearance would prevent harm by ensuring that the rates remain confidential, the confidentiality of pricing information is not a relevant factor in determining whether forbearance is appropriate.
28. In light of the above, 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 operation and maintenance services for the MVFL network facilities 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, would not be in the public interest. As a result, the Commission **denies** Northwestel's

request for forbearance from the regulation of its service fees applied to the operation and maintenance of the MVFL network.

Additional issue raised by SSI

29. With regard to SSI's request that Northwestel be directed to file a General Tariff for the operation and maintenance services to support the MVFL, the terms and conditions for these services are entirely specific to the MVFL network. In Telecom Decision 94-19, the Commission stated that a service designed for a particular customer's needs involving elements of a General Tariff, where the purpose is to customize the offering, will be subject to a Special Facilities Tariff. Given the uniqueness of the MVFL network and the specific operation and maintenance needs of such a large and sophisticated customer as the GNWT, it is appropriate for Northwestel to file a Special Facilities Tariff rather than a General Tariff for the operation and maintenance services.

Policy Direction

30. 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.² 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 Act³ are advanced by the regulatory measures established in this decision.

31. 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.

Secretary General

² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

³ 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.