



Telecom Decision CRTC 2006-33

Ottawa, 25 May 2006

Part VII application by Superior Wireless Inc. against TBayTel alleging unjust discrimination

Reference: 8622-S72-200515752

*In this Decision, the Commission addresses a Part VII application filed by Superior Wireless Inc. (Superior) alleging that its customers had been subject to unjust discrimination by TBayTel. The Commission finds that while TBayTel did discriminate against Superior's customers, the discrimination was not unjust. Accordingly, the Commission **denies** the relief sought by Superior.*

The application

1. On 22 December 2005, Superior Wireless Inc. (Superior) filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* alleging that its customers had been subject to unjust discrimination by a cellular competitor, TBayTel, contrary to subsection 27(2) of the *Telecommunications Act* (the Act).
2. Superior alleged that TBayTel had deactivated digital roaming on TBayTel's wireless (cellular) network for customers of Superior on 12 December 2005 without prior notification. Superior alleged that this action by TBayTel had prevented its customers from making or receiving calls. Superior claimed that TBayTel continued to allow digital voice roaming to other wireless carriers' customers. Superior alleged that TBayTel had knowingly and deliberately taken this action to disrupt Superior's service, discredit Superior, and gain an unfair competitive advantage.
3. Superior requested that the Commission intervene on its behalf and require TBayTel to reinstate digital voice roaming immediately for a period of 30 to 60 days to allow Superior to advise its customers and investigate a technical solution that would allow its customers to make and receive calls in Thunder Bay.

Process

4. Pursuant to a Commission staff letter dated 29 December 2005, TBayTel filed its answer on 10 January 2006, and Superior filed its reply on 13 January 2006. TBayTel filed an additional pleading on 18 January 2006, and both parties filed responses to Commission interrogatories on 2 February 2006. By letter dated 5 February 2006, TBayTel requested that both parties be given an opportunity to provide final comments and reply comments. The Commission denied TBayTel's request in a letter dated 17 February 2006. On 23 February 2006, Superior filed a revised response to one of the Commission's interrogatories.

Background

5. Superior is a mobile wireless service provider that has operated in Northwestern Ontario since 1999. Superior offers, under licence from Industry Canada, a mix of analogue and digital mobile services within a serving area outside of Thunder Bay identified as Tel-41. Superior offers digital personal communications service (PCS) in the Thunder Bay serving area identified as Tel-24.
6. TBayTel is a municipally owned independent telephone company offering local, long distance, Internet, and wireless services within its territory, which is centred on Thunder Bay. TBayTel offers a mix of analogue and digital mobile services in area Tel-24, analogue mobile and digital PCS in an area west of Thunder Bay known as Tel-48, and digital PCS in area Tel-41.
7. Both wireless companies have entered into roaming agreements with other wireless service providers throughout Canada and parts of the United States. Superior and TBayTel entered into a roaming agreement between themselves in 2001 (the 2001 roaming agreement).

Regulatory framework

8. In *Forbearance from Regulation of Mobile Wireless Services Provided by Municipally Owned Telephone Companies*, Telecom Decision CRTC 98-19, 9 October 1998, the Commission granted forbearance from regulation of TBayTel's mobile wireless services. In that decision, the Commission retained section 24 and subsections 27(2), 27(3), and 27(4) of the Act and required that TBayTel offer mobile services through a separate division of the company.
9. Subsections 27(2), (3), and (4) of the Act read as follows:
 - (2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.
 - (3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.
 - (4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

Positions of parties

Superior

10. In its application, Superior alleged that on 12 December 2005, TBayTel, without prior notification or consultation, had deactivated Superior's customers' ability to roam on TBayTel's digital voice network in area Tel-24. Superior submitted that TBayTel had prevented Superior's customers from making or receiving calls and had given no time for Superior to minimize the impact on its customers or work out a technical solution to allow its customers to continue to have service in area Tel-24.
11. Superior submitted that TBayTel had continued to provide digital voice roaming to other cellular carriers' customers in area Tel-24, namely the customers of Bell Mobility, Saskatchewan Telecommunications and MTS Allstream Inc. Superior also submitted that TBayTel had knowingly and deliberately disrupted services to Superior's customers in an attempt to discredit Superior and to gain an unfair competitive advantage. Superior alleged that it had been subject to unjust discrimination by TBayTel's actions.
12. Superior submitted that since 12 December 2005 it had received approximately 2,200 complaints from within area Tel-24 and approximately 280 complaints from outside area Tel-24 concerning the issue of restricted roaming. In addition, Superior indicated that from 23 December 2005 to 2 February 2006, 9 customers had left Superior's service, intending to move to TBayTel's service; 2 customers had suspended service; and 83 customers had received credit adjustments because of inconvenience.
13. Superior submitted that it had advised TBayTel in July 2004 that if TBayTel continued to expand into Superior's Tel-41 territory, Superior would expand its network into TBayTel's Tel-24 territory. Superior also submitted that in March 2005 it had been granted a licence in area Tel-24 that allowed it to offer digital PCS. Superior further submitted that in July 2005 it had requested TBayTel to load new numbering and routing information with respect to its digital service in area Tel-24 into TBayTel's roaming tables to accommodate intercarrier roaming. Superior indicated that it had begun offering service in area Tel-24 in September 2005.
14. Superior submitted that TBayTel continued to permit Superior's customers to roam on TBayTel's digital network outside of area Tel-24, in areas where TBayTel was offering infrastructure-based competition to Superior. Superior alleged that in those areas – Sioux Lookout, Ignace, Upsala, Terrace Bay, and Marathon – when TBayTel launched its digital PCS service, it had not required Superior to execute a revised roaming agreement or a new digital roaming agreement. Superior asserted that the companies' networks had overlapped since late 2004, when TBayTel had started offering digital PCS service outside of area Tel-24.

TBayTel

15. TBayTel submitted that both companies had enjoyed an agreeable commercial relationship since Superior had begun offering cellular telephone service. TBayTel stated that the 2001 roaming agreement contemplated roaming service within each company's territory by the other company's customers on their respective networks. TBayTel argued that roaming permitted a cellular customer to obtain service in another region, outside of the region in which the

customer's service provider operated. TBayTel submitted that roaming was not meant to be a full-scale substitute for a service provider's network, nor was it meant to be a form of resale of a home cellular provider's service.

16. TBayTel suggested that if Superior wanted to ensure that its customers had roaming access to TBayTel's digital service in area Tel-24, it should have taken steps to negotiate an arrangement with TBayTel before it commenced service. TBayTel alleged that it was clear that Superior's strategy was to operate as if it had a complete digital network in area Tel-24 without investing the capital to create one. TBayTel submitted that while Superior was licensed to offer service throughout area Tel-24, unlike TBayTel, Superior had chosen to install only a partial network there.
17. TBayTel submitted that the 2001 roaming agreement between it and Superior contemplated roaming on an analogue network and no direct competition between TBayTel and Superior. TBayTel also submitted that when the 2001 roaming agreement was signed, there was no overlap between the networks of TBayTel and Superior. With respect to locations outside of area Tel-24 where the networks did overlap and Superior's customers were allowed to roam on TBayTel's digital network, TBayTel submitted that Superior's network footprint completely encompassed TBayTel's digital network. TBayTel submitted that because the two networks totally overlapped, a Superior customer would only ever receive a Superior signal and a TBayTel customer would only receive a TBayTel signal, so the requirement to roam was not needed. TBayTel submitted that because roaming was not needed, TBayTel had not configured its network to restrict roaming by Superior's customers.
18. TBayTel alleged that the situation had changed when Superior built its network in area Tel-24 and allowed its customers to roam in area Tel-24 with no discussion with TBayTel. TBayTel alleged that Superior's decision to operate in area Tel-24 constituted a material change in the commercial arrangements contemplated in the 2001 roaming agreement. TBayTel argued that since no party had ever discussed the possibility or consented to allow roaming where networks overlapped, Superior's customers' roaming in area Tel-24 was not authorized under the 2001 roaming agreement. TBayTel submitted that when it realized that Superior had been making unauthorized use of TBayTel's digital network, it gave Superior two hours' notice and suspended digital roaming in area Tel-24 on 12 December 2005.
19. TBayTel argued that it had not terminated the roaming arrangements with Superior's customers on 12 December 2005. TBayTel submitted that its actions were reasonable and took into account the public interest by allowing Superior's customers to roam on TBayTel's analogue network in area Tel-24 since that date, as well as on TBayTel's analogue and digital network outside area Tel-24. TBayTel submitted that it had taken these measures to minimize the impact on Superior's customers and that any disruption to Superior's customers had been caused by Superior's delay in making its network modifications to ensure that analogue roaming was available in area Tel-24.
20. TBayTel argued that Superior had failed to demonstrate that it was the subject of discrimination because it had failed to identify any comparable businesses or customers that were being treated more favourably or differently by TBayTel. TBayTel submitted that it had no roaming arrangements with any other cellular provider that, like Superior, provided services

in its territory. TBayTel noted that Rogers Wireless Inc. (Rogers Wireless) provided service in Thunder Bay but that it had no roaming agreement with the company. TBayTel submitted that its policy was not to enter into digital roaming arrangements where its network overlapped with the network of a competing carrier. TBayTel also submitted that its policy was in line with the spirit and intent of roaming agreements.

21. TBayTel submitted that Superior's issues were competitive in nature and had arisen as a result of the robust competitive character of the Canadian wireless industry. TBayTel submitted that because the Commission had forborne from regulation in this area, retaining only limited powers, it should allow competitors, and the market, to deal with the issues as much as possible and only step in if there were a serious abuse of power or material disruption to the system. TBayTel submitted that there had been no disruption to the system and its actions had not been an abuse of market power, but rather an exercise of its rights as a competitor in the Canadian wireless market.

Commission's analysis and determination

22. In the following analysis, the Commission addresses whether TBayTel's actions amounted to discrimination within the meaning of section 27 of the Act and, if so, whether such discrimination was unjust.
23. The Commission disagrees with TBayTel's submission that Superior and its customers are not the subject of discrimination in the circumstances of this case because there are no comparable businesses or customers that are being treated more favourably or differently by TBayTel. The Commission considers that TBayTel's definition of discrimination is unduly narrow.
24. The Commission considers that because other wireless service providers' customers are permitted to roam on TBayTel's digital network in area Tel-24, while Superior's customers are not, Superior and its customers are subject to discrimination by TBayTel within the meaning of section 27 of the Act. At the same time, the Commission notes that discrimination in and of itself is not contrary to the Act.
25. The Commission notes that, unlike Superior's network, the networks of the wireless service providers whose customers are permitted to roam on TBayTel's digital network in area Tel-24 do not overlap with TBayTel's network in that territory. Accordingly, the Commission considers that the circumstances applicable to those service providers' customers are very different from the circumstances pertaining to Superior's customers. In this regard, the Commission notes that the only wireless service provider whose network, like Superior's, does overlap with that of TBayTel in area Tel-24 is Rogers Wireless, which does not have a roaming agreement with TBayTel.
26. The Commission agrees with TBayTel's submission that the purpose of roaming is to enable a wireless customer to obtain service outside the area where the customer's service provider is licensed to operate. The Commission notes that this view is consistent with the Mobility Canada Agreement referred to by TBayTel in its 2 February 2006 response to Commission interrogatories.

27. The Commission notes that the definition of "Serving Carrier" in the 2001 roaming agreement also contemplates that roaming between the two companies would be restricted to areas where their respective networks do not overlap. The definition reads as follows:

"Serving Carrier" means a Party who provides cellular services for registered customers of another Party while such customers are out of their Home Carrier's geographic area and in the geographic area where the Serving Carrier holds a license or permit for a domestic public cellular radio telecommunication system and station.

28. Based on the record of this proceeding, the Commission considers that Superior is using TBayTel's facilities in area Tel-24, and hence roaming arrangements, to provide service to its customers where it does not have network coverage in area Tel-24. The Commission considers that this use of roaming is inconsistent with the purpose of roaming arrangements in general and with the 2001 roaming agreement in particular.
29. In assessing whether the actions of TBayTel amount to unjust discrimination, the Commission also considers that the degree of competition in the wireless market is a significant consideration. In *Application by Microcell regarding alleged contraventions of section 27(2) of the Telecommunications Act by Rogers Wireless and Bell Mobility*, Telecom Decision CRTC 2003-26, 28 April 2003, the Commission considered that the wireless market was characterized by rivalrous behaviour and was robustly competitive. The Commission considers that this assessment continues to be valid with respect to the current state of competition in the wireless market. In this regard, the Commission notes that in its *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets, October 2005*, the Commission reported that the wireless market continued to display strong growth and to be competitive.
30. The Commission considers that the robustly competitive nature of the wireless market suggests that the Commission should exercise restraint with respect to the application of its powers under subsection 27(2) of the Act.
31. The Commission considers that an important issue in this proceeding is the impact of TBayTel's actions on Superior's customers. Based on the record of this proceeding, the Commission finds that while Superior customers have been affected, they do have options available to them to mitigate such impact, including the possibility of roaming on TBayTel's analogue network in area Tel-24.
32. In light of the above, the Commission finds that TBayTel has not unjustly discriminated against Superior and its customers.
33. Accordingly, the Commission **denies** Superior's application.

Secretary General

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