



Telecom Decision CRTC 2012-644

PDF version

Ottawa, 26 November 2012

Northwestel Inc. – Application to review and vary Telecom Decision 2012-4 regarding V-Connect service

File number: 8662-N1-201201574

In this decision, the Commission denies Northwestel's request to vary the finding in Telecom Decision 2012-4 that V-Connect service was not previously forborne. The Commission also denies Northwestel's request to forbear prospectively from the regulation of its V-Connect service. Finally, the Commission ratifies the rates that Northwestel has charged for V-Connect service prior to this decision.

Introduction

1. In Telecom Decision 2012-4, the Commission concluded that Northwestel Inc.'s (Northwestel) V-Connect¹ service was not forborne, and directed Northwestel to file tariffs and associated cost studies for that service within 30 days of the date of that decision.
2. Northwestel did not file tariffs as directed, and instead filed a Part 1 application, dated 6 February 2012, requesting that the Commission
 - review and vary its finding in Telecom Decision 2012-4 that V-Connect service was not previously forborne;
 - in the alternative, forbear from the regulation of V-Connect service on a prospective basis;
 - ratify the rates previously charged for V-Connect service to date under subsection 25(4) of the *Telecommunications Act* (the Act); and
 - issue a stay of paragraph 20 of Telecom Decision 2012-4, wherein the Commission directed Northwestel to file tariffs and cost studies for V-Connect service.
3. The Commission received comments from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies), the Government of the Northwest Territories, Saskatchewan Telecommunications (SaskTel),

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

SSi Micro Ltd. (SSi Micro), TELUS Communications Company (TCC), the Utilities Consumers' Group, the Yukon Government, and several businesses and individuals. The public record of this proceeding, which closed on 27 July 2012, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

4. 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 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.
5. The Commission considers that it must address the following issues in its determinations:
 - I. Should the Commission vary its finding in Telecom Decision 2012-4 that Northwestel's V-Connect service is not a forborne service?
 - II. If V-Connect service was not previously forborne, should the Commission forbear from the regulation of Northwestel's V-Connect service on a prospective basis?
 - III. Should the Commission ratify the rates charged previously by Northwestel for its V-Connect service?
- I. Should the Commission vary its finding in Telecom Decision 2012-4 that Northwestel's V-Connect service is not a forborne service?**
6. Northwestel submitted that there is substantial doubt as to the correctness of certain portions of the Commission's determinations in Telecom Decision 2012-4. Specifically, Northwestel argued that the Commission had erred in finding that V-Connect service was not previously forborne in Telecom Order 97-572. In the company's view, Telecom Order 97-572 applied to current and future packet data services as they may evolve over time. As such, Northwestel argued that V-Connect service, as a packet data service, was therefore within the scope of forbearance established in that order.
7. Northwestel further argued that the Commission was incorrect in basing its finding on the fact that V-Connect service supports class of service capability, a feature lacking in the other data services² that were forborne in Telecom Order 97-572. In its view, class of service is one example of many new functionalities and capabilities

² The services that were forborne in Telecom Order 97-572 were Datapac, future X.25, packet data, and frame relay services.

that have been added to data services over time, and the language of Telecom Order 97-572 made it clear that the Commission did not intend on embarking on forbearance proceedings for every new data service with additional functionalities or capabilities.

8. The Bell companies, SaskTel, and TCC agreed that class of service capability is not sufficient to differentiate V-Connect service from the other data services that were forborne in Telecom Order 97-572. These parties expressed concern that the Commission's findings in this regard may cast doubt as to the forbearance status of other carriers' data services that support class of service capability.
9. SSi Micro submitted that the Commission did not commit any errors in Telecom Decision 2012-4. In its view, Northwestel did not adhere to the conditions set out in Telecom Order 97-572, and has neither identified any new facts or principles nor has it demonstrated that there have been any fundamental changes in circumstances since Telecom Decision 2012-4 was issued.

Commission's analysis and determinations

10. Having considered the arguments made by the parties in this proceeding, the Commission is not persuaded that it erred in Telecom Decision 2012-4 in finding that V-Connect service is not a forborne service. The Commission remains of the view that V-Connect service is a different service than the other data services that were the subject of Telecom Order 97-572, due to the fact that it supports a class of service functionality.
11. Additionally, the Commission considers that V-Connect service is not simply a packet data service, but in fact has the characteristics of a wide area network (WAN) service. For example, Northwestel indicated in its evidence that V-Connect service is used to create WANs by providing site-to-site connections that can cover large geographic areas. The Commission notes that Northwestel's description of V-Connect service is consistent with how the Commission has defined WAN services in past decisions. As a result, the Commission is of the view that V-Connect service differs from the other data services not only in terms of its class of service capability, but also because it belongs to a different product market – namely, the WAN services product market.
12. The Commission notes that it forbore from the regulation of the WAN services of several of the incumbent local exchange carriers (ILECs)³ in Order 2000-553. However, Northwestel was not subject to that order, and has not been granted forbearance for WAN services in any order/decision since.

³ At that time, the ILECs were known as the Stentor companies. The Stentor companies subject to Order 2000-553 were Bell Canada, BC TEL, Island Telecom Inc., Maritime Tel and Tel Limited, MTS Communications Inc., NBTel Inc., NewTel Communications Inc., and TELUS Communications Inc.

13. In light of the above, the Commission concludes that it did not err in Telecom Decision 2012-4 and therefore **denies** Northwestel's request to vary that decision.

II. If V-Connect service was not previously forborne, should the Commission forbear from the regulation of Northwestel's V-Connect service on a prospective basis?

14. Northwestel submitted that, if the Commission does not vary its determination that V-Connect service was not previously forborne, it should then forbear from the regulation of V-Connect service on a prospective basis, as there is competition sufficient to protect the interests of users.
15. Northwestel argued that it faces competition from alternative suppliers using various technologies, including satellite providers, and cited its loss of a major government contract in Nunavut to a competitor as an example of the market's competitiveness. Northwestel also argued that end-users are able to arrange for similar network functionality, in certain cases using other facilities leased from Northwestel.⁴
16. In addition to these substitutes, Northwestel submitted that its proposed Wholesale Connect service,⁵ which supports a class of service capability and connectivity to approximately 30 communities across its serving territory, would allow competitors to provide their own end-users with telecommunications services, such as voice and video conferencing, to compete on a retail basis.
17. TCC supported forbearance for V-Connect service, provided that the forbearance conditions outlined in Telecom Order 97-572 are observed by Northwestel, including the requirement to maintain mirror image rates.⁶ TCC did not support forbearing from the regulation of V-Connect service based on the availability of Wholesale Connect service because, in its view, the two services are not substitutes for each other.
18. SSi Micro indicated that, on a technical level, Wholesale Connect service could meet its requirements as a substitute for V-Connect service in terms of terrestrial backbone connectivity, but that final rates are of crucial importance and will not be known until the Commission renders its decision on Northwestel's proposed tariff.

Commission's analysis and determinations

19. In order to determine whether it should forbear from the regulation of V-Connect service, the Commission will apply the forbearance framework established in Telecom Decision 94-19. Under that framework, the Commission defines the

⁴ For example, Northwestel indicated that end-users are able to arrange for their own V-Connect-like network functionality simply as a software application over an existing broadband service, or by configuring their own service over digital facilities leased from Northwestel.

⁵ See Northwestel Tariff Notice 883, which was given interim approval by the Commission in Telecom Order 2012-203.

⁶ The concept of "mirror image rates" refers to the Commission's expectation in Telecom Order 97-572 that Northwestel's rates for these services would be the "mirror image" of the rates charged by the large ILECs.

relevant product and geographic markets for the service in question, and then assesses whether a firm possesses market power in the provision of that service using factors including market share, supply and demand conditions, evidence of rivalrous behaviour, and the likelihood of entry into the market, including barriers to entry.

20. As indicated in paragraph 11 above, based on the characteristics of V-Connect service, including descriptions of this service provided by Northwestel in this proceeding, the Commission considers that the relevant product market for V-Connect service is that of WAN services. The Commission further considers that the relevant geographic market is Northwestel's operating territory, and notes that this definition is consistent with how the Commission defined the geographic market for the ILECs' WAN services in Order 2000-553.
21. The Commission notes that Northwestel has a high share of the market for WAN services across its operating territory, particularly in communities served by terrestrial facilities.
22. In terms of supply and demand conditions, the Commission considers that these factors relate to the availability of practical substitutes for V-Connect service, as well as the ability of customers to switch to another service provider.
23. With respect to substitutes, the Commission notes that V-Connect service can be provisioned using terrestrial facilities,⁷ satellite facilities, or a combination of both. The Commission notes that Northwestel has an extensive network of terrestrial facilities with access to dozens of communities across its operating territory, and there is no evidence that any other service providers possess a comparable terrestrial network. The Commission notes that there is evidence of a competitor providing a V-Connect-like service using satellite facilities. However, having examined the evidence filed by Northwestel, the Commission notes that the rates for satellite V-Connect service are much higher than the rates for terrestrial V-Connect service, for comparable speeds. Furthermore, the Commission notes that the speed options available for terrestrial V-Connect service are far greater than those available for satellite V-Connect service.
24. As a result of the lack of substitutes, the Commission is of the view that supply alternatives for V-Connect service are limited for the majority of customers. 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.
25. With respect to rivalrous behaviour, the Commission notes that there is only one example on the record of this proceeding of a competitor offering a competing service to V-Connect service on a regional basis, and, in that particular situation, the competitor is providing service exclusively to remote communities in Nunavut over

⁷ Fibre or microwave facilities of varying capacity.

satellite facilities. There is no evidence of rivalry or competitive activity for regional customers in any communities in the Northwest Territories or Yukon, nor is there evidence of a competitor using its own terrestrial network facilities to provide service.

26. Finally, the Commission considers that the likelihood of entry by competitors in the market for WAN services in Northwestel's operating territory, particularly in terrestrial communities, is extremely low due to significant barriers to entry such as high capital costs, low population density, vast geographic area, and difficult terrain. Given these factors, the Commission considers that construction of a new terrestrial network with the scale necessary to compete in the WAN services market is not economically feasible at this time.
27. With regard to Northwestel's submission that the availability of Wholesale Connect service will enable competitors to enter the retail market in its operating territory, the Commission is not persuaded at this time that Wholesale Connect service will enable competition sufficient to forbear from the regulation of V-Connect service. The Commission considers that it cannot evaluate the impact that Wholesale Connect service might have on the competitiveness of the market until rates are finalized and there is evidence of competitors using the service to provide their own retail offerings to compete against Northwestel.
28. Based on the above factors, the Commission concludes that Northwestel has market power in its operating territory with respect to the provision of WAN services, including its V-Connect service. The Commission therefore **denies** Northwestel's request for forbearance from the regulation of V-Connect service. Northwestel is to file tariffs for V-Connect service, with associated cost studies, within **30 days of the date of this decision**.
29. Given the Commission's determinations set out above, Northwestel's request for a stay is moot.

III. Should the Commission ratify the rates charged previously by Northwestel for its V-Connect service?

30. The Commission notes that, pursuant to subsection 25(4) of the Act, it may ratify the charging of a rate by a Canadian carrier otherwise than in accordance with a tariff approved by the Commission if it is satisfied that the rate was charged because of an error or other circumstance that warrants the ratification.
31. In this case, the Commission is satisfied that Northwestel charged the rates in question without an approved tariff due to an error, namely its belief that V-Connect service had previously been forborne from regulation by the Commission. The Commission also considers that it would be in the interest of past and existing customers for V-Connect service, as well as for Northwestel, to provide certainty with respect to the question of ratification of rates.

32. Therefore, in light of the circumstances, the Commission considers it appropriate to ratify the rates charged for V-Connect service prior to the date of this decision.

Secretary General

Related documents

- *Northwestel Inc. – Introduction of wholesale connect service*, Telecom Order CRTC 2012-203, 3 April 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
- Telecom Order CRTC 97-572, 29 April 1997
- *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994