



Telecom Decision CRTC 2016-247

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Managed Network Systems, Inc. – Application to review and vary certain determinations set out in Telecom Regulatory Policy 2015-326 concerning the phase-out of mandated access to unbundled local loops

*The Commission **denies** a request from Managed Network Systems, Inc. that the Commission review and vary its finding in Telecom Regulatory Policy 2015-326 to withdraw mandated access to unbundled local loops following a three-year phase-out period.*

Background

Unbundled local loops

1. Unbundled local loops (ULLs) provide a transmission path¹ by means of copper facilities between an end-user's premises and an incumbent local exchange carrier's (ILEC) central office that can be used by competitors to provide local telephony and Internet access services to residential and business customers.
2. In Telecom Decision 97-8, the Commission required the ILECs to unbundle their local access facilities to make ULLs available on a wholesale basis to competitive local exchange carriers to support competition.
3. In Telecom Decision 2008-17, the Commission maintained the existing obligation imposed on the ILECs to provision ULLs. ULLs were classified as a conditional essential service on the basis that competitors did not have any viable wholesale alternatives to the ILEC ULLs and that it would not be practical or feasible for competitors to duplicate the functionality of ULLs.

Telecom Notice of Consultation 2013-551 proceeding

4. In Telecom Notice of Consultation 2013-551, the Commission initiated a proceeding to review issues related to wholesale services and their associated policies. In that proceeding, the Commission examined, among other things, the appropriateness of

¹ In general, there are two types of local loops available (Type A and Type B). A Type A local loop is an analogue transmission path that supports the transmission of a voice-grade signal. A Type B local loop is a digital transmission path that supports the transmission of an Integrated Services Digital Network Basic Rate Interface (ISDN BRI) type signal.

the previously established wholesale service categories, and what services, if any, should be mandated or continue to be mandated.

5. The Commission issued its determinations on wholesale wireline services, including ULLs, in Telecom Regulatory Policy 2015-326. These determinations as to whether certain services should be mandated or not were based on the application of the essential services test (hereafter referred to as the Essentiality Test)² supplemented by a set of policy considerations.³
6. In assessing wholesale wireline services against the three components⁴ of the Essentiality Test,⁵ the Commission indicated that for a wholesale service to meet the Essentiality Test, all three components must be satisfied. The Commission concluded that ULLs
 - met the input component of the Essentiality Test in rate bands⁶ A, B, C, and D within the provinces of Alberta, British Columbia, Ontario, and Quebec, given that ULLs in these areas continue to be an input for competitors to provide voice telecommunications services in the downstream local wireline residential and business markets;
 - met the duplicability component of the Essentiality Test, given that it was not practical or feasible for competitors to duplicate the functionalities of ULLs; and
 - did not meet the competition component⁷ of the Essentiality Test, given that the withdrawal of mandated access to ULLs would not have a significant

² As set out in paragraph 36 of Telecom Decision 2008-17, the Commission determined that to be essential, a facility, function, or service must satisfy all of the following conditions: (a) it is required as an input by competitors to provide telecommunications services in a relevant downstream market (the input component of the Essentiality Test); (b) it is controlled by a firm that possesses upstream market power such that withdrawing mandated access, or denying access to the facility, would likely result in a substantial lessening or prevention of competition in the downstream retail market (the competition component of the Essentiality Test); and (c) it is not practical or feasible to duplicate the functionality of the facility (the duplicability component of the Essentiality Test). Also see paragraphs 33 to 46 of Telecom Regulatory Policy 2015-326.

³ In paragraph 51 of Telecom Regulatory Policy 2015-326, the Commission stated that it would apply the following policy considerations to inform, support, or reverse a decision to mandate the provision of a wholesale service: (i) public good; (ii) interconnection; and (iii) innovation and investment.

⁴ See footnote 2.

⁵ See paragraphs 172 to 202 of Telecom Regulatory Policy 2015-326.

⁶ A rate band represents a group of exchanges or wire centres with similar characteristics, such as number of lines and loop length. While the criteria applied to classify exchanges into bands are uniform across the country, band costs may vary by ILEC or by region within the ILECs' serving territories.

⁷ Two elements are assessed in the competition component of the Essentiality Test: (i) the upstream market conditions, specifically, whether a firm or a group of firms has market power, and (ii) the impact that any upstream market power might have on competition levels in the associated downstream retail market(s).

impact now and in the future on competition for residential and business local voice services, regardless of the exchange or the ILEC⁸ serving territory.

7. Given that ULLs did not meet all three components of the Essentiality Test across the country, and there was no valid policy reason supporting a need to continue mandating the provision of these facilities,⁹ the Commission found that ULLs were not essential and would no longer be mandated. In exchanges where there were no ULLs in service, the Commission determined that ULLs should be forborne, effective 22 July 2015.
8. However, in exchanges where there was demand for ULLs, the Commission found that a three-year phase-out period (i.e. until 22 July 2018) for ULLs was appropriate to enable competitors to review their provisioning requirements and take appropriate measures. During the phase-out period, ULLs were to continue to be made available in these exchanges. ILECs were provided with two options to implement the phasing-out of ULLs:
 - If an ILEC's intent is to continue to make ULLs available after the expiry of the phase-out period, the ILEC can choose to file a forbearance application regarding the provision of its ULLs, no earlier than one year prior to the end of the phase-out period.
 - If an ILEC's intent is to cease making ULLs available, that ILEC will be required to provide written notice to existing customers and the Commission one year prior to the end of the phase-out period.

Application

9. The Commission received an application from Managed Network Systems, Inc. (MNSi), dated 20 October 2015, in which the company requested that the Commission review and vary its finding in Telecom Regulatory Policy 2015-326 to phase out mandated access to ULLs over three years. MNSi submitted that the Commission made errors in fact and errors in consideration of basic principles raised in the original proceeding regarding the prevalence of ULLs and the application of the competition component of the Essentiality Test. MNSi also submitted that, as a result of these errors, there is substantial doubt as to the sufficiency of the designated phase-out period for ULLs to attenuate the impacts on consumers and competitors.
10. MNSi requested that the Commission vary its determinations with respect to ULLs such that further conditions be applied to ILECs after the three-year phase-out period for ULLs, namely that

⁸ Telecom Regulatory Policy 2015-326 applies to the following ILECs: Bell Canada, MTS Inc., Saskatchewan Telecommunications, and TELUS Communications Company.

⁹ The Commission noted, among other things, that a decision to no longer mandate the provision of ULLs could lead to a greater adoption of advanced or emerging services by consumers. For example, competitors that migrate their end-users from retail Internet access services provisioned over ULLs to services provisioned over wholesale high-speed access services would enable their end-users to access new content and applications that were previously inaccessible.

- ILECs should not be permitted to cease making ULLs available in any exchange until such time as less than 1% of the retail residential and business local wireline voice services in the exchange are provided using ULLs; and
 - in exchanges where ILECs continue to make ULLs available on a forbore basis, the monthly rate for forbore ULLs in an exchange should be subject to a price ceiling equal to the monthly rate in effect on the date that forbearance is granted until such time as less than 1% of the retail residential and business local wireline voice services in the exchange are provided using ULLs.
11. The Commission received interventions regarding MNSi's application from Bell Canada and TELUS Communications Company (TCC).
 12. The public record of this proceeding, which closed on 15 January 2016, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

13. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess 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, for example due to (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.
14. The Commission has identified the following issues to be addressed in this decision:
 - Is there substantial doubt as to the correctness of the Commission's determination that mandated access to ULLs be phased out in three years?
 - If yes, is MNSi's proposed remedy that further conditions be applied to ILECs after the three-year phase-out period appropriate?

Is there substantial doubt as to the correctness of the Commission's determination that mandated access to ULLs be phased out in three years?

Positions of parties

15. MNSi submitted that the Commission erred in assessing the competition component of the Essentiality Test at the rate band level¹⁰ rather than at the ILEC exchange level. MNSi took the position that the Commission did not specify in Telecom

¹⁰ A rate band represents a group of exchanges or wire centres with similar characteristics, such as number of lines and loop length. While the criteria applied to classify exchanges into rate bands are uniform across the country, rate band costs may vary by ILEC or by region within the ILECs' serving territories.

Regulatory Policy 2015-326 the administrative reasons it relied on in deciding to assess the competition component of the Essentiality Test at the rate band level. MNSi argued that the prevalence of ULLs varies widely between exchanges, and while the prevalence may be declining in some exchanges, it is growing in others. As such, assessing the competition component of the Essentiality Test using either national data or data by rate band in each province would not accurately represent either the prevalence or trends in different exchanges.

16. MNSi submitted that the only ULL demand data cited in Telecom Regulatory Policy 2015-326 was a view from Bell Canada that fewer than 1% of retail local telephony customers were served using ULLs. Further, it is not clear whether the Commission relied on this data, but, if it did, it should not have done so, as the prevalence of ULLs is higher within the relevant downstream market.¹¹
17. MNSi submitted that ULLs are only currently provided in about 140 exchanges, which represent fewer than 5% of the exchanges in Canada. Given the small number of exchanges where ULLs are currently provided, it would not have been an undue administrative burden on any party for the competition component of the Essentiality Test to be assessed using exchange-specific data. MNSi also submitted that there is no reasonable justification for assessing at the rate band level and applying the same broad-brush conclusions to every exchange. Applying the competition component at the exchange level with exchange-specific data would likely lead to a different conclusion.
18. MNSi also submitted that, as a result of the errors in fact and errors in consideration of basic principles, there is substantial doubt as to the adequacy of the designated phase-out period to attenuate the impacts on consumers and competitors. In this regard, MNSi argued that the three-year phase-out period that was put in place as a measure to attenuate the impact on consumers and competitors was inadequate given the number of affected consumers and the substantial investments made by competitors to provide services through ULLs.
19. Bell Canada submitted that the Commission did not err regarding ULLs, correctly concluding that ULLs were immaterial to continued competition downstream and thus did not satisfy the Essentiality Test. Bell Canada also submitted that there was no policy consideration warranting the continued mandated provision of ULLs beyond the three-year phase-out period prescribed in Telecom Regulatory Policy 2015-326. Bell Canada submitted that there is no substantial doubt that the national prevalence of ULLs for local voice services is very low, and that competitor demand for ULLs has been declining for some time.
20. TCC submitted that MNSi has not demonstrated that the Commission interpreted or applied the factual evidence before it erroneously nor that it failed to consider basic

¹¹ MNSi submitted that data from the Commission's 2014 *Communications Monitoring Report* suggests a prevalence of roughly 318,000 ULLs out of 15.9 million lines, or approximately 2% on a national basis. MNSi's estimate is based on the 2013 annual revenues from ULLs (\$44 million) divided by Bell Canada's ULL rate of \$11.52 in rate band B as an average monthly rate.

principles raised in the original proceeding regarding the prevalence of ULLs in its application of the competition component of the Essentiality Test.

21. TCC also submitted that, in the case of ULLs, the aggregation of data at the rate band level was appropriate, because the exchanges within a rate band share the same characteristics, such as number of lines and loop length.
22. In reply, MNSi submitted that, while some characteristics may be shared between exchanges in a rate band, other extremely pertinent characteristics differ materially, such as the presence of a competitor using ULLs, the prevalence of ULLs, and whether ULL demand is growing or declining.

Commission's analysis and determinations

23. The Commission's determinations in Telecom Regulatory Policy 2015-326 regarding ULLs were based on an extensive record and a large amount of evidence provided by several parties, including all large ILECs and several competitors relying on ULLs to provide their services. This record was built through several rounds of interventions and interrogatories, as well as through an oral hearing, and ULLs were extensively addressed by parties that participated in that proceeding.
24. The Commission stated in paragraph 35 of Telecom Regulatory Policy 2015-326 that when applying the Essentiality Test, some degree of aggregation may be appropriate, since it would be exceedingly onerous to gather data for every wholesale service product market for every location (e.g. community or exchange) in the country, and since certain markets share similar competitive market conditions. The Commission further stated that a balance must be struck between the use of meaningful and practical definitions for product and geographic markets, as well as the administrative burden associated with gathering and processing large amounts of data.
25. There was not enough information on the record of the proceeding that led to Telecom Regulatory Policy 2015-326 for the Commission to assess ULLs against the Essentiality Test on an exchange basis. Given the number of exchanges in Canada (i.e. around 3,000), and the quantity of information that would have been required to assess the Essentiality Test for ULLs for each of them, it was appropriate for the Commission to aggregate exchanges into larger analytical units in reaching its determinations in Telecom Regulatory Policy 2015-326.
26. As indicated in Telecom Regulatory Policy 2015-326, a rate band represents a group of exchanges or wire centres with similar characteristics, such as number of lines and loop length, and ULLs are provided to competitors at tariffed rates that are consistent within an ILEC rate band. In addition, exchanges within a rate band generally share comparable competitive market conditions (e.g. the presence of competitors). These considerations support the Commission's decision in Telecom Regulatory Policy 2015-326 to use rate bands by ILEC territory as a proxy to assess ULLs for the purpose of the Essentiality Test.

27. Based on the fact that ULLs are currently provided only in a subset of exchanges, MNSi argued that the Commission should assess the competition component of the Essentiality Test at the exchange level rather than at the rate band level, and that such an analysis would likely lead to a different conclusion. However, the record of this proceeding does not support this assertion.
28. The exchanges where ULLs are still provisioned are almost all within rate bands A through D, which are rate bands comprising urban or suburban areas. There is competition in all of those exchanges, not only from service providers relying on ULLs, but also from cable companies and wireless service providers. With respect to the exchanges where ULLs are still provisioned that are not within rate bands A through D,¹² while a cable company offering local voice services is not present in all of these exchanges, customers in these exchanges have access to alternatives, such as voice over Internet Protocol (VoIP) and wireless services. Given this, the Commission is not persuaded that its determination in Telecom Regulatory Policy 2015-326 that any impact would be minimal is wrong. This is further supported by the record which led to that decision that revealed the low prevalence of ULLs, and that the trend in use of ULLs has been a steady decline over the years (i.e. a decrease of approximately 50% from 2009 to 2013) and is expected to continue to decline.¹³
29. The Commission considers that, even if demand for ULLs may be growing in a given exchange, the phasing out of mandated access to ULLs would be unlikely to negatively impact the downstream local wireline voice services market to a substantial degree. As stated in paragraph 185 of Telecom Regulatory Policy 2015-326, even if certain subscribers who obtain their local service(s) from competitors that use ULLs are required to change local service providers in the event that the ILECs withdraw the provision of ULLs, these subscribers would still have access to several alternative service offerings. This remains true even in exchanges where the prevalence of ULLs would be more significant.
30. The records of this proceeding and the proceeding leading to Telecom Regulatory Policy 2015-326 do not demonstrate that ULLs are used to service a significant proportion of end-users in the downstream local wireline voice services market in any given exchange where ULLs are still provisioned. Further, the record of this proceeding does not demonstrate that phasing out mandated access to ULLs would negatively impact the downstream local wireline voice services market to a substantial degree, nor did the record of the proceeding that led to Telecom Regulatory Policy 2015-326 provide such evidence.
31. In light of all the above, the Commission considers that it did not make errors in fact or errors in consideration of basic principles raised in the original proceeding regarding the prevalence of ULLs and the application of the competition component of the Essentiality Test.

¹² Four exchanges in which ULLs are provisioned are in rate band E.

¹³ See paragraphs 175, 176, and 182 of Telecom Regulatory Policy 2015-326.

32. In light of the above, the Commission finds that MNSi has failed to demonstrate substantial doubt as to the correctness of its determination that mandated access to ULLs be phased out in three years.

If yes, is MNSi's proposed remedy that further conditions be applied to ILECs after the three-year phase-out period appropriate?

33. As it has concluded above that there is no substantial doubt as to the correctness of its determination in Telecom Regulatory Policy 2015-326 that mandated access to ULLs be phased out in three years, the Commission finds that consideration of MNSi's proposed remedy concerning ULLs is moot.

Conclusion

34. In light of the foregoing, the Commission **denies** MNSi's application.

Secretary General

Related documents

- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015, as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Review of wholesale services and associated policies*, Telecom Notice of Consultation CRTC 2013-551, 15 October 2013, as amended by Telecom Notice of Consultation CRTC 2013-551-1, 8 November 2013
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997