



Telecom Regulatory Policy CRTC 2016-313

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Consideration of whether the Commission should forbear with respect to off-tariff negotiated agreements for GSM-based wholesale mobile wireless roaming services

The Commission forbears from the regulation of off-tariff negotiated agreements for GSM-based wholesale mobile wireless roaming services until the rates, terms, and conditions, which are now interim, have been approved on a final basis. At that time, the Commission will examine the appropriateness of granting forbearance for off-tariff agreements in light of the final tariffs.

Background

1. Since 2008, incumbent local exchange carriers (ILECs) and large cable carriers (collectively, incumbent carriers) have generally been able to enter into commercially negotiated agreements with competitors for the provision of various wholesale wireline services without Commission approval, provided there was a default tariff in place that competitors could use if they were unable to negotiate an agreement (off-tariff agreements).
2. The Commission has generally found that permitting off-tariff agreements gives incumbent carriers and competitors greater flexibility in making provisioning arrangements, and that doing so is consistent with the Policy Direction¹ requirement to rely on market forces to the maximum extent feasible as a means of achieving the telecommunications policy objectives set out in section 7 of the *Telecommunications Act* (the Act).
3. In Telecom Regulatory Policy 2015-177, the Commission determined that the domestic Global System for Mobile communications (GSM)-based wholesale mobile wireless roaming services (GSM roaming services) provided by Bell Mobility Inc., Rogers Communications Partnership (RCP),² and TELUS Communications Company (TCC) [collectively, the national wireless carriers] to

¹ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

² RCP ceased to exist as of 1 January 2016. All of RCP's business activities, including its assets and liabilities, are now held by RCCI.

other wireless carriers offering mobile wireless services in Canada (collectively, other wireless carriers) should be mandated and should be provided pursuant to Commission-approved rates, terms, and conditions. The Commission directed the national wireless carriers to issue interim tariff pages, which would be in effect until the Commission approved, on a final basis, tariff pages that reflected cost-based rates.

4. In a response to the interim tariff pages issued pursuant to Telecom Regulatory Policy 2015-177, Bragg Communications Incorporated, operating as Eastlink (Eastlink); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); and WIND Mobile Corp. (WIND) filed a joint application in which they argued that the terms and conditions that the national wireless carriers had included in their interim tariffs were more onerous than those found in existing agreements that were negotiated prior to the publication of Telecom Regulatory Policy 2015-177.
5. In a letter dated 30 November 2015, the Commission directed the national wireless carriers to revise their interim tariff pages to incorporate by reference the terms and conditions of their agreements with other wireless carriers that were in place on 5 May 2015. The Commission also stated that its forbearance determinations regarding off-tariff agreements applied to wireline services only, and that a new forbearance determination would be needed before off-tariff agreements for GSM roaming services could take effect.

Telecom Notice of Consultation 2015-554

6. In Telecom Notice of Consultation 2015-554, the Commission invited parties to comment, with supporting rationale, on whether, in circumstances where there is a default tariff, the Commission should forbear from regulating off-tariff agreements for GSM roaming services between the national wireless carriers and other wireless carriers.
7. In particular, the Commission requested comments on whether refraining from exercising its powers under sections 25, 29, and 31, and subsections 27(1), 27(5), and 27(6) of the Act with respect to GSM roaming services provided pursuant to negotiated agreements would be consistent with the telecommunications policy objectives set out in section 7 of the Act.
8. Additionally, if it permitted off-tariff agreements for GSM roaming services, the Commission requested comments on whether
 - such agreements should be permitted only once the Commission had approved a final tariff; and
 - there should be filing and disclosure requirements and, if so, what these requirements should be.
9. The Commission received interventions from Bell Canada, the Canadian Network Operators Consortium Inc. (CNOOC), Eastlink, MTS Inc. (MTS), the Province of

British Columbia, Rogers Communications Canada Inc. (RCCI), the Public Interest Advocacy Centre (PIAC), Saskatchewan Telecommunications (SaskTel), TBayTel, TCC, Vaxination Informatique, and WIND. The public record of this proceeding, which closed on 15 February 2016, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

10. The Commission has identified the following issues to be addressed in this decision:

- Should the Commission permit companies to enter into off-tariff agreements for the provision of GSM roaming services and, if so, when?
- Should there be filing and disclosure requirements and, if so, to what extent?

Should the Commission permit companies to enter into off-tariff agreements for the provision of GSM roaming services and, if so, when?

11. Bell Canada, MTS, RCCI, SaskTel, TBayTel, and TCC supported the allowance of off-tariff agreements. They submitted that such agreements are common in the industry, and that since the issuance of Telecom Decision 2008-17, the Commission has allowed ILECs and large cable carriers to enter into off-tariff agreements for various wholesale services.
12. They also submitted that a Commission-approved tariff could not possibly encompass all necessary terms and conditions, and that without off-tariff agreements, wireless carriers might be deprived of mutually beneficial arrangements.
13. They further submitted that permitting off-tariff agreements for GSM roaming services would be consistent with the Policy Direction requirement to rely on market forces to the maximum extent feasible.
14. Bell Canada referred to wholesale wireline services, noting that only a few such services have not been explicitly permitted to be offered under off-tariff agreements.
15. TCC submitted that allowing off-tariff agreements would be appropriate since it would parallel Industry Canada's³ rules, which provide for roaming to Canadian wireless service providers by way of commercial negotiation, upon request. TCC argued that any denial from the Commission to authorize commercial negotiations would directly contradict Industry Canada's roaming framework.
16. Videotron supported the allowance of off-tariff agreements, but submitted that (i) the Commission should determine that negotiated rates cannot exceed the final tariffed rate, and (ii) the Commission should retain its powers under section 24 and subsections 27(2), 27(3), and 27(4) of the Act in respect of such off-tariff agreements.

³ Now known as Innovation, Science and Economic Development Canada.

17. WIND did not support full forbearance and submitted that agreements could instead be streamlined in a similar fashion to the filing of Schedule Cs to master agreements for local interconnection, as approved in Telecom Decision 2007-129. Carriers could file the agreements in confidence and make abridged versions available for the public record.
18. WIND also submitted that the Commission should wait two years before granting full forbearance for off-tariff agreements to ensure that negotiated agreements are working properly. It argued that the GSM roaming service tariffs should specify maximum rates, and that negotiated rates should be allowed with only minimal Commission supervision provided that they do not exceed the tariffed rates.
19. Certain parties opposed Commission forbearance from the regulation of off-tariff agreements. CNOC argued that because there is a lack of competition in the mobile wireless service market, allowing such agreements would result in undue preference and unjust discrimination since the larger new wireless entrants would have more negotiating leverage than the smaller new entrants. CNOC also submitted that in cases of unjust discrimination or undue preference, the Commission's dispute resolution processes would not be sufficient to protect the interests of small new entrants.
20. Eastlink opposed any determination that would permit the negotiation of off-tariff agreements for GSM roaming services on a forbearance basis. It argued that GSM roaming services were re-regulated to ensure that new entrants can access wholesale roaming services with reasonable rates and terms, and that there have been no changes in market conditions in the time since that decision was made that would justify forbearance of any kind.
21. Eastlink proposed two arrangements: a Commission-approved default tariff with terms specifically related to rates for wholesale roaming, and a separate negotiated agreement, which would be subject to Commission approval, that contains other terms and conditions and is based on the Global System for Mobile Communications Association Standard Roaming Agreement.⁴
22. With regard to time frames, Bell Canada, MTS, RCCI, SaskTel, TBayTel, and TCC submitted that the Commission should allow off-tariff agreements to take effect immediately, while the tariffs are interim.
23. TCC recognized the potential for rates to change between the interim and final approval stages, but indicated that other wireless carriers could protect themselves by negotiating the right to renegotiate or terminate their existing agreements should they wish to avail themselves of the terms contained in the final tariff.

⁴ This is a standardized document used worldwide that outlines roaming service provisions and technicalities.

24. MTS and TBayTel submitted that rates negotiated prior to final tariff approval should be adjusted retroactively upon approval of the final rates, but that the terms and conditions should not be required to be adjusted. SaskTel proposed retroactive approval of rates after final tariff approval.
25. CNOC and PIAC submitted that, if the Commission were to forbear, it should do so only after the final tariffs are in place to serve as a default if negotiations failed.

Commission's analysis and determinations

26. As noted above, since 2008 the Commission has generally permitted off-tariff agreements for wholesale services when there is a default tariff, because doing so provides a degree of flexibility for parties to enter into customized agreements. In the Commission's view, the decision to allow off-tariff agreements for wholesale wireline services is an example of minimally intrusive regulation that is functioning well.
27. The arguments against allowing off-tariff agreements for GSM roaming services are largely centred on a concern that smaller new entrants would be at a disadvantage in negotiations relative to larger carriers, and that this would affect their ability to compete effectively in the marketplace.
28. However, the risk of this occurring is low, mainly because off-tariff negotiations are optional. On a going-forward basis, if a company is not satisfied with a particular negotiation, it can use a Commission-approved default tariff that contains rates, terms, and conditions that are just and reasonable.
29. Accordingly, the Commission determines that it would be appropriate to permit companies to enter into off-tariff agreements for the provision of GSM roaming services. However, the Commission must consider whether to apply such a determination with respect to the interim tariffs, final tariffs, or both.
30. Currently, the industry is subject to interim tariffs for GSM roaming services. Wireless carriers must use these tariffs, which include, by reference, their previous GSM roaming service agreements. They cannot make changes to these agreements without Commission approval because the Commission has not granted them permission to do so (by forbearing from the regulation of off-tariff agreements).
31. Allowing off-tariff agreements while the tariffs are interim would enable companies, if they choose, to engage in more flexible arrangements and amend their existing contracts, which were first negotiated at a time when GSM roaming services were not subject to tariff regulation.
32. Given that the final rates, terms, and conditions for GSM roaming services have yet to be established, forbearance from the regulation of off-tariff agreements should apply only until the rates, terms, and conditions have been disposed of on a final basis. At that time, wireless carriers should have the choice of obtaining the services in question pursuant to the tariffed rates, terms, and conditions.

33. Accordingly, any off-tariff agreements should not include clauses that bind wireless carriers beyond the date on which the final rates, terms, and conditions are approved. This would provide wireless carriers with the flexibility to amend their agreements in the interim and provide certainty that all companies can take advantage of the rates, terms, and conditions in a Commission-approved final tariff.
34. As previously indicated, the process to review the final tariffs for GSM roaming services is ongoing. Given the uncertainty at this time as to what the final tariffs will encompass, it would be appropriate for the Commission to delay making a determination regarding off-tariff agreements with respect to final tariffs until those tariffs are in place.
35. In light of the above, at this time, the Commission **approves** off-tariff agreements for the period from the date of this decision until the rates, terms, and conditions are approved on a final basis. Further, the Commission intends to launch a follow-up process to determine whether such agreements will continue to be appropriate once the final tariffs have been approved.

Findings of forbearance

36. In light of the above, the Commission makes the following findings of forbearance with respect to off-tariff agreements for GSM roaming services for the period from the date of this decision until the rates, terms, and conditions have been approved on a final basis:
 - The Commission finds, as a question of fact, that to forbear from the exercise of certain of its powers is consistent with the Policy Direction and the policy objectives set out in section 7 of the Act, subject to any reporting requirements set out below, pursuant to subsection 34(1) of the Act.
 - Pursuant to subsection 34(3) of the Act, the Commission finds that forbearance, to the extent set out in this decision, with respect to the provision of GSM roaming services by Bell Mobility, RCCI, or TCC to other wireless carriers pursuant to negotiated agreements will not likely impair unduly the establishment or continuance of a competitive market for the services in question.
 - Pursuant to subsection 34(4) of the Act, the Commission declares that, as of the date of this decision, sections 25, 29, and 31, and subsections 27(1), 27(5), and 27(6) of the Act do not apply to the provision of GSM roaming services by Bell Mobility, RCCI, or TCC to other wireless carriers pursuant to negotiated agreements that do not bind the wireless carriers past the approval date of the final tariff by the Commission.
 - The Commission will retain its powers with respect to section 24 and subsections 27(2) and 27(3) of the Act to the extent necessary to address any issues that may arise.

Should there be filing or disclosure requirements and, if so, to what extent?

37. MTS, RCCI, SaskTel, TBayTel, and TCC opposed any requirement to file or disclose off-tariff agreements, arguing that the documents were sensitive and confidential.
38. RCCI submitted that any filing requirement would be administratively burdensome. TCC added that a filing requirement would be contrary to subparagraph 1(a)(i) of the Policy Direction, which requires that regulation be efficient and proportionate to its purpose.
39. Bell Canada proposed that companies file a general summary with the Commission, consistent with Telecom Regulatory Policy 2012-359, because this would strike an appropriate balance between addressing potential concerns over unjust discrimination and fostering an environment that encourages mutually beneficial commercial agreements.
40. The above-noted parties generally agreed that should filings be required, the option to file in confidence should be available.
41. CNOC proposed that if the Commission were to permit off-tariff agreements, the negotiated rates should be filed in confidence with the Commission, while the complete terms of each agreement should be made public within two days of its effective date.
42. Eastlink indicated that it would support Bell Canada's proposal to require the filing of a general summary only.
43. PIAC submitted that all agreements should be filed and disclosed on the public record to ensure that off-tariff agreements do not unfairly advantage certain providers while disadvantaging others.

Commission's analysis and determinations

44. In Telecom Decision 2012-359, the Commission reduced the filing obligations to require incumbent carriers to file only a general summary of their off-tariff agreements for certain wholesale wireline services. In the Commission's view, such a summary would also be appropriate with respect to GSM roaming services to ensure that information about such agreements is publicly available. As such, during the interim period, Bell Mobility, RCCI, and TCC are to file a general summary of their off-tariff agreements for GSM roaming services for the public record.
45. However, given that in Telecom Regulatory Policy 2015-177, GSM roaming services were re-regulated and the Commission stated its intention to monitor competitive conditions in the mobile wireless service market, Bell Mobility, RCCI, and TCC are to also file with the Commission, in confidence if they wish, copies of any off-tariff agreements for GSM roaming services entered into during the interim period.

Conclusion

46. In light of all the above, the Commission **directs** Bell Mobility, RCCI, and TCC to

- reissue their interim tariff pages within **30 days** of the date of this decision, including the following provision:

Because the Commission has forborne, in Telecom Regulatory Policy CRTC 2016-313, with respect to the regulation of this service as set out in that decision, the company may also provide the service in this interim tariff at rates and on terms and conditions different from the tariffed rates and terms pursuant to an agreement entered into between the company and a competitor. Such an agreement may not bind the wireless carriers beyond the approval of the final tariff by the Commission.

- file a general summary for the public record, as well as a copy, of any off-tariff negotiated agreements entered into during the interim period within **15 days** of these agreements being entered into.

Secretary General

Related documents

- *Consideration of whether the Commission should forbear with respect to off-tariff negotiated agreements for GSM-based wholesale mobile wireless roaming services*, Telecom Notice of Consultation CRTC 2015-554, 16 December 2015
- *Regulatory framework for wholesale mobile wireless services*, Telecom Regulatory Policy CRTC 2015-177, 5 May 2015
- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application for revised filing requirements associated with wholesale negotiated agreements*, Telecom Regulatory Policy CRTC 2012-359, 3 July 2012
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Forbearance with respect to certain inter-carrier agreements filed pursuant to section 29 of the Telecommunications Act*, Telecom Decision CRTC 2007-129, 14 December 2007