



Telecom Decision CRTC 2016-36

PDF version

Ottawa, 1 February 2016

File number: 8662-N1-201505629

Northwestel Inc. – Application to review and vary certain determinations in Telecom Decision 2015-78 or approve an exogenous adjustment for retail Internet services

*The Commission finds that there is substantial doubt as to the correctness of the determination in Telecom Decision 2015-78 to deny Northwestel’s proposal to charge an additional fee for stand-alone digital subscriber line (DSL) Internet service. Under its Modernization Plan, Northwestel was to deploy 15 megabit-per-second Internet service to the 45 communities remaining to be upgraded to that service. The Commission varies its determination and **approves** a stand-alone residential DSL Internet service surcharge of \$20 per month in certain high-cost communities. Northwestel committed, on the record of this proceeding, that if the application was granted, the company would be able to justify investing in upgrades to the remaining 45 communities under its Modernization Plan by the end of 2017.*

Background

1. In Telecom Regulatory Policy 2013-711, the Commission determined that the offering and provision of Northwestel Inc.’s (Northwestel) terrestrial retail Internet services would no longer be forborne,¹ as the circumstances that justified their original forbearance had changed, and Northwestel now had significant market power. The Commission also determined that retail digital subscriber line (DSL)² Internet service should be available independent of primary exchange service (PES) [stand-alone DSL Internet service]. Among other things, the Commission found that it would not be appropriate for Northwestel to charge an additional monthly fee (surcharge) for stand-alone DSL Internet service (stand-alone DSL surcharge).
2. During the process leading to Telecom Regulatory Policy 2013-711, Northwestel committed to offering stand-alone DSL Internet service, with a surcharge, in its terrestrially served communities. The company started offering the service with a

¹ Terrestrial services include both cable and digital subscriber line services, but exclude services provided using satellite infrastructure, which remain forborne.

² DSL is a connection that enables customers to receive high-speed data access services over existing copper telephone lines.

surcharge in its high-cost serving areas (HCSAs)³ in October 2013, after the public hearing but before the publication of Telecom Regulatory Policy 2013-711, in which the Commission determined that such a surcharge would be inappropriate. The surcharge was \$20 for residential customers and \$30 for business customers in HCSAs.

3. In February 2014, Northwestel filed an application to review and vary Telecom Regulatory Policy 2013-711, specifically with respect to the Commission's determination regarding the application of a stand-alone DSL surcharge for residential customers. At the same time, it filed Tariff Notice (TN) 904,⁴ in which it proposed rates, terms, and conditions for its retail DSL and cable Internet services, as well as terrestrial enterprise Internet services. Included in the tariff application were proposed stand-alone DSL Internet surcharges.
4. In Telecom Decision 2014-379, the Commission approved Northwestel's request to review and vary the determination that it would not be appropriate for the company to apply a stand-alone DSL surcharge. However, the Commission stated that more detailed costing information was required to re-examine whether such a surcharge was appropriate and, if so, to determine the amount of the surcharge. Accordingly, the Commission announced that it would consider this issue under the TN 904 process.
5. In Telecom Decision 2015-78, the Commission approved, with changes, Northwestel's proposed tariffs for terrestrial retail Internet services for residential, business, and enterprise customers. The changes included the reduction of the company's proposed residential DSL Internet service rates. In that decision, the Commission also denied Northwestel's proposed stand-alone DSL surcharge. It noted that the application of the additional fees would increase the disparity in the rates that a subset of DSL Internet service customers in these remote areas pay compared with (i) rates that Northwestel's cable Internet service customers pay for similar services, and (ii) rates that Internet service customers pay for similar services in the South. The Commission further determined that the markups for business DSL Internet service were sufficient to allow the rates for those services to cover the local loop cost for stand-alone DSL Internet service without additional fees. The Commission considered that requiring Northwestel to apply the same rates to customers in HCSAs as those in non-HCSAs would further its goal of ensuring that northern Canadians are provided Internet access at reasonable prices and enhance these customers' ability to participate in the digital economy.
6. The Commission considered that the changes mandated in that decision would not have a significant detrimental impact on Northwestel's revenues or ability to pursue initiatives such as its ongoing network modernization plan (Modernization Plan).

³ An HCSA is a clearly defined geographical area where the incumbent local exchange carrier's monthly costs to provide basic service are greater than the associated revenues generated by the rates charged for the service.

⁴ Later amended by TNs 904A, 904B, and 904C

Northwestel's Modernization Plan

7. In Telecom Regulatory Policy 2011-771, the Commission expressed its concern that Northwestel had failed to make the necessary upgrades to its network. As such, it directed the company to develop a plan to modernize its network in a timely manner to ensure that northern customers receive telecommunications services comparable to those available in southern Canada. Under its Modernization Plan, Northwestel proposed, among other things, to deliver broadband Internet services to all terrestrially served communities in its operating territory at speeds that would meet or significantly exceed the Commission's target of 5 megabits per second (Mbps) download and 1 Mbps upload by 2017. Northwestel was directed to file an annual update report with Commission.
8. The last report, filed on 31 March 2015, indicated that the various initiatives in the plan were progressing as planned, except that the upgrading of 45 communities to 15 Mbps download and 1 Mbps upload Internet service speeds was rescheduled as "to be determined."
9. In Telecom Regulatory Policy 2013-711, the Commission also determined that Northwestel's regulatory framework should be reviewed in four years, which would coincide with the completion of the Modernization Plan. The Commission considered that a review at that time would be appropriate because it would allow for a thorough assessment of the impact of the plan. Accordingly, the Commission determined that the regulatory regime would be in effect for four years, with a review of the regime expected to commence in 2017.

Local service subsidy regime

10. In certain rural and remote areas of Canada, the costs to provide residential wireline telephone service that meets the basic service objective⁵ exceed the prices that customers pay. Because of this, pursuant to subsection 46.5(1) of the *Telecommunications Act* (the Act), the Commission requires certain telecommunications service providers to contribute to a fund to support continued access by Canadians to basic telecommunications services (the local service subsidy regime).⁶
11. The current local service subsidy regime serves to subsidize the provision of residential wireline local telephone service (local telephone service) in HCSAs. These subsidies are currently provided only to incumbent local exchange carriers (ILECs) in regulated HCSAs, since they have the obligation to provide local telephone service. As such, while Northwestel receives subsidies for the provision of local telephone service in HCSAs, it does not receive any subsidies for providing other

⁵ See Telecom Decision 99-16.

⁶ The local service subsidy regime was established in Decision 2000-745. A summary of the current regime can be found in Telecom Circular 2007-15.

telecommunications services, such as DSL Internet service, in the same HCSAs. Therefore, if a service such as DSL Internet is purchased on a stand-alone basis, no subsidy is received.

Review of basic telecommunications services

12. In April 2015, the Commission issued Telecom Notice of Consultation 2015-134, initiating a proceeding to conduct a comprehensive review of its policies regarding basic telecommunications services in Canada and of the telecommunications services that Canadians require to participate meaningfully in the digital economy. It is examining, among other things, whether changes should be made to (i) the various regulatory measures related to basic telecommunications services, such as the basic service objective, the obligation to serve, the national contribution mechanism, and the local service subsidy regime, and (ii) the price cap regimes, as applicable. The Commission is also examining whether a mechanism is required in Northwestel's operating territory to support the provision of modern telecommunications services by funding capital infrastructure investment in transport facilities as well as the cost of maintaining and enhancing these facilities.

Application

13. The Commission received an application from Northwestel, dated 3 June 2015, in which the company requested that the Commission (i) review and vary its determination in Telecom Decision 2015-78 to deny the stand-alone DSL surcharge, and (ii) approve a surcharge of \$20 for customers subscribing to the residential service in Band H1⁷ communities. Northwestel submitted that the Commission had made an error in fact and an error in law that together lead to substantial doubt as to the correctness of the Commission's determinations regarding the stand-alone DSL surcharge.
14. If the Commission were to deny Northwestel's application to review and vary Telecom Decision 2015-78, the company requested an exogenous adjustment⁸ to its price cap indices for the residential and business Internet sub-baskets to permit it to recover the costs to proceed, under the Modernization Plan, with the deployment of 15 Mbps Internet service to the 45 communities to be upgraded to that service by the end of 2017.
15. Northwestel submitted that the determination to deny the stand-alone DSL surcharge in Telecom Decision 2015-78 made the provision of DSL Internet service uneconomic and that, without some form of relief, the required investment to complete the company's planned network enhancements to enable the provision of 15 Mbps Internet service for the company's DSL subscribers is at risk. Northwestel committed that, if the Commission reversed its decision with respect to the stand-

⁷ Band H1 (HCSA) includes all exchanges in Northwestel's traditional operating territory except for Whitehorse, Yukon, and Yellowknife, Northwest Territories.

⁸ See Telecom Decision 2007-5 for exogenous factor criteria that apply to Northwestel.

alone DSL surcharge for residential customers in Band H1 only and reinstated the \$20 surcharge for those customers, the company would be able to justify investing in upgrades to the remaining 45 communities under the Modernization Plan by the end of 2017.

16. The Commission received interventions regarding Northwestel's application from the Charter Community of Deline (Deline), the Consumers' Association of Canada and the Public Interest Advocacy Centre (collectively, CAC/PIAC), the Government of the Northwest Territories (GNWT), the Government of Yukon (GY), Michael Hansen, Iristel Inc. (Iristel), and the SSi Group of Companies (SSi). The public record of this proceeding, which closed on 13 October 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

17. 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 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.
18. The Commission has identified the following issues to be addressed in this decision:
- Is there substantial doubt as to the correctness of the original decision that it would not be appropriate for Northwestel to apply a stand-alone DSL surcharge?
 - Did the Commission err in fact by failing to request and take into account revised forecast demand and revenue data?
 - Did the Commission err in law by mandating non-compensatory rates?
 - Has substantial doubt as to the correctness of Telecom Decision 2015-78 been otherwise demonstrated?
 - If the stand-alone DSL surcharge is denied: Is Northwestel entitled to an exogenous adjustment for retail Internet service?

Is there substantial doubt as to the correctness of the original decision that it would not be appropriate for Northwestel to apply a stand-alone DSL surcharge?

19. Northwestel submitted that the Commission had made an error in fact, and that there has been a fundamental change in circumstances since Telecom Decision 2015-78

was issued. The company argued that these factors collectively led to an error in law when the Commission directed the company to provide a service at a rate that is not compensatory and, therefore, is neither just nor reasonable.⁹ Specifically, the Commission failed to ask for and take into consideration revised forecast demand and revenue data that would account for the rate changes adopted by the Commission. Northwestel further submitted that the company's data indicates that the subscription rate for its stand-alone DSL Internet service, even before the elimination of the surcharge, exceeded the subscription rate that the company had included in its economic study in support of its tariff application. Northwestel argued that this constitutes a fundamental change in circumstances since the decision was rendered.

20. Northwestel argued that by eliminating the stand-alone DSL surcharge and reducing both the rates for DSL Internet service as well as the rate gap between the higher- and lower-speed services, the company will experience increases in demand for (i) stand-alone DSL Internet service, for which the rate does not recover the costs associated with the loop used to provide the service; and (ii) higher-speed services that are more costly to provision and have lower markups relative to lower-speed services.
21. Northwestel submitted that as a result of these errors, the Commission set rates for DSL Internet service that are not compensatory, and did so without providing recourse to subsidy. The company argued that this constitutes an error in law in that the adoption of rates resulting in a negative business case for residential DSL Internet service is not just or reasonable. It submitted that unless the carrier itself is proposing below-cost rates, just and reasonable rates must allow for recovery of costs.
22. Northwestel indicated that the business case to proceed with upgrading its DSL networks to allow for 15 Mbps Internet service in 45 communities requires \$8.5 million in additional revenue. It submitted that it has not asked for relief in the form of a subsidy, but proposed solutions that would permit it to move forward quickly with the proposed broadband deployment, as outlined in its Modernization Plan, by 2017. It added that it would be inappropriate to wait for the outcome of Telecom Notice of Consultation 2015-134 proceeding since it is likely to be more than a year away, further delaying the DSL network upgrades set out in the Modernization Plan.
23. Northwestel justified its proposal to limit the surcharge to Band H1 residents on the basis that it allocates the costs to customers who are driving the demand for stand-alone service. It added that, while parity in pricing is an important consideration, it cannot take precedence over the main objective, which is to bring 15 Mbps Internet service to the North.
24. The GNWT submitted that should the Commission conclude that Northwestel requires some financial relief to implement its commitment to extend 15 Mbps Internet service, it would support the imposition of either a stand-alone DSL surcharge or an exogenous factor rate adjustment at or below the levels proposed by

⁹ Subsection 27(1) of the Act states that “[e]very rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.”

Northwestel. Should this relief be in the form of a stand-alone DSL surcharge, the GNWT suggested that the Commission consider applying this charge in both HCSAs and non-HCSAs, and to both residential and business customers, at correspondingly reduced levels. The GNWT strongly urged the Commission to adopt an approach to hold Northwestel to the commitments the company made in its Modernization Plan, and ensure that Northwestel provides 15 Mbps Internet service to all terrestrially served communities in its operating territory by the end of 2017.

25. The GY submitted that it finds it difficult to support a claim that would increase customer rates, particularly since there appears from the record that no other alternatives to the revenue shortfall were considered. It added that, if the service is uneconomic, consideration should be given to an interim subsidy while such matters are subject to consideration as part of the Telecom Notice of Consultation 2015-134 proceeding.
26. CAC/PIAC urged the Commission to reject Northwestel's application in its entirety because Northwestel has not demonstrated that there is substantial doubt as to the correctness of the Commission's decision to deny a stand-alone DSL surcharge. They added that the Commission's determinations were made in the public interest and on the basis of a range of considerations, as they should be, and not just to promote the interests of the company's shareholders, which appears to be the primary objective pursued by the company in its application. CAC/PIAC argued that the Commission should be promoting consumer choice and competitive alternatives, not approving punitive charges designed to stifle competition.
27. CAC/PIAC also raised the competitive harm resulting from the continued delays in deployment of improved Internet service, and uncertainty regarding the cost for consumers. They further submitted that any new decisions regarding the funding of Northwestel's Modernization Plan should not be made until after the conclusion of the Telecom Notice of Consultation 2015-134 proceeding.
28. Deline, the GNWT, the GY, Iristel, and CAC/PIAC submitted that the Modernization Plan should go forward on time. Iristel and SSi were concerned that Northwestel constantly finds ways to renege on commitments it made with respect to its Modernization Plan.

Commission's analysis and determinations

Did the Commission err in fact by failing to request and take into account revised forecast demand and revenue data?

29. While the Commission did not request Northwestel to file further demand estimates if rates were lowered and the stand-alone DSL surcharge removed, it is clear that the Commission's determinations in Telecom Decision 2015-78 were partly based on an increased demand for retail Internet services.
30. It is also clear that some services did not pass the price floor test, and that the Commission's determination to lower the proposed residential DSL Internet service

rates and eliminate the application of a stand-alone DSL surcharge could lead to reduced retail Internet service revenues for the company. The Commission's decision was not restricted to considerations relating to the services' profitability, but was based on many factors.

31. In its application, Northwestel admitted that its original demand assumptions proved erroneous before Telecom Decision 2015-78 was issued. This illustrates how demand assumptions are necessarily indicative only, since margins of error can vary significantly. As such, it is not clear that the Commission would have reached a different conclusion if it had required Northwestel to file different demand assumptions.
32. The determinations in Telecom Decision 2015-78, while different from the Commission's general practice of establishing retail rates that pass the price floor test, are consistent with previous decisions concerning Northwestel in which the Commission made determinations with a view to, among other things, ensuring that northern Canadians have access to telecommunications services that are as comparable as possible to those provided to southern Canadians. Therefore, the Commission did not err in fact by failing to request revised forecast demand and revenue data.

Did the Commission err in law by mandating non-compensatory rates?

33. Setting just and reasonable rates for the provision of telecommunications services lies at the core of the Commission's mandate. The Commission's power to determine whether the rates set by a Canadian carrier are just and reasonable is expressly set out in the Act, most notably at subsection 27(1). Pursuant to section 47 of the Act, the Commission is required to perform its duties and exercise its powers, including those set out in section 27 of the Act, with a view to implementing the policy objectives set out in section 7 of the Act.
34. The effect of section 47 of the Act in conjunction with the discretion afforded to the Commission by virtue of subsection 27(5) of the Act – which provides that in setting just and reasonable rates the Commission can adopt any method or technique that it considers reasonable – is to provide the Commission with a broad discretion in determining whether any given rate is just and reasonable. In fulfilling this mandate, the Commission is called upon to take into account different constituencies and interests referred to in the policy objectives, and is not restricted to ensuring that rates are compensatory. While the costs incurred by a carrier in the provision of a service are relevant considerations, they must necessarily be balanced against other considerations that are relevant to the achievement of the policy objectives.
35. In setting rates and ruling against the application of a stand-alone residential DSL surcharge, the Commission took into consideration a number of matters. These included Northwestel's costs to provide the services under consideration and the company's ability to generate revenues related to the full suite of its terrestrial retail

Internet services.¹⁰ The Commission also considered the need to render retail Internet service in Northwestel's terrestrially served communities more affordable, and the disparity between the rates paid by consumers served by Northwestel's terrestrial DSL network and those paid for similar services by both consumers in the South and by consumers served by Northwestel's cable network. The Commission also considered the impact that its decision would have on the company's revenues and ability to proceed with the implementation of its Modernization Plan. Ultimately, the Commission concluded that its determinations appropriately balanced the various interests under consideration and would serve to advance the achievement of the policy objectives set out in paragraphs 7(b) and 7(h) of the Act.¹¹

36. In light of the above, the Commission's decision properly took into account the competing interests at play and the various policy objectives which Parliament entrusted it to pursue. The Commission was therefore within its jurisdiction and did not err in law by approving non-compensatory rates.

Has substantial doubt as to the correctness of Telecom Decision 2015-78 been otherwise demonstrated?

37. As determined above, the Commission did not err in fact by failing to request updated demand forecast or in law by setting non-compensatory rates. However, it is clear that Northwestel's revenues are lower than those the company had anticipated when it filed TN 904.

38. Telecom Decision 2015-78 impacted Northwestel not only because of the change in demand and in rates, but also because of the cross-impact related to its telephone service and associated revenues.¹² The Commission considered in Telecom Decision 2015-78 that the changes would not have a significant detrimental impact on Northwestel's revenues or ability to pursue initiatives such as its ongoing network Modernization Plan. However, in this application, Northwestel stated that, without additional funding, it would not be in a position to upgrade its DSL Internet service in 45 communities, and has therefore halted these upgrades.

39. This position is inconsistent with the Commission's finding in Telecom Decision 2015-78 that its determinations would not have a material impact on the Modernization Plan. The evidence on the record of this proceeding demonstrates that the revenue impact of the Commission's determinations in Telecom Decision 2015-78 has jeopardized Northwestel's completion of its Modernization Plan, and providing the company with the ability to levy a stand-alone DSL surcharge would

¹⁰ The company supported consideration of the overall profitability of its Internet service revenues, rather than the profitability of each service, when it filed TN 904.

¹¹ The cited policy objectives are 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, and 7(h) to respond to the economic and social requirements of users of telecommunications services.

¹² Northwestel noted losses in local telephone subscribers, and their associated subsidy, as stand-alone DSL Internet service became available and more affordable.

allow completion of the plan. Accordingly, the Commission finds that there is substantial doubt as to the correctness of Telecom Decision 2015-78.

40. As a result, some of the policy considerations that informed the Commission's decision to deny a stand-alone DSL surcharge¹³ become moot if customers do not have access to similar services. Therefore, the Commission is of the view that approving the stand-alone DSL surcharge as proposed by the company in its application, along with Northwestel's commitment on the record that it will complete its DSL network upgrades by the end of 2017 as scheduled in its Modernization Plan, would further the policy objectives set out in paragraphs 7(a) and (b) of the Act.¹⁴
41. The Commission is of the view that it would be most appropriate to allocate costs to the customers who are driving the cost of DSL Internet service and will benefit from associated upgrades. These customers are located in Band H1. As such, the Commission finds that Northwestel's original surcharge proposal of \$20 for stand-alone residential DSL Internet service customers in Band H1 communities is reasonable.
42. The Commission continues to be concerned that certain subscribers will now be faced with a monthly \$20 surcharge; however, it expects that its decision will (i) promote parity of services with those provisioned in the South by enabling 45 remaining communities' Internet service speeds to be upgraded to 15 Mbps without any further delay, and (ii) assist in the completion of the Modernization Plan by the end of 2017, as Northwestel committed to.

If the stand-alone DSL surcharge is denied: Is Northwestel entitled to an exogenous adjustment for retail Internet service?

43. In light of the Commission's decision to permit Northwestel to apply a stand-alone residential DSL surcharge in Band H1 communities, the Commission need not address the company's alternative request for exogenous adjustments to certain of its price cap indices as it is moot.

Conclusion

44. In light of all the foregoing, the Commission concludes that there is substantial doubt as to the correctness of its determination in Telecom Decision 2015-78 that the decision would not have a significant detrimental impact on Northwestel's ability to pursue initiatives such as those set out in its Modernization Plan. Accordingly, the

¹³ For example, the concern that the application of additional fees would increase the disparity in the rates that a subset of DSL Internet service customers in these remote areas pay compared with (i) rates that Northwestel's cable Internet service customers pay for similar services, and (ii) rates that Internet service customers pay for similar services in the South.

¹⁴ 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; and (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.

Commission **approves** Northwestel's request to vary the determination that it would not be appropriate for the company to apply a stand-alone DSL surcharge. In order for Northwestel to be able to proceed, under the Modernization Plan, with the deployment of 15 Mbps Internet service to the 45 communities remaining to be upgraded to that particular service by the end of 2017, the Commission allows Northwestel to apply a residential stand-alone DSL Internet surcharge of \$20 in Band H1 communities.

45. Northwestel is to issue revised tariff pages consistent with the determinations in this decision within **10 days** of the date of this decision.

Secretary General

Related documents

- *Review of basic telecommunications services*, Telecom Notice of Consultation CRTC 2015-134, 9 April 2015, as amended by Telecom Notices of Consultation CRTC 2015-134-1, 3 June 2015; 2015-134-2, 22 December 2015; and 2015-134-3, 14 January 2016
- *Northwestel Inc. – Tariffs for terrestrial retail Internet services*, Telecom Decision CRTC 2015-78, 4 March 2015
- *Northwestel Inc. – Application to review and vary certain determinations in Telecom Regulatory Policy 2013-711*, Telecom Decision CRTC 2014-379, 21 July 2014
- *Northwestel Inc. – Regulatory Framework, Modernization Plan, and related matters*, Telecom Regulatory Policy CRTC 2013-711, 18 December 2013
- *Northwestel Inc. – Review of regulatory framework*, Telecom Regulatory Policy CRTC 2011-771, 14 December 2011
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *The Canadian revenue-based contribution regime*, Telecom Circular CRTC 2007-15, 8 June 2007
- *Price cap regulation for Northwestel Inc.*, Telecom Decision CRTC 2007-5, 2 February 2007
- *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000
- *Telephone service to high-cost serving areas*, Telecom Decision CRTC 99-16, 19 October 1999