



THE VAN HORNE INSTITUTE

Analysis of Canadian Radio-television and Telecommunications Commission (CRTC) released Telecom Regulatory Policy 2015-326

By Dr. Michael McNally, Assistant Professor, School of Library and Information Studies, University of Alberta

On July 22, 2015, the Canadian Radio-television and Telecommunications Commission (CRTC) released Telecom Regulatory Policy 2015-326 resulting in substantive changes to regulation of Canada's wholesale internet services sector. The primary change is to the way in which wholesale high-speed access services are mandated, with mandating being phased out for aggregated services, while disaggregated services including fibre-to-the-premises (FTTP) access facilities becoming mandated.

Background

The CRTC's decisions stem from a consultation initiated on Dec. 6, 2013¹ that included a wide range of participants from incumbent-local exchange carriers (ILECs) (Bell, Telus, SaskTel and MTS Allstream), cable companies (Eastlink, Cogeco, Quebecor/Videotron, Rogers and Shaw), resellers of wholesale internet services (such as Primus and Distributel) referred to as competitors, consumer and public interest groups (such as OpenMedia.ca, Public Interest Advocacy Centre and Consumers' Association of Canada) as well as several other groups, individuals and local/territorial governments.

Regulation of wholesale high-speed access services has become an increasing area of interest for the CRTC since 2005.² The Commission's general approach has been to favour facilities-based competition, and access to incumbent carriers' facilities is intended to encourage competitors to invest in other parts of the network resulting in lower prices, innovative services and greater choice.³ In recent years, the CRTC has mandated wholesale high-speed access services on an aggregated basis whereby companies lease a package of both access facilities needed to connect to customers (i.e. connections to homes and business) and transport facilities through which large volumes of traffic can be sent.⁴ Two key questions at issue were whether the aggregated approach (combining access and transport facilities) is ideal and whether fibre-access facilities (such as FTTP connections), which had been excluded from aggregated wholesale mandating, be mandated.⁵

¹ Telecom Notice of Consultation 2015-551.

² CRTC. Telecom Regulatory Policy 2015-326, para. 4.

³ CRTC. Telecom Regulatory Policy 2015-326, para. 7.

⁴ CRTC. Telecom Regulatory Policy 2015-326, para. 8.

⁵ CRTC. Telecom Regulatory Policy 2015-326, para. 10.

In 2008⁶ the CRTC mandated both aggregated and disaggregated wholesale high-speed access services, though it found only disaggregated services essential.⁷ In 2010,⁸ the Commission reaffirmed mandated access to aggregated wholesale high-speed access services; however, it stipulated that this obligation was limited to existing technologies including all digital subscriber line (DSL) based facilities and fibre-to-the-node (FTTN) facilities. The 2010 decision left FTTP access facilities not mandated, and also resulted in disaggregated wholesale high-speed access services being changed from mandated to not mandated services.⁹

The CRTC's policy guidance for its decision includes the policy objectives set out in section 7 of the Telecommunications Act, the 2006 Policy Direction to the CRTC, and the additional considerations of a desire to ensure sustainable retail competition that provides reasonable prices and innovative services of high quality, incenting network investment, technological neutrality and recognizing differences in regional markets.¹⁰ Regulation of access to wholesale facilities is based on the three part Essentiality Test that allows the Commission to assess which facilities are essential and as such will be mandated.¹¹

The CRTC's Decision

In making its determination of how to mandate wholesale high-speed access services, the CRTC applied the Essentiality Test. In doing so it used a broad approach assessing essentiality for both aggregated and disaggregated wholesale high-speed access services, but not on a service by service basis. Using this approach, FTTP was considered no differently than other types of access facilities (such as DSL or hybrid-fibre copper connections).¹² In regards to FTTP the CRTC noted that while existing user demand for high speed (+50 Mbps) connections is low, that there is a likely future increase for demand in such services.¹³ The Commission also decided alternatives to wireline connections (such as fixed wireless access, satellite based services, and mobile wireless) were not comparable substitutes for wireline high-speed access services.¹⁴ Furthermore, the CRTC also stated that incumbent carriers had significant advantages to deploy FTTP access facilities.¹⁵

The Essentiality Test used by the CRTC has three elements – the input component, the competition component and the duplicability component.¹⁶ The input component assess whether the wholesale service under examination is a necessary input for competitors to provide

⁶ Telecom Decision 2008-17

⁷ CRTC. Telecom Regulatory Policy 2015-326, para. 59.

⁸ Telecom Regulatory Policy 2010-632.

⁹ CRTC. Telecom Regulatory Policy 2015-326, para. 60 and 61.

¹⁰ CRTC. Telecom Regulatory Policy 2015-326, para. 14.

¹¹ CRTC. Telecom Regulatory Policy 2015-326, para. 15-17.

¹² CRTC. Telecom Regulatory Policy 2015-326, para. 114.

¹³ CRTC. Telecom Regulatory Policy 2015-326, para. 119.

¹⁴ CRTC. Telecom Regulatory Policy 2015-326, para. 126.

¹⁵ CRTC. Telecom Regulatory Policy 2015-326, para. 134.

¹⁶ CRTC. Telecom Regulatory Policy 2015-326, para. 31.

downstream retail services.¹⁷ The competition component examines whether not mandating access will result in incumbent providers' upstream market power being able to negatively impact downstream retail markets.¹⁸ The duplicability component considers whether the functionality of a particular wholesale service can be duplicated by a reasonably efficient competitor on a sufficient scale.¹⁹ A wholesale service is determined to be essential if all three components are met (i.e. that the wholesale service it is a required input, not mandating access would have a negative impact on downstream retail markets, and functionality cannot be duplicated).

Applying the Essentiality Test the CRTC determined that wholesale high-speed access services, including FTTP access facilities, meet the input component of the test in all incumbent carriers' serving regions;²⁰ incumbent carriers have upstream market power in the provision of wholesale high-speed access services, including FTTP access facilities, and that denying access to such facilities would prevent or lessen competition in the downstream retail market²¹ and, that the access component (connections to homes and business) for wholesale high-speed access services including FTTP are not practically or feasibly duplicable, but transport facilities are.²²

As a result of the findings the CRTC has decided to no longer mandate the provision of aggregated wholesale high-speed access services, but instead mandate disaggregated wholesale high-speed access services.²³

In order to implement its decision the CRTC had decided to phase in the new regulation, beginning with disaggregated wholesale high-speed access services in Ontario and Quebec (where demand is greatest).²⁴ Where disaggregated service is implemented there will be a three year phase out of mandated aggregated service.²⁵ Incumbents and competitors will continue to be able to enter into off-tariff agreements for wholesale service subject to disclosure requirements.²⁶ The tariff process including proposed markups, methods of cost recover and implementation timelines will be decided in a follow-up process, and implementation of the new regulatory regime beyond Ontario and Quebec will be decided at a later date depending on demand conditions.²⁷

¹⁷ CRTC. Telecom Regulatory Policy 2015-326, para. 38.

¹⁸ CRTC. Telecom Regulatory Policy 2015-326, para. 42.

¹⁹ CRTC. Telecom Regulatory Policy 2015-326, para. 46.

²⁰ CRTC. Telecom Regulatory Policy 2015-326, para. 120.

²¹ CRTC. Telecom Regulatory Policy 2015-326, para. 124 and 130.

²² CRTC. Telecom Regulatory Policy 2015-326, para. 135 and 136.

²³ CRTC. Telecom Regulatory Policy 2015-326, para. 138 and 141

²⁴ CRTC. Telecom Regulatory Policy 2015-326, para. 152.

²⁵ CRTC. Telecom Regulatory Policy 2015-326, para. 155

²⁶ CRTC. Telecom Regulatory Policy 2015-326, para. 157.

²⁷ CRTC. Telecom Regulatory Policy 2015-326, para. 159 and 160.

The Commission also considered unbundled local loops, which will now no longer be mandated, and Ethernet and high-speed competitor digital network services which will remain forborne and not mandated as part of the consultation.

Impact of the CRTC Decision

The decision of the CRTC provides non-incumbents with mandated access on a disaggregated basis to wholesale high-speed access facilities including FTTP. The Commission considers such regulation necessary to address limitations of competitive market forces.²⁸ ILECs and cable companies were of the opinion that this approach will negatively impact their ability to provide new services and certain investment decisions;²⁹ however, competitors suggested such an approach would encourage them to make new network investments.³⁰ Competitors and consumer groups supported mandating access to FTTP access facilities, and consumer groups further suggested that this would not diminish investments by incumbent carriers.³¹

The decision appears to be an effective means to address concerns regarding wholesale high-speed access. The approach adopted by the CRTC will encourage new network investments by competitors, while market forces will continue to incent incumbents to invest in services, including FTTP access facilities. Ultimately, given the numerous practical barriers to duplicating FTTP connections (capital requirements, construction challenges, securing right of ways) the approach adopted seems a reasonable means for encouraging the deployment of FTTP connections without requiring redundant infrastructure creation. However, the CRTC's decision will take some time to be phased in and currently applies to only Ontario and Quebec.

²⁸ CRTC. Telecom Regulatory Policy 2015-326, para. 135 and 261.

²⁹ CRTC. Telecom Regulatory Policy 2015-326, para. 95 and 109.

³⁰ CRTC. Telecom Regulatory Policy 2015-326, para. 82.

³¹ CRTC. Telecom Regulatory Policy 2015-326, para. 96 and 103.