



Filed by GCKey

4 August 2017

Danielle May-Cuconato
Secretary General
Canadian Radio-television and Telecommunications Commission
Les Terrasses de la Chaudière
1 Promenade du Portage
Gatineau, QC J8X 4B1

Dear Ms. May-Cuconato:

Re: Part 1 Application filed by TNW Wireless Inc. for interim and final orders against Bell Mobility Inc. and Telus Communications Company for mandated wholesale roaming agreements under Telecom Regulatory Policy CRTC 2015-177, CRTC File No. [8620-R63-201705675](#)

1. Shaw Communications Inc. ("**Shaw**") is in receipt of an Application filed by TNW Wireless Inc. ("**TNW**") pursuant to Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 for interim and final orders against Bell Mobility Inc. ("**Bell**") and Telus Communications Company ("**Telus**") that would require these incumbent mobile wireless carriers ("**incumbent carriers**") to enter into mandated wholesale roaming agreements under the terms and conditions established in Telecom Decision CRTC 2017-56, *Wholesale mobile wireless roaming service tariffs – Final terms and conditions*, 1 March 2017 ("**Decision 2017-56**"). TNW also requested a declaration that its subscribers' use of "iPCS while on Wi-Fi, using Wi-Node cannot be deemed roaming."
2. There should be nothing that stands in the way of TNW entering into a mandated wholesale roaming agreement under the terms and conditions

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- established by the Commission in Decision 2017-56 in order to serve subscribers that will have access to a cellular Radio Access Network (“**RAN**”) or other access facilities that TNW owns and operates. However, that is not our understanding of the service in question. Instead, TNW’s subscribers would be provided with permanent access to the incumbent carriers’ host network, whereby the only means of access to TNW’s backbone and core network that will be provided to its subscribers by TNW is via public Wi-Fi access points.
3. Under the rules pursuant to the Commission’s determinations in Decision 2017-56, given that the only means of access to its network that will be provided by TNW is via public Wi-Fi access points, neither Bell nor Telus should be required to enter into a mandated wholesale roaming agreement with TNW.
 4. In such circumstances, it would also be wrong in law and in equity to compel Bell and Telus to enter into an agreement forcing these incumbent carriers to provide permanent access to their host networks to TNW’s subscribers on an interlocutory or interim basis.

Decision 2017-56 and Decision 2017-57

5. In Decision 2017-56, the Commission established the principle that incumbent carriers are not required to provide access to their networks to wholesale roaming customers that do not qualify for mandated wholesale roaming. In order to qualify for mandated wholesale roaming, the wholesale roaming customer must establish that the purpose and effect of the wholesale roaming arrangement is to provide the wholesale roaming customer’s subscribers with incidental, and not permanent, access to the incumbents’ host networks.¹ The

¹ Decision 2017-56, paragraph 31.

Commission further clarified that for purposes of determining eligibility, public Wi-Fi does not form part of the wholesale roaming customer's home network.²

6. The focus in Decision 2017-56 on public Wi-Fi access to a wholesale roaming customer's network was related to the Part 1 application filed by Ice Wireless Inc. ("**Ice Wireless**") for relief from a disconnection notice that had been served by Rogers Communications Canada Inc. ("**Rogers**"). Rogers alleged breach of the wholesale roaming agreement between Ice Wireless and Rogers in connection with the activities and roaming of subscribers of a Mobile Virtual Network Operator ("**MVNO**") affiliated with Ice Wireless, called Sugar Mobile Inc. ("**Sugar Mobile**").
7. When not roaming on Rogers' host network, Sugar Mobile's subscribers primarily relied on public Wi-Fi access nodes to access Ice Wireless's network. Ice Wireless argued that because Sugar Mobile's subscribers roamed only part of the time, relying primarily on public Wi-Fi access nodes, Sugar Mobile's subscribers would be provided with only incidental access to Rogers' host network.
8. In response to Sugar Mobile's argument, in Telecom Decision CRTC 2017-57, *Ice Wireless Inc. – Application regarding roaming on Rogers Communications Canada Inc.'s network by customers of Ice Wireless Inc. and Sugar Mobile Inc.*, 1 March 2017 ("**Decision 2017-57**"), the Commission reiterated its concern that were it to include public Wi-Fi in the definition of a wholesale roaming customer's home network, this would mean that all global Internet Protocol (IP) connectivity would need to be treated as constituting a part of a wholesale roaming customer's home network, that none of this connectivity would necessarily be owned, operated or controlled by the wholesale roaming

² Decision 2017-57, paragraph 25.

customer, and that this would be contrary to the wholesale wireless framework's stated objective of promoting facilities-based competition because it would eliminate incentives for a wireless carrier to invest in its network.³

TNW'S APPLICATION

TNW's home network

9. Shaw does not possess all of the technical information that TNW has passed on to Bell and Telus, respectively, none of which appears to have been filed with the Application. However, the following relevant facts appear in the TNW Application:
 - (a) TNW is the licensee of cellular spectrum in Tier 2 areas in northwest British Columbia, and parts of Yukon. It states that it owns tower/radio sites;⁴
 - (b) TNW states that it requires wholesale roaming on Bell's and Telus' host networks "in order to be commercially viable";⁵
 - (c) The only form of access to its network and to the Internet that TNW states that it actually provides is by means of public Wi-Fi access points to the iPCS platform that TNW uses under a licence agreement;⁶
 - (d) TNW discusses in some detail the iPCS platform.⁷ It is clear from this discussion that in all cases, access to this platform is provided by TNW

³ Decision 2017-57, paragraph 25.

⁴ TNW Application, paragraph 4 and

⁵ TNW Application, paragraph 7.

⁶ For example, see TNW Application, paragraph ES-3, 5

⁷ For example, see TNW Application, paragraph ES-8 and paragraphs 49-62. TNW does state at paragraph ES-9 of its Application that "all voice calls and text messaging use TNW licensed spectrum at all times." This statement appears overbroad as this cannot be the case when TNW subscribers are roaming on the incumbents' host networks and appears to be contradicted by the statement at

not through any cellular or other facilities that it owns, operates, or controls, but rather, solely through public Wi-Fi; and

- (e) While TNW makes passing references to its “traditional offering,” these are made in reference to TNW’s subscribers when they are roaming on an incumbent’s host network,⁸ which would of course access the incumbent’s RAN and not TNW’s.

Application of Decision 2017-56 to TNW’s Application

10. Based on the evidence set out in its Application, TNW asks that the Commission find that TNW’s use of iPCS technologies “is compliant with CRTC 2017-56”⁹ and focuses on whether its subscribers are roaming when they are accessing the iPCS platform via public Wi-Fi.
11. By definition, when TNW’s subscribers are provided with access to the iPCS platform, it is on public Wi-Fi. So of course, TNW’s subscribers are not roaming when they are connected to the iPCS platform via public Wi-Fi.
12. The issue is not whether the type of access provided by TNW when TNW’s subscribers are accessing public Wi-Fi access points constitutes roaming or not – that is irrelevant, as is the discussion on the application software and other technology that routes calls or data when TNW’s subscribers are using public Wi-Fi access points.
13. Rather, the issue that arises from TNW’s Application is whether TNW is offering anything other than public Wi-Fi access to its backbone and core network. If the only type of access that TNW is offering to its subscribers is public Wi-Fi access to

paragraph 31 that “subscribers using iPCS would NOT be able to use voice, data and text messaging through native device functions”

⁸ For example, see TNW Application, paragraph 32.

⁹ TNW Application, paragraph 19a and 47-62.

- its backbone and core network, then Decision 2017-56 and Decision 2017-57 make it clear that TNW cannot be said to be providing its subscribers with access to a home network.
14. In turn, if TNW is not offering access to a home network, then the access that its subscribers will have to the incumbent carriers' host networks is permanent and not incidental. Permanent wholesale roaming is not mandated. No incumbent should be compelled to enter into an agreement to provide permanent wholesale roaming.
 15. The Commission outlined a number of other factors that would be relevant to determining whether a wholesale roaming customer has made improper use of an incumbent carrier's host network and the wholesale roaming service that it provides.¹⁰ It is impossible, since TNW has not addressed these factors, for Shaw to comment on how these may apply to TNW.
 16. However, based on the facts as disclosed in TNW's Application, it would appear that the type of access to incumbent host networks that TNW intends to provide is permanent, which is prohibited.
 17. Ice Wireless' claim that Sugar Mobile's end-users' use of public Wi-Fi and Ice Wireless' network backbone together constituted use of Ice Wireless' home network was rejected by the Commission on grounds that Ice Wireless had failed

¹⁰ See Decision 2017-56, paragraph 78. The other relevant factors that the Commission cited are whether the wholesale roaming customer (i) deliberately issued phone numbers from exchanges outside its home network footprint to its end-users; (ii) has sold or marketed its services outside its home network footprint; (iii) has sold or marketed its services in a manner that would result in its end-users gaining permanent access to the incumbent's network; (iv) has provided its end-users with a device that has for its sole or predominant purpose permitting them to gain permanent access to the incumbent's network; and (v) has otherwise failed to take commercially reasonable steps to limit roaming on the incumbent's network by its end-users to incidental levels that are within the scope of the service. In considering this factor, the Commission may take into account evidence of broad traffic patterns and network use trends concerning a significant proportion of wholesale roaming customer or MVNO end-users.

to provide adequate support for the claim as well as for the allegation that the RAN and the backbone form a single inseparable network.¹¹ The Commission also found that even if this were not the case, the use of public Wi-Fi by a wholesale roaming customer would not amount to use of a home network for purposes of roaming.¹²

18. Thus, to the extent that TNW's Application seeks to force Bell and Telus to enter into mandated wholesale roaming agreements that would force them to provide permanent access to their host networks, TNW's Application should be dismissed.

Disguised Attempt to Review and Vary Decision 2017-56

19. TNW attempts to distinguish its case from that of Sugar Mobile¹³ and claims, as noted above, to be in full compliance with Decision 2017-56 insofar as its request to enter into wholesale roaming arrangements with Bell and Telus is concerned. As discussed above, it is doubtful that there is anything distinguishing Sugar Mobile from TNW in relation to the fundamental issue of whether TNW is providing its subscribers with access to its backbone and core networks by means of cellular or other facilities that it owns and operates or otherwise controls.
20. Assuming that there is no distinguishing factor, TNW's Application is a disguised attempt to review and vary Decision 2017-56 that does not meet the test to review and vary a Commission decision.
21. Pursuant to Telecom Information Bulletin 2011-214, *Revised Guidelines for Review and Vary Applications*, applicants requesting that the Commission

¹¹ Decision 2017-57, paragraph 29.

¹² Decision 2017-57, paragraph 29.

¹³ TNW Application, paragraphs 73-78.

exercise its discretion pursuant to section 62 of the *Telecommunications Act* must demonstrate that there is “substantial doubt” as to the correctness of a decision due, for example, to the existence of certain conditions, including an error in law or fact, or a fundamental change in circumstances since the making of the decision.

22. TNW claims that it satisfies the requirements of Decision 2017-56 but it cannot distinguish itself from the Sugar Mobile situation. TNW does not and has not even attempted to meet the Commission’s review and variance criteria. As such, its Application should be dismissed.

Interim Relief

23. Shaw does not intend to address in detail TNW’s request for interim relief. This request is better addressed by the parties against whom it is directed, since these parties are best placed to address the three-part *RJR MacDonald* test and in particular, the harm and balance of convenience components of the test.
24. Having said that, Shaw submits that TNW’s request for interim relief lacks the requisite legal foundation.
25. TNW is seeking mandatory injunctions against Bell and Telus – injunctions that would require that Bell and Telus proactively do something, as opposed to requesting that Bell and Telus refrain from doing something that is prohibited or illegal.
26. A mandatory injunction may be given to remedy past wrongs and require the defendant to undo some wrong he or she has committed. Such orders are restorative in nature, requiring the defendant to take whatever steps are necessary to repair the situation in a manner consistent with the plaintiff’s rights or to carry out some unperformed duty to act.

27. However, in the case before the Commission, to the extent that TNW is seeking permanent roaming through public Wi-Fi facilities, it is asking for a mandatory injunction that is inconsistent with the law currently in place. In other words, there is no right that TNW may assert against Bell and Telus to compel them to enter into an agreement that would be inconsistent with Decision 2017-56. As such, TNW's request for interim relief in the form of a mandatory injunction must fail for lack of a legal right to the relief that it is requesting. Using the language from the first prong of the *RJR-MacDonald* test, there is no serious issue to be tried that would justify granting TNW's requested relief on an interim basis.

Conclusion

28. For all the foregoing reasons, Shaw respectfully submits that TNW's Application should be dismissed in its entirety.

Yours truly,

[Original signed by]

Paul Cowling
Vice President, Legal and Regulatory Affairs
Shaw Communications Inc.

cc: TNW Wireless Inc.

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