

**In the Matter of Canada Gazette, Part 1, Vol. 140, No. 50 –  
December 16, 2006  
Order Varying Telecom Decision CRTC 2006-15**

**Comments of Bell Aliant Regional Communications, Limited  
Partnership**

**January 15, 2007**

## 1.0 Introduction

1. Bell Aliant Regional Communications, Limited Partnership ("Bell Aliant") is pleased to offer the following comments with respect to the Government of Canada's proposed Order Varying Telecom Decision CRTC 2006-15 ("the Order") published in the Canada Gazette Part I December 16, 2006.
2. The Government of Canada has taken a significant step forward towards modernizing Canada's telecommunications regulatory environment by issuing the proposed Order. This step will bring Canada closer in alignment with the approach to deregulation taken in other markets and in other countries. The Government has recognized that where a facilities based competitive presence has emerged, an asymmetrical approach to regulatory constraints is inappropriate and that the market, rather than the regulator, should determine the service offerings available to consumers.
3. In markets where competitors are allowed to compete head on free from regulatory restrictions, they are forced to differentiate themselves through innovative service offerings, quality of service, product mix or through pricing and promotional actions. Consumers win by being presented with a greater variety of options to fit their needs. The Government's action in varying the criteria for forbearance will allow the benefits of full market competition sooner than would have otherwise been the case and promises to create an environment which will foster market innovation and efficiency.
4. In recognizing the competitive realities of the industry and presenting new forbearance criteria, the proposed Order also brings the Commission's forbearance decision in line with the Government's policy direction to the CRTC which requires a reliance on market forces to the maximum extent feasible.
5. Bell Aliant welcomes the government's initiative to vary the Commission's forbearance decision in a manner that will deliver the full benefits of competition to Canadian consumers in a more timely manner. Atlantic Canada has been a model of residential, facilities-based competitive entry. The provinces of Nova Scotia and Prince Edward Island have had full, unbridled competition from a facilities-based cable company for several years now. In fact in April 2004, Bell Aliant became the first telephone

company in Canada to request forbearance for residential local telephone service. Unfortunately, some two years later, this request was denied in Decision 2006-15.

6. There are numerous exchanges in Atlantic Canada that are undeniably competitive and Bell Aliant will be seeking forbearance in accordance with the revised criteria. However, in light of the history and particular circumstances in Atlantic Canada, as discussed in more detail in this submission, and the fact that the Commission's decision dealt with a specific Bell Aliant request for forbearance, Bell Aliant is requesting that, in its variation of the Commission's decision, the government take some specific initial steps to address the competitive situation in Atlantic Canada. Specifically, Bell Aliant is requesting that the government include in its variation of Decision 2006-15 a specific grant of forbearance for the exchanges in the Halifax Local Interconnection Region (LIR) in which EastLink offers and provides its telephone services, given the particular uncontested facts, as confirmed by the Commission itself, existing in the Halifax market.
7. In addition, Bell Aliant has noticed a few inconsistencies between the forbearance criteria and the Government's direction toward furtherance of a vibrant and efficient Canadian telecommunications market place. In such cases, Bell Aliant offers a few suggestions for improvements or clarifications to the proposed variance.

## **2.0 Forbearance Criteria**

### **2.1 Presence of facilities based competition**

8. As a part of the competitive presence test, the Government has correctly viewed the presence of facilities based competitors to be the appropriate hallmark of a competitive telecommunications market. Bell Aliant was the first economically regulated carrier to experience the rapidity with which a facilities based competitor, especially one like a cable company who already has a significant existing relationship with residential customers, can roll out its telephony offering throughout its network footprint and quickly establish a significant telephony customer base.

9. The local telephone market has been characterized by the entrance of cablecos throughout the country. Cablecos possess a unique advantage in that their cable networks reach 97% of Canadian households. In addition, cablecos have captured 56.8% of residential broadband revenues and 14.8% of business broadband revenues in Canada. Cablecos also serve 53.9% of the residential broadband subscribers and 9% of the business broadband subscribers in Canada<sup>1</sup>. The reach of cablecos' cable and internet networks provides an existing infrastructure over which to provide telephone service.
  
10. In Atlantic Canada, EastLink has extended its telephone service through much of its cable footprint in Nova Scotia and Prince Edward Island. At the end of 2005, it had captured 35% of residential wireline market in the Halifax CMA<sup>2</sup> and this has grown over the past year. As another example, Rogers Home Phone recently reported that it has added 86,700 new telephone customers in the fourth quarter of 2006<sup>3</sup>. Cablecos, large and small, have the ability and the capacity to expand their telephony service quickly throughout their existing footprints.
  
11. The Competition Bureau has consistently stated that network coverage and capacity offer a better measure of the competitiveness of a market than do retail market share statistics. The Bureau offered the following analysis during the proceeding which led to Decision 2006-15 which supports the proposed new criteria:

In the Bureau's view, capacity and network coverage represent the most appropriate measures of market shares. Capacity represents the incentive and ability of a service provider to access and compete for the customers of an incumbent local exchange carrier (ILEC) in response to a price increase. Network coverage represents the physical presence of a service provider to offer service to the ILEC customers. For example, in geographic markets where there are two independent facilities-based service providers with sunk costs, that are not capacity constrained, and are equally capable of offering the relevant product, the capacity market share of the ILEC and the new entrant will each be 50%.<sup>4</sup>

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<sup>1</sup> *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets*, 2006, p. 58-61.

<sup>2</sup> *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets*, 2006, Appendix 4

<sup>3</sup> *Globe and Mail*, Rogers rings up more wireless customers, January 8, 2007, <http://www.theglobeandmail.com/servlet/story/RTGAM.20070108.wrogers0108/BNStory/Business/>

<sup>4</sup> *Argument of the Commissioner of Competition*, PN 2005-2, 15 September 2005, paragraph 62.

12. Bell Aliant assumes that the proposed criteria regarding the presence of facilities-based competition is also satisfied by the presence of carriers who combine their facilities with the lease of unbundled loops from an alternate supplier. The presence of such competitors in no way diminishes the level of competitive rivalry in the market. In fact, the availability of unbundled loops can only enhance a competitor's ability to expand its service quickly throughout an exchange.
13. The Government's proposed inclusion of wireless based service providers as part of the residential market also recognizes the growing reality of wireless substitution. This is readily evidenced in the rapid growth of wireless only households throughout Canada. Data from Statistics Canada's Residential Telephone Services Survey (RTSS) indicates that the number of wireless only households in Canada grew by 85% in 2005. Small, mainly rural Prince Edward Island saw a growth rate of 59% of households that had decided to cut the cord.
14. Evidence of customers completely cutting the connection to a wire line based service is not the only reason to include wireless based service providers as part of the local market. As Bell Aliant and others have previously pointed out<sup>5</sup>, substitution takes place each time a customer chooses to use a wireless connection instead of a wireline connection.

## **2.2 Geographic market**

15. The use of exchanges as one of the appropriate geographic markets for consideration for forbearance, as proposed in the Order, rather than the overly large local forbearance regions (LFRs) reflects the reality that most competitors roll out their telephone services on an exchange basis. Exchanges have also typically been established using a community of interest or along the borders of a previously established geographically homogenous area. Bell Aliant thus fully supports the use of exchanges as an appropriate geographic market.

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<sup>5</sup> Comments of Bell Aliant, Bell Canada, SaskTel and Télébec, PNs 2006-9, para. 16-18 and 2006-12, para. 81-85.

16. Bell Aliant also supports the government's proposed option of using LIRs, as defined in the Appendix to Telecom Decision CRTC 2004-46 as an appropriate geographic market definition. LIRs, as defined in the Appendix, reflect natural communities of interest consistent with the Government's intention. The Commission introduced these geographic regions with the intent that they be competitively neutral and follow previously established community of interest boundaries:

In determining which exchanges to consolidate for purposes of establishing LIRs, the Commission has decided to broadly align the LIRs to boundaries reflecting a community of interest. The Commission considers that the most neutral and appropriate template for determining community of interest is the existing provincially defined administrative regions. The Commission notes that these boundaries are not reliant on any network architecture and are therefore competitively neutral. These boundaries are well specified, readily identifiable, and are associated with economic, social and political interests. They also allow the consolidation of exchanges into LIRs without creating too large an interconnection region. The Commission, therefore, finds it appropriate to consolidate exchanges for the purposes of interconnection on the basis of provincially defined administrative regions.<sup>6</sup>

17. Bell Aliant submits that it would be useful to clarify the requirement in the proposed revision that facilities-based carriers be providing service "throughout the market" (proposed revision to paragraph 242 a) (ii) and (iii)). Bell Aliant notes that, typically, once a competitor is established in an exchange, it offers service widely throughout that exchange and, in any event, can easily expand to the remainder of the exchange. Thus, once present in the exchange, the facilities-based entrant provides immediate competitive discipline throughout the exchange. Moreover, even if that were not the case and there remain pockets of uncontested customers within an exchange, the price cap that is imposed on the forborne exchange would serve to protect customers from any possible market power of the incumbent. Accordingly, in order to eliminate any possible confusion, Bell Aliant requests that the final Order clarify that the competitive facilities test is satisfied if alternative providers offer service anywhere in an exchange or, if the market is an LIR, anywhere in each exchange in the LIR.

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<sup>6</sup> Telecom Decision CRTC 2004-46, *Trunking arrangements for the interchange of traffic and the point of intersection between local exchange carriers*, paragraph 72.

### 2.3 Competitor Quality of Service

18. The proposed order corrects many of the flaws contained in the original competitor Quality of Service (CQoS) criteria; however, in a facilities based competitive environment, Bell Aliant is of the view that satisfaction of CQoS should not be necessary to conclude whether or not a market is sufficiently competitive. First of all, facilities based competitors require very few services from regulated carriers for the provisioning of their local telephone service. As an example of this, EastLink has succeeded in capturing over 35% of the Halifax CMA residential market notwithstanding that Bell Aliant has not consistently met all of its CQoS measures. This factor has not prevented the Halifax market from becoming intensely competitive.
19. In addition, the CQoS measures themselves do not necessarily accurately reflect the degree of service actually provided to competitors. The measures were developed based on the assumption that the model of competition would develop primarily in large urban areas. In fact competitors have not restricted development of their competitive footprints to urban areas. In spite of this, regulated carriers continue to be measured against service intervals developed for urban markets while in fact, a large number of services to competitors are provided in rural and even remote regions. The measures as they currently exist do not adequately reflect the time or effort required to, for example, provision trunks or repair facilities in non-urban regions.
20. Bell Aliant expressed its view with respect to the CQoS criterion in its response to Telus' Application to Review and Vary Decision 2006-15. Bell Aliant submits that there is no causal link between CQoS results and the degree of local services competition in a relevant market. The notion that CQoS results are critical to competitors due to the competitors' dependence on the regulated carrier's wholesale services is not borne out by the facts and such an assumption is seriously flawed. CQoS indicator results are not indications that the market is, or is not, sufficiently competitive to protect the interest of users. There is no sound policy or competitive reason to impose CQoS as a criterion to be satisfied in order to obtain forbearance.

21. Notwithstanding Bell Aliant's view that CQoS is unnecessary as a forbearance criterion in a facilities based competitive environment, if CQoS is nevertheless retained as a criterion, Bell Aliant provides the following comments on the proposed changes to the current criterion. The proposed criterion corrects many of the flaws in the CQoS forbearance criterion as defined in Decision 2006-15. The consideration of CQoS results on an aggregated basis rather than by individual competitor represents the average standard of competitor service provided. This is especially important in a market characterized by facilities based competitors who self supply almost all components of their service offerings. In such a situation where services required from the regulated carrier are few, a few instances of misses in the service interval are likely to result in failure to meet the criteria for forbearance if CQoS results were to be considered on a competitor by competitor basis.
22. The proposed removal of the trailing indicators as part of the CQoS criteria also corrects a serious flaw in the current forbearance criteria. Trailing indicators measure service order misses a second time against a second service interval. This is a condition not existing in retail QoS measures. In addition, failure to meet a trailing indicator, subjects an economically regulated carrier to a competitor rate rebate. Including these indicators as a criterion upon which to base forbearance amounts to penalizing the service provider twice.
23. On another point with respect to the CQoS criterion as proposed by the Government, Bell Aliant has some reservations regarding potential vagueness in the wording in the proposed order of the criteria (b) (ii): "it did not consistently provide substandard services to any of those competitors". This wording is open to interpretation and may entail considerable time on the Commission's part in dealing with endless submissions from competitors alleging delivery of substandard services. In any event Bell Aliant submits it is an unnecessary measure if a regulated carrier is consistently meeting CQoS. As a result, Bell Aliant submits that paragraph 242. b) (ii) should be removed from the proposed Order. At a minimum, if it is retained, it should be clarified so that forbearance would only be denied under this criterion if the substandard service were part of a practice intended to substantially lessen competition.

## **2.4 OSS and competitor tariffs**

24. The removal of the requirement for access to operational support systems and the filing of competitor tariffs as a criterion for forbearance is consistent with a market characterized by facilities based local exchange carriers (LECs) who are not reliant on obtaining these services from economically regulated carriers. Bell Aliant fully approves the removal of these criteria.

## **3.0 Specific Request for Forbearance: Halifax**

25. Bell Aliant requests that the government include in its variation of Decision 2006-15 a specific grant of forbearance for the residential local service markets in the exchanges in the Halifax LIR in which EastLink offers and provides its telephone services. The background to this request is as follows.
26. In addition to defining streamlined criteria for forbearance generally, the Commission's Decision 2006-15 also dealt with a specific application of Bell Aliant requesting forbearance for a number of exchanges in Atlantic Canada where cable company, EastLink, offers telephone service over its own facilities and has achieved substantial market penetration. The census metropolitan area (CMA) of Halifax was most notable among these exchanges. (Of course, wireless and VoIP services are also widely available in these exchanges.) Bell Aliant's Application was filed in April 2004.
27. In Decision 2006-15, the Commission denied forbearance in any of the requested exchanges, including Halifax. It did so notwithstanding Bell Aliant's demonstration of a lack of market power in Halifax and the Commission's virtual acknowledgment of this fact. For example, amongst its findings, the Commission determined that Aliant's market share loss in the Halifax CMA, for example, was 33% (which has subsequently been confirmed by the Commission to be 34.9% based on year end 2005 figures<sup>7</sup>) and that competition with EastLink was vigorous. In fact, the Commission stated as follows:

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<sup>7</sup> *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, 2006*

“The Commission notes that the record provides clear evidence of rivalrous behaviour in the Halifax LFR. Both Aliant Telecom and EastLink are vigorously competing for residential local exchange customers through the use of bundles, promotions and extensive advertising campaigns” (para 506)

28. The Commission’s denial of forbearance in Halifax was based entirely on the fact that the Competitor Services tariff and CQoS criteria prescribed in the Decision had not been met, even though the failure to meet these criteria had obviously not prevented facilities-based competition from flourishing in Halifax.
29. Moreover, by not acting initially on the application, and subsequently deferring consideration until streamlined criteria had been determined, the Commission subjected consumers in Atlantic Canada to an inordinate regulatory delay which has denied them the benefits of unfettered competition. The fact of the matter is that, since the Commission’s decision, EastLink has continued to gain customers and flourish, all the while operating under shelter of Commission regulations. This loss of telephone lines excludes any loss to wireless service providers operating in Halifax. While there are many markets in Atlantic Canada that are vigorously competitive, it cannot seriously be disputed that competition in Halifax in particular is more than sufficient to protect consumers, based on the Commission’s own findings. In fact, Halifax is quite likely the most vigorously competitive residential market in the country.
30. It has been nearly three years since Aliant first requested forbearance and consumers are still being denied the full benefits of market forces. The Order in Council is an opportunity to correct this situation for sound competitive and public policy reasons. The Commission itself has acknowledged that it remains open to grant forbearance in a particular market based on a lack of market power, notwithstanding the failure to meet any specific streamlined criteria. Halifax is demonstrably such a market and, in these circumstances, it would be an unfortunate policy outcome if, as a result of byzantine regulatory rules and process, Halifax continued to be regulated perhaps even beyond other Canadian cities.
31. Accordingly, Bell Aliant requests that the government include in its variation of Decision 2006-15 a specific grant of forbearance for the residential local service market in the exchanges in the Halifax LIR in which EastLink offers and provides its telephone services.

#### 4.0 Elimination of promotional and winback constraints.

32. Bell Aliant fully supports the removal of winback constraints. In today's telecommunications market place, that is, a market place crowded with facilities based local exchange carriers (LECs), wireless carriers as well as access independent VoIP service providers, there is no need to artificially protect competitors from the competitive winback activities of economically regulated carriers or for that matter, the winback activities of other competitors. Winback attempts of lost customers are a demonstration of a vibrant and competitive market. Customers must have the freedom and the information to determine which service offering will best meet their telecommunications needs.
33. Elimination of the artificial constraint of the winback rule will result in all LECs and Wireless Service Providers (WSPs) vying for the business of customers and winning that business based on the innovativeness, the value of their service or the product mix being offered. Customers will no longer be deprived of knowledge of all competitive options; and all service providers will be motivated to provide greater innovation in their service offerings.
34. The Telecommunications Policy Review Panel supported the removal of the winback rule asserting that the ability to make offers and counter offers is "the very essence of competition"<sup>8</sup>. The Panel went on to state:
- Unless a win-back campaign can be shown to significantly lessen competition, with the ensuing detriment to consumers outweighing the benefits to them (a very unlikely occurrence, in the Panel's view), win-back campaigns should not be restricted by the regulator.<sup>9</sup>
35. Finally, it is Bell Aliant's view that the winback rule constitutes a violation of Bell Aliant's and customers' constitutional Charter Rights (*Canadian Charter of Rights and Freedoms*). The winback restrictions interfere with a regulated carrier's ability to communicate with customers who have changed their local service provider; and, they

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<sup>8</sup> Telecommunications Policy Review Panel, *Final Report 2006*, page 3-23.

<sup>9</sup> Ibid.

interfere with the customer's right to receive information regarding new local services or offers of regulated carriers provided services not related to local service.<sup>10</sup>

36. Bell Aliant also supports the government's proposed removal of restrictions on promotions. Promotions are a normal marketing tool used to introduce a new product or service to customers. They allow customers to sample offers under an introductory time frame or at an introductory value. This allows the customer a chance to evaluate the new offering and it allows a service provider the opportunity to prove the value of its new product.
37. Consistent with this, promotions are not a deterrent to the development of competition. They are the logical outcomes of efforts to introduce innovative product offerings to the market. Regulatory restrictions on the offering of promotions stifle market innovation and investment and are inconsistent with the Government's Policy Direction to "rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives"<sup>11</sup>.
38. For all of these reasons, Bell Aliant supports the Government's action in removing regulatory restrictions on the use of promotions.

## **5.0 Further issues**

### **5.1 Applications**

39. If CQOS is retained as a criteria for forbearance, then Bell Aliant submits that, in cases where exchanges or LIRs meet the facilities based test or the criteria set out in paragraph 213 of Decision 2006-15, the Order should allow for applications for forbearance in anticipation of the CQoS criterion being met. Forbearance could then be granted immediately once the criteria are met. This measure would remove the delay inherent in regulatory process and would further the aim of streamlining the

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<sup>10</sup> Comments of Aliant Telecom Inc. regarding Bell Canada and SaskTel Part VII Application, regarding the Constitutionality of the Winback Restrictions, paragraph 2.

<sup>11</sup> Government of Canada, *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*

CRTC processes, in keeping with the government's policy direction with respect to efficiency in regulation. It is also consistent with the Commission's willingness to entertain such pre-applications<sup>12</sup>. Specifically, should CQoS be retained as a criterion for forbearance, Bell Aliant requests that paragraph 242 be amended to provide that forbearance must be granted if the ILEC demonstrates that, during the six months period preceding "the granting of forbearance" (rather than "preceding the application"), the CQoS criterion has been satisfied.

40. Bell Aliant also notes that the Government has directed the expeditious treatment of forbearance applications for 10 of the largest CMAs. Should the Government decline to grant Bell Aliant's request for immediate forbearance in the exchanges in the Halifax LIR in which EastLink offers and provides its telephone service despite the arguments submitted elsewhere in these comments and in Aliant's 2004 forbearance application, Bell Aliant requests that, at a minimum, Halifax be added to the list of markets to be treated expeditiously for the purposes of forbearance.
41. As a final note, Bell Aliant submits that 120 days is not necessary for the consideration of a forbearance application. With the streamlined forbearance process in place and all relevant information readily available to the Commission, 60 days for consideration and disposal of forbearance applications is a reasonable time frame. This will ensure that customers will enjoy the benefits of a fully competitive market in a reasonable timeframe. Accordingly, Bell Aliant requests that the decision be varied so as to require that forbearance applications pursuant to the streamlined criteria be dealt with within 60 days.

## **6.0 Conclusions**

42. The proposed revisions to the forbearance criteria as well as the lifting of marketing restraints on promotions and winback activities will bring a new vigor to the Canadian telecommunications industry, stimulating both competition and innovation. This will

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<sup>12</sup> Notes for an address by Charles Dalfen Chairman, Canadian Radio-television and Telecommunications Commission to the 2006 Telecommunications Summit, Toronto, Ontario, June 14, 2006

bring enhanced benefits to consumers of telecommunications services and strengthen the industry as a whole.

43. The Government has recognized and removed many of the barriers to deregulation inherent in the current forbearance criteria. The finalization of this Order will strengthen the Canadian telecommunication industry domestically and internationally.
44. Bell Aliant also requests that the Government grant immediate forbearance in the residential marketplace of Halifax. Deregulation has been delayed in this market for too long. By freeing Bell Aliant to fully compete head on with EastLink, the Government will be correcting a distortion in the marketplace.
45. Bell Aliant urges the Government to implement this order without delay. Consumers should not face any further delay in realizing the benefits of competition in the telecom local market.

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