

DISTRIBUTEL



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15 January 2007

VIA E-MAIL

Mr. Leonard St-Aubin
Director General
Telecommunications Policy
Industry Canada
300 Slater Street, 16th Floor
Ottawa, Ontario, K1A 0C8

Dear Mr. St-Aubin,

Subject: Canada Gazette, Part 1, December 16, 2006
Order Varying Telecom Decision CRTC 2006-15

Distributel Communications Limited ("Distributel") is submitting the attached comments in regards to the Order Varying Telecom Decision CRTC 2006-15.

Yours truly,

 on behalf of.

Donald Cavanagh
Vice President Telecom

Attachment

c.c: The Honourable Maxime Bernier, Ministry of Industry
Mrs. Diane Rhéaume, Secretary General, CRTC (via e-pass)
In electronic format, to telecom@ic.gc.ca

**DISTRIBUTEL'S COMMENTS TO THE ORDER VARYING TELECOM
DECISION 2006-15**

Introduction

1. Distributel Communications Limited (Distributel) is submitting the following comments with respect to the Order mentioned in the above subject.
2. The Order follows a joint petition made by the Incumbent Local Exchange Carriers (ILECs), Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications and TELUS Communications Company (the Companies) as well as the Government of Saskatchewan and the Coalition for Competitive Communications, following Telecom Decision CRTC 2006-15 Forbearance from regulation of retail exchange services (the Local Forbearance Decision). In their petition, the Companies, put a significant emphasis on the CRTC's flawed approach to just about every aspect of regulation and on specific problems with the Local Forbearance Decision's framework.

Order Varying Telecom Decision CRTC 2006-15

3. In their petition, the Companies based most of their analysis on the Telecommunications Policy Review Panel (the Panel) report, to suggest market forces are sufficient to protect the interests of consumers without regulatory or government intervention. The Companies point out flaws in the Commission comprehension of basic economic principles, its view of competition, its view of the role of regulation, as well as its unwillingness or inability to reform regulation.
4. It is interesting to note that the Panel also outlined reasons where competition and market forces alone could not solely be relied upon. One reason cited by the Panel being the presence of significant market power. The Panel also mentions

that abuse of dominance would be another reason to justify economic regulation. With 95%¹ of the local residential market shared collectively by the ILECs, there is no doubt they have significant market power and the potential to abuse market dominance.

5. Market forces can only work in a truly competitive market, which is not the case with the ILECs having such a significant market share in the local exchange market. One can hardly conceive that at this stage of competition in the local exchange market that market forces alone will be sufficient to protect consumers. The Commission is in fact very much in touch with market realities and has issued a Local Forbearance Decision that balances the interests and positions of all parties.
6. The Commission made its determinations based on a comprehensive proceeding initiated by Telecom Public Notice CRTC 2005-2, *Forbearance from regulation of local services*, where **all** members of the industry had the opportunity to provide their input. The objective of the Commission is to establish a regulatory framework that would enable sustainable competition. Its Local Forbearance Decision sets out the essential quantifiable criteria to measure the readiness of a specific local market for forbearance.
7. With the ILECs still having such a dominant position and without objective rules for forbearance as proposed by the Commission in the Local Forbearance Decision, the market would see only a limited number of competitors offering local service. Even the analysis leading to the Order recognized this as a very real possibility when it said: “*While it is possible that over time only a small number of competitors may offer service, this does not mean that consumers’ interests will not be well served.*” It is clear that a duopoly of Cable Companies and ILECs will result if the proposed Order is implemented in its current state. It is widely accepted that duopolies do not protect consumers’ interests significantly more

¹ CRTC Telecommunications Monitoring Report dated July 2006, data for year 2005.

then monopolies do. Distributel believes the Commission's objective is clear, deregulate in a manner as to maximize the number of competitors resulting in a more vigorous market with real and innovative choices for Canadian consumers.

8. The Organization for Economic Co-Operation and Development (OECD) in its report on Regulatory Reform in the Telecommunications Industry² concluded the following: “A key factor in Canada's success has been the powers vested in the regulator and its independence which has permitted it to pursue its main objectives of first preparing the market for the introduction of competition, and then putting in place the general framework to open the market and the regulatory safeguards necessary to support such competition.” (emphasis added) And it goes on to add: “The regulator is concentrating on the key market, the local market, where the furthering of competition is necessary.” The Local Forbearance Decision accomplishes this exact goal.

9. The reason that Canadian consumers are now beginning to have a wider range of competitive options for their local service is precisely due to the measured approach of the Commission. Relying solely on market forces while the market is still predominantly controlled by a few dominant players would see a reversal of all the benefits we have seen so far.

10. Under Section 34 of the *Telecommunications Act*³(the Act), the Commission has the power to refrain from exercising its power, when as a question of fact, it would be consistent with Canadian telecommunications policy objectives. The Commission through its consultations with the telecommunications industry issued a well researched decision to implement local forbearance by weighing the submissions of all participants. The Commission has demonstrated experience dealing with the complexity of forbearing. Many markets have been deregulated over the years, such as long distance, private lines, etc. Their approach to

² OECD Reviews of Regulatory Reform, OECD 2002, p. 48

³ Telecommunications Act, S.C. 1993, c. 38

deregulation has created a more competitive market where Canadian consumers are provided with quality services at competitive prices, which in turn has led to Canada having one of the most advanced and affordable telecommunications networks in the world.

11. The Governor in Council, on the recommendation of the Minister of Industry, the Honourable Maxime Bernier, has erred by issuing an Order that oversimplifies the approach to local forbearance and deregulates prematurely before market forces have evolved sufficiently to protect consumers' interests. While the Minister's approach may be based on sound doctrine, the Commission's approach has been further guided by practicality and informed judgment. In its desire to rely on market forces, the Minister should bear in mind that until only recently the ILECs enjoyed a complete monopoly on local telephone service. That complete *absence* of market forces is not so easily undone.
12. The legacy of the monopoly is the incumbents' 95% residential local market share, and the market power that confers. But what does it mean in practice? For one thing, incumbency provides a huge *information* advantage over the competition. Not only do the ILECs have knowledge about the size, structure and preferences of various market segments, but they also have detailed information about each individual client. In addition, through techniques such as bundling and multi-year contracts, incumbents have increased the switching costs faced by those clients who might be tempted to leave for a competitor.
13. To attract a client away from an incumbent, a competitor needs more than just a better offer. The superiority of its offer has to exceed the client's cost of changing suppliers. Distributel's sales force routinely encounters this when selling long distance. A client will be persuaded to use our long distance services. Then, when the order to change long distance providers is being processed by the ILEC, he is reminded that he had previously made a verbal agreement to receive a better rate for his local lines conditional on his long distance service staying with the

ILEC. Our long distance offer must be *so much* better than the incumbent's as to still be attractive after taking into account the increased cost the client will pay for his local lines if he switches.

Marketing Restrictions

14. Perhaps the unkindest cut of all comes at the end of the sales cycle, after a competitor has succeeded in overcoming the switching costs. Only then, after it knows that it has lost the customer, will the incumbent roll out its sweetest deals to win the client back. And those efforts often succeed.
15. In a normal marketplace, without a decades long history of monopoly, rivals would not necessarily know when a competitor had made a sale. By contrast, in the telephone services market, the incumbent is aware of almost every defection. In this context it is not surprising that the Commission imposed restrictions on the ILECs' pricing and winback activities. It understands the practical necessity of such constraints if it is to succeed in undoing the monopoly and giving competitors a chance to get established.
16. Targeted pricing and winback activities are now permitted in the long distance market where the Commission has forborne from regulation, having judged that competition is sufficiently well established that it can survive such practices. In the local services market the Commission's intention was to do the same. By contrast, the Order ignores the practical necessity of imposing constraints until competition takes root. Reliance on market forces is a fine idea, but not while those forces still swell with the strength of monopoly.

Forbearance Tests

17. The Order proposed two tests to evaluate forbearance in a specific local market. The competition principle test and the competitive facilities test, to help determine if the Commission should forbear, under Section 34 of the Act, from regulating local telephone services.
18. Distributel suggests that the new tests are flawed as they provide only vague criteria and do not provide any guidelines as how the criteria should be interpreted.
19. The competition principle test requires the entrant to obtain and retain a customer base but does not offer any indication as to how large a customer base, nor how long it must be retained. By contrast the 25% market share loss criterion proposed by the Commission is an objective way of assessing the state of the market.
20. The competitive facilities test requires even less conditions to be met. Once a number of facilities-based providers are present in the market, forbearance will be granted without any criteria for market share loss or rivalrous behavior.
21. The competitor Quality of Service (Q of S) is another objective requirement relying on measurable objectives. The Order has kept most components of the requirement recognizing the fact that the ILECs, being in such a dominant position and controlling necessary essential and near essential services, are able to negatively impact the competitors ability to offer quality service.

Requirement for Competitor Services Tariffs

22. The Order eliminates, as a criterion to forbear in a proposed market, the need for the ILECs to have in place a Competitor Services tariffs, specifically for DSL services. As the Commission pointed out in its Decision, DSL services are one of the key inputs to services offered by competitors. To eliminate the requirement for a wholesale tariff on such a service would greatly disadvantage many competitors.
23. The Companies stated in their petition that this requirement: “...*is completely open-ended and subject to mischievous demands from competitors because the CRTC has not defined what these services may be in the future.*” And goes on to say that: “...*(bundled ADSL) are not required by facilities-based cable competitors who already have their own broadband networks in place.*”
24. This holds true for the Cable Companies, but the impact on the CLECs and Resellers who do not have their own broadband networks seems to be left aside. Without a wholesale tariff in place, the capacity to offer local services in most areas would be greatly impeded and would drastically limit the number of competitors able to offer service. It is not realistic to expect all competitors to build their own broadband networks, nor is it desirable. The result of the Order will be that consumers in most regions of Canada will ultimately end up with only two competitive choices for local service, the cable companies and the ILECs
25. Resellers have been an important part of the evolution of the telecom industry. To think otherwise would be denying the contribution made by these entities in providing innovative and cost-effective telecom services to millions of Canadians. Distributel was the first to introduce flat rate plans for long distance service. Primus Canada was the first to market in Canada, with Voice over Internet Protocol (VoIP) service.

26. As the Commission has noted numerous times over the years, resale is an important stepping stone to facility-based competition. It provides a competitor with the ability to establish a customer base, then build its own network only when it becomes economically viable to do so. In addition it allows for a greater number of services providers to compete, hence more innovation and competitive choices. The need for wholesale tariffs is crucial and cannot be taken for granted in a market relying solely on market forces.

Conclusion

27. Distributel agrees with the need to deregulate, but the uniqueness of the Canadian market has to be taken into account and the Commission has a proven track record of making sure that the input of all the players are considered so in the end the consumer benefits from strong and healthy competition.

28. Obviously, the proposed tests mentioned in the Order favor ILECs and Cable Companies and offer very little opportunities for CLECs and Resellers to establish themselves in the local market. CLECs and Resellers are an important part of the competitive local landscape and any regulatory changes should factor in the significant contribution they have made in the telecom industry. They bring innovative and alternative choices to the Canadian consumer and help keep the market dynamic and competitive.

29. As long as only a few players control essential and near essential facilities, some regulation will be required to ensure that market dominance is not abused. Although the Honourable Minister Bernier has tabled amendments to the *Competition Act* to establish financial consequences for companies that would engage in anti-competitive behavior, this safeguard is an after the fact tool whose exercise may come too late to save a competitor who is a victim of such behavior.

30. In issuing the Local Forbearance Decision, the Commission established a forbearance framework that will ultimately lead to a competitive and innovative local market.

31. In light of the above, Distributel respectfully requests that the Minister of Industry recommend Her Excellency the Governor in Council to reconsider the proposed Order and allow the Commission's Local Forbearance Decision to stand. Alternatively, the duopoly that is bound to develop if the Order proceeds will not ultimately provide the innovative, competitive and affordable services that Canadian consumers are entitled to.