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VIA EMAIL AND COURIER

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

Dear Mr. St-Aubin:

Subject: Proposed Order Varying Telecom Decision CRTC 2006-15 as
published in the *Canada Gazette*, Part I, 16 December 2006

Pursuant to the procedures established by the Privy Council Office on 7 December 2006 and as published in the *Canada Gazette*, Part I on 16 December 2006, Primus Telecommunications Canada Inc. (Primus) hereby submits its comments on the government's proposal to vary *Forbearance from the regulation of retail local exchange services*, Telecom Decision 2006-15, 6 April 2006 (Decision 06-15).

Introduction

As noted by the *Backgrounder* associated with the Minister's announcement on 11 December 2006, the Governor in Council (GIC) received three separate petitions in response to Decision 06-15¹. These three petitions prompted the GIC to recommend the changes found in its proposal.

The GIC is proposing a number of very fundamental revisions to Decision 06-15. Foremost among them is the replacement of the CRTC's 25% market share loss test with the requirement that only two or three facilities-based telecommunications service providers offer service throughout a geographic market. The Order Varying Telecom Decision 2006-15, as found in the *Canada Gazette* on 16 December 2006 states in part that "retail local exchange services, for which forbearance is granted under section 34 of the Act based on the criteria set out in this Order, will be subject to competition that is sufficient to protect the interests of users and will not unduly impair the establishment or continuance of a competitive market."²

Two or Three are not enough

Primus has stated on the public record that it is not opposed to local rate forbearance. However, in the same breath, Primus has stated its position that local forbearance must be accompanied, or even preceded, by the implementation of a workable wholesale regime and other safeguards against the on-going dominance and anticompetitive actions of the ILECs. And safeguards will be required even after forbearance is granted in a local

¹ Separate applications were received from: Aliant, Bell Canada, SaskTel and TELUS; the Government of Saskatchewan; and, the Coalition for Competitive Telecommunications.

² *Canada Gazette Part I*, page 4319.

market. Primus respectfully submits that the presence of two or three facilities-based telecommunications service providers in any particular market will, alone, neither encourage nor foster the levels of competition that are in the best interests of users.

The additional safeguards required will be the focus of the balance of Primus' submission. These safeguards include the continuing need for winback restrictions, a specific list of activity that the CRTC would consider anticompetitive, restrictions on ILEC bundling until wholesale competitors are able to make similar offers to users, and GIC and CRTC endorsement of the principle that wholesale rates should be lower than retail rates.

In Primus' view, one of the most important safeguards relates to ILEC winback activity. Primus is recommending an alternative approach to the GIC's proposal concerning the ILEC winback restrictions. Primus believes that its proposal is workable and more closely links the relaxation of the winback restrictions to the diminution of ILEC market power in any given geographic market be it a LIR, local exchange or other area. Primus' proposal will better preserve and promote competition in those geographic markets that are not yet forborne from regulation and where, by definition, the ILECs continue to have significant market power.

An alternative for winback restrictions

Upon its first review of Decision 06-15, Primus was surprised by the manner in which the CRTC had decided to link the previously separate issues of local forbearance and the winback restrictions. The CRTC made this determination

without any discussion in its Decision of the impact it would have on the ILECs' competitors. The CRTC's determinations on winback were two fold. First was the automatic reduction of the no-contact period from 12 to three months. Second was a mechanism whereby the winback rules would be eliminated within a particular Local Forbearance Region (LFR) if the ILECs could demonstrate that they had lost 20% market share.

In its proposal, the GIC intends to completely and immediately eliminate the winback rules upon the implementation of the Order. However, Primus submits that such an approach would only serve to gloss over market realities (i.e. continued ILEC dominance) across much of the country. Primus submits that Canadian consumers and competitive forces would be better served by the approach set out by Primus later in this submission.

Primus notes that the original rationale for the winback restrictions was based on the advantages that the ILECs enjoy in the local market as a result of their former monopoly position and their continued dominance. The winback rules were intended to operate as a competitive safeguard to protect new entrants from abuse of that dominance. This was made clear by the Commission in Decision 2005-28, when it extended the winback rules to the ILECs' VoIP services. Primus submits that the CRTC's reasoning is equally applicable to the local telephony market:

The Commission has considered winback rules to be necessary and appropriate to prevent anti-competitive behaviour. In Decision 2004-4, the Commission stated that although winback activity could be a

feature of mature competitive markets, the local services market was far from being a mature competitive market. The Commission considers that the same concerns regarding the potential for anti-competitive conduct by the ILECs arise in the case of winning back local VoIP customers. The Commission considers that, absent the winback rules, the ILECs could use the same incumbency advantages to win back local VoIP customers as they could use to win back PES customers.

For example, the Commission considers that since most local VoIP customers will be former ILEC PES customers, the ILECs will have knowledge of the customers' telecommunications needs, preferences and calling patterns. Winback rules will prevent the ILECs from attempting to winback former PES or local VoIP service customers before they have sufficient experience with a competitor's VoIP service in order to be in a position to evaluate the service fairly. The Commission considers that winback rules allow competitive VoIP service providers an appropriate period of time to demonstrate the reliability and quality of their services, before the ILEC can attempt to regain the customer.³ (emphasis added)

On the same day that the Commission released Decision 2006-15, it released Telecom Decision CRTC 2006-16, *Bell Canada and Saskatchewan Telecommunications' request that the Commission stop applying the local exchange service winback restrictions on the basis that they unjustifiably*

³ Decision 2005-28, at paras 254-255.

infringe the right to freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms, which ruled on the constitutionality of the winback rules. That decision confirmed both the intent and the effectiveness of the winback rules:

The Commission therefore finds that the winback rule prevents the ILECs from deriving an undue or unfair competitive advantage, or benefiting from an unfair opportunity, arising from their enhanced ability to win back their former local exchange service customers through direct communications with those customers, and thereby provides CLECs with a fair opportunity to retain customers. The Commission therefore concludes that the winback rule serves its objective.⁴

For its part, the Competition Bureau has also commented on the need for market analysis in considering whether to remove marketing safeguards, such as the winback rules. In its evidence in the 2006-15 proceeding, the Bureau warned against taking a “one size fits all” approach, such as the GIC’s current proposal, to local markets that may be at different stages of development:

Absent a reliable evidentiary record on the state of competition in local markets, or on the likelihood of such a market developing in the near future, the Bureau is not prepared to recommend the abandonment of the existing safeguards imposed on the ILECs. By the same token, the Bureau is not prepared to endorse the existing safeguards as

⁴ Decision 2006-16, para 142.

appropriate for current market conditions, prior to analyzing what those conditions are. That is one of the objectives of this proceeding.

Moreover, not all local markets are likely to be at the same stage of competitive development and a policy of “one size fits all” may not be appropriate. As discussed above, the Bureau is not satisfied that the Commission had the appropriate evidence before it, or analyzed that evidence using the appropriate tests in its recent proceedings regarding the on-going need for regulatory safeguards in the local telephone market. The correct approach is the central issue in this proceeding and these issues need to be reassessed in light of a solid evidentiary record.⁵

In its final argument in the forbearance proceeding, the Competition Bureau indicated that it had no position on the Commission retaining rules for winbacks as they might be necessary to promote competition until markets are forborne:

The Bureau generally favors a minimalist approach to regulation that tailors the regulatory response to the particular problem and weighs the benefits of regulating against the benefits or detriments of not doing so. Competition is rarely perfect and the Bureau submits that the Commission must guard against trying to micro-manage it. The Bureau has no position on the Commission retaining rules for winbacks and promotions or the imputation test as they may be necessary to promote competition until markets are forborne. However, with respect to the waiving of service charges, the Bureau considers that these charges

⁵ Bureau Evidence, para 325.

could be a barrier to customers switching back to the ILEC. Therefore, the Bureau submits that such charges should be cost based in order to minimize customer switching costs.⁶ (emphasis added)

Primus submits that there are a number of factors which make the local telephone market different from many other markets and which render the ILEC's winback activities anti-competitive.

First, virtually all residential households require telephone service so, generally speaking, there is no "buy" or "no buy" decision to be made.

Secondly, the ILECs started out with 100% of the market and have almost perfect information about the customers' telephone needs and usage patterns. This gives the ILECs historical knowledge of each customer's decision to change suppliers, as well as customer-specific information as to the type of special deal that might be attractive to them.

Third, unlike many other products and services, local telephone service remains in place until a customer decides to change suppliers. It is not a consumable product that periodically needs to be replaced. There is not generally the same process of competitive shopping at venues where multiple competitive products are available. In this environment, competitors must market directly to consumers to entice them away from the ILEC, and the ILECs need only respond at an individual customer level, when they lose a customer.

⁶ Bureau reply, para 133.

The ILECs' incumbency, and their knowledge of the precise moment a customer leaves, gives them an opportunity to target their marketing to an individual customer and their special knowledge of that customer's telephone usage, gives them an opportunity to target a special offer to that individual customer.

In contrast, competitors cannot target special offers at ILEC customers on an individual basis. They do not have the same incumbent knowledge of the customers' usage and they must market their services more broadly to the ILECs' customers. This is the essence of the unfairness of the abuse of the ILEC's dominance.

The ILECs often characterize winback activity as normal competitive behaviour which is the essence of competitive markets. Primus does not disagree that all companies try to increase their markets share by winning over customers. The key distinguishing factor here is that the local telephone market is not an ordinary competitive market. The special incumbent position of the ILECs places them in a position to exploit their dominance in a way that enables them to compete unfairly in a manner that preserves their dominance.

The harm that befalls competitors when the ILECs win back a customer also differs from the harm that befalls a competitor in most other competitive markets when they lose a sale.

If the LECs and their competitors were starting out on an equal footing and were trying to sell their services to a given customer, they would both incur marketing costs and the customer could select one or the other supplier. The losing supplier would lose its marketing costs.

In the local telephone market, there is a bigger potential risk for competitors and less risk for the ILEC.

The ILEC starts out with the customer in the vast majority of the cases and the competitor incurs marketing costs to try to win the customer. If the customer decides to switch, the competitor incurs significant costs (over and above its marketing costs) to connect the customer to its network. However, it is not until after these costs have been incurred by the competitor that the ILEC responds with its winback offer.

Not only is the offer different from what the ILEC had offered its customer in the past (so the competitor has had no chance to respond to the offer), but it is made after the competitor has invested more money to connect the customer and turn up its service

Therefore, if the customer accepts the new offer, the competitor not only loses its marketing costs – but also additional investment required to hook-up the customer. This increases the risk to competitors and consumes valuable capital needed to expand their businesses.

This is not a fair competitive environment and the no-winback period was intended to address this impediment to the development of a competitive market.

In the circumstances of Decision 2006-15, the Commission decided to significantly weaken the regulatory safeguard that it originally created to respond to this issue. The GIC's proposal only serves to make a bad situation worse. Moreover, it is proposing to completely eliminate the restrictions on a national basis, while overall the ILECs continue to remain dominant throughout this sector with a market share that dwarfs new entrants in all regions of Canada, and remains close to 100% in many of the local geographic markets.

In light of all of the above, Primus respectfully submits that the GIC should reconsider its approach of completely eliminating the winback restrictions and implement the following proposal.

At the outset and by way of explanation, Primus is not challenging CRTC's decision to reduce the no-contact period from 12 months to 3 months. What Primus is recommending, however, is that the GIC vary Decision 06-15 in a manner in which the winback rules would remain in effect in all local markets, regardless of their geographic size, *until forbearance is granted*. As demonstrated above, both the CRTC and the Competition Bureau maintain that there is value in maintaining the restrictions in non-forborne markets. Linking the elimination of the winback rules with the achievement of local

forbearance would make logical sense rather than simply eliminating the restrictions on a national basis without any evaluation of market realities.

That being said, however, Primus does not believe that all winback restrictions should disappear upon CRTC approval of a forbearance application. Primus submits that in forborne markets the ILECs should be permitted to contact customers for the purpose of making a winback offer so long as that offer is not an offer that is specifically tailored to the individual customer but is the offer generally available to all the ILEC's customers in that geographic market. If the ILEC offers a promotion to the customer, that promotion must be available to all the ILEC's customers in that market. In the specific case of a promotion to waive the service connection fee, any such credit should be capped at the level of the current ILEC installation fee.

Anticompetitive behaviour

In addition to the on-going need for winback restrictions, Primus submits that the GIC should, through its revisions to Decision 06-15, require the CRTC to address the requirement for competitive safeguards in the telecommunications market. One such safeguard relates to anticompetitive behaviour both in regulated and forborne markets.

For example, in many ways, many of the winback offers used by the telephone companies today, even in forborne markets, are anti-competitive. Therefore, even after local forbearance is granted for a geographic market, certain rules governing ILEC winback should be adopted to prevent certain anticompetitive behaviour by the ILECs.

The following is only one example of ILEC anticompetitive winback activity. In this particular case, Bell Canada approached a Primus customer with a winback offer of \$125 in long distance credits. However, when the time came to apply these credits to the customer's account, Bell Canada not only applied this credit to the long distance portion of the customer's account but it also applied the long distance credit to the remaining services including the customer's local services. Application of long distance credits to local services without an approved tariff is a clear violation of an ILEC's tariff. It took over two months of service for the customer to exhaust the long distance winback credit.

Behaviour such as this by the dominant service provider demonstrates the need for continued restrictions on the anticompetitive actions of the ILECs. For all of these reasons, Primus submits that the GIC should, via its changes to Decision 06-15, have the Commission initiate proceedings to develop reasonable limits on the winback activities of the ILECs in forborne markets. One of the areas for CRTC investigation should be the granting of overly large rebates to customers. In the example provided above, Bell Canada offered a Primus customer \$125 up front in service credits. Credits of this magnitude are excessive and, Primus submits, unmatched by competitors.

Vertical Integration and retail/wholesale rate relationships

By virtue of their vertical integration, ILECs are able to offer bundles of services crossing many different markets. Potential ILEC bundles include the wireless, long distance, high-speed Internet access and television and with the

appropriate tariffs in place, local telephony. It is important to note, however, that competitive service providers that rely on ILEC wholesale services are currently unable to match an ILEC bundle that includes television. Moreover, many ILEC wholesale high-speed Internet services are uneconomic and access to wholesale wireless services is, at very best, extremely challenging. Primus submits that the GIC should endorse the principle that wholesale tariffs should be available from all ILECs for the services they offer their entire customer base.

Primus also submits that the GIC should endorse the principle that wholesale rates should be lower than retail rates and direct the CRTC to make this issue part of its deliberations in the context of *Review of regulatory framework for wholesale services and definition of essential service*, Telecom Public Notice CRTC 2006-14, 9 November 2006. All aspects of the wholesale regime in Canada are under consideration in that proceeding. Wholesale rates need to be less than retail rates.

Conclusion

In conclusion, Primus believes that local forbearance must be accompanied, or even preceded, by the implementation of a workable wholesale regime and other safeguards against the on-going dominance and anticompetitive actions of the ILECs. Such safeguards will be required even after forbearance is granted in a local market. Primus respectfully submits that the presence of two or three facilities-based telecommunications service providers in any particular market will, alone, neither encourage nor foster the levels of competition that are in the best interests of users.

Additional safeguards are required and include the continuing need for winback restrictions, a specific list of activity that the CRTC would consider anticompetitive, restrictions on ILEC bundling until wholesale competitors are able to make similar offers to users, and GIC and CRTC endorsement of the principle that wholesale rates should be lower than retail rates.

Yours truly,

A handwritten signature in black ink on a light gray rectangular background. The signature reads "Jonathan L. Holmes" in a cursive style.

Jonathan L. Holmes

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