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H. Maura Lendon
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August 15, 2006

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

Dear Mr. St. Aubin:

**Re: Proposed Order under Section 8 of the *Telecommunications Act* –
Policy Direction to the Canadian Radio-television and
Telecommunications Commission, Canada Gazette, Part I, 17 June 2006**

1. On behalf of AT&T Inc., AT&T Enterprises Canada Co., and AT&T Global Services Canada Co. (collectively “AT&T”), I am pleased to submit these comments on Industry Canada’s public notice in the Canada Gazette concerning the “Proposed Order under Section 8 of the *Telecommunications Act* – Policy Direction to the Canadian Radio-television and Telecommunications Commission,” issued on 17 June 2006 (the “Policy Direction”).

2. AT&T commends Industry Canada for the Policy Direction, and the Canadian government for taking proactive steps to make Canada’s telecommunications regulatory system more modern, flexible and efficient. We strongly support the ultimate objectives. However, AT&T submits that the pre-condition to the objective of relying on market forces to the maximum extent feasible, as contemplated in the proposed Policy Direction, requires the removal of Canada’s market entry barriers preventing open investment and competition in the various Canadian telecommunications markets. Among OECD countries, Canada currently has one of the most restrictive and inflexible set of rules limiting Foreign Direct Investment (“FDI”) in the telecommunications sector.¹ Without open competition, a firm with Significant Market Power (“SMP”) can have an ongoing incentive and ability to maximize profits by keeping prices higher and producing lower quantities of services than that which would otherwise exist in an efficient market.²

¹ *Telecom Policy Review Panel Report*, G. Sinclair, H. Intven, A. Tremblay, March 2006 at 11-24.

² *TPR* at 3-9

3. To ensure that competitive market forces can prevail in the Canadian telecommunications markets, AT&T strongly encourages further changes to the Canadian regulatory regime beyond those set out in the proposed Policy Direction. Specifically, new forms of competition must be allowed to emerge to challenge any areas where the ILECs continue to have SMP. Thus, co-incident with the adoption of the proposed Policy Direction, the government should also take the steps recommended in the Telecom Policy Review Panel Report (“TPR”) to eliminate FDI restrictions on ownership in telecommunications infrastructure in Canada.³ This way, the government can help ensure that sufficient competition can emerge to sustain a streamlined regulatory approach to the Canadian telecommunications market.

4. AT&T also notes that the removal of FDI restrictions will, among other significant benefits to the Canadian economy:

- ◆ bring increased non-Canadian investment into Canada;
- ◆ promote increased deployment of additional lit telecommunications transmission facilities infrastructure within Canada and between Canada and points outside Canada. There are numerous construction firms operating in Canada who are ready and willing to construct dark fibre facilities for any party that desires them;⁴
- ◆ ensure faster deployment of new technologies and service innovation; and
- ◆ ensure better service reliability is available to those customers that require it.

Collectively, the above mentioned benefits of removing FDI restrictions will bring lower prices and better services for Canadian consumers and will also stimulate broader growth in the Canadian economy.

5. The harmful market impacts of FDI restrictions are well known to Canadian policy makers. As Canada’s House of Commons Standing Committee on Industry, Science and Technology found in 2003, FDI restrictions not only impede telecommunications industry competition but also limit broader economic growth:

“Foreign ownership restrictions have played a role in impeding capital investment by new entrants in the Canadian telecommunications sector in the past decade. They also have been a factor in the recent financial instability of the industry, which saw a number of capital restructurings and bankruptcies. Moreover, since telecommunications is a critical element of the global, networked, knowledge-based economy, these restrictions are also likely stifling Canada’s productivity and economic growth performance.

³ *TPR* at 11-24

⁴ See “*Application Pursuant to Section 34 of the Telecommunications Act for Forbearance in Respect of Interexchange Dark Fibre – Reply Comments of TELUS Communications Company*”, July 21, 2006

“In summary, foreign ownership restrictions compromise, among other important economic contributions, the diffusion of new communications technologies and Canadians’ access to modern communications services. For all these reasons, the Committee recommends the complete removal of Canada’s foreign ownership restrictions applicable to telecommunications carriers.”⁵

Background

6. AT&T is one of the leading communications companies in the world, recognized for its proven commitment over 120 years to service quality, reliability, integrity and innovation.

7. AT&T has a long history of contributing to the successful development of Canadian telecommunications infrastructure beginning in 1880 when The Bell Telephone Company of Canada was founded by Charles Fleetford Sise, a representative of National Bell of Boston. AT&T contributed approximately 24.9% of the initial paid up equity capital with further investments along the way. By 1923, AT&T held more than one third of the equity of the Bell Telephone Company of Canada and had agreed, among other things, to continue to provide the company with “fundamental work of research in the science of telephony; furnish engineering assistance; furnish advice and assistance in financial matters” and “exchange data and technical advice in connection with the construction, maintenance, repair and operation of plant”. Various technical assistance agreements remained in place as did the number of shares held by AT&T until 1975 when they were sold.

8. AT&T also founded Eastern Telephone and Telegraph (“ET&T”) in 1931 which became the part owner and Canadian operator of the first trans-Atlantic submarine cable from Nova Scotia via Newfoundland to Europe which operated between 1953 and 1978.

9. AT&T also invested in Unitel Communications Inc., Canada’s first new entrant carrier into Canada’s switched long distance market in 1993, and acquired an interest in MetroNet Communications Corp., a new entrant CLEC, in 1999. These interests were consolidated into AT&T Canada Corp. in 1999, and after a subsequent restructuring and acquisition, that company continues today as a division of MTS Allstream Inc., fully independent from AT&T Inc.

10. The above examples are but a few of the investments AT&T has made in Canadian telecommunications. AT&T Inc.’s subsequent Unitel and MetroNet divestments were also in large part due to strategic and competitive difficulties of operating in an environment where FDI is restricted. Today, again in large part as a result of FDI restrictions, AT&T’s role in Canada is more limited. AT&T’s wholly owned subsidiaries AT&T Enterprises Canada Co. (“AEC”) and AT&T Global Services Canada Co. (“AGSC”) operate in Canada as “resellers”

⁵ Report of the Standing Committee on Industry, Science and Technology, *Opening Canadian Communications to the World*, April 2003, Conclusion, <http://www.parl.gc.ca/InfoComDoc/37/2/INST/Studies/Reports/instrp03-e.htm>.

– a statutory definition used in contra-distinction to a facilities-based “Canadian carrier”. AEC is a switchless reseller of long distance services and AGSC, among other things, operates an advanced MPLS data network across Canada consisting of owned switching nodes and leased transport facilities for both its network backbone and end-customer accesses. This network is in turn connected to a global network serving 80 countries around the world.

Foreign Direct Investment Restrictions Harm Canadians

11. The current FDI restrictions have a negative effect on Canadian telecommunications customers. For example:

- ◆ The FDI restrictions require AGSC to lease network infrastructure rather than own it, and thus prevent AGSC from making economically efficient build v. buy decisions with respect to customer access and backbone facilities. This legal restriction artificially distorts market prices to AGSC’s customers, particularly when AGSC competes with Canadian carriers for the business of such customers;
- ◆ AGSC and all other non-Canadian controlled telecommunications service providers operating in Canada, as potential customers for unlit fibre, are prevented from buying or leasing and subsequently lighting dark fibre facilities.⁶ Thus removal of FDI restrictions would increase the supply of Canadian telecommunications facilities;
- ◆ Service reliability to customers can be artificially constrained. The large Canadian ILECs are unwilling to offer wholesale customers any significant service reliability and repair time guarantees on leased facilities even in exchange for additional service fees, with the narrow exception for CDN access facilities where the CRTC has mandated some moderate service quality metrics which often go unfulfilled. AT&T has observed that a number of Canadian contractors and fibre installation companies are willing to guarantee service response times with respect to the maintenance and repair of outside plant.⁷ AGSC would like flexibility to buy these types of enhanced reliability services for its customers but cannot do so because it is prohibited by FDI restrictions from owning or operating telecommunications facilities; and
- ◆ The inability of non-Canadians to control LEC operations precludes AT&T from securing operational, business and competitive synergies. Thus AT&T’s Canadian

⁶ Non-Canadian controlled entities are not permitted to light dark fibre for the purpose of offering telecommunications services to the public for compensation as this may constitute “operation” of a telecommunications facility contrary to section 16 of the *Telecommunications Act*.

⁷ Fibre construction and maintenance companies operating in Canada will often agree to have repair personnel on-site in respect of a fibre cut within 2-4 hours, but AT&T, as a reseller of another party’s fibre would have no legal right to bring its own contractor to repair the cut fibre.

subsidiaries cannot fully expand their product portfolios, and cannot optimize network design efficiencies, and this in turn artificially restricts our Canadian customers' access to proven service innovations and price benefits that open competition delivers. These legal restrictions do not serve the interests of Canadian customers.

Policy Directive Concerning Regulations That Discriminate Against Resellers

12. Certain CRTC decisions further amplify the market distortions created by the FDI restrictions by providing certain benefits to “Canadian carriers” and not “resellers.” These discriminatory distinctions are largely predicated on the premise that the CRTC cannot otherwise regulate resellers because the CRTC lacks the ability to impose conditions of service on resellers pursuant to Section 24 of the *Telecommunications Act*.⁸ However, these decisions have little or nothing to do with non-Canadian ownership of transmission facilities situated in Canada. Prominent examples include:

- ◆ Telecom Decision CRTC 98-12, ACC TelEnterprises Ltd. - Application dated 26 September 1997 to Review and Vary Telecom Decision CRTC 97-8, Local Competition, 1 May 1997, 7 August 1998, denied “resellers” access to: (i) certain ILEC unbundled network components; (ii) bill and keep compensation arrangements or mutual compensation at cost-based rates; (iii) efficient interconnection arrangements, such as gateway point of interconnection (POI) interconnection; (iv) the portable subsidy mechanism; (v) further cost reductions, including the equal sharing of the cost of interconnecting trunks and CCS7 signaling links with other interconnected LECs; and (vi) payment for switching and aggregation activities related to the origination/termination of IXC traffic from and to local service customers; and
- ◆ Telecom Decision CRTC 2005-28, Regulatory framework for voice communication services using Internet Protocol, 12 May 2005, denied “resellers” engaged in the provision of local VoIP services the right to directly obtain North American Numbering Plan numbers from the Canadian Number Administrator, as well as access to the Canadian Local Number Portability database. Local VoIP resellers can only obtain numbers and number portability from other LECs. This requires that non-Canadian owned service providers must source their upstream network elements from a horizontal competitor, rather than having a legal right to obtain Canadian public resources (i.e., numbering pools) directly from the government;

⁸ Section 24 of the *Telecommunications Act* gives the CRTC the legislative power to impose any conditions on the offering of a telecommunications service by a “Canadian carrier”. This section does not apply to resellers. As a result, the CRTC must require Canadian carriers to impose any CRTC mandated conditions of service down to resellers through tariffs or contract conditions (also referred to as “indirect regulation”). Concerns about the efficiency of indirect regulation have, for example, caused the CRTC to prevent non-Canadian VoIP providers from having access to CCS7 interconnection because of concerns about privacy protection as per Telecom Order CRTC 2004-353 (since reversed).

13. Against the backdrop of the current regulatory restrictions in Canada, AT&T is encouraged by that portion of the proposed Policy Direction which acknowledges the artificial market distortions inherent in the current framework. The proposed Policy Direction states:

“(b) when it is determined that regulatory measures are required, then that regulatory measure should satisfy the following criteria:

...

(iv) interconnection arrangements and access regimes, including access to buildings, in-building wiring and support structures, should, to the greatest extent possible, be technologically and competitively neutral, in order to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers;” {emphasis added}

14. AT&T however remains concerned that the proposed language can not achieve optimal results for “resellers” until such time as non-Canadian controlled telecommunications service providers operating in Canada can participate in mandated joint builds of interconnection facilities in the same way that “Canadian carriers” can. Unfortunately, such builds are prohibited by current FDI restrictions. Until such time that a service provider has an open freedom to determine whether it is economically efficient to build versus buy network facilities, regardless of the level of foreign ownership of the service provider, the Canadian telecommunications market will remain one characterized by artificially distorted competition.

Conclusion

15. The precondition to deregulation and forbearance is open and vibrant competition. Regulatory reform in Canada including the lifting of FDI restrictions will bring greater AT&T investment into Canada, more efficient use of existing fibre, better service reliability, faster deployment of new technologies and service innovation, and most significantly, greater opportunities for Canadians. AT&T therefore urges that simultaneous with the adoption of the proposed Policy Direction, the government also should implement the TPR recommendations concerning relaxation of FDI restrictions.

Yours truly,

“Original signed by H. Maura Lendon”

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Chief Counsel Canada