



Commissaire de la
concurrence

Place du Portage I
50, rue Victoria
Gatineau (Québec)
K1A 0C9

Commissioner of
Competition

Place du Portage I
50 Victoria Street
Gatineau, Québec
K1A 0C9

Télécopieur-Facsimile
(819) 953-5013

Téléphone-Telephone
(819) 997-3301

January 12, 2007

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

Dear Mr. St-Aubin:

Subject: *Order Varying Telecom Decision CRTC 2006-15, Canada Gazette, Part I, December 16, 2006 at 4312.*

1. The Competition Bureau (the Bureau) appreciates this opportunity to comment on the proposed *Order Varying Telecom Decision 2006-15* published in the Canada Gazette, Part I, December 16, 2006 (the Proposed Order).
2. The *Competition Act* empowers the Commissioner of Competition to make representations and to call evidence before any federal board, commission or other tribunal, including the Canadian Radio-television and Telecommunications Commission (CRTC or Commission), in respect of competition.¹ In furtherance of this mandate, the Bureau has shared its economic expertise and analytical tools to provide guidance to the CRTC on competition matters in a number of important telecommunications proceedings. In this regard, the Bureau participated fully, as an interested party, in the proceeding that lead to the decision now sought to be varied, *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, dated April 6, 2006 (the Decision).
3. These comments relate to the scope of forbearance that would be granted by the CRTC using any of the tests for forbearance set out in the Proposed Order.² In the Decision, the CRTC stated that it would limit the scope of any

¹ R.S.C. 1985, c. C-34, s. 125.

² These tests are set out in the Proposed Order at para. 2.

forbearance granted under the framework set out therein by retaining certain of its powers, and imposing conditions. The Proposed Order would not vary that aspect of the Decision. In the Bureau's view, the conditional forbearance provided for in the Decision (and in the Decision as varied by the Proposed Order) may lead to jurisdictional uncertainties in future complaints of anti-competitive conduct in forborne local exchange services markets.

Scope of forbearance provided for in the Decision

4. Section 34 of the *Telecommunications Act* provides that the Commission may refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 of that Act.
5. In the Decision, the CRTC stated that it would retain its powers under subsection 27(2) of the Act to address, in forborne markets, unjust discrimination or the conferral of undue preference in relation to service provision or rates.³ In addition, the Commission would retain its powers under subsection 27(2) of the Act to ensure ongoing access by competitors to underlying facilities and functionalities of the Incumbent Local Exchange Carriers (ILEC) and to create new Competitor Services and arrangements.⁴
6. The Commission also stated that it would retain its powers and duties under subsection 27(1) of the Act to the extent necessary to impose a price ceiling on stand-alone residential primary exchange service.⁵ This price ceiling, in the Commission's view, would be imposed to ensure that vulnerable and uncontested residential customers would have access to affordable basic telephone services in a forborne environment⁶ and the Bureau presumes that the Commission's retention of its subsection 27(1) powers would be thus limited.
7. The Commission stated that it would retain its powers under section 24 of the Act to support its retained powers and duties under subsections 27(1) and (2) of the Act and to maintain a number of specific conditions. These conditions would include existing conditions on ILECs relating to the provision of residential stand-alone primary exchange service that meets a

³ The Decision at para. 461.

⁴ *Ibid* at para. 465.

⁵ *Ibid* at paras. 449-454.

⁶ *Ibid* at para. 382. The stand-alone primary exchange service provided by the ILECs must meet an established basic service objective which includes enhanced calling features such as access to emergency services; Message Relay Service; privacy protection features; access to operator and directory assistance services; access to the long distance network; and a copy of the current telephone directory.

basic service objective.⁷ They would also include existing obligations on all Local Exchange Carriers (LECs) relating to the protection of customer privacy, the provision of 911 access, the provision of Message Relay Service, and the provision of billing statements in Braille.⁸

8. The CRTC would also use its section 24 powers to maintain conditions common to all LECs relating to the provision to wireless service providers of interconnection and equal access; the provision of reciprocal interconnection, bill and keep arrangements and a point of interconnection; and the implementation of local number portability.⁹

Conditional forbearance and jurisdictional uncertainty

9. When the Commission forbears from regulation on an unconditional basis, it is clear that laws of general application, including the *Competition Act*, apply to telecommunications carriers' unregulated conduct. However, conditional or partial forbearance orders may blur the line between the Commission's responsibilities under the *Telecommunications Act* and the Bureau's responsibilities under the *Competition Act*. Jurisdictional ambiguity may in turn create a general climate of uncertainty in the market, potentially stifling innovation in services, pricing, and ultimately competition.
10. The Bureau therefore recommends that the Proposed Order be amended to ensure that the extent to which the CRTC will retain its powers post-forbearance is explicit and as circumscribed as possible to meet the intended objective.
11. In the proceeding that led to the Decision, the Bureau urged the Commission, where it has decided to grant forbearance, to forbear from regulation as fully as possible. The Bureau suggested that the Commission should only consider imposing conditions on forborne services in the face of compelling evidence that competition alone would not ensure the provision to consumers of telecommunications services that are considered to be vital. For example, an exception to full forbearance might be justified to impose conditions requiring the provision of 911 and to ensure that certain other social objectives are met.¹⁰ The Bureau also acknowledged that conditions may need to be maintained to ensure interconnection among competitive

⁷ *Ibid* at paras. 393-394, 396 and 382. See *ibid* for a description of the basic service objective.

⁸ *Ibid* at paras. 362-396 and Appendix C.

⁹ *Ibid.*

¹⁰ Evidence of the Commissioner of Competition dated June 22, 2005 at para. 287 in *Forbearance from regulation of local exchange services*, Telecom Public Notice CRTC 2005-2.

local networks.¹¹ In the event that such limits on forbearance are deemed to be necessary, the Bureau urged the Commission to make clear, in its forbearance orders, the precise activities that it intends to continue to regulate.¹²

12. In the Decision, the CRTC did not circumscribe the extent to which it would retain its powers under subsection 27(2) in forborne local exchange markets and the Proposed Order would not vary this aspect of the Decision. In the Bureau's view, this may create uncertainty as to whether the Bureau would have jurisdiction to address allegations of certain types of anti-competitive conduct (e.g., predatory pricing, margin squeezing of unintegrated competitors, and anti-competitive targeted pricing) under the abuse of dominance provisions of the *Competition Act*. This is because the CRTC's retention of its subsection 27(2) powers would provide the CRTC with broad authority to deal with the same types of conduct.
13. The Organization for Economic Co-operation and Development (OECD) has also identified the disadvantages associated with the retention by the CRTC, in forbearance orders, of certain of its powers and its imposition of conditions on forbearance. In its 2002 report on regulatory reform in Canada, the OECD referred to conditional forbearance as a "Damocles sword for the market"¹³. The OECD remarked that:

Unlike a number of regulators in the OECD area the CRTC has consistently tried to streamline regulatory processes and forbear from regulation. However, it often forbears on a conditional basis creating uncertainty in the market as to whether competition policy will come into play if market competition issues arise, or if sector specific regulation will be reintroduced. The CRTC should try and forbear unconditionally allowing the specified market to come fully within the ambit of the Competition Bureau.¹⁴

14. A number of parties, including the Bureau, echoed the view of the OECD before the Telecommunications Policy Review Panel (the Panel). For example, in that forum, the Coalition for Competitive Telecommunications (the Coalition) submitted that the CRTC should not reserve the power under subsection 27(2) of the *Telecommunications Act* to re-enter the field by

¹¹ *Ibid* at para. 293.

¹² *Ibid* at para. 329 and Argument of the Commissioner of Competition dated September 15, 2005 at paras. 144 and 145 in the same proceeding.

¹³ OECD Reviews of Regulatory Reform, *Regulatory Reform in Canada From Transition to New Regulation Challenges*, Regulatory Reform in the Telecommunications Industry, OECD, 2002, at 15, online: OECD <<http://www.oecd.org/dataoecd/48/28/1960562.pdf>>

¹⁴ *Ibid* at 50.

categorizing certain conduct as discriminatory.¹⁵ The Coalition argued that the prospect of CRTC re-entry creates an unacceptably ambiguous jurisdictional environment for both service providers and customers. The National Competition Law Section of the Canadian Bar Association similarly called for clarity in the allocation of responsibility between the CRTC and the Bureau.¹⁶ TELUS agreed, arguing that when the Commission forbears, it should have to assert its intention to forbear completely from economic regulation and the *Competition Act* should have full application to forborne activities.¹⁷ Aliant also submitted that, as with all other competitive industries, the competition authority should adjudicate complaints of anti-competitive practices under the *Competition Act*, rather than the CRTC under subsection 27(2) of the *Telecommunications Act*.¹⁸

15. In its Final Report the Panel remarked as follows on the limitations inherent in subsection 27(2) of the *Telecommunications Act*:

The Panel believes the broad prohibitions of ss. 27(2) against unjust discrimination and undue or unreasonable preferences are much too general and rely too greatly on the regulator's discretion. Potential problems and abuses should be specifically identified and measures should be designed as narrowly as possible to target them adequately.¹⁹

16. In addition, the Panel agreed that conditional forbearance leads to jurisdictional issues that need to be resolved.²⁰ In respect of anti-competitive conduct in local exchange services markets forborne from regulation under the framework set out in the Proposed Order, the Bureau submits that an immediate way to enhance jurisdictional certainty would be for the CRTC to forbear completely from regulation under subsection 27(2) leaving the conduct in question to the existing enforcement authority of the Bureau under the *Competition Act*.

Recommendations

17. In the Bureau's view, complaints of anti-competitive conduct in local exchange markets that have met the criteria for forbearance should be handled by the Bureau, in light of its expertise in carrying out competition

¹⁵ Comments of the Coalition for Competitive Telecommunications to the Telecommunications Policy Review Panel, dated August 15, 2005 at para. 46.

¹⁶ Comments of the National Competition Law Section of the Canadian Bar Association to the Telecommunications Policy Review Panel, dated August 15, 2005 at 11.

¹⁷ Comments of TELUS to the Telecommunications Policy Review Panel, dated August 15, 2005 at 195.

¹⁸ Comments of Aliant to the Telecommunications Policy Review Panel, dated August 15, 2005 at 19.

¹⁹ Telecommunications Policy Review Panel Final Report, 2006, at 3-21.

²⁰ *Ibid* at 4-26.

analyses, and under the provisions of the *Competition Act*, which are focused squarely on the effects on competition of the behaviour in question.

18. The Bureau therefore recommends that the Proposed Order be amended to vary those parts of the Decision in which the CRTC states that it will retain its powers under subsection 27(2) of the *Telecommunications Act*. The amended Order should provide for full forbearance, where the criteria for forbearance have been met, from CRTC regulation and oversight under subsection 27(2) of the *Telecommunications Act*.
19. In addition, to ensure that it is clear to parties that the *Competition Act* will apply in a forborne environment, the Bureau recommends amending the Proposed Order to include explicit language stating that the CRTC will not adjudicate complaints of anti-competitive conduct in forborne local exchange markets but that such complaints fall under the ambit of the *Competition Act* and will be dealt with by the Competition Bureau.
20. As noted above, the Commission stated that it would retain post-forbearance powers other than those under subsection 27(2) of the *Telecommunications Act*. These were: subsection 27(1) (to the extent necessary to impose a price ceiling on stand-alone residential primary exchange service), section 24 (to the extent necessary to support its retained powers under subsection 27(2) and to maintain existing obligations on all LECs including obligations to ensure interconnection and the fulfillment of certain social objectives), and subsections 27(3) and (4) (as a necessary consequence of its retention of section 24 and subsections 27(1) and (2)).
21. With respect to the Commission's retention of its powers under subsection 27(1), the Bureau understands from the Decision that the CRTC would only retain these powers to the extent necessary to impose a price ceiling on stand-alone residential primary exchange service to ensure that vulnerable and uncontested residential customers will have access to affordable basic telephone services in a forborne environment.²¹ However, to ensure that it is clear that the CRTC will not use its powers under subsection 27(1) to deal with complaints of anti-competitive conduct post-forbearance and that such complaints will be dealt with under the *Competition Act*, the Bureau recommends that the Proposed Order be amended to include explicit language to that effect.
22. In conjunction with its recommendation that the Proposed Order be amended to provide for full forbearance under subsection 27(2), the Proposed Order should be amended to remove the CRTC's retention of its section 24 powers and subsection 27(3) and (4) powers to the extent they

²¹ *Supra* note 3 at paras. 383, 449-454.

were retained to support the CRTC's subsection 27(2) powers. In addition, the Bureau recommends that the Proposed Order be amended to clarify that section 24 powers will only be used by the Commission in furtherance of particular, and clearly articulated, objectives.

23. The Bureau considers that the incorporation of these recommendations into the Proposed Order will result in a forbearance framework that is in keeping with the Government's policy direction to the CRTC to rely on market forces to the maximum extent feasible and to tie any necessary regulatory measures to the specific telecommunications policy objectives that they are intended to address.²²

24. In the Bureau's view, the adoption of these recommendations will also help to foster more efficient and effective regulation, and an environment of regulatory certainty, easing the transition from regulation to competition in local exchange telecommunications services markets to the ultimate benefit of Canadian consumers.

Yours truly,

A handwritten signature in black ink, appearing to read "Sheridan Scott". The signature is written in a cursive, flowing style.

Sheridan Scott

²² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, S.O.R./2006-355, ss.1(a)(i), 1(b)(ii).