

Telecom Public Notice CRTC 2005-2 - *Forbearance from Regulation of Local Exchange Services*

Submission of the Commissioner of Competition

1.0 EXECUTIVE SUMMARY

1. This is a summary of the evidence and preliminary views of the Commissioner of Competition (the Competition Bureau or the Bureau) submitted to the Canadian Radio-television and Telecommunications Commission (CRTC) in response to Telecom Public Notice CRTC 2005-2, *Forbearance from regulation of local exchange services*.

2. The Bureau believes the issues raised in this proceeding, namely a framework for forbearance from regulation of local telephone service, are critical to the development of competitive local phone services in Canada. Greater reliance on market forces and competition in place of regulation to offer significant benefits to Canadians in terms of competitive prices, greater choice, innovative services, as well as enhanced service quality.

3. The Bureau is strongly committed to assisting the CRTC in implementing a framework which will ensure Canadians enjoy the long-term benefits of competitive local phone markets.

4. The purpose of this submission is to assist the Commission in addressing the issues posed in the Public Notice by:

- providing a theoretical framework for defining the relevant geographic and product markets applicable to local business and residential services, as well as for the Commission's assessment of market power within those markets;

- identifying the types of data and evidence required to properly determine the forgoing issues; and
- providing a practical analytical framework for assessing the data generated against the theoretical framework.

5. Defining relevant product and geographic markets and assessing market power within those markets are key steps in the analysis of competition issues under both the merger and abuse of dominance provisions of the *Competition Act*. The analysis of forbearance under section 34 of the *Telecommunications Act* is similar to analysis of a merger. With minor adaptation, the Bureau's 2004 *Merger Enforcement Guidelines* can therefore provide a useful framework for the analysis of whether it is appropriate to forbear in a given market. The Bureau's approach to this analysis has widespread support from the Competition Tribunal in Canada, as well as from the courts. It is also consistent with the competitive analysis approach adopted by the European Union.

6. The Bureau's submission proposes a framework for defining relevant local telecommunications markets and assessing the impact that reducing or eliminating regulation would have on the market power of local telephone networks (ILECs). The submission also identifies the types of data and anecdotal evidence required to make these determinations.

7. A key issue in this proceeding is whether forbearance would enable an ILEC to exercise market power. This requires a forward-looking analysis, similar to the one used by the Bureau when it reviews mergers. A rigorous application of this framework is essential for properly assessing the likely competitive effects of forbearance.

8. Market shares alone do not necessarily indicate that a firm has market power. If entry barriers are low, a firm cannot exercise market power even if it enjoys a large market share. Hence, it is essential that the Commission obtain detailed information on the height of entry barriers, countervailing power by large buyers, as well as the growth history and business plans of existing competitors and potential entrants in addition to other information.

9. A snapshot of the current competitive situation is not sufficient. The analysis of whether ILECs would likely increase prices would take into account both the current market situation as well as the situation that is likely to exist in the future. Thus, it is necessary to determine the extent to which competition will likely be sustainable should the Commission choose to forbear. It is essential that data be assessed not only on market shares within specific product and geographic markets – but also on the likelihood that new entrants would use new technologies to expand the choice of competitive suppliers for consumers. This includes information about the growth of broadband, cable telephony, IP technologies, and fixed and mobile wireless technologies to determine their ability to provide effective competition to the incumbent telephone companies.

10. The assessment of market power under this economic framework requires a highly fact-specific analysis of the likelihood of demand- and supply-side substitution. Therefore, it is not possible to answer the specific questions posed in the Public Notice in this initial evidentiary stage of the proceeding.

11. Once the evidence has been collected, it may be possible to define a set of specific criteria that will guide the Commission in dealing with future forbearance applications and provide more certainty and efficiency in the regulatory process.

12. In the case of Aliant's specific application for forbearance, the Bureau intends to participate in the evidence gathering stage through the interrogatory

process and to analyze all the available evidence before making recommendations in its argument and representations to the Commission.

How the Submission is Organized

13. The Bureau's submission is organized as follows. Section 2 provides an introduction to the submission. Section 3 describes the tests established by section 34 of the *Telecommunications Act* and the framework the CRTC has developed for assessing forbearance requests. In addition it refers to CRTC decisions which may assist the Commission in its deliberations. Section 4 provides an overview of the Bureau's approach to forbearance and in particular, the requirement for a forward-looking assessment of the need for and application of pricing constraints. Section 5 of the submission provides an overview of local telecommunications markets. While this analysis provides a starting point for the assessment of forbearance, detailed, up-to-date information on existing and prospective network technologies and services is required to ensure proper definition of relevant markets and assessment of market power in these markets.

14. Section 6 of the submission describes the framework for assessing the competitive effects of forbearance. In particular, the section sets out the economic framework for defining relevant product and geographic markets and assessing market power within those markets. It also describes economic predation theories that establish when downward pricing constraints are likely necessary. The section discusses the data that are required to apply these frameworks, and sets out the Bureau's preliminary views on the application of the economic framework to local telecommunications services.

15. Section 7 of the submission discusses the approach to forbearance in the European Union.

16. Sections 8, 9, 10 and 11 discuss the extent of forbearance, post-forbearance criteria and conditions, the appropriate process for future forbearance applications and the need for a transitional regime. Section 10 also provides a framework for measuring the costs and benefits of "bright-line" tests or

simplified approaches to assessing forbearance. Assessment of these issues turns on the development of a complete evidentiary record and application of this evidence to the economic framework described in section 6. Accordingly, the Bureau has set out its preliminary views on these issues. It intends to address these issues more fully once the factual record of this proceeding has been completed.

17. Section 12 of the submission discusses the need for clear jurisdictional boundaries between the CRTC and the Competition Bureau, in order to ensure clarity and minimize unnecessary regulation.

18. Lastly, section 13 addresses Aliant's forbearance application. In the absence of an evidentiary record, the Bureau believes it is premature to take a position on Aliant's application. The Bureau will address the merits of Aliant's application in later stages of the proceeding, once the Bureau has had the opportunity to examine all available evidence.

19. Through this submission and its participation in these proceedings, the Bureau hopes to provide its expertise to assist the Commission in creating competitive local telephone markets for the benefit of Canadian consumers.

