



## Telecom Decision CRTC 2006-72

Ottawa, 7 November 2006

### **Primus Telecommunications Canada Inc. – Application to review and vary determinations in Telecom Decision CRTC 2006-15 pertaining to the winback rule**

Reference: 8662-P11-200607327

*In this Decision, the Commission **denies** Primus Telecommunications Canada Inc.'s request to review and vary those portions of Telecom Decision CRTC 2006-15 pertaining to the winback rule.*

#### **The application**

1. On 6 June 2006, Primus Telecommunications Canada Inc. (Primus) filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, requesting that the Commission review and vary certain determinations and orders relating to the local exchange service winback restrictions found in paragraphs 484 to 488 inclusive of *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, 6 April 2006 (Decision 2006-15). In its application, Primus requested that the Commission issue the following:
  - a) an order reversing the Commission's determination to reduce the residential local exchange services "no-winback period" for incumbent local exchange carriers (ILECs) from 12 to 3 months;
  - b) an order reversing the Commission's determination to consider applications to discontinue the application of the no-winback rule entirely when an ILEC could demonstrate it had lost 20 percent of its market share in a relevant local exchange market and had satisfied certain quality of service indicators for a three-month period; and
  - c) an order staying the winback determinations made in Decision 2006-15 until such time as the Commission had made its determinations on the issues raised in the above two items.

#### **Background**

2. In various decisions, the Commission has placed certain restrictions on the ILECs' ability to directly communicate with former local exchange service customers in an attempt to win them back (the winback rule).

3. The most recent statement of the winback rule was set out in Decision 2006-15 as follows:

... an ILEC is not to attempt to win back a business customer with respect to primary exchange service [(PES)] or local VoIP [voice over Internet Protocol] service, and in the case of a residential customer of local exchange service (i.e. PES or local VoIP service), with respect to any service, for a period commencing at the time of the local service request and terminating three months after that customer's primary local exchange service or local VoIP service has been completely transferred to another local service provider, with one exception: ILECs should be allowed to win back customers who call to advise them that they intend to change local service provider.<sup>1</sup>

4. In the above statement of the winback rule, the Commission reduced the no-winback period from 12 to 3 months.<sup>2</sup> The Commission found that

... [i]n light of this new market reality, the Commission considers that the 12-month no-winback period with respect to residential local exchange service under the winback rule is no longer appropriate. The Commission finds that the residential local exchange service no-winback period is more appropriately set at three months, as it was prior to Decision 2004-4. ... In the Commission's view, a no-winback period of three months is, under current market conditions, sufficient and necessary to prevent the ILECs from enjoying an undue or unfair advantage ....

5. In addition, in Decision 2006-15, the Commission considered that where an ILEC could demonstrate that it had met certain other criteria<sup>3</sup> in a relevant market, the local winback rule could be lifted. The Commission found that in these circumstances

... competition in that relevant market will have reached a sufficient level that the ILECs' ability to use their incumbency advantages to target competitors' customers for winback purposes, in direct communications, will no longer provide them with an undue or unfair advantage ...

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<sup>1</sup> Decision 2006-15, paragraph 486.

<sup>2</sup> In *Call-Net Part VII Application – Promotion of local residential competition*, Telecom Decision CRTC 2004-4, 27 January 2004 (Decision 2004-4), the Commission extended the no-winback period from 3 to 12 months with respect to residential local exchange service due, in part, to the slower than expected development of local competition. In *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28, 12 May 2005, as amended by Telecom Decision CRTC 2005-28-1, 30 June 2005 (Decision 2005-28), the Commission extended the application of the winback rule to local VoIP services.

<sup>3</sup> In Decision 2006-15, at paragraph 488, the Commission determined that it was prepared to consider applications from an ILEC requesting the removal of the local winback rule in a relevant market when the applicant ILEC could demonstrate that it had lost 20 percent of its market share in that relevant market and that, for the three months prior to the application, it had met individual standards for each of the 14 specified competitor quality of service indicators of the rate rebate plan for competitors, when the results were averaged across the three-month period.

## **Process**

6. On 30 June 2006, Primus filed its responses to interrogatories addressed by the Commission.
7. On 6 July 2006, Bell Canada, Aliant Telecom Inc.<sup>4</sup> and Saskatchewan Telecommunications (collectively, the Companies), Shaw Communications Inc. (Shaw), and TELUS Communications Company (TCC) filed their comments on Primus's application. Primus filed its reply argument on 17 July 2006.
8. The positions of parties have necessarily been summarized in this Decision. The Commission notes, however, that it has carefully considered all submissions on the record of this proceeding.

## **Primus's submission**

9. Primus submitted that despite the introduction of VoIP, ILEC residential market share had not eroded significantly, and that there was nothing to suggest that the rationale in Decision 2004-4 for extending the no-winback period from 3 to 12 months, or in *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28, 12 May 2005, as amended by Telecom Decision CRTC 2005-28-1, 30 June 2005 (Decision 2005-28), extending the winback rule for VoIP, had been undermined.
10. Primus further submitted that in Decision 2006-15, the Commission had failed to analyze whether any appropriately defined local markets could be characterized as "mature competitive markets," in which the ILECs no longer retained knowledge of the customer's telecommunications needs, preferences, or calling patterns.
11. Primus argued that while the Commission determined that market-by-market analysis was required to assess whether the ILECs had significant market power (SMP) in a particular market, the Commission had not considered the extent to which the winback rule was still required in any particular market. Since the purpose of the winback rule was to protect new entrants from ILEC dominance in a local market and to allow them to establish a relationship with new customers prior to the customers being targeted with new promotions from the ILECs, Primus questioned how changing the rule was justified in local markets where the ILEC was dominant, or on a national basis. Primus submitted that reversing Decision 2004-4 would retard competition, preserve ILEC dominance, and delay forbearance, and that a 12-month no-winback period was required in all local markets where ILECs remained dominant.
12. Primus also argued that Decision 2006-15 was internally inconsistent, in that the Commission determined that the winback rule would be removed based on analyzing competition in a relevant local market, while it also determined that, in the absence of any such analysis, it was appropriate to reduce the no-winback period from 12 to 3 months on a national basis. Primus

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<sup>4</sup> On 7 July 2006, Bell Canada's regional wireline telecommunications operations in Ontario and Quebec were combined with, among other things, the wireline telecommunications operations of Aliant Telecom Inc., Société en commandite Télébec, and NorthernTel, Limited Partnership to form Bell Aliant Regional Communications, Limited Partnership.

further submitted that because the no-winback period was established as a regulatory safeguard to protect competitors from abuse of ILEC dominance in the residential local exchange market through targeted promotions, it made no sense to eliminate the winback rule when the ILEC remained dominant, prior to forbearance. Similarly, Decision 2006-15 failed, in Primus's submission, to explain why the winback rule would be eliminated when an ILEC lost 20 percent market share, while other safeguards remained until the ILEC lost 25 percent market share.

13. Primus was of the view that ILEC winback activity was anti-competitive. Primus objected to the ILECs' practice of targeting lost customers with special deals, arguing that the ILECs' incumbency, near-perfect information about the market, and knowledge of the precise moment a customer left allowed them to target the marketing of special bundles to individual former customers.
14. Finally, Primus argued that in a local market, the repercussions from ILEC winback activity were more harmful than mere loss of a sale. Primus submitted that should a customer decide to switch to a competitor, the competitor would incur significant costs to connect the customer to its network. Primus noted that if the customer were then to accept a winback offer, the competitor would lose both its marketing costs and the additional investment to connect the customer.

#### **Positions of other parties**

15. Shaw submitted that recent decisions pertaining to the winback rule indicated that the Commission still believed the rule was essential to local competition and, based on this, it would be appropriate to remove or relax it when competition reduced incumbency advantages so that targeted winback attempts no longer gave ILECs an undue or unfair advantage. Absent evidence that this had occurred, Shaw submitted that the 12-month no-winback period established in Decision 2004-4 was appropriate.
16. Shaw submitted that reducing the no-winback period nationally failed to consider competition in relevant local markets. Shaw concurred with Primus that this was inconsistent with the purpose of the winback rule, with competition law principles, and with the forbearance framework, and submitted that these inconsistencies raised substantial doubt as to the correctness of Decision 2006-15's reduction of the no-winback period to three months on a national basis. Shaw further submitted that an analysis of the effects of reducing the no-winback period in markets where the ILEC retained near total market share was missing, which compounded doubt as to the correctness of Decision 2006-15.
17. The Companies questioned whether Primus was directly affected by the winback determinations. They submitted that since Primus was not a facilities-based carrier, the Commission should not heed Primus's arguments pertaining to the Commission's winback determinations, as these measures did not address non-facilities-based service providers. The Companies noted that resellers did not issue local service requests (LSRs), unless they were local exchange carriers requiring facilities or the transfer of a number.

18. The Companies submitted that Primus offered no substantial doubt as to the correctness of the Commission's winback determinations, noting that Primus's assertion in the application that "nothing has changed" in the local exchange market, including changes due to VoIP, was out of step with findings in the Telecommunications Policy Review Panel Report (the TPR Report).<sup>5</sup> The Companies further submitted that the TPR Report discredited regulations restricting ILEC winback activity.
19. The Companies further submitted that market share gains made by cable companies with their VoIP services confirmed that consumers were increasingly replacing their traditional wireline local connections with VoIP connections, demonstrating that residential consumers viewed VoIP products as functional substitutes.
20. The Companies submitted that the Commission never implemented the winback rule based on market conditions in any particular local market, in that the scope, breadth, and duration of the rule could not have been tailored to any given local market until (i) the Commission defined the geographical scope of (and services comprising) local wireline markets, which it did in Decision 2006-15, and (ii) the Commission possessed market-specific market share data based on geographical markets.
21. TCC submitted that Primus mixed its arguments on the need for the winback rule with its arguments on the issue of substantial doubt as to the correctness of Decision 2006-15. TCC was of the view that just because Primus believed the winback rule was necessary did not mean that the Commission made an error in Decision 2006-15 that should be reviewed or varied. According to TCC, Primus objected to ILEC winback activity generally, not winback activity at 3 versus 12 months. TCC submitted that the question in this proceeding was whether or not the period should have been reduced to three months, not whether ILECs should be permitted to make winback contact at all.
22. TCC noted that the Commission never referenced competitive conditions in particular geographical areas when creating or modifying the winback rule in the decisions cited by Primus in its application.
23. TCC submitted that local exchange service was becoming more competitive, and given that the slow pace of local competition was what led the Commission to extend the no-winback period from 3 to 12 months in 2004, the Commission's findings regarding the rapidly increasing pace of that competition in 2006 were sufficient to reduce the period back to 3 months, if not to completely eliminate it.
24. TCC noted that Primus did not accuse the ILECs of violating any tariffing, bundling, or promotions rules in making winback offers. TCC submitted that these offers either included forborne services or were bundles that included regulated services and met the Commission's tariffing, bundling, and promotions rules.

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<sup>5</sup> *Telecommunications Policy Review Panel: Final Report 2006*, March 2006.

### **Primus's reply argument**

25. Primus argued that it was not seeking protection from competition, but from abuse of market power in markets where ILECs possessed SMP and where ILEC winback activity infringed subsection 27(2) of the *Telecommunications Act*. Primus noted that the TPR Report recognized the need to regulate ILEC conduct in markets where SMP was retained.
26. Primus argued that, in Decision 2006-15, despite establishing clearly defined local markets to assess market power, and despite establishing criteria that needed to be satisfied before removing regulatory safeguards, including the winback rule, the Commission failed to consider these principles when it reduced the no-winback period from 12 to 3 months.
27. Primus submitted that there was no evidence to support the conclusion that a three-month no-winback period was adequate to prevent ILECs from enjoying an undue or unfair advantage, or from benefiting unfairly due to their ability to target former local exchange service customers for winback purposes. Given the degree that competition varied from local market to local market, with some markets experiencing no competition, there was no evidence to support an across-the-board reduction of the no-winback period from 12 to 3 months. While Primus acknowledged that VoIP had the potential to allow competition to develop in local markets, ILECs continued to have SMP in every geographical market.
28. Primus submitted that it was not privy to the Commission's latest market data, and expressed doubt over any dramatic change in market conditions, noting that there were areas of the country where competition had made little progress. Primus noted that in more populated provinces like Ontario and Quebec, Bell Canada retained very high market share, citing Bell Canada's most recent financial reports.
29. Primus noted that the Companies' reference to a TPR Report comment that winback campaigns should not be restricted by the regulator was prefaced by the phrase "unless a winback campaign can be shown to significantly lessen competition." Primus further noted that the Commission had consistently recognized that a no-winback period was necessary to prevent the ILECs from using their dominant position to unfairly suppress competition.
30. Regarding the Companies' submission that suggested that it was inappropriate for Primus to file a review and vary application because the winback rule did not apply to resellers, Primus submitted that while the Commission had referred to the impact of the winback rule on competitive local exchange carriers (CLECs), the Commission had never suggested that resellers did not benefit from winback restrictions.
31. Primus noted that the Commission applied the winback rule to ILEC VoIP services in Decision 2005-28, but it did not distinguish between VoIP customers with service from resellers versus CLECs. Primus submitted that because it and other resellers were "VoIP service providers," as defined by the Commission, each reseller was directly affected by the reduction of the no-winback period from 12 to 3 months.

## Commission's analysis and determinations

32. In *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998, the Commission set out the criteria to consider review and vary applications. Specifically, the Commission stated the following:

... applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to: (i) an error in law or in fact; (ii) a fundamental change in circumstances or facts since the decision; (iii) a failure to consider a basic principle which had been raised in the original proceeding; or (iv) a new principle which has arisen as a result of the decision.
33. Contrary to the submissions of the Companies, the Commission considers that Primus, as a competitor in the local exchange services market, is directly affected by Commission determinations regarding the winback rule.
34. With respect to Primus's argument that there was little change in the local market since Decision 2004-4 to justify the winback determinations in Decision 2006-15, the Commission considers that the changes in market conditions, as evidenced on the record of the proceeding leading to Decision 2006-15, were sufficiently material to justify changing the no-winback period from 12 to 3 months. The Commission finds that Primus has not presented new evidence to raise any doubt, let alone substantial doubt, as to the correctness of the Commission's determination regarding changes in the residential marketplace.
35. The Commission notes that more recent data regarding the local exchange services market support the Commission's findings in Decision 2006-15. In *Reconsideration of Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2006-53, 1 September 2006, the Commission noted that growth in residential local VoIP services was resulting in significantly stronger competition in the local exchange services market, and that local exchange competition in the residential market was more deeply rooted than had been apparent based on the record of the proceeding leading to Decision 2006-15.
36. The Commission does not accept Primus' assertion that Decision 2006-15 was internally inconsistent since the Commission determined that it was necessary to assess the competitiveness of individual local markets as a precondition for removing the winback rule, yet it did not do so in connection with the reduction of the winback period. The Commission notes that it increased the duration of the no-winback period to 12 months in Decision 2004-4 and lowered it to 3 months in Decision 2006-15 based on an assessment of general market conditions across the country. By contrast, the Commission established the 20 percent market share loss threshold that would trigger the elimination of the winback rule as part of Decision 2006-15, setting out the terms and conditions under which it would be prepared to grant forbearance. As with full forbearance, the elimination of the winback rule would occur on a market-by-market basis.

37. With respect to Primus's contention that the Commission failed to distinguish the winback safeguard from other competitive safeguards that the Commission did not remove or alter, the Commission notes that its determination that the 12-month duration of the no-winback period could be reduced to 3 months was based on a view that the longer period was no longer necessary to prevent undue preference and unjust discrimination and involved an assessment only of the winback rule. The Commission finds that the fact that it did not make changes to other competitive safeguards does not raise substantial doubt as to the correctness of the Commission's specific determinations regarding the winback rule.
38. Further, the Commission finds that Primus's arguments regarding the anti-competitive nature of ILEC winback activity do not raise substantial doubt as to the correctness of the Commission's determination that three months is an appropriate no-winback period in light of new market conditions.
39. Finally, regarding Primus's assertion that greater risk exists for competitors than for ILECs due to the competitor's cost to connect customers to its network, which therefore requires 12 months of protection from ILEC winback activity based on customer acquisition and connection cost evidence, the Commission considers that the purpose of the winback rule is not to protect the financial viability of competitors.
40. In light of the foregoing, the Commission finds that Primus has failed to establish substantial doubt as to the correctness of the Commission's winback determinations set out in Decision 2006-15. The Commission therefore **denies** Primus's request to review and vary those portions of Decision 2006-15 pertaining to the winback rule.

**Primus's request for a stay**

41. In its application, Primus also requested a stay of Decision 2006-15 pending the Commission's determinations on the review and vary application.
42. Given its determinations above, the Commission concludes that Primus's request for a stay is moot and that there would be no utility in examining the merits of the stay application.

Secretary General

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