



Telecom Decision CRTC 2006-16

Ottawa, 6 April 2006

Bell Canada and Saskatchewan Telecommunications' request that the Commission stop applying the local exchange service winback restrictions on the basis that they unjustifiably infringe the right to freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*

Reference: 8622-B2-200505068 and 8680-B2-200513707

*In this Decision, the Commission **denies** Bell Canada and Saskatchewan Telecommunications' request that the Commission stop applying the local exchange service winback restrictions, as they existed at the time of the request, on the basis that they unjustifiably infringed freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter). The Commission concludes that while the winback restrictions in question infringe section 2(b) of the Charter, the infringement is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society, consistent with section 1 of the Charter.*

Introduction

The Application

1. On 25 April 2005, Bell Canada and Saskatchewan Telecommunications (SaskTel) (collectively, the Companies) filed a Part VII application (the Application) requesting that the Commission stop applying the local exchange service winback restrictions on the basis that they violated the applicants' and consumers' freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the Charter)¹ and could not be justified under section 1 of the Charter.²
2. On 24 October 2005, the Commission re-opened and extended the proceeding in order to receive submissions from the interested parties with respect to the constitutionality, under the Charter, of the Commission's statement of the local exchange service winback restrictions 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), which extended the scope of the local exchange service winback restrictions to local voice over Internet protocol (VoIP) services. In addition, the Commission addressed interrogatories to the applicants and to a number of other parties. The record of the proceeding closed on 12 December 2005.

¹ Section 2(b) of the Charter provides that everyone has the fundamental freedoms of "thought, belief, opinion and expression, including freedom of the press and other media of communication[.]"

² Section 1 of the Charter provides that the rights and freedoms set out in the Charter are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

3. The record of this proceeding includes submissions from the Companies, Aliant Telecom Inc. (Aliant Telecom), TELUS Communications Inc. (TCI), MTS Allstream Inc. (MTS Allstream), who, in its initial comments, filed on behalf of itself and Call-Net Enterprises Inc.³ (Call-Net), and as such made submissions not only as an incumbent local exchange carrier (ILEC) but also as a competitive local exchange carrier (CLEC) (collectively, MTS Allstream/Call-Net), Bragg Communications Inc., carrying on business as EastLink (EastLink), Rogers Communications Inc. (Rogers), Quebecor Media Inc. (QMI), the Canadian Cable Telecommunications Association (CCTA), ARCH: A Legal Resource Centre for People with Disabilities⁴ (ARCH) and the Coalition for Competitive Telecommunications (the Coalition). The parties, other than the Companies, Aliant Telecom and TCI, are referred to as the "Respondents."
4. The positions of the parties have necessarily been summarized; however, the Commission has carefully reviewed and considered the submissions of all parties.

The winback rule and Decision 2006-15

5. The local exchange service winback restrictions, which are the subject of the current proceeding, were stated by the Commission in Decision 2005-28-1 as follows:

[A]n ILEC is not to attempt to win back a business customer with respect to primary exchange service [(PES)] or local VoIP service,⁵ 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, in the case of a business customer, and 12 months, in the case of a residential customer, 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.

The above will be referred to in this Decision as the "winback rule."

6. In *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, 6 April 2006 (Decision 2006-15), released today, the Commission modified the winback rule, as it relates to residential customers, by reducing the period during which the winback rule applies to a given former local exchange service customer (the no-winback period) from 12 to three months. In the proceeding leading to this Decision, the Commission set out to determine the framework according to which it would forbear from regulation in the local exchange services market. It also examined whether there should be a transitional regime, in which certain competitive safeguards, such as the winback rule, would be reduced or removed

³ Now Rogers Telecom Holdings Inc.

⁴ Now ARCH Disability Law Centre.

⁵ As that term was defined in Decision 2005-28.

prior to forbearance. In Decision 2006-15, the Commission determined that reducing the no-winback period for former residential local exchange service customers from 12 to three months would be a part of the transitional regime, effective immediately.⁶

7. The Commission notes that the arguments and evidence submitted by the parties in this proceeding relate to the winback rule as it existed prior to Decision 2006-15. The Commission considers that it would be inappropriate to make findings in this proceeding regarding the Decision 2006-15 winback rule. However, since the Decision 2006-15 winback rule only modifies the no-winback period in relation to residential customers, and maintains all other aspects of the winback rule, the Commission considers there is merit in setting out its determinations with respect to the constitutionality of the prior winback rule.

Background

Regulatory framework for competition

8. In 1993, Parliament enacted the *Telecommunications Act* (the Act), replacing the telecommunications-related provisions of the *Railway Act*. The Act affirmed many of the policy objectives that the Commission had been giving effect to under the *Railway Act* since the 1970s, including the introduction of competition in various telecommunications markets.
9. Section 7 of the Act articulates the objectives of Canadian telecommunications policy. Several of these objectives relate to the promotion of competition in telecommunications, including:
 - enhancing the efficiency and competitiveness of Canadian telecommunications at the national and international levels;
 - stimulating research and development in Canada in the field of telecommunications and encouraging innovation in the provision of telecommunications services; and
 - fostering increased reliance on market forces for the provision of telecommunications services and ensuring that regulation, where required, is efficient and effective.
10. Section 47 of the Act requires that the Commission exercise its powers and perform its duties in furtherance of the telecommunications policy objectives in section 7.
11. In *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission established a comprehensive regulatory framework for the telecommunications industry, in light of the policy objectives of the Act and the evolution of the telecommunications environment. The Commission stated that market forces would generally be preferable for governing the behaviour of telecommunications service providers

⁶ The Commission notes that Decision 2006-15 also lays out the conditions under which the winback rule would be lifted entirely, in relevant markets, prior to forbearance.

in markets that were sufficiently competitive. The Commission also stated that greater reliance on market forces would allow for greater choice and supplier responsiveness and would ensure that user applications, not regulators, drove supply considerations.

12. The Decision 94-19 framework encompassed a wide range of regulatory issues, as well as a framework for the introduction of competition into the local exchange service market. In particular, the Commission found that the potential existed for meaningful competition in the local exchange service market. The Commission considered that encouraging this potential would lead to benefits, such as productivity improvements, service innovation, and enhanced choices for consumers, and found that in order to achieve these objectives, there was a need to remove barriers to entry and adopt conditions to safeguard competition.
13. In Decision 94-19, the Commission noted that "the key concern of competitors in this proceeding has been the potential for telephone companies to abuse market power arising from their vertically integrated structure and historically dominant market position."⁷ The Commission also noted that "regulation is necessary to ensure that service is affordable, where market forces are not sufficient to provide that assurance, and to address issues of undue preference and unjust discrimination that arise due to the vertically integrated nature of the telephone companies and their dominance in some markets."⁸
14. Order in Council P.C. 1994-1689, 8 October 1994 (Order in Council), underscored the high importance that the Government of Canada ascribed to the promotion of competition in telecommunications. The Government noted that competition "stimulates investment and innovation and reduces the gap between the development and the deployment of new technologies, products and services, thereby quickly expanding the range of products and services available to consumers",⁹ and can also serve to reduce prices. The Government stated that the regulatory framework "must ensure that obligations and opportunities are shared equitably by all participants, i.e. the competitive model must allow each participant an equal opportunity to succeed, or fail, based on their efforts."¹⁰
15. In *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8), the Commission established a framework for the implementation of local competition, in accordance with the principles enunciated in Decision 94-19. The Commission found that efficient and effective competition would be best achieved through facilities-based competitive service providers. The Commission considered that, without facilities-based competition, competition would only develop at the retail level, with the ILECs retaining monopoly control of wholesale level distribution. The Commission adopted the principle that CLECs were not simply customers of ILECs, but were carriers of equal stature to the ILECs in the local exchange market.

⁷ Decision 94-19 at pg. 15.

⁸ *Ibid.*, pg. 13.

⁹ As appended to *Call for Comments Concerning Order in Council P.C. 1994-1689*, Public Notice CRTC 1994-130, 20 October 1994.

¹⁰ *Ibid.*

16. In Decision 97-8, the Commission found that there were several barriers to competitive entry into the local exchange market. The Commission recognized that technical and operational modifications would be needed to allow CLECs to interconnect their network facilities to the ubiquitous networks of the ILECs in a manner that would allow them to offer local exchange services to end-users. The Commission found that absent mandatory unbundling of telephone company networks, including fair rates and terms of access to the ILECs' essential and near-essential facilities, CLECs would be forced to make prohibitively expensive capital expenditures to enter the market. The Commission also implemented a set of competitive safeguards related to pricing, so as to ensure that CLECs were charged fair rates for the use of ILEC essential facilities, and so as to prevent anti-competitive pricing charged to consumers.
17. Following Decision 97-8, the Commission conducted a number of proceedings addressing barriers to competition, including proceedings relating to co-location¹¹ and unbundling¹², as well as access to support structures¹³, rights-of-way¹⁴ and multi-dwelling units.¹⁵ The Commission continues to deal with many of these issues on an ongoing basis.

The adoption and evolution of the winback rule

18. The Commission established the winback rule as one of a series of measures that flowed from the regulatory framework adopted by the Commission in Decisions 94-19 and 97-8 to foster sustainable facilities-based local competition.
19. The first version of the winback rule in respect of local exchange service was set out by the Commission in its letter entitled *Commission Decision Regarding CRTC Interconnection Steering Committee Dispute on Competitive Winback Guidelines* issued on 16 April 1998 (the Winback Letter). In the Winback Letter, the Commission prohibited the ILECs from attempting to win back former customers for PES, for a period of three months. The Commission stated:

The Commission is of the view that asymmetrical winback guidelines should be put in place for a specific period of time to facilitate CLEC entry into the local market. The Commission notes, in this regard, that without such guidelines, ILECs would potentially be able to win back customers even before local service is effectively transferred to a CLEC because ILECs control and have access to customer specific information,

¹¹ See for example, *Co-location*, Telecom Decision CRTC 97-15, 16 June 1997.

¹² See for example, *Final Rates for Unbundled Local Network Components*, Telecom Decision CRTC 98-22, 30 November 1998, and *Local competition: Sunset clause for near-essential facilities*, Order CRTC 2001-184, 1 March 2001.

¹³ See for example, *Rates set for access to telephone companies' support structures*, Order CRTC 2000-13, 18 January 2000.

¹⁴ See for example, *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001.

¹⁵ See for example, *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003.

such as leased loops, directory listings, and 911 information. The Commission notes that asymmetrical winback guidelines will not prevent ILECs from advertising to the general public. Instead, ILECs will not be allowed to communicate with customers on an individual basis for a limited period of time following transfer of the customer's service to another local service provider.

The Commission is of the view that asymmetrical winback guidelines will help to protect customers and ensure effective competitive entry... The Commission therefore directs that an ILEC is not to attempt to win back a customer for a period of three months after that customer's 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.

20. In *Application of the winback rules with respect to primary exchange service*, Telecom Decision CRTC 2002-1, 10 January 2002 (Decision 2002-1), in recognition of the evolution in the way in which telecommunications services, including local exchange service, were being marketed to consumers, the Commission directed ILECs to refrain from attempting to win back a residential customer, either for PES or any other service, for a period of three months after the customer's PES had been completely transferred:

The Commission notes that circumstances have changed since the winback rules were first applied in 1998. In particular, there has been an increase in the marketing of bundled service offerings. In this regard, the Commission notes that an attempt by an ILEC to sell a bundle that included optional local services to a lost residential primary exchange customer would generally constitute a winback activity for primary exchange service since its acceptance would generally mean that the customer, for technical reasons, would be obliged to switch back to the ILEC's primary exchange service.

In the case of the bundling of other services such as Internet and long distance with primary exchange service or optional local services, the Commission notes that a winback of a long distance or Internet customer would also inevitably repatriate the primary exchange service, despite the fact that such service might not be the target of the winback in question.¹⁶

21. In *Call-Net Enterprises Inc. v. Bell Canada - Compliance with winback rules*, Telecom Decision CRTC 2002-73, 4 December 2002 (Decision 2002-73), the Commission responded to a complaint by Call-Net that Bell Canada had been contacting customers immediately after receiving Call-Net's local service requests (LSRs), before the customers had migrated onto

¹⁶ Decision 2002-1 at paras. 16-17.

the Call-Net network. The Commission determined that the no-winback period starts at the time that the customer's decision to change service providers is communicated in an LSR. The Commission found Bell Canada to be in violation of the winback rule, and required Bell Canada to develop and implement internal procedures to ensure its compliance with the winback rule.¹⁷

22. In *Call-Net Part VII Application - Promotion of local residential competition*, Telecom Decision CRTC 2004-4, 27 January 2004 (Decision 2004-4), the Commission noted that while winback activity can be a feature of a mature competitive market, the local telephone market was not such a market, and that competition had not grown as rapidly as had been anticipated when the winback rule was imposed in 1998. The Commission determined that it would extend the no-winback period in respect of residential customers from three to 12 months, on the following grounds:

The Commission agrees with Call-Net's argument that sustainable competition can only be achieved if CLECs have the opportunity to develop a stable customer base. The Commission also notes that, according to the POLLARA survey, more than half of the residential customers who left Bell Canada did so because the CLEC offered a better price or rate. While price may be a key method for a CLEC to win customers, the Commission considers that if a CLEC is to retain customers and build a stable customer base, it must have a reasonable opportunity to demonstrate the quality and reliability of its services.

The Commission notes that the vast majority, if not all of a CLEC's customers will be former ILEC customers. As a result, an ILEC will have knowledge of the customer's telecommunications needs, preferences and calling patterns. That knowledge would give the ILEC an advantage when targeting winback activity to that customer. Given the predominance of the ILECs in the residential local market, the Commission considers that this enhanced ability to target former customers constitutes an undue or unfair advantage during the period CLECs require to establish a stable relationship with their customers.

The Commission also considers that targeted winback activities increase churn and administrative costs for all [local exchange carriers (LECs)]. Increased churn is likely to be especially detrimental to CLECs as they do not have a large stable base of customers capable of funding the CLEC's ongoing operations. In this regard, the Commission accepts Call-Net's evidence that customer churn decreased significantly after a customer had received service from Sprint Canada for a year or more.¹⁸

¹⁷ Decision 2002-73 at paras. 25-27.

¹⁸ Decision 2004-4 at paras. 119-121.

23. In Decision 2005-28, the Commission extended the application of the winback rule to local VoIP services:

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 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 ILECs from attempting to win back 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.¹⁹

Procedural objections regarding material filed on the record

Evidence filed by the Respondents

24. The Companies and TCI argued that evidence filed by the Respondents that related to ILEC pricing and targeted pricing strategies was outside the scope of this proceeding, and therefore should be disregarded. TCI argued that this proceeding was concerned only with the constitutionality of the winback rule, not the other marketing restrictions to which ILECs remained subject. In TCI's view, even if the winback rule was eliminated, the rule against rate de-averaging, the near-ban on promotions, and the restrictions on bundling would remain in effect and would continue to constrain the normal competitive responses of the ILECs.
25. Aliant Telecom argued that certain submissions filed by the Respondents were premised upon the irrelevant assumption that there would be ILEC violations of bundling, promotion or below cost pricing requirements, should the winback rule be eliminated. Aliant Telecom submitted that these submissions should be disregarded by the Commission as they were irrelevant to the interrogatories posed and were outside the scope of this process.

¹⁹ Decision 2005-28 at paras. 254-255.

26. In response, the CCTA argued that its evidence spoke directly to the incentives that ILECs had to engage in winback activity and how targeting special offers narrowly at only the customers lost to competitors was an economically rational pursuit. The CCTA argued that:
- While winback activity might occur in any number of markets, the circumstances in the local market presented additional incentives for the ILEC to pursue these strategies. Unlike other markets, competitors seeking to make gains in the local market did not have the option to pursue potential customers not served by the ILEC by virtue of the ILEC's incumbent position and the high penetration of local service. There were no residential local customers that could not and would not be targeted by the ILECs.
 - Removing the winback restrictions would substantially and irrevocably enhance the ability of the ILECs to act on strong incentives to maximize their profits by repatriating customers from competitors. Competitors would not be able to recover their costs, including high costs of customer acquisition. As a result, competitors would be put under greater financial pressure, lost market share would revert back to the ILECs and, ultimately, the competitiveness of the local market would be undermined.
27. The Commission considers that the only issue in this proceeding is the constitutionality of the winback rule under the Charter. As will be discussed further below, the winback rule relates to the ability of ILECs to directly communicate with former local exchange service customers for the purpose of a winback attempt; it is not designed to resolve concerns regarding the specific service offering being communicated to those former customers. These concerns, which relate to the rates and conditions according to which the service offering may be provided by the ILECs, are addressed by the Commission's pricing safeguards and other pricing rules, and in particular, those set out in *Promotions of local wireline services*, Telecom Decision CRTC 2005-25, 27 April 2005 (Decision 2005-25). The Commission therefore finds that these rules are outside the scope of this proceeding. Accordingly, the Commission has not considered material filed in relation to pricing and pricing strategies of the ILECs for the purpose of its determinations in this proceeding.
28. The Companies also argued that the Respondents had attempted to introduce other argument beyond the scope of this proceeding. In support of this statement, the Companies referred to a statement by QMI in relation to Bell Digital Voice service. The Commission agrees that the issue of what is or is not a VoIP service is not a matter in question in this proceeding. Accordingly, the Commission has not considered any submissions relating to this issue in the course of its deliberations in this proceeding.

Evidence filed by the Companies

29. MTS Allstream requested that certain material filed by the Companies in response to Commission interrogatories and in their supplemental comments be disregarded, on the grounds that it could have been presented with the Application and, more importantly, had no relevance

to the issues raised at that stage of the proceeding. In response, the Companies argued that this information was relevant to the proceeding and directly responsive to the Commission interrogatories.

30. The Commission finds that the material referred to is relevant to this proceeding, with the exception of portions of the *VoIP CRTC Ruling Report*, a consumer survey conducted by Ipsos-Reid on behalf of ILECs (Ipsos-Reid Report) and filed by Bell Canada in this proceeding. For the reasons discussed in paragraph 27 above, the Commission has not considered for the purpose of its determinations in this proceeding those parts of the Ipsos-Reid Report relating to the prices of services and the requirement to obtain tariff approval of bundles pursuant to section 25 of the Act. As will be discussed further below, the Commission has considered that part of the Ipsos-Reid Report which related to the winback rule.

Is the winback rule consistent with the Charter?

31. The parties generally agreed that the issue in this proceeding was whether the winback rule was justifiable under section 1 of the Charter. The Commission has considered, for the purpose of this analysis, that the winback rule constitutes an infringement of freedom of expression, the limited nature and scope of which is examined starting at paragraph 53 below, and therefore, that it is necessary to determine whether the winback rule is consistent with section 1 of the Charter.
32. In *R. v. Oakes*, [1986] 1 S.C.R. 103 (*Oakes*), the Supreme Court of Canada (the Court) set out the analytical framework to be used to determine whether a law that infringes a Charter right constitutes a reasonable limit under section 1 (the Oakes test).²⁰
33. The Oakes test has two major parts. The test requires first that a determination be made as to whether or not the infringing measure has a "pressing and substantial" objective. If the measure does not have a pressing and substantial objective, then it will not fall within section 1, and there is no need to proceed to the second part of the test.
34. If, however, a pressing and substantial objective is identified, the analysis proceeds to the second part of the Oakes test, which is to assess the measure's proportionality (the proportionality test). A finding of proportionality requires that all three of the following branches be satisfied: the first requires that the measure adopted be rationally connected to the objective in question (the rational connection branch); the second requires that the measure impairs the freedom no more than reasonably necessary to attain the objective (the minimal impairment branch); the third requires that there be proportionality both between the deleterious effects of the measure and its objective, and between the deleterious and salutary effects of the measure (the proportionate effects branch).²¹

²⁰ The Commission notes that no party in this proceeding submitted arguments with respect to the requirement that the winback rule be prescribed by law.

²¹ As modified in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at paras. 93-95 (*Dagenais*).

35. The standard of proof for all stages of the Oakes test is proof on a balance of probabilities.²² In most cases, conclusive scientific evidence is not required for the purpose of defending an impugned measure.
36. The Commission notes that a number of similar arguments were raised by different parties in addressing the different stages of the Oakes test. In order to avoid repetition, the Commission has generally addressed these arguments under only one stage of the Oakes test.
37. The Commission notes that in order to assess whether the winback rule meets the requirements of the Oakes test, it is first necessary to consider the context in which the winback rule was adopted, and the nature and scope of its infringement on freedom of expression.

The context in which the winback rule was adopted and the nature and scope of the infringement

Positions of parties

The ILECs

38. With respect to the nature of the infringement, the Companies submitted that, as a result of the winback rule, a customer who decided to switch from an ILEC was cut off from all contact initiated by the ILEC for the relevant no-winback period, and was therefore unable to make the same informed choices available to other customers. The Companies argued that such contact merited significant Charter protection, as most individuals found local and long distance telephone services, Internet access and broadcasting distribution services to be important to their daily lives. In the Companies' view, low-income families were also likely to consume telecommunications services, yet the current winback rule restricted the information they could receive about lower-cost plans or providers. The Companies argued that, unlike the case of *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (*Irwin Toy*), which dealt with advertising directed at children, the winback rule was not intended to protect a vulnerable group of consumers.
39. TCI submitted that the Court had held that commercial expression merited strong protection under section 2(b) of the Charter, citing *Irwin Toy*, *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 (*Ford*), and *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 (*Rocket*), as examples of where the Court had found commercial expression worthy of Charter protection in respect of both the speaker and the listener.

Respondents

40. Citing *RJR-MacDonald* and *Irwin Toy*, the CCTA argued that a lower standard of section 1 justification was appropriate where the legislator or policy-maker was mediating between different groups, as opposed to where the state was acting as a singular antagonist of the individual. The CCTA submitted that the winback rule sought to balance the rights and interests of consumers and ILECs in the short term to establish a competitive environment in the long term where such a rule would be unnecessary.

²² *Oakes* at para. 67; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 137 (*RJR-MacDonald*).

41. The CCTA submitted that the Companies improperly omitted reference to the contextual approach generally applied in commercial expression cases. Relying on *Rocket*, the CCTA submitted that the Court stated that when the motive for commercial expression was "primarily economic", restrictions on commercial expression "might be easier to justify than other infringements of section 2(b)."²³ The CCTA also relied on the Court's statement in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (*Thomson Newspapers*) at paragraph 91 to the effect that "the low value of the expression may be more easily outweighed by the government objective." The CCTA submitted that the Companies had insufficiently considered that the appropriate standard of proof on the proportionality analysis is the balance of probabilities, and that this reflected a degree of deference to Parliament's (or, in this case, the Commission's) choice.
42. The CCTA argued that the Companies exaggerated the winback rule's impact because the winback rule only affected a limited subset of customers. The CCTA submitted that Decision 2005-28 reaffirmed that the winback rule only applied to ILEC-initiated contact with "customers who have decided to switch their local residential services [where the purpose of that contact is] to win them back"²⁴ and that the winback rule "will only be triggered when a VoIP [or other local exchange] service provider contacts an ILEC to notify the ILEC of a change of service."²⁵ According to the CCTA, the winback rule had no effect on the Companies' ability to market their services generally or on the choice of medium or message, nor did it prevent customers from reviewing any offer made by the Companies to the general public through print, television, radio, their retail outlets, websites or any other communication medium.
43. MTS Allstream/Call-Net argued that the winback rule had not been introduced into a fully competitive marketplace, unlike the markets in *Irwin Toy* (dealing with advertising directed at children) and *Rocket* (dealing with advertising for dental services), but rather into an incomplete transition from a monopoly to a competitive telecommunications market. MTS Allstream/Call-Net submitted that, following the passage of the Act and Decision 94-19, the Commission imposed certain regulatory safeguards in order to facilitate the transition to a competitive environment, including the winback rule, to offset the market power and advantages that naturally accrued to the ILECs by virtue of their historic monopoly, and to protect CLECs from the potential for abuse that stemmed from these advantages.
44. MTS Allstream/Call-Net characterized the expression at issue as motivated primarily by economic interest on the basis that it attempted to win back lost customers. MTS Allstream/Call-Net argued that the winback rule did not affect customer choice, because the customers who had switched could be presumed to be aware of ILEC services and that they had choice. In MTS Allstream/Call-Net's view, the only restricted information would relate to any change in ILEC services since the customer decided to switch, and such change was unlikely, given the short time in which the winback rule applied – three months for business and 12 months

²³ *Rocket* at para. 29.

²⁴ Decision 2005-28 at para. 258.

²⁵ *Ibid.*, at para. 259.

for residential. MTS Allstream/Call-Net further argued that any claimed impact of the winback rule was theoretical, as customers could still obtain up-to-date information about ILEC services through advertising and marketing in all forms, other than direct solicitation, and when customers called the ILEC to indicate their intention to switch local providers.

45. ARCH submitted that the Court had repeatedly stated that legislative bodies that were called upon to balance the claims of competing groups must be afforded wide latitude to determine the proper distribution of resources throughout society because they were well placed to make such decisions. ARCH submitted that this was especially true where the competing interests under consideration included those of disadvantaged groups.

The Companies' reply

46. The Companies argued that the Respondents' attempts to discount the value of commercial expression were fundamentally at odds with the Court's jurisprudence. The Companies submitted that restrictions on "information which would be useful to the public and present no serious danger of misleading the public or undercutting professionalism"²⁶ – the type of information affected by the winback rule – were not justified. They further argued that the element of consumer protection from qualitative claims about professional services that could not be assessed by non-specialists, which favoured the regulation of certain types of dentists' advertising in *Rocket*, was entirely absent in this case. The Companies argued that winback activity was not behaviour that was abusive, improper or illegal; rather, the clear evidence from consumers and business on the record of this proceeding was that customers whose access to winback messages was denied were not a vulnerable class, and that they appreciated and welcomed these messages as they provided timely, accurate information to better enable customers to exercise informed choice amongst service providers.
47. The Companies cited the Winback Letter to argue that, notwithstanding the sentence quoted by the CCTA from Decision 2005-28, throughout the seven years that the winback rule had been in force, the only exception was when a customer called the ILEC directly to advise that the customer intended to change local service providers (LSPs).²⁷ The Companies submitted that, at the very least, the exception was unclear, and requested clarification of whether the exception applied to all customer-initiated calls to the ILECs or just to customer-initiated calls in which the customer specifically advised the ILEC that he or she intended to change LSPs.

Commission determinations

Context

48. The Commission notes that the Court has consistently determined that a claim under the Charter must be assessed in light of the context in which the claim arises, as "[c]ontext is

²⁶ *Rocket* at para. 40.

²⁷ The Winback Letter describes the exception as follows: "ILECs should be allowed to win back customers who call to advise them that they intend to change local service provider."

relevant both with respect to the delineation of the meaning and scope of Charter rights, as well as to the determination of the balance to be struck between individual rights and the interests of society."²⁸

49. As explained above, the comprehensive competition framework that was established in Decisions 94-19 and 97-8 constituted the regulatory context in which the Commission adopted the winback rule. The Commission considers that facilitating the transition from monopoly to competition in the provision of local exchange services, through the adoption of specific measures aimed at mitigating the advantages of ILECs relative to competitors that create barriers to competition, is a complex problem that lies at the heart of the Commission's mandate under the Act. The winback rule is one example of the Commission's attempt to mediate between the needs and interests of ILECs and those of competing service providers, as well as consumers, in furtherance of the objectives of the Act. In this respect, the winback rule does not differ from other measures adopted by the Commission aimed at allowing for a level playing field among incumbent carriers and new entrants, to the ultimate benefit of consumers. The winback rule is also, in this respect, similar to the rules the Commission has established, in furtherance of its objectives under the *Broadcasting Act*, to limit the ability of certain incumbent cable companies to directly contact their former customers for winback purposes. These rules necessarily differ in scope from the winback rule in order to address the different circumstances in which they are applied.
50. The Commission notes that the winback rule was adopted within the context of ILEC dominance in the local exchange services market. When the winback rule was first adopted in 1998, competitive entrants had 4.5 percent of local business lines, and such a statistically insignificant share of the local residential market that ILECs were reported to have 100 percent of local residential lines.²⁹ Although ILEC market share has declined since 1998, until recently the rate of decline has been slow. As noted in Decision 2004-4, at the end of 2001, the ILECs had 99.4 percent of all residential customers in Canada, and at the end of 2002, their market share had only dropped slightly to 98.6 percent. The Commission's most recently published data reveals that while CLECs' market share in 2004 had improved from the year before, the ILECs continued to remain dominant, with CLECs having attained 3.2 percent of local residential lines and 12.4 percent of business lines at the end of 2004.³⁰

The nature and scope of the infringement

51. The Commission notes that there was some debate on the record as to the constitutional value of the particular expression at issue in this proceeding. The Companies and other ILECs submitted that commercial speech had traditionally been accorded a fairly high level of protection under section 2(b) of the Charter, while the Respondents submitted that commercial speech had been considered to be of lower value than other forms of speech, notably political speech, which was closer to the core principles of section 2(b) of the Charter.

²⁸ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at para. 149.

²⁹ *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets*, September 2001, at pg. 25.

³⁰ *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets*, October 2005, at pgs. 49-50.

52. The Commission notes that the Court has stated that commercial speech serves an important public interest where it plays an important role in enabling consumers to make informed choices.³¹
53. The Commission notes that former local exchange service customers to whom the winback rule applies have access to service and product information generally available at the ILEC's retail outlets, by means of advertising in the media and through other marketing activities that do not involve a direct communication for winback purposes, as well as by means of the ILEC's websites.
54. The Commission further notes that the winback rule does not prevent:
- an ILEC's current local exchange service customers, including those who have switched other services to competitors, from receiving direct communications from the ILEC at any time; and
 - an ILEC's former local exchange service customers from receiving direct communications from the ILEC at any time in relation to any service that the customer continues to obtain from the ILEC or any service that the customer had not previously purchased from the ILEC.
55. Rather, the winback rule prevents an ILEC's former local exchange service customers from being targeted through a direct communication by an ILEC for a winback attempt in respect of local exchange service, in the case of a business customer, and in respect of all services that the customer switched to a competitor, in the case of a residential customer, during the applicable no-winback period.
56. The Commission notes that parties in this proceeding disagreed as to the scope of the exception contained in the winback rule for customer-initiated contact. In the Application, the Companies submitted that where a customer called the ILEC to request information on local exchange services, a sales representative was free to offer the customer information and to transfer the service back to the ILEC if the customer so requested. The Commission agrees that the circumstances identified by the Companies properly fall within the scope of the exception contained in the winback rule.
57. In light of all the foregoing, the Commission finds that the winback rule restricts in a limited manner the ability of ILECs to convey information to former local exchange service customers, and does not materially interfere with the ability of consumers to make informed economic choices concerning the telecommunications services and products that the ILECs provide in accordance with the Act.

³¹ See for example, *Rocket* at paras. 14 and 29.

Is the objective of the winback rule pressing and substantial?

Positions of parties

The ILECs

58. The Companies submitted that the purpose of the winback rule initially articulated in the Winback Letter and Decisions 2002-1 and 2002-73 was to foster competitive entry by preventing ILECs from attempting to win back customers before local service was effectively transferred.
59. The Companies further submitted that when the Commission extended the winback rule in Decision 2004-4, the purpose was changed to providing a CLEC with "a reasonable opportunity to demonstrate the quality and reliability of its services" in order to "build a stable customer base." The Companies argued that this purpose was diametrically opposed to Canadian telecommunications policy objectives, as it denied consumers valuable information about the value and price of competing telecommunications services and service providers, protected CLECs from competition and the promotion of efficiency, and placed market forces on hold, rather than subjecting competitors to the discipline of full market forces. According to the Companies, this purpose did not benefit consumers, nor enable them to choose their services and suppliers, which the Commission acknowledged in Decision 94-19 as its purpose in attempting to foster competition. The Companies submitted that the Commission's mandate in the Act was to facilitate competition, not to manage competition by favouring one carrier relative to another at the expense of consumers.
60. According to the Companies, the incumbent cable companies had long-standing relationships with the same pool of potential customers as the ILECs. The Companies submitted that it could not be a pressing and substantial objective to suppress an important element of competition, namely the free exchange and receipt of commercial information amongst ILECs and their former customers, in order to protect well-capitalized, vigorous competitors.
61. In addition, the Companies submitted that the previous concern that ILECs had an advantage over competitors in respect of assembling bundles containing non-local services as a means to win back their former local service customers was no longer justified. The Companies argued that for consumers interested in bundles, the market was increasingly a battle between the bundles of competitors versus those of the ILECs. The Companies submitted that in many instances, the ILECs' bundles were lacking the crucial broadcast distribution service element.
62. The Companies also noted that Rogers' market research indicated that a significant number of customers did not want to be tied to a single service provider because they perceived services as constantly evolving and improving. The Companies submitted that rules that prevented customers from receiving timely information to assist them in making informed decisions about the service provider that best met their needs could hardly be termed pressing and substantial.
63. With respect to VoIP services, the Companies submitted that the winback rule did not satisfy the pressing and substantial test. The Companies submitted that given the novelty of VoIP technology, the large number of new entrant VoIP providers, the wide variation in the features

provided by such services and the high level of competition in the VoIP segment of the local services market, it was now more important than ever for consumers to receive communications of all types, including direct communications from ILECs, about local VoIP services.

64. In its response to interrogatories, Bell Canada submitted that the survey results in the Ipsos-Reid Report showed that a significant majority of recently surveyed Canadians strongly favoured winback activity, noting that 64 percent of survey respondents considered the Commission's policy restricting ILECs from engaging in winback activity with former customers in respect of VoIP services to be bad for them as consumers. Accordingly, the Companies suggested that these results refuted the Commission's initial assessment of the underlying purpose of the winback rule, and demonstrated that restricting Canadians from receiving direct communications that helped make them more informed consumers was no longer a pressing and substantial objective.
65. The Companies argued that, for the reasons above, the purposes underlying the extension of the no-winback period from three to 12 months and the extension of the winback rule to all services in respect of former residential customers' local telecommunications services failed the pressing and substantial purpose test. In the Companies' view, at a minimum, the 12-month aspect of the winback rule and its application to all services other than residential local services had to be withdrawn by the Commission immediately.
66. Aliant Telecom submitted that the Commission's stated objective in imposing the winback rule on ILECs was to provide CLECs with a reasonable opportunity to demonstrate the quality and reliability of their services in order to retain customers and build a stable customer base. Aliant Telecom argued that the Commission's objective of fostering a stable customer base might be unsustainable, as competition by its very nature was dynamic. Aliant Telecom further argued that it was impossible to regulate a successful outcome for any particular company or group of companies without effectively eliminating competition.
67. TCI submitted that on the face of the Commission's previous decisions, the winback rule had two objectives. TCI submitted that the first objective, protection of the abuse of customer confidential information during the local service transfer stage, was a legitimate objective of the winback rule. TCI submitted that no local exchange carrier should be able to take advantage of such information during the local service transfer stage. TCI submitted that the protection of abuse of confidential customer information at the local service transfer stage could not, however, be the objective the Commission was trying to achieve with the winback rule. TCI argued that if this were the objective, the winback rule would have to be designed whereby it applied to all local service providers.
68. TCI submitted that the other objective of the winback rule was to facilitate CLEC local entry by competitors and that this was not a pressing and substantial objective, since infringements upon freedom of expression should only be allowed where the object of the law was to restrict expression that might be harmful to its audience or to restrict expression to a vulnerable group.

TCI noted that past cases that upheld freedom of expression infringements included cases that dealt with obscene materials,³² child pornography,³³ defamatory statements,³⁴ and the protection of children from the effects of advertising (*Irwin Toy*). TCI submitted that there was nothing inherently dangerous about the content of the restricted expression and that there was no group whose protection in this manner could be economically justified; rather, the objective was to protect the economic interests of competitors from the full effects of competition.

69. TCI submitted that the extension of the winback rule to VoIP services unnecessarily aided the entry of cable companies and access-independent VoIP providers. TCI submitted that promoting and preferring the interests of cable companies, foreign VoIP providers and domestic VoIP providers at the expense of customers was not a pressing and substantial objective that justified the infringement of a fundamental freedom protected by the Charter.
70. TCI submitted that the winback rule actually inflicted harm on the audience. TCI argued that because certain former ILEC customers were not able to be reached by the ILEC in a direct manner, the winback rule restricted the ability of customers to compare offers in the market between competing providers. TCI also argued that because information on competing offers was restricted, competitors were shielded from the full effects of competition. TCI submitted that this distortion of the competitive market could serve to maintain prices at levels above what might prevail in a fully competitive market, to the detriment of customers and the competitive process.

Respondents

71. The CCTA argued that the objective of the Commission's winback restrictions in the local exchange market was first and foremost to promote sustainable facilities-based competition in this market, as described most recently in *Aliant Telecom Inc.'s request for interim relief with respect to the local winback rule and wireline promotion rules*, Telecom Decision CRTC 2005-53, 14 September 2005 (Decision 2005-53). The CCTA submitted that the Commission's objective had been stated as precisely and specifically as possible, and that contrary to the claims of the Companies, other factors cited by the Commission in its previous deliberations on the winback restrictions did not revise or replace this objective. The CCTA further argued that the Commission's references to factors such as the establishment of a stable customer base simply described outcomes that were consistent with the achievement of sustainable competition. In the CCTA's view, the Commission's modifications to the winback rule over the years were in response to the ILECs' opportunity and incentive for anti-competitive behaviour. The CCTA submitted that the pressing and substantial objective of the winback rule was also borne out by the evidence on the state of competition in the local exchange market, which showed that competition in the local exchange market remained weak, particularly in the residential segment.

³² *R. v. Butler*, [1992] 1 S.C.R. 452 (*Butler*).

³³ *R. v. Sharpe*, [2001] 1 S.C.R. 45 (*Sharpe*).

³⁴ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

72. The CCTA also submitted that the contextual approach applied in *RJR-MacDonald, Thomson Newspapers, Sharpe and Butler* required that the Commission take note of the winback rule's objective in the larger context of the objectives in section 7 of the Act. Citing Decisions 94-19 and 97-8, the CCTA argued that all aspects of the framework for local competition, including the winback rule, must be read in conjunction with and considered integral to the objective of a competitive market for local telecommunications services and that, without rules supporting competitive entry, local competition could never take root.
73. According to MTS Allstream/Call-Net, the overriding purpose of the winback rule was to promote the very values that the Companies claimed underlie the expression at issue: informed customer choice and competition. Citing section 7 of the Act and the Order in Council, MTS Allstream/Call-Net submitted that Parliament and the Government of Canada had mandated that it was in the best interests of all Canadians to have a competitive structure for the telecommunications sector and, on this basis, that the objective and the concerns addressed by the winback rule were both pressing and substantial.
74. According to MTS Allstream/Call-Net, the winback rule addressed the ILECs' actual and potential abuse of their dominance and incumbency advantages, and the effect of such abuse on competition. MTS Allstream/Call-Net submitted that ILECs provided local phone services to every subscriber in their serving areas and, as a result, had extensive information about their customers' needs, habits and buying patterns, unparalleled brand recognition and customer relationships. In MTS Allstream/Call-Net's view, these advantages combined to give ILECs both the incentive and ability to preempt or thwart the development of competition through the use of winbacks.
75. MTS Allstream/Call-Net included a table showing competitors' shares of total local lines for each of the residential and business markets between 1999 and 2003 in support of their argument that competition had barely progressed in the local residential market and had progressed slowly in the business market since the winback rule was first imposed in 1998. The table shows that as of 2003, the incumbents retained 98 percent of total local lines in the residential market, and almost 89 percent of local lines in the business sector.³⁵
76. MTS Allstream submitted that although VoIP might be a new technology, this did not change the fundamental nature of the speech at issue, which was commercial speech, and therefore did not materially alter the constitutional analysis.
77. MTS Allstream submitted that Bell Canada's argument with respect to VoIP service was misplaced for several reasons. Firstly, because the central finding of the VoIP decision was that local VoIP and local circuit-switched voice services constituted the same market, MTS Allstream submitted that allowing the Companies to attempt to win back customers for VoIP services rather than for circuit-switched voice services would be not only inconsistent with this finding but virtually impossible to implement. Secondly, MTS Allstream submitted that, just as in the local circuit-switched voice services market, the winback rule did not prevent the Companies from disseminating information in any number of ways to all its

³⁵ MTS Allstream/Call-Net cited their source as the following: CRTC Report to the Governor in Council, *Status of Competition in Canadian Telecommunications Markets*, 2001-2004.

current customers directly (which included over 97 percent of the market for local residential services), and to all its current and potential customers through mass media and marketing to the general public. Thirdly, MTS Allstream submitted that the very fact that customers had switched to a competitor for VoIP services indicated that they were aware that they had a choice. Finally, MTS Allstream submitted that it was absurd to argue, as the Companies did, that it was now more important than ever for consumers to receive communications of all types, including direct communications from ILECs, about VoIP services, when Bell Canada was the only ILEC providing any "so-called" VoIP service at all at present. MTS Allstream argued that there was also no evidence that the failure of other ILECs to provide VoIP services was connected to the existence of the winback rule.

78. QMI submitted that the purpose of the winback rule was not to protect competitors, but to promote local competition by preventing the ILECs from undermining the ability of competitors to build stable customer bases. In QMI's view, the character of the competitor was irrelevant, as competition could not evolve if competitors, of any type, were unable to build an economically viable base of local telephony customers.
79. QMI submitted that from the perspective of the pressing and substantial purpose test, the application of the winback rule to VoIP services added no new dimensions to the issues and no new weight to the claims of Bell Canada and SaskTel.
80. According to QMI, the reason that Bell Canada and SaskTel objected so vigorously to the winback rule was because it worked. QMI submitted that in a situation where an ILEC could focus its resources on a very small percentage of customers, while its competitors must market to virtually everyone in the market, the ILEC had a significant advantage. QMI argued that the winback rule nullified that advantage and established a much more level playing field. QMI submitted that the Companies wanted to regain the marketing advantage that went with their market dominance by eliminating the winback rule. QMI submitted that this fact, in and of itself, demonstrated that the winback rule met the pressing and substantial purpose test.
81. Rogers submitted that Bell Canada's own responses further confirmed that it sought the elimination of the winback rule so that it could attack new entrants' customers directly and with greater success; and that it would have had significantly greater success in preventing new entrants from gaining and/or retaining customers but for the winback rule. Rogers submitted that the ILECs' evidence strongly supported its position that the objective of the winback rule – to facilitate competitive entry and promote sustainable and enduring local competition in the face of the ILECs' market power and incumbency advantages – remained as pressing and substantial now as when the winback rule was first established.
82. Rogers submitted that once it was accepted that there was no distinction between the markets for VoIP services and for circuit-switched services as far as competition and regulation in the market for local services was concerned, then the ILECs must not be allowed to use VoIP service to circumvent the goal of the winback rule.
83. MTS Allstream and QMI submitted that Bell Canada's submissions regarding the survey results of the Ipsos-Reid Report purporting to demonstrate that a majority of Canadians were opposed to the application of the winback rule to VoIP local services were irrelevant and

should be disregarded by the Commission. MTS Allstream and Rogers argued that the survey results were flawed, because had the survey respondents been advised clearly that VoIP was only one way of providing local service in a market in which Bell Canada still retained more than 95 percent market share, and had the objective of the winback rule been explained to the survey respondents in context, their responses would most likely have been different. Rogers submitted that it was notable that, notwithstanding the flaws in the survey, some 36 percent of the survey respondents still believed that the winback rule should apply to the ILECs' VoIP services. Rogers further submitted that the survey did not solicit consumers' views about the relationship between the winback rule and receiving information about VoIP technology; rather, the respondents were asked whether they thought prohibiting Bell Canada from offering them promotions to win them back from a competitor was bad for them as consumers.

84. EastLink submitted that the winback rule was an important and necessary factor in reaching the Commission's objective of sustainable facilities-based competition.
85. The Coalition submitted that the winback rule, as it applied to local business services, served no legitimate public policy purpose, as it denied businesses the information they required to make the most appropriate choices regarding their telecommunications services.

The Companies' reply

86. According to the Companies, the winback rule paternalistically assumed that customers who were contacted directly by their former ILEC would "forget" their reasons for switching and would be incapable of assessing whether their experience with the CLEC had been long enough to decide whether to remain with the CLEC. The Companies submitted that *Thomson Newspapers* rejected similar assumptions about the inability of Canadian voters to assess surveys published in the three days prior to an election and held that such assumptions did not meet the pressing and substantial test.³⁶
87. The Companies further submitted that it contradicted the essence of competition to protect a competitor from market pressures to innovate, market and deliver high quality services while working to establish its brand and customer loyalty.
88. The Companies argued that the Commission had emphasized repeatedly since Decision 94-19 that market share was not a determinative criterion upon which to determine whether a market was truly competitive. The Companies submitted that a Charter infringing measure that purported to deliver "stable" market share, in the hope that this would promote competition, when the Commission itself had downplayed the importance of market share as a measure of effective competition, could not be a pressing and substantial purpose. The Companies further noted that there was no evidence on the record indicating whether any of the Respondents would be financially viable or sustainable or not, absent the winback rule.
89. The Companies argued that the purpose of inhibiting direct communications between ILECs and their former customers to enable CLECs to build a stable customer base in the local wireline market could only be a pressing and substantial purpose if it were consistent with

³⁶ *Thomson Newspapers* at paras. 100-102.

the purposes of the Act as a whole.³⁷ The Companies argued that prohibiting consumers from receiving true, non-misleading information about their communications options, solely to prevent them from making an informed decision to purchase local telecommunications services (or, in the case of residential customers, any services) from an ILEC, undermined the policies set out in the Act, and as such, were inconsistent with the purposes of the Act, and hence could not advance a pressing and substantial purpose sufficient to justify the violation of a Charter right.

90. The Companies noted QMI's assertion that the winback rule had a pressing and substantial objective because it nullified the ILECs' advantage of having to market to too few subscribers, whereas CLECs must market to too many. The Companies submitted that this argument conveniently ignored the fact that it was much more efficient for competitors to advertise broadly through the mass media than it was for ILECs to narrowly tailor the message individually and directly to a segment of the market.
91. The Companies submitted that the CCTA was incorrect both in law and in fact when it cited Decision 2005-53 and asserted that the Commission's objective underlying the winback rule was to promote sustainable facilities-based competition in this market. The Companies submitted that the Commission's restatement of the purpose in Decision 2005-53 was not made in the context of the Application or the proceeding to further extend, vary or interpret the application of the winback rule; rather, that Decision served to deny Aliant Telecom's application for relief from the application of the winback rule in its territory. The Companies submitted that the Court had repeatedly warned against the inappropriate shifting of purposes, particularly in circumstances where the nature of the rule had not changed, as was the case in Decision 2005-53.³⁸
92. In the Companies' view, there was no evidence that CLECs and new entrants were not economically viable or sustainable to justify the infringement of ILECs' constitutionally protected rights to directly communicate messages regarding their local and, in the case of residential subscribers, any other services, and of customers' right to receive such messages. The Companies argued that there was no evidence that the winback rule promoted sustainable competition.
93. The Companies submitted that the Respondents had relied exclusively upon market share and churn evidence as proof of the pressing and substantial purpose of the winback rule. The Companies suggested that this evidence was irrelevant because: i) market share data alone told nothing about the state of competition; ii) the relevant market had not yet been defined; iii) the relevant indicia to determine the level of competition in a market had also yet to be defined; iv) the appropriate purpose of the "pressing and substantial test" was the promotion of stable customer bases, not the promotion of competition; and v) evidence of churn told nothing about whether the defined mischief was pressing and substantial.

³⁷ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116.

³⁸ *Thomson Newspapers* at para. 98; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 91; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at paras. 23-24.

94. The Companies further argued that while the Respondents submitted that their churn data indicated that churn might have declined as the winback rule had changed and lengthened, this data might equally indicate that churn levels were declining as the quality and value of the Respondents' services increased over time. In the Companies' view, the data was unclear because it did not appear to track churn according to the service provider to whom the churning customer migrated. The Companies maintained that churn rates did not tell whether customers had a sufficient period to evaluate the Respondents' services; churn data did not indicate whether the Respondents' subscriber bases were stable, whether they would become more or less so, or whether at the current levels of churn their telecom businesses were sustainable.

Commission determinations

95. As indicated earlier, it is necessary under the Oakes test to demonstrate that the objective of the winback rule is pressing and substantial. For the reasons outlined below, the Commission considers that the objective of the winback rule is pressing and substantial.
96. As set out above, the Commission's local competition framework was established to foster sustainable facilities-based competition, which the Commission considered would best promote greater choice for consumers of local exchange services. The competition framework addressed the numerous incumbency advantages enjoyed by the ILECs by virtue of their having been monopoly local service providers. These advantages related to the ILECs' ownership and control of ubiquitous networks – connected to virtually every residence and business in the ILECs' respective territories – and the ILECs' long-standing relationships with almost all local exchange service consumers. The Commission adopted measures that would address these barriers to competition in a manner that would afford all participants a fair opportunity to succeed, or fail, based on their efforts.
97. The Commission considers that in identifying the specific objective of the winback rule, it is helpful to identify, through a review of the Commission's decisions, the specific ILEC advantage(s) or competitive barrier(s) that the winback rule was designed to address.
98. In the Winback Letter, the Commission determined that the winback rule would facilitate CLEC entry into the local exchange services market and prevent the ILECs from winning back customers through their control of, and access to, customer-specific information, such as leased loops, directory listings, and 911 information.
99. In Decision 2002-1, the Commission expanded the winback rule to cover all services for residential customers, in response to the increasing importance of bundled offerings. In that Decision, the Commission reiterated that without the winback rule, the ILECs would be able to win back customers because they control and have access to customer-specific information.
100. In Decision 2004-4, the Commission extended the no-winback period with respect to residential customers from three to 12 months, in response to the slower than anticipated emergence of competition in the local PES market. The Commission noted that the vast majority, if not all, of a CLEC's customers would be former ILEC customers, and that as a result, an ILEC would have knowledge of the customer's telecommunications needs, preferences and calling patterns, which would give the ILEC an advantage when targeting winback activity to that customer.

101. Finally, in Decision 2005-28, the Commission held that the winback rule would also apply to local VoIP service. The Commission considered that, absent the winback rule, the ILECs could use the same incumbency advantages to win back local VoIP customers as they could use to win back PES customers. Specifically, the Commission considered that since most local VoIP customers would be former ILEC PES customers, the ILECs would have knowledge of the customers' needs, preferences and calling patterns.
102. The Commission finds that while it has continually adapted the winback rule in response to the dynamics of the marketplace, the specific underlying objective of the winback rule that has consistently been identified relates to the incumbency advantages that ILECs have by virtue of being the former monopoly provider, and in particular, their control of, and access to, detailed customer-specific information concerning almost all local exchange service customers. In imposing the winback rule, the Commission's specific objective is to prevent the ILECs from deriving an unfair or undue competitive advantage, or benefiting from an unfair opportunity, arising from this enhanced ability to directly communicate with competitors' customers for winback purposes. The type of direct communication in question deprives CLECs of a fair opportunity to retain customers. Absent the winback rule, ILEC winback activity would inhibit the development of sustainable facilities-based local competition, and undermine the Commission's overall objective of promoting greater choice for consumers of local exchange services, consistent with the telecommunications policy objectives in section 7 of the Act.
103. The Companies' understanding of the objective of the original winback rule, as being focused on the winning back of customers before local service is effectively transferred, is incorrect. The Commission finds that while it did evoke the possibility of customer repatriation by the ILEC during the period of customer migration to the CLEC, the Commission's concern was not limited to the period of time before the transfer is complete, which is evident given that it established a three-month no-winback period from the outset of the adoption of the winback rule in the Winback Letter.
104. The Commission notes the submission of several of the parties that in Decision 2004-4, in which the Commission extended the no-winback period for residential customers from three to 12 months, its stated rationale was that "sustainable competition can only be achieved if CLECs have the opportunity to develop a stable customer base", and that "if a CLEC is to retain customers and build a stable customer base, it must have a reasonable opportunity to demonstrate the quality and reliability of its services."
105. In Decision 2004-4, the Commission accepted Call-Net's evidence that customer churn increased when ILECs were allowed to contact local customers, and that customer churn decreased after a customer had received service from Sprint Canada for a year or more. The Commission found that the extended winback rule would serve to prevent the ILECs' undue or unfair competitive advantage with respect to their use of customer-specific information when targeting former customers after the expiry of the three-month no-winback period.
106. The Commission finds that allowing CLECs to develop a stable customer base, and affording them an opportunity to demonstrate the quality and reliability of their services, while important to furthering the Commission's general objective of facilitating sustainable competition, did not supplant the specific objective of the rule.

107. The Commission notes the Companies' argument that it was inappropriate for the Commission to rely on market share to justify the pressing and substantial nature of the winback rule, because the Commission itself had downplayed the importance of market share evidence as a measure of effective competition. The Commission notes that at the time of the adoption of the winback rule, there was not, in effect, any competition in the residential market, and competition in the business market had only just begun to emerge. The Commission has found that it is only recently that the market realities are beginning to evolve and that competition is increasing more rapidly. To address this development, in *Forbearance from regulation of local exchange services*, Telecom Public Notice CRTC 2005-2, 28 April 2005, the Commission initiated a proceeding to determine the framework, including the criteria, for forbearance from the regulation of residential and business local exchange services. The Commission's determinations in that proceeding are set out in Decision 2006-15 issued today.
108. In Decision 2006-15, the Commission notes that the local exchange services market is rapidly evolving, that more and more Canadians have competitive options available to them for local exchange services, and that hundreds of thousands of Canadians are choosing those competitive options. Consequently, in Decision 2006-15, the Commission has decided that the 12-month no-winback period for residential customers is no longer appropriate. The no-winback period has accordingly been reduced to three months. The winback rule will be removed completely in forborne markets. In addition, prior to forbearance, an ILEC will be able to apply to have the winback rule removed completely if certain criteria are met.
109. The Commission notes the disagreement between the parties as to the proper conclusions to be drawn from the survey data presented in the Ipsos-Reid Report.
110. The Commission notes the following question that was posed to survey respondents:
- Question: "If you were to switch your local telephone service to a competitor's VOIP service, the CRTC currently prohibits traditional telephone companies from contacting you for one year to offer you special promotions or offers on any service they provide and to encourage you to switch back. Thinking about your interests as a consumer, do you believe this is a good or bad policy?"³⁹
111. According to the Ipsos-Reid Report, 64 percent of the 1,200 survey respondents answered that they considered this to be a bad policy, while 33 percent of survey respondents regarded it as a good policy. In contrast to the Commission's conclusion in Decision 2004-4 that the potential harm to the ILECs' former customers in not receiving direct winback communications would be outweighed by the overall benefit to all consumers, Bell Canada argued that its survey was not limited to its former customers, and that its results therefore reflected the views of all Canadians. Bell Canada argued that these results refuted the Commission's initial assessment of the winback rule's underlying purpose and demonstrated that restricting Canadians from receiving direct communications that helped make them more informed consumers was no longer a pressing and substantial purpose.

³⁹ Ipsos-Reid Report at pg.10.

112. The Commission considers that the question lacks clarity and fails to provide adequate context. As noted by QMI, the above survey question did not focus exclusively on the winback rule, but also referred to special promotions and offers. Accordingly, the Commission finds that it is not possible to identify the issue to which the survey respondents were reacting when they provided their views. Therefore, the Commission concludes that it would be inappropriate to draw any conclusions with respect to the survey respondents' views of the winback rule, based solely on the above question.
113. Even if it were to accept that only 33 percent of consumers support the winback rule, the Commission notes that in adopting the winback rule, it had to weigh any potential short-term benefit to former ILEC local exchange service customers of receiving direct ILEC winback communications during the no-winback period, with the long-term benefit to all consumers of ultimately having a competitive local exchange market that would provide greater choice for all consumers in services and service providers.
114. With regard to the argument by certain parties that the extension of the rule to VoIP providers did not relate to a pressing and substantial objective, the Commission notes that in Decision 2005-28, it considered that in determining the appropriate regulatory framework for local VoIP services, the issue was not the technology being used, but the nature of the service being provided. The Commission found that local VoIP services are close substitutes for circuit-switched local exchange services, and therefore are part of the same relevant market as circuit-switched services. As a result, the Commission found that the same potential for anti-competitive conduct by ILECs arose in the winning back of local VoIP customers as in the winning back of circuit-switched local exchange services customers.
115. Given its determinations in Decision 2005-28, the Commission concludes that mitigating the ILECs' enhanced ability to target former local VoIP customers for winback purposes is as pressing and substantial an objective as it is in the circuit-switched local exchange services market.
116. The Commission notes the ILECs' argument that the application of the winback rule with respect to former ILEC customers who have switched local exchange service to cable companies could not relate to a pressing and substantial objective, given the cable companies' tremendous resources and their status as incumbents. In this regard, the Commission notes that while the cable companies may have long-standing relationships with many of the same customers as the ILECs, these relationships are predominantly based on the provision of broadcasting services. The Commission notes that cable companies have little, if any experience in providing local exchange services to their customers. Cable companies that provide local exchange services are new entrants and, as such, are subject to the regulatory framework applicable to CLECs.
117. In light of all the foregoing, the Commission concludes that the winback rule's specific objective relates to the pressing and substantial concern of preventing the ILECs from unfairly using their enhanced ability to directly communicate with competitors' customers for winback purposes, which deprives CLECs of a fair opportunity to retain customers. In so doing, the winback rule furthers the wider pressing and substantial objective of promoting greater choice for consumers of local exchange services by allowing for sustainable facilities-based local competition, consistent with the telecommunications policy objectives in section 7 of the Act.

The three-branch proportionality test

The rational connection branch

Positions of parties

The ILECs

118. The Companies submitted that the Commission had no reasonable basis on the evidence tendered for concluding that the winback rule would achieve the stated objective. The Companies argued that the mischief that the winback rule was originally intended to remedy was the potential for ILECs to win back customers before service was transferred, because ILECs controlled and had access to customer-specific information. The Companies further submitted that there was no connection between the prevention of this mischief and the winback rule, which primarily targeted ILEC conduct after that problematic period.
119. The Companies pointed to evidence on the record of Decision 2004-4 demonstrating that winback activities were not the cause of CLECs' slower than predicted market entry. The Companies argued that even the statistics cited by Call-Net showed that the majority of Call-Net customers who discontinued their Call-Net service did so for reasons unrelated to Bell Canada's winback activities. The Companies submitted that Call-Net's own statistics showed that, in most cases, customers who left its service did so during the first three months after switching, while winback activity was prohibited. The Companies submitted that customers generally left Call-Net for reasons unrelated to winbacks, likely related to quality of service or pricing.
120. The Companies submitted that Rogers conceded in its response to interrogatories in this proceeding that of the top five reasons identified by its customers for discontinuing their service with Rogers (whether it be within 12 months or after), three involved poor service quality, with the other two relating to price and the customer wanting high-speed Internet service. The Companies submitted that all five of these reasons could be viewed as customer dissatisfaction with Rogers' overall value proposition. The Companies argued that these survey responses demonstrated that providing a CLEC with a 12-month reprieve from ILEC winback activity did not enable a CLEC to demonstrate the quality and reliability of its services. Instead, Rogers continued to experience churn, notwithstanding the 12-month no-winback period. The Companies argued that the winback rule therefore only served to deny dissatisfied customers the benefit of information received via direct ILEC winback contact.
121. The Companies noted that according to Rogers' own evidence in its response to interrogatories, the greater proportion of its customers migrated to a competitor during the first three months of service. The Companies argued that this evidence demonstrated that most customers only required between one day and three months to make an informed judgment as to the value proposition. In the Companies' view, this demonstrated, at a minimum, that any no-winback period longer than three months was unreasonably long.
122. TCI submitted that as the result of the evolution of the telecommunications market, ILECs offered many services on a unique basis, without the need for the customer to purchase local service. TCI argued that the continued inclusion of the expanded list of services beyond local service therefore had no connection to the facilitation of entry into the local market.

123. TCI argued that protecting incumbent cable companies had no rational connection to nurturing CLEC local entry, in light of the Commission's extension of the winback rule to VoIP services. TCI submitted that cable companies had their own infrastructure to deliver VoIP, independent of the ILECs' facilities, and already had stable customer bases from their incumbent cable offerings.
124. TCI argued that constraining the ILECs from communication with former customers regarding bundled offerings was not rationally connected to facilitating local entry, because all major providers now offered some sort of bundled offering to their customers.
125. Aliant Telecom noted the CCTA's submission that the effect on its members of eliminating the winback rule would be an increase in churn. Aliant Telecom argued that this missed the point. Aliant Telecom submitted that in order for there to be a rational connection under section 1 of the Charter between the objective (fostering stable customer bases and sustainable competition) and the Charter-impairing measure, the latter had to be shown to promote the former. Aliant Telecom noted that nowhere did the CCTA state that in a world without winbacks, any of its members would be economically unviable. Aliant Telecom submitted that the Respondents had failed to prove that winback restrictions would lead to sustainable competition. Aliant Telecom further submitted that the Commission had not yet defined what sustainable competition was; therefore, without knowing how to measure a successful objective, it was impossible to establish an effective and minimally harmful measure to reach that objective. Aliant Telecom argued that for these reasons, the Respondents failed to prove that the imposition of winback restrictions on the ILECs was rationally connected to the objective of fostering competition and ensuring a stable competitor customer base.

Respondents

126. MTS Allstream/Call-Net submitted that there was a rational connection between the winback rule and the goal of increased customer choice and sustainable competition because the winback rule was aimed at the problem of market dominance by the ILECs and was intended to facilitate customer choice and competition. MTS Allstream/Call-Net referred to evidence in the proceedings dealing with the winback rule to show the weak state of competition, as well as the impact of ILEC winbacks on competition, which was demonstrated most clearly in statistics showing that churn increased with winback activity. MTS Allstream/Call-Net also referred to evidence showing that customer churn was costly for new entrants, as marketing and customer provisioning expenditures increased the cost base without a corresponding increase in customers or revenues. MTS Allstream/Call-Net argued that this resulted in more time required for recovery of costs from new customer acquisition.
127. MTS Allstream/Call-Net submitted that while churn rates still rose when an ILEC targeted a competitor with winback activity, the overall churn rate of competitors had clearly decreased as a result of the winback rule and other competitive safeguards imposed by the Commission.
128. In response to the Companies' argument that the Commission was managing rather than facilitating competition, MTS Allstream/Call-Net submitted that the role of the Commission was to mediate among competing groups and interests. MTS Allstream/Call-Net argued that the Commission had implemented and extended the winback rule based on evidence respecting

the state of the market and subscriber churn, as well as its knowledge of and expertise in the industry in the Canadian context. MTS Allstream/Call-Net submitted that all of these factors showed a rational connection between the purpose of the restriction and the means adopted to effect it.

129. The CCTA argued that it was unsurprising that the record of Decision 2004-4 showed customers leaving Call-Net for reasons unrelated to winbacks, since the winback rule had been in place since 1998. The CCTA argued that this evidence nonetheless showed the enhanced susceptibility of new CLEC customers to offers from the ILECs during the time that the customers were evaluating the quality of CLEC services, and that the objective of fostering competition was accordingly logically furthered by the winback rule.
130. Rogers submitted that the winback rule was squarely aimed at ensuring that new entrants had a fair opportunity to gain and retain customers in the face of the ILECs' 100 years of monopoly and incumbency advantages, and their proven incentives and ability to retain market share. Rogers further submitted that the Commission's most recent monitoring report revealed that new entrants had yet to make any significant headway in gaining and retaining customers. Rogers argued that the ILECs' as well as Rogers' responses to interrogatories further established that the winback rule had been very instrumental to the market share that competitors had gained so far, albeit a modest market share.
131. With regard to the Companies' argument that Rogers' survey of former customers demonstrated that those customers left Rogers as a result of its poor quality of service and overall value proposition, and not because of winback activity, Rogers submitted that the factors cited by survey respondents strongly reinforced the rational connection between the winback rule and facilitating local competition. Rogers submitted that customers discontinued service because of incentives offered during the winback call, including: discounts offered by the ILEC; exploitation by the ILEC of the new entrant's learning curve in the local market in matters such as provisioning and billing; unfair and illegal restrictions on the customer by the ILEC; or outright delay in service activation, customer cut-over, etc. Rogers argued that its evidence showed that, during their early tenure, customers were more vulnerable and more likely to respond positively to an ILEC's winback call in which any of the factors listed above was used as a winback incentive by the ILEC. Rogers submitted that the purpose of the winback rule was to ensure that the competitor was able to establish a more solid relationship with the customer so that if, at the expiry of the no-winback period, the ILEC came calling, the customer could make a decision based on a fair comparison of the competitor's offer versus the ILEC's.
132. With regard to the Companies' argument that Rogers' evidence showed that customers were most vulnerable to churn in the early tenure (three months), and therefore did not require a one-year period to assess the quality and reliability of the company's services, Rogers submitted that from the point of view of rational connection, if customers were most vulnerable to churn in the first three months, it followed that prohibiting ILEC winback calls for any period beyond the initial three months would ensure that ILECs did not take advantage of that vulnerability.
133. Rogers submitted that Bell Canada itself had argued in support of the winback rule in the broadcast distribution undertaking (BDU) market in order to promote a more competitive

market, and had consistently opposed the elimination of the rule in that market. Rogers argued that it was not open to Bell Canada to assert the rational connection between the winback rule and competition only when it favoured its interests.

134. With respect to the Companies' arguments regarding Rogers' customer survey, QMI submitted that it was precisely because of the winback rule that the customers who chose to leave Rogers had an opportunity to reasonably assess the quality of Rogers' service, undisturbed by the direct marketing activities of the local ILEC. QMI submitted that the fact that some customers chose to leave Rogers indicated that the winback rule was rationally connected, as customers had the necessary time to decide. QMI submitted that dissatisfied customers knew that they could return to the ILEC, and that there was therefore no need for an ILEC to engage in winback activity to identify this option to the customer.
135. With regard to the Companies' argument that the decrease in churn over time implied that the 12-month no-winback period was inappropriate, QMI submitted that all parties had accepted that churn decreased with the length of time a customer had been with a service provider. QMI submitted that the relevant question was whether winback activity affected churn for the full 12-month period. QMI submitted that the evidence indicated that there was an increase in churn for customers once the no-winback period ended, which demonstrated a clear relationship between the presence, or absence, of the winback rule and the level of churn. QMI argued that there was thus a rational connection between the rule and the objective.

The Companies' reply

136. The Companies argued that there was no evidence showing that the existing churn rates had made the Respondents' business cases viable, or any more viable. The Companies submitted that the churn rates similarly did not demonstrate any link between denying customers access to ILECs' winback messages and what constituted a "reasonable opportunity" for a new customer to experience the competitors' wares.
137. In response to Rogers' argument that the Companies should be barred from challenging the rational connection of the winback rule because Bell Canada had previously adduced evidence that there was a rational connection supporting the constitutionality of winback rule in the broadcasting distribution industry, the Companies submitted that this was irrelevant to this proceeding. The Companies submitted that the section 1 analysis was necessarily contextual and fact-specific and that the scope, content and breadth of the BDU winback rule and the markets in which they operated and the incumbent BDUs to which they applied, were all fundamentally different from the relevant local PES markets, which had yet to be defined.
138. The Companies submitted that MTS Allstream/Call-Net had concluded that the local services market was not a mature market without providing any evidence of the products, services and geographic scope of the market. They argued that the nationally aggregated data used by MTS Allstream said nothing about the nature and extent of competition. According to the Companies, the objective of the winback rule, even if it were the promotion of local competition, could not be rationally connected to the winback rule because, without first having conducted the market analysis, there was no evidence, and no common sense, reason or logic, indicating that the winback rule was required or continued to be required in any particular local service market.

Commission determinations

139. The Commission notes that in order to satisfy the rational connection test, it is necessary to show
- ... a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, [it] must show that the restriction on rights serves the intended purpose.⁴⁰
140. The Commission finds that the evidence on the record of this proceeding demonstrates that ILECs contact their former customers to win them back (i.e. former long distance customers, and, after the applicable winback period has expired, former local exchange service customers), that winback attempts are successful, and that CLECs' churn rates are lower during the no-winback period. In addition, the Commission finds that the evidence demonstrates that CLECs' monthly churn rates declined during the period where the Commission continually broadened the scope and duration of the winback rule.
141. Based on the evidence, as well as common sense and logic, the Commission finds that the ILECs benefit from their enhanced ability to win back former local exchange service customers through direct communications, to the detriment of CLECs, and that the CLECs' churn rates decrease when the winback rule is in effect.
142. 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.
143. The Commission notes that a number of ILECs argued that a rational connection could not and had not been shown, because the Commission had never defined the scope of the local communications service market in terms of products, services and geography, nor had it ever attempted to analyze the state of competition within such markets.
144. The Commission notes that it has analyzed the state of local competition in a number of decisions. For example, in *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, the Commission found that the evidence in that proceeding showed that facilities-based competition was generally limited to the business market in large urban areas, and that there was little, if any, competition of any type in the residential market. Similarly, in *Review of price floor safeguards for retail tariffed services and related issues*, Telecom Decision CRTC 2005-27, 29 April 2005, the Commission found that, in light of the evidence before it, the state of competition in local markets remained weak. In Decision 2005-28, the Commission found that while market share may not always be determinative of market power, it was clear that the ILECs were the dominant providers of local exchange services in Canada. The Commission also found that there was no evidence

⁴⁰ *RJR-MacDonald* at para. 153.

presented in that proceeding to demonstrate that market shares had altered materially since the end of 2003 or that the ILECs did not have market power in relation to local exchange services.

145. The Commission notes that from the time it was first established, the winback rule was intended to be in force only for so long as the lack of competition in the local exchange services market was such that the ILECs could derive an undue or unfair competitive advantage, or benefit from an unfair opportunity, arising from their enhanced ability to directly communicate with competitors' customers for winback purposes. The Commission further notes that in today's Decision 2006-15, it has determined the specific conditions that must be met in order for the Commission to remove the winback rule and to forbear from regulation.
146. In light of all the foregoing, the Commission concludes that the winback rule satisfies the rational connection test.

The minimal impairment branch

Positions of parties

The ILECs

147. The Companies argued that the winback rule failed the minimal impairment branch because its restrictions on freedom of expression were not reasonably tailored to its objectives. The Companies supported their argument, first, by asserting that the winback rule was part of what was effectively a complete Commission ban on the advertising of ILEC local service promotions and telecommunications services because of the effect of the winback rule, in combination with the Commission not considering applications by ILECs for local exchange promotions. The Companies submitted that the Court emphasized in *RJR-MacDonald* that in the case of a complete ban, the minimal impairment test would only be satisfied where it could be demonstrated that only a full ban would enable the government to meet its objective.⁴¹
148. The Companies argued that, even if the Commission relaxed its suspension of considering ILEC local exchange services promotions, the winback rule would fail the minimal impairment branch on its own. The Companies submitted that in the case of residential customers, the application of the winback rule's 12-month no-winback period trenching upon expression relating to services that were forborne from regulation and sufficiently competitive, namely, Internet, long distance, and cellular services. The Companies argued that it was unreasonable for the Commission to extend the winback rule to these services, regardless of whether they were marketed in a bundle with local services, as it was unnecessary to restrict ILECs' communications regarding such services in an attempt to limit the marketing of local exchange services.
149. As another example of the winback rule's over breadth, the Companies pointed out that retail end-users who did not subscribe to Bell Canada's local exchange service or who subscribed to the local service of a competitor that leased the local loop from Bell Canada could obtain access to Bell Canada's Sympatico Internet service using the dry copper facility (a local loop

⁴¹ *RJR-MacDonald* at para. 163.

not used to provide local telephone service) to that location, which meant that the winback of a Sympatico Internet customer would not inevitably lead to Bell Canada winning back that customer's local service.

150. The Companies submitted that the winback rule failed to minimally impair section 2(b) of the Charter on the following grounds: i) through its extension to VoIP services; ii) by virtue of the new evidence demonstrating the unreasonable length of the one-year residential embargo period; and iii) through its unnecessary and unreasonable protection of incumbent cable companies. The Companies submitted that Rogers' evidence indicating that its highest rate of churn continued to occur amongst those customers who had been subscribers for three months or less called into question the reasonableness of a ban that extended beyond three months – the greatest proportion of Rogers customers who switched to a competitor did so within the first three months even with a winback rule in place. The Companies maintained that this was compelling proof that customers no longer required anywhere near a full year in which to reasonably evaluate the quality of the service.
151. The Companies further submitted that the 12-month no-winback period was four times longer than any of the winback restrictions implemented by the Commission in respect of the BDU, high-speed retail Internet and long distance markets. The Companies also argued that Call-Net's evidence in the Decision 2004-4 proceeding demonstrated that, in most cases, customers who left Call-Net's service did so during the first 90 days after switching, while winback activity was prohibited.
152. The Companies argued that the experience in the United States with local service winback restrictions only served to confirm the unreasonableness of the one-year residential embargo period. The Companies submitted that there were no regulator-imposed restrictions on ILEC winback activities in the large majority of states. The Companies submitted that 31 of the 38 states surveyed by Bell Canada did not have such prohibitions, and in those that did, the ILECs were prohibited from contacting former customers who switched to an alternative local exchange carrier for a period of time for purposes of winning them back. The Companies submitted, however, that the mandatory no-winback periods were very short, typically seven or 10 days, with the single exception being a 17-day no-winback period that applied to the incumbent carrier in Indiana. The Companies submitted that it was also noteworthy that winback promotions were common in these states once the no-winback period had expired.
153. The Companies submitted that the Federal Communications Commission (FCC), while initially prohibiting carriers from using customer proprietary network information to win back customers, subsequently reversed itself, maintaining the prohibition only until customers had actually made the switch to the competitor. The Companies submitted that the FCC concluded that to maintain the prohibition after the transfer had taken place might "deprive customers of the benefits of a competitive market."⁴²
154. TCI argued that it was difficult for ILECs to justify using general advertising to reach a small subset of their audience, i.e. former local customers, given the expense involved and, accordingly, the practical effect of the winback rule was to constitute a complete ban on the ILECs from reaching a particular part of their desired audience for a designated period of time.

⁴² Order FCC 99-223, *Order on Reconsideration and Petitions for Forbearance*, CC Docket No. 96-115, 3 September 1999.

155. TCI argued that, contrary to a minimal impairment upon freedom of expression within the local services market only, the winback rule reduced freedom of expression to such a degree as to create a tremendously distorted market for a variety of telecommunications and broadcasting services, ultimately harming customers. TCI argued that the winback rule had an overreaching effect upon the high-speed Internet access market, to the detriment of customers, because the ILECs could not specifically reach previous local customers with high-speed Internet access service information and special Internet promotions. TCI further argued that the winback rule unnecessarily hamstrung ILECs from marketing their own "triple-play" bundles to former telephone customers and prevented ILECs from being able to market stand-alone digital subscriber line or television services directly to their former telephone customers.
156. TCI argued that all providers, including the ILECs, were either offering, or planning to offer, new VoIP services that required demonstration to their customers and, therefore, in the VoIP world, the winback rule gave one set of entrants a priority head start in the market at the expense of another set of entrants, the ILECs. In TCI's view, this was not the same situation as giving a CLEC an opportunity to show that its resold loop-based service was comparable in quality to that of the ILEC.
157. TCI argued that cable companies did not need 12 months to develop a stable customer base in the residential market. In any event, in TCI's view, the evidence demonstrated that winback activities decreased in success as the time elapsed after a customer had been transitioned to a new provider, which occurred well before 12 months. TCI noted that while its data was founded upon its experience in residential long distance, it would expect that the residential local winback success rate would mimic the residential long distance trend. Accordingly, TCI argued that the effects upon freedom of expression rights for ILECs and their former customers could hardly be said to be a minimal impairment.
158. Aliant Telecom submitted that it did not see how restricting customer access to direct communications about fast-changing and forborne services benefited customers, nor how it impaired Aliant Telecom's or customers' Charter rights as minimally as possible. Aliant Telecom submitted that customers possessed the intelligence to decide for themselves which service offering gave them the greatest benefits and the best value, and that, provided with full information about product offerings, customers would make informed choices on the products and services that best fit their needs and circumstances.

Respondents

159. The CCTA submitted that so long as the winback rule fell within a range of reasonable alternatives, it would not be considered overbroad merely because of a conceivable alternative that might better tailor the infringement to the objective.⁴³ The CCTA argued that if the winback rule were any lighter, it might prove incapable of contributing to the objectives and that, regardless of whether consumers were contacted directly by the ILEC, all the information remained freely available and accessible to the customer through the Companies' other marketing efforts and, if the customer initiated the contact, directly from the Companies.

⁴³ *RJR-Macdonald* at para. 160.

160. MTS Allstream/Call-Net argued that the Companies had overstated the impact of the winback rule. MTS Allstream/Call-Net submitted that the means chosen did not have to be the least restrictive possible, but must be reasonable in view of the ends sought to be achieved.⁴⁴ MTS Allstream/Call-Net argued that it was unnecessary to consider the higher standard from *RJR-MacDonald* to justify a complete ban, because the winback rule did not constitute a complete ban. MTS Allstream/Call-Net submitted that the winback rule did not affect the Companies' contact with existing customers, and that the winback rule's impact was limited to prohibiting ILECs from contacting those few customers who had decided to switch but had not yet switched or who had switched during the preceding three months (in the case of business customers) or 12 months (in the case of residential customers). MTS Allstream/Call-Net submitted that the winback rule did not restrict the Companies from marketing messages to these customers through general advertising or other marketing strategies, nor did the winback rule prevent the Companies from attempting to win back customers who called to inform the ILEC that they were planning to change providers. MTS Allstream/Call-Net also pointed out that, in Decision 2005-25, the Commission reinstated the ILECs' ability to make local service promotions available to the general public.
161. MTS Allstream/Call-Net noted the Companies' argument that, for residential customers, the winback rule infringed expression with respect to services other than local exchange services. Citing the Commission's views in Decision 2002-1, MTS Allstream/Call-Net argued that the impact of this aspect of the winback rule on the ILECs was negligible at best because so few subscribers (2 percent nationally) had chosen to switch their residential local exchange service. MTS Allstream/Call-Net further argued that ILECs could still try to win back customers who had switched services other than residential local exchange and could continue to advertise a variety of their services to the general public. MTS Allstream/Call-Net submitted that, since customers of competitors were equally exposed to radio, print and television advertising, there was no basis for arguing that the winback rule prevented ILECs from marketing their other services.
162. MTS Allstream/Call-Net submitted that the rationale in Decision 2002-1 remained well-founded, regardless of the Companies' submission that customers who did not subscribe to Bell Canada's local service could access Bell Canada's Internet service by using dry loops. In MTS Allstream/Call-Net's view, a call by an ILEC to a former customer respecting any service other than local exchange services would in all probability lead to a discussion of a customer's overall telecommunications needs, including local exchange. To MTS Allstream/Call-Net's knowledge, Bell Canada was the only ILEC providing dry loops at that time, and changing the winback rule based on the capability of one provider was, at best, premature.
163. In response to the Companies' submission that the application periods of the winback rule were too long, MTS Allstream/Call-Net presented the following arguments. First, in response to the point that the winback rule was only intended to apply from the time of the transfer request to the time of the transfer, the Winback Letter prohibited an ILEC from attempting to win back a customer for three months after service had been completely transferred. Second, in response to the point that extending the application period in Decision 2004-4 was unwarranted, the evidence filed by Call-Net, supported by the submissions of FCI Broadband and Microcell and accepted by the Commission, showed that competitors who retained customers for one year

⁴⁴ *Sharpe* at para. 96.

were more likely to build a stable customer base. MTS Allstream/Call-Net submitted that, given that the purpose of the winback rule was to facilitate competition, it was reasonable, based on this evidence, for the Commission to decide that competition would be most sustainable if competitors were given a chance to retain their customer base.

164. In response to the argument that cable service providers did not require the winback rule's protection, MTS Allstream/Call-Net countered that, despite the advantages enjoyed by cable service providers that independent CLECs might not have, the underlying purpose of the winback rule applied to cable service providers. Firstly, an ILEC could glean information in the customer transfer process and had information about each local telephone subscriber that no entrant possessed. Secondly, even though they had infrastructure, the cable companies would also require time to demonstrate the reliability of their service, which the winback rule was designed to provide by alleviating high customer churn. Thirdly, while some cable companies had greater economies of scale than other competitors, ILECs remained dominant in the local telephony market and could use their market power to impede competition. MTS Allstream/Call-Net submitted that the winback rule was appropriately applied to cable service providers until actual market conditions proved that they had made genuine inroads in the local residential telephone market.
165. According to MTS Allstream/Call-Net, the winback rule was intended to be temporary, and the example of winback restrictions in the BDU sector showed that, once competition had been established and the potential for abuse had been sufficiently reduced, the Commission had proven open to reducing the restrictions. MTS Allstream/Call-Net submitted that the Commission evaluated the winback rule on an ongoing basis to ensure that it was appropriate.
166. With regard to the Companies' argument that the extension of the winback rule to VoIP prevented former customers from receiving commercial messages from the ILECs about the ILECs' VoIP services, MTS Allstream argued that the winback rule did not prevent the Companies from directly disseminating information about their present or prospective VoIP services to their current customers, nor from marketing their services to the public at large, which included by necessity customers of their competitors. MTS Allstream argued that in this respect, the winback rule was minimally impairing of the Companies' right to freedom of expression.
167. In response to the Companies' argument that because VoIP services were a new and recent class of services, consumers required more direct and timely communications about them, MTS Allstream submitted that the Companies ignored the central fact that in Decision 2005-28, the Commission found that local VoIP was substitutable for local voice service. MTS Allstream argued that, as a result, local VoIP and local voice were part of the same market – a market in which the ILECs remained overwhelmingly dominant. MTS Allstream submitted that allowing the Companies to solicit customers to return to their local VoIP services, while retaining the winback rule for local circuit-switched voice services, would be inconsistent with the Commission's determination and would create an ill-defined and unworkable technological exception from regulation. MTS Allstream argued that such an exception would be nearly impossible to implement, as it would lead to endless regulatory proceedings to determine where the boundaries of this exception begin and end, and would be open to widespread abuse and regulatory gamesmanship on the part of the Companies.

168. With regard to the Companies' argument that the extension of the winback rule to 12 months was overbroad, MTS Allstream noted that in an interrogatory, the ILECs were asked to compare the success of their winback activities targeted at residential customers upon the expiry of the previous three-month no-winback period as compared to the 12-month no-winback period. According to MTS Allstream, it was significant that the ILECs were unable to provide the requested information. MTS Allstream pointed to Bell Canada and Aliant Telecom's submissions that in the long distance sector, the success rate of winbacks declined the longer the period after the customers switched, and that the evidence provided by the Respondents confirmed the effectiveness of the winback rule. MTS Allstream argued that, in sum, this demonstrated that a longer no-winback period accomplished exactly what it was designed to do: it reduced customer churn, thus fostering sustainable competition and customer choice.
169. With regard to the Companies' submission of evidence regarding the regulatory treatment of the winback rule in the United States, MTS Allstream argued that the evidence was irrelevant to the Canadian context.⁴⁵
170. Rogers submitted that Bell Canada offered no evidence to support its assertion that reaching former customers through the general media was becoming less effective. Rogers further submitted that even if this assertion were accepted, this would not cause the winback rule to fail the minimal impairment test. Rogers argued that in *Sharpe*, McLachlin C.J. explained that to meet the minimal impairment test, the means chosen need not be the least restrictive possible, but rather had to be reasonable in light of the ends achieved.⁴⁶
171. With regard to Bell Canada's argument that, due to the increasing importance of service bundles, the harmful impact of the winback rule had increased because it prevented the ILECs from being able to market other forborne services, Rogers submitted that Bell Canada grossly overstated the impact of the winback rule on its marketing ability. Rogers submitted that even though the winback rule prohibited the ILECs from contacting the residential customer for any service during the relevant period, that customer must nevertheless subscribe to a competitor's local service in order to be protected under the winback rule. Rogers argued that this meant that, at most, the number of customers to whom Bell Canada was prohibited from directly marketing other services for 12 months was about 2 percent of the total market.
172. In response to the Companies' submission that the 12-month prohibition for residential customers was too long, Rogers argued that Bell Canada's response to interrogatories indicated that the winback rule had been more effective because it was extended from three months to 12 months. Rogers referred to Bell Canada's statement that the success of winback activity inversely correlated strongly to the duration of the time period between the time the customer transferred service to a competitor and the time of the winback contact. Rogers reiterated that for a measure to be minimally impairing, it need not be the least restrictive possible; it was sufficient if it was reasonable in view of the ends sought to be achieved.
173. Rogers submitted that all parties were in general agreement that the winback rule had facilitated new entrants' ability to gain and retain customers and that the longer the no-winback period, the greater this benefit. Rogers submitted that Bell Canada's responses confirmed

⁴⁵ MTS Allstream also objected to the submission of this evidence on procedural grounds, which is discussed in para. 29 above.

⁴⁶ *Sharpe* at para. 96.

unequivocally that it would have been able to retain significantly greater market share but for the 12-month no-winback period. Rogers submitted that, in short, the pressing and substantial objective of local competition would have been less successful or an outright failure but for the 12-month no-winback period.

174. With regard to the extension of the winback rule to local VoIP services, Rogers submitted that the arguments in support of the winback rule as it related to PES also applied to local VoIP services. Rogers added that there was no evidence that the public required targeted winback offers from the ILECs in order to be informed about VoIP service and technology. Rogers submitted that the public appeared to be well informed about the new technology in spite of the winback rule.
175. EastLink submitted that its responses to the Commission's interrogatories indicated that bundling of other services impacted churn of local exchange service back to Aliant Telecom. EastLink further submitted that today, customers seeking Aliant Telecom's digital TV service, for instance, must take Aliant Telecom's High Speed Internet service and that those customers were more likely to take Aliant Telecom's telephone services as well.
176. With regard to the Companies' argument that the extension of the winback rule to VoIP services was overbroad, QMI submitted that to the extent that there was a need for information about new VoIP services, this need existed for all customers, not just potential winbacks.

The Companies' reply

177. The Companies submitted that the winback rule constituted a complete ban of a particular form of ILEC advertising, i.e. ILEC-initiated direct contact with former local service customers in respect of attempts to market local service, in person, by mail, telephone, fax or e-mail. The Companies also submitted that Decision 2005-25 clearly prohibited ILEC local exchange service promotions that targeted the customers of the ILECs' competitors, a group that necessarily included the ILECs' former customers. The Companies argued that, when read together, Decision 2005-25 and the winback rule prohibited ILECs from engaging in all forms of contact with their former customers, including direct contact and mass media based advertising. The Companies argued that the fact that they might advertise in the general media in no way mitigated the completeness of the ban on direct marketing. The Companies submitted that this argument was tantamount to requiring the ILECs to communicate messages they did not wish to communicate via media that they did not wish to utilize.
178. The Companies further argued that the "temporary" nature of the ban did not change its over breadth. The Companies submitted that the Commission had never considered non-Charter infringing measures as a means to provide competitors with a "reasonable period" to demonstrate the quality and reliability of their services. The Companies argued that Rogers' evidence was that the majority of its migrations continued to occur amongst customers within their first three months of service, at a time when these customers were denied access to direct winback communications from ILECs. In the Companies' submissions, this evidence confirmed that customers could and did make up their minds within the first three months of receiving service. The Companies argued that it was contrary to logic, common sense and the evidence to suggest that residential consumers were incapable of making an informed choice about local service providers unless they had first subscribed to a CLEC's service for a full year.

179. In response to the Respondents' arguments that the United States evidence was irrelevant in Canada because of the differences in competitive conditions as between the two countries, the Companies submitted that their evidence demonstrated that even when CLECs' share of the local residential or local access services markets in a state was zero, or otherwise at a very low level, the relevant state regulatory authority deemed it inappropriate to ever impose a winback embargo period.
180. The Companies argued that, contrary to the Respondents' suggestion that the number of people affected by a Charter violation could be used to water down the Oakes test, the fact that there were Canadians whose Charter rights were not currently being violated by the winback rule did not reduce the burden on the Respondents to establish that it was reasonably necessary to violate the free speech rights of all the individuals who were affected. In the Companies' view, the violation of even one individual's free speech rights placed an onus on the party seeking to uphold that restriction to satisfy every element of the Oakes test.
181. The Companies asserted that none of the Respondents' arguments refuted the point that extending the winback rule to forborne and non-telecommunications services broadened the forms of protected expression prohibited under the winback rule. The Companies argued that the fact that cable companies were equally capable of assembling bundles consisting of the same or comparable services (i.e., local and long distance telephony, local calling features, Internet and broadcast distribution services, and in some cases wireless services) at competitive prices undermined the Commission's reasons for adopting the winback rule. The Companies submitted that in light of these new realities, the concern that the ILECs might once have had an advantage over competitors when it came to the ability to assemble bundles containing non-local services as a means to winback their former local service customers was no longer present.
182. The Companies submitted that the Respondents offered no evidence that contact regarding any service would in all probability lead to discussing a customer's overall telecommunications needs, including local. According to the Companies, such speculation was not sufficient grounds upon which to ban Charter-protected speech and ignored the Commission's rationale for extending the winback rule to Internet service, which was that a winback of an Internet customer would "also inevitably repatriate the primary exchange service."⁴⁷
183. The Companies argued that the possibility that the winback rule might be curtailed or eliminated at some time in the future was irrelevant to the extent to which it infringed freedom of expression today. According to the Companies, the winback rule had been in force for over seven years and was intended, among other things, to foster "sustainable competition" and result in "a stable customer base" for competitors, terms which had never been defined. The Companies argued that, as a result, it was unclear what, if any, preconditions must be met for the winback rule to be relaxed or withdrawn and that, to the extent the Commission might address the winback rule in the Local Forbearance Proceeding, the earliest that would take place was in March 2006.
184. The Companies submitted that the application of the winback rule to protect cable companies further demonstrated the over breadth of the winback rule. The Companies argued that it could not be minimally impairing to suppress an important element of competition, namely the free

⁴⁷ Decision 2002-1 at para 17.

and timely exchange and receipt of commercial information amongst ILECs and their former customers, in order to protect well-capitalized, vigorous competitors, such as the incumbent cable companies. The Companies submitted that contrary to the CCTA's suggestion, the purpose of the winback rule was not to counter anti-competitive targeting by the ILECs, since the Commission's local promotion and pricing rules provided an adequate safeguard against such activity.

Commission determinations

185. The Commission notes that the appropriate standard by which to assess whether a measure is minimally impairing was set out by the Court as follows:

[T]he government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.⁴⁸

186. For the reasons outlined below, the Commission concludes that the winback rule satisfies the minimal impairment test.

Partial versus complete ban

187. The Commission notes that the Court has stated that "it will be more difficult to justify a complete ban on a form of expression than a partial ban[.]"⁴⁹
188. The Companies and TCI submitted that the winback rule constituted a complete ban of a particular form of ILEC advertising.
189. In the Commission's view, the Companies' characterization of the winback rule as a complete ban on communications between ILECs and their former local exchange service customers artificially defines both the form and the content of the restricted expression in a very narrow manner. The Commission considers that to classify the winback rule as a complete ban in this manner would be to collapse the distinction between what constitutes a partial ban and a complete ban, as it would fail to take into account the range of ILEC expression to which the winback rule does not apply.

⁴⁸ *RJR-MacDonald* at para. 160.

⁴⁹ *Ibid.*, at para. 163.

190. As discussed above, the winback rule only applies for a specified period of time to direct communications which attempt to win back former local exchange service customers, for local services, in the case of a business customer, and for all services, in the case of a residential customer.

191. The winback rule does not prevent an ILEC from directly communicating with:

- its current local exchange service customers, including those who have switched other services to competitors from the ILEC;
- its former local exchange service customers in relation to any service that the customer continues to obtain from the ILEC or any service that the customer had not previously purchased from the ILEC; or
- a former local exchange service customer who has called the ILEC in relation to local exchange service.

In addition, the winback rule has no effect on an ILEC's ability to advertise in the general media, on the Internet or through its retail outlets, or to conduct other marketing activities that do not involve a direct communication with former local exchange service customers in which the ILEC attempts to win them back.

192. The Commission notes that in contrast to situations involving a complete ban dealt with in the case law, where consumers are deprived of receiving information to make informed choices, the winback rule only affects former local exchange service customers during a defined period of time, and furthermore, these consumers have multiple means by which to obtain information from the ILECs concerning the services and products the ILECs provide in accordance with the Act.

193. The Commission notes the Companies' argument that the winback rule, together with the restrictions on local service promotions in Decision 2005-25, constituted a complete ban. The Commission notes that the tariffing rules in Decision 2005-25 relate to the specific rate that the ILECs can legally charge for a telecommunications service and the conditions upon which the Commission would be prepared to approve a tariff for the service offering, in accordance with sections 25 and 27 of the Act. As such, the tariffing rules are distinct and independent from the winback rule and, as discussed above, are not at issue in this proceeding. In any event, the Commission finds that the fact that these tariffing rules require that the ILECs must make available and promote equally to all customers within a given rate band any discounts or other promotional offers that they wish to make available to competitors' customers within that band, and that any such offering must meet certain pricing safeguards, do not have the effect of making the winback rule a complete ban.

194. In light of all the foregoing, the Commission concludes that the winback rule, being a prohibition that is limited to certain customers, under certain circumstances, for a certain period of time, is properly characterized as a partial ban.

Non-impairing alternatives

195. The Companies argued that the Commission did not consider non-impairing alternatives to the winback rule. The Commission finds that no non-impairing alternative to the winback rule is available that would enable it to achieve the objective of the rule, given that it is the direct communication between the ILECs and their former local exchange service customers for winback purposes that gives rise to the harm that the winback rule has always sought to prevent.

History of the impugned measure

196. The Commission notes that the modifications in the scope of the winback rule since 1998 reflect its tailoring of the measure as precisely as possible in the face of changes in the telecommunications market, for the reasons outlined below.

(i) Extension of the winback rule to all services – Decision 2002-1

197. In Decision 2002-1, the Commission addressed the new circumstances in the provision of local exchange services as a result of a significant increase in bundled service offerings. The Commission responded by extending the winback rule's application with respect to former residential customers to attempts to win back such customers in respect of any service that a customer has switched to a competitor. The Commission notes that there were two aspects to this extension of the winback rule.
198. First, the Commission clarified that an offer to a former local exchange service customer that involved a bundle of services which included local exchange service would necessarily require the customer to switch back to the ILEC's local exchange service. Similarly, an offer involving a bundle of services that included services, such as optional local services, that are technically dependent on the ILEC's local exchange service, would constitute a winback activity in respect of local exchange service, since acceptance of such an offer would mean that the customer, for technical reasons, would be obliged to switch back to the ILEC's local exchange service. The Commission found that an offer involving a bundle of services that includes local exchange service or optional local service (or any other service that, for technical reasons, requires the customer to obtain local exchange service from the ILEC) would be tantamount to an attempt to win back local exchange service, since the customer would be required to subscribe to local exchange service as part of the bundle.
199. The second aspect of this extension was that it included attempts to win back a former residential local exchange service customer with respect to any telecommunications service that the customer had switched to a competitor, even where the ILEC's offer did not involve a bundle including local exchange service or a service dependent on local exchange service. The rationale for this extension was that if a former local exchange service customer who has also switched other services to a competitor is convinced to switch their non-local exchange services back to the ILEC, the customer could reasonably be expected to be won back for local exchange service as well.

200. The Commission finds that the record of this proceeding is consistent with its determinations in Decision 2002-1. The evidence demonstrates that the vast majority of residential consumers purchase at least one additional telecommunications service from their local exchange service provider, that a significant majority purchase two additional services; and that the convenience of dealing with a single provider, on one bill, is an important consideration for many consumers. In addition, the Commission notes that it has considered the ILECs' confidential evidence with respect to the number of services to which residential customers subscribe when they switch back to the ILEC from a competitor as well as EastLink's submission that a loss of a customer for one service typically means a loss for multiple services.
201. Accordingly, based on the evidence, the Commission finds that where an ILEC contacts former residential local exchange service customers in an attempt to win them back in relation to a non-local exchange service that they have switched to a competitor, should the customer decide to switch back for the non-local exchange service, then the customer can reasonably be expected to be won back for local exchange service as well.
202. The Companies further submitted that the winback rule extended to forborne and non-telecommunications services and in this respect was unreasonable. Firstly, the Commission notes that the winback rule applies only to telecommunications services that a former local exchange customer has switched to a competitor, and not, for example, to broadcasting services (unless the non-telecommunications service is offered on the condition that the customer subscribe to a telecommunications service). Secondly, as discussed above, if a former residential local exchange service customer switches back a forborne service to an ILEC, it is reasonable to expect that the customer will be won back for local exchange service as well.

(ii) Extension of the winback rule from 3 to 12 months: Decision 2004-4

203. The Commission notes the Companies' argument that the Commission's extension of the winback rule to 12 months with respect to residential customers was overbroad because Call-Net's evidence in the Decision 2004-4 proceeding demonstrated that in most cases customers who left Call-Net did so during the first 90 days after switching.
204. The Commission notes that in the proceeding for Decision 2004-4, Call-Net referred to a focus group study that showed that, depending on the month, between 8 and 34 percent of respondents left Sprint Canada as a result of phone calls from Bell Canada. Call-Net noted that the variance in monthly percentages correlated to the level of Bell Canada's winback activity. The Call-Net evidence in that proceeding, to which the Companies referred, indicated that churn increased by 25 percent following the expiry of the then applicable three-month no-winback period. Call-Net's evidence also indicated that, once customers had been retained for a period of one year, churn dropped to 17 percent of the level experienced in the first 30 days after a customer switched to Sprint Canada. In the proceeding for Decision 2004-4, there was also evidence of the impact that churn had on Call-Net's costs.
205. The Commission finds that both the ILEC and CLEC evidence in this proceeding demonstrate that, in general, the longer the customer remains with the CLEC, the lower the churn rate of the CLEC and the winback success rate of the ILEC.

206. Recognizing that winback success in long distance is not necessarily equivalent to winback success in the local service market, the Commission accepts the Companies' submission that the "[long distance] data illustrates the point that the success rate of winback activity inversely correlates strongly to the duration of the time period between the time the customer transfers service to a competitor and the time of the winback contact." TCI also noted that it would expect that the residential local winback success rate would mimic the similar residential long distance trend experienced by the company.
207. The Commission considers that it would be difficult to prove conclusively that the churn rate after a 12-month no-winback period is significantly lower than what the churn rate would be after a shorter no-winback period. In order to do so, it would be necessary to isolate the impact of the winback rule from other exogenous factors that could affect churn rate, such as the particular competitors in the market at the time; the nature of the competitive offerings, both in terms of both type of service and pricing; a strike at the ILEC or the competitor; the level of winback activity; or other circumstances that could significantly affect customer service in a specific period of time.
208. Further, the Commission notes that the specific objective of the winback rule is not to decrease the number of customers that ILECs win back, nor to ensure that CLECs retain their customers; rather, it is to ensure that ILECs do not win back customers as a result of an undue or unfair advantage, or as a result of an unfair opportunity, and that CLECs have a fair opportunity to retain their customers. The Commission therefore considers that churn rate data, while they may provide an indication as to the need for and the effectiveness of the winback rule, are not determinative of these issues.
209. The Commission finds, in light of the circumstances in which the winback rule was extended to 12 months and which prevailed until recently, that 12 months was a necessary and appropriate no-winback period in order to obtain the winback rule's objective. As noted above, in Decision 2006-15, the Commission has reduced the no-winback period for residential customers from 12 to three months in light of the new circumstances in the market.
210. The Companies also argued that there was no evidence that competitors required 12 months to recover the costs of acquiring a new customer. The Commission notes, however, that the winback rule was not extended to 12 months on the basis that CLECs required 12 months to recover the costs of acquiring a new customer. Rather, as discussed above, the winback rule in respect of residential local exchange services was extended on the basis that competition had emerged more slowly than anticipated, and that the ILECs derived an undue or unfair competitive advantage, or benefited from an unfair opportunity, arising from their enhanced ability to directly communicate with competitors' customers for winback purposes. The Commission found that an extension to the rule was necessary and appropriate to help CLECs to have a fair opportunity to retain customers. In any event, the Commission notes that while no specific cost information was provided in this regard on the record of this proceeding, the Respondents have submitted that a longer period of time affords the competitor an opportunity to recoup more of its initial investment in acquiring the customer. In Decision 2004-4, the Commission considered that customer churn is costly to all LECs, and especially detrimental to CLECs, as they do not have a large stable base of customers capable of funding their ongoing operations.

The international context

211. The Companies argued that the experience in the United States with respect to local service winback restrictions only served to confirm the unreasonableness of the one-year residential embargo period. The Companies submitted that the majority of states in the United States had no winback restrictions at all, and that the no-winback periods in states that did impose winback restrictions were much shorter than those in Canada. The Companies also referred to an FCC decision in which the FCC came to different conclusions than the Commission as to the effect of winback activity on competition.
212. The Commission notes that there is no consensus among state regulators in the United States as to either the need for, or the appropriate ambit of, winback restrictions on telecommunications carriers. The Commission further finds that there is insufficient evidence on the record to explain why the winback rules adopted by various state regulators or by the FCC, or the lack of such rules, is compelling in this proceeding, given the different regulatory context and state of competition for local exchange services in Canada. Accordingly, the Commission concludes that the regulatory measures adopted – or not adopted – by various states in the United States, or by the FCC, do not carry much weight in assessing the reasonableness of the winback rule in Canada.

Conclusions

213. In summary, based on the evidence and in light of the regulatory context in which the winback rule was imposed, as well as the nature and scope of the infringement on ILECs' and consumers' freedom of expression, the Commission concludes that the winback rule impairs freedom of expression no more than is reasonably necessary to obtain its objective and therefore satisfies the minimal impairment test.

The proportionate effects branch

Positions of parties

The ILECs

214. The Companies argued that there was no proportionality between the deleterious and the salutary effects of the winback rule, and that the extensions of the winback rule had significantly increased its deleterious effects, without demonstrably increasing its salutary effects.
215. The Companies submitted that the extended winback rule had reduced consumers' access to useful information, which had inhibited consumers' ability to make informed choices. The Companies argued that many consumers would avoid switching their services to competitive LSPs if they knew that this would disqualify them from eligibility for other promotions. The Companies argued that the extended restrictions had a deleterious impact upon ILEC marketing in those areas in which they were most vulnerable to competition, such as Internet, wireless communications and long distance services. The Companies further argued that taken as a whole, these deleterious effects were disproportionate to the salutary effects of the winback rule.

216. The Companies argued that Bell Canada's decision to cease outbound marketing activity in respect of all services to small and medium-sized business (SMB) customers who had switched local service to a competitor was largely attributable to the winback rule. In its response to interrogatories, Bell Canada further submitted that the combined effect of the winback rule, Decision 2005-25's continuing prohibition on ILECs from engaging in local exchange service promotions that were directed solely to customers of competitors or offered only in geographic areas where competitors were providing services, and Decision 2005-28's extension of the winback rule to local VoIP service promotions, was to render it uneconomical for Bell Canada to engage in outbound marketing activity to SMB customers. These customers continued to have a high expectation that they would be offered bundles that include local service and, in order to be encouraged to return to Bell Canada, these customers demanded, at a minimum, financial or other inducements to do so, including the waiver of service initiation charges. Bell Canada submitted that because of these factors, its success rate was "virtually nil" in winning back SMB customers.
217. TCI argued that the deleterious effects of the winback rule were so pervasive and substantial that they could not be judged to be proportionate in their effects. TCI argued that the winback rule impaired the operation of a competitive local services market; detracted from the development of VoIP in Canada; damaged the reputation of the ILECs amongst their former local customers; and harmed customers and their freedom of expression rights.
218. TCI argued that the Commission's interrogatories would not provide sufficient evidence for the Commission to satisfy its onus requirements in justifying the section 2(b) infringement.

Respondents

219. MTS Allstream/Call-Net submitted that the winback rule's minor restriction of speech was demonstrably outweighed by the benefits of facilitating customer choice and competition. MTS Allstream/Call-Net argued that in order to make informed choices, customers needed access to information about competitive providers but did not need contact with the Companies, with whom they were already familiar and from whom they could receive information through advertising or by contacting the company themselves. MTS Allstream/Call-Net submitted that the Companies had provided no evidence of a deleterious impact on ILEC marketing of competitive services.
220. MTS Allstream/Call-Net submitted that the winback rule partially mitigated the Companies' incumbency advantages and market power, and facilitated genuine competition and customer choice by allowing competitors to retain customers for either three or 12 months before being subject to winbacks. MTS Allstream/Call-Net further submitted that a competitive market would result in lower prices, a wider variety of providers and service offerings, new product innovation, and long-term economic health.
221. Regarding the Companies' submission that they had ceased outbound marketing activity for all services to SMB customers, MTS Allstream/Call-Net noted that the winback rule did not prohibit the Companies from marketing services other than local exchange to business customers and that the Commission must not judge the constitutionality of the winback rule based on the unnecessarily restrictive implementation of the winback rule by the Companies.

222. The CCTA argued that the Companies provided neither evidence nor a detailed description of the deleterious effects of the winback rule on consumers or on ILEC marketing of competitive services. The CCTA further submitted that there were no grounds on which the Commission could conclude that the winback rule was deleterious, much less disproportionately so.
223. Rogers argued that Bell Canada's responses to interrogatories had not challenged Rogers' submission that the winback rule did not materially inhibit consumers' ability to make informed choices. Rogers submitted that consumers did not need direct, individual and targeted communication initiated by the ILEC in order to be informed. Rogers submitted that these customers were former customers of the ILEC and were already familiar with the ILECs' services, and could still receive information about new products and pricing through general advertising.
224. QMI submitted that there was a clear proportionality between the extent of the infringement of freedom of expression and the benefit achieved by the winback rule in respect of the development of competition. QMI submitted that the winback rule promoted competition in local telephony, in accordance with the policy objectives set out in section 7 of the Act. QMI submitted that the winback rule implemented the objective of promoting competition by imposing a minimal constraint on freedom of expression – a prohibition on ILEC direct communications with former customers for the purpose of winning back their business. QMI submitted that this prohibition had the demonstrated result of reducing churn, thereby helping competitors build economically viable customer bases, which would enable the development of sustainable competition.
225. QMI submitted that the winback rule did not restrict in any other way the ability of an ILEC to communicate information about its services to the public, including potential winback customers. QMI submitted that the winback rule also did not prevent competitor customers from asking for such information directly from an ILEC or from shifting their business back to the ILEC, either with or without the benefit of additional information.
226. EastLink submitted that the evidence filed in this proceeding confirmed that the winback rule was proportional to the Commission's objective of promoting sustainable facilities-based competition in this market; the winback rule impaired the ILECs' rights under the Charter as little as reasonably possible; and the salutary effects of the winback rule overrode its deleterious effects.

The Companies' reply

227. The Companies argued that the Respondents dramatically understated the deleterious effects of the winback rule while exaggerating its purported benefits. The Companies argued that the evidence on the record of harm to customers was clear and uncontradicted. The Companies submitted that the Respondents had also failed to account for the harm that the winback rule inflicted upon the intensity of competition. The Companies argued that in particular, there was no justification for extending the winback rule to VoIP, which the Commission had recognized was a separate class of local service by allowing for the filing of VoIP under separate tariffs. The Companies further argued that the infringements resulting from the winback rule applied in respect of services previously found sufficiently competitive to warrant forbearance by

the Commission. In the Companies' view, the significant and far-reaching harm to consumers and to fair and robust competition occasioned by the winback rule far outweighed the benefits, if any, resulting from the rule.

Commission determinations

228. Under the third and final branch of the proportionality inquiry, "there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures."⁵⁰
229. For the reasons discussed below, the Commission concludes that the deleterious effects of the winback rule are outweighed by the importance of the winback rule's objective, and are also outweighed by its salutary effects.

The deleterious effects of the winback rule

230. As discussed above, the winback rule does not limit the ILECs' ability to advertise any of their services and products on their websites, through their retail outlets, in the general media or by means of other marketing activities that do not involve direct communications with former local exchange service customers in an attempt to win them back.
231. The Companies argued that general advertising was increasingly ineffective in inducing customers to switch back. The Commission finds, however, that the confidential evidence submitted by the Companies in support of this position is not persuasive. However, even if there had existed persuasive evidence on the record that established that general advertising was an increasingly less effective means for inducing former customers to switch back, the Commission considers that this factor alone would not be sufficient to change its conclusion that the deleterious effects of the winback rule are outweighed by the importance of its objective and its salutary effects.
232. The Companies also submitted that Bell Canada had ceased outbound marketing activity for all services to SMB customers who had switched local service to a competitor because of the costs of targeted telemarketing and the expectation of most SMB customers that they would be offered bundles that included local exchange service. MTS Allstream/Call-Net submitted that the Commission should view this as irrelevant.
233. The Commission finds, based on the record of the proceeding, that Bell Canada's decision not to market to SMB customers only applies with respect to that subset of SMB customers who have switched all their local lines to a competitor, as Bell Canada submitted that it continued to telemarket to SMB customers who had retained at least one local line with Bell Canada. The Commission notes that Bell Canada did not submit that its decision to cease marketing activity in respect of services to SMB customers who had switched local exchange service to a competitor was solely attributable to the winback rule. The Commission further notes that other ILECs do engage in outbound marketing of non-local exchange services to SMB customers. In any event, even assuming that Bell Canada's decision to cease such outbound

⁵⁰ *Dagenais* at para. 92.

marketing was primarily because of the winback rule, the Commission finds that this factor alone would not be sufficient to change its conclusion that the deleterious effects of the winback rule are outweighed by the importance of its objective and its salutary effects.

234. To the extent that the winback rule prevents ILECs from being able to target former local exchange service customers for winback attempts in direct communications with those customers, the Commission finds that this constitutes both a deleterious effect on the ILECs and a salutary effect of the winback rule, since it prevents the ILECs from conferring upon themselves an undue or unfair advantage, or benefiting from an unfair opportunity, to win back customers, and thereby provides competitors with a fair opportunity to retain their customers. Further, the Commission notes that the deleterious effects on ILECs relate to a relatively small proportion of their customers: those who have switched local exchange services to a competitor. By contrast, the salutary effect on CLECs relates to a large percentage of their customers.
235. With respect to the deleterious effects on consumers' freedom of expression, as discussed above, the Commission finds that the winback rule has minimal deleterious effects on the ability of former ILEC local exchange consumers to make informed economic choices concerning the ILECs' telecommunications services and products.
236. The Commission notes the argument made by TCI that the winback rule ultimately harmed CLECs, because it forced ILECs to offer artificially low prices in order to induce customers back after the expiry of the no-winback period. The Commission notes that the CLECs have not raised this as a concern. The Commission further notes that during the period when the winback rule will continue to be in force, ILECs will be required to obtain Commission approval of their rates for local exchange services, as well as for bundles that include local exchange services. Accordingly, the Commission cannot conclude that there is any substantial concern regarding the potential of ILECs' offering artificially low prices.
237. The ILECs argued that, as a result of the winback rule, customers were vulnerable to being misinformed about the ILECs, or were induced into making false and negative assumptions about the ILECs' interest in retaining their business. For example, SaskTel related its experience regarding long distance campaigns by competitors who, SaskTel alleged, misinformed consumers about SaskTel's long distance services and made false statements about, among other things, the company's business practices and ownership structure. SaskTel argued that winback campaigns allowed ILECs to correct these false impressions. As the Commission has stated previously in this Decision, the winback rule would not prevent the ILECs from correcting any false impressions through general advertising or through direct communications that do not amount to a winback attempt.
238. TCI provided anecdotal feedback from residential sales channels suggesting that former local exchange service customers contacted after the 12-month period did not understand why TCI had not called them during that time, and assumed that TCI did not care about their business. The Commission notes that in accordance with Decision 2006-15 issued today, the winback rule does not preclude ILECs from, for example, sending a card to former local exchange service customers to express the company's appreciation of their business, so long as the circumstances do not amount to an attempt to win back the former local exchange service customer.

239. Finally, with regard to the Companies' argument that many consumers would avoid switching their services to CLECs if they knew that this would disqualify them from eligibility for other promotions, the Commission notes that the winback rule has no impact on the eligibility of consumers to receive any promotional offerings approved by the Commission.

The benefits of the winback rule

240. The Commission finds that the most important and direct benefit of the winback rule, as demonstrated by common sense, and by the evidence in this proceeding, is that it eliminates the undue or unfair competitive advantage, or the unfair opportunity, arising from the ILECs' enhanced ability to directly communicate with competitors' customers for winback purposes. In turn, CLECs are permitted a fair opportunity to attempt to retain their customers.
241. Preventing the ILECs from availing themselves of this unfair opportunity furthers the overall objective of facilitating sustainable facilities-based competition in the provision of local exchange services, consistent with the telecommunications objectives of section 7 of the Act. As discussed above, the Commission has established a regulatory framework to allow for facilities-based local competition in order to promote greater consumer choice in terms of services and service providers. The Commission has found that competition in the provision of local exchange services is in the public interest and will lead to benefits, such as productivity improvements, service innovation, and enhanced choice for consumers.

Conclusions regarding proportional effects

242. In light of all the foregoing, the Commission concludes that preventing the ILECs from deriving an undue or unfair competitive advantage, or benefiting from an unfair opportunity, arising from their enhanced ability to directly communicate with competitors' customers for winback purposes, and the associated benefits for competitors and consumers, outweigh the deleterious effects of the winback rule on the ILECs and on their former local exchange service customers.

Disposition of the Application

243. The Commission concludes that the winback rule in question in this proceeding has a pressing and substantial objective and satisfies all three branches of the proportionality test, and therefore is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society, consistent with section 1 of the Charter. Accordingly, the Commission **denies** the Companies' application.

Stay application

244. On 22 November 2005, Bell Canada filed a separate Part VII application (the stay application) requesting that the Commission issue an interlocutory order staying the application of the winback rule in-territory to Bell Canada until the Commission issues its final decision in respect of the Application.

245. In response, QMI filed comments on 5 December 2005, Aliant Telecom filed comments on 20 December 2005, and MTS Allstream, the CCTA and Primus Telecommunications Canada Inc. each filed comments on 22 December 2005. Bell Canada filed reply comments on 3 January 2006.
246. Given its determinations in this proceeding, the Commission concludes that the Companies' 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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