Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2006-53

Ottawa, 1 September 2006

Reconsideration of *Regulatory framework for voice communication services using Internet Protocol*

Reference: 8663-C12-200605587 and 8663-C12-200402892

In this Decision, the Commission reaffirms the regulatory regime for local voice over Internet Protocol services established 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.*

The Commission considers, however, that based on evidence presented during this proceeding, it would be appropriate to reassess the market share forbearance criterion threshold of 25 percent for local exchange services set in Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, 6 April 2006 (Decision 2006-15). In light of this determination, the Commission considers that it would also be appropriate to reassess the 20 percent market share loss threshold applicable to the transitional measure related to the local winback rule that was established in Decision 2006-15.*

Accordingly, coincident with this Decision, the Commission is issuing Proceeding to reassess certain aspects of the local forbearance framework established in Decision 2006-15, *Telecom Public Notice CRTC 2006-12, 1 September 2006.*

The dissenting opinions of Commissioners Cram, Langford, and Noël are attached.

Background

The VoIP decision

1. In *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28, 12 May 2005, as amended by Telecom Decision CRTC 2005-28-1, 30 June 2005 (Decision 2005-28), the Commission set out the details of the appropriate regulatory regime applicable to the provision of voice over Internet Protocol (VoIP) services.

2. The Commission used the term "VoIP services" to refer to voice communication services using Internet Protocol (IP) that use telephone numbers that conform to the North American Numbering Plan (NANP) and provide universal access to and/or from the public switched telephone network (PSTN). The Commission confirmed that peer-to-peer services, which are IP-enabled voice communication services that do not connect to the PSTN and do not generally use NANP-conforming telephone numbers, were not subject to regulation.

3. To the extent that VoIP services provided subscribers with access to and/or from the PSTN and the ability to make or receive calls that originated and terminated within an exchange or local calling area as defined in the tariffs of the incumbent local exchange carriers (ILECs), they were referred to as local VoIP services.

4. In Decision 2005-28, the Commission found and confirmed that local VoIP services as defined in that Decision were not retail Internet services and did not fall within the scope of forbearance determinations made for existing retail Internet services. The Commission determined that local VoIP services were part of the same market as local exchange services, that it would not be appropriate to forbear from the regulation of local VoIP services, and that the regulatory framework governing local competition, set out in *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8), and subsequent determinations, applied to local VoIP services, except as otherwise provided in Decision 2005-28.

The local forbearance decision

5. In *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, 6 April 2006 (Decision 2006-15), the Commission established a framework for assessing applications for forbearance pursuant to expedited procedures. Specifically, according to the framework:

   - the relevant product market comprises all local exchange services, including VoIP services;
   - the relevant geographic market is the local forbearance region; and
   - forbearance will be appropriate where an ILEC has lost at least 25 percent market share, demonstrated evidence of rivalrous behaviour in the relevant market, met the competitor quality of service indicators for the previous six months, put in place the necessary competitor tariffs, and implemented competitor access to its operational support systems.

The Order in Council

6. On 4 May 2006, Order in Council P.C. 2006-305 (the Order in Council) was issued pursuant to subsections 12(1) and 12(5) of the *Telecommunications Act* (the Act), referring Decision 2005-28 back to the Commission for reconsideration. The Commission was directed to complete its reconsideration of Decision 2005-28 within 120 days of the date of the Order in Council.

Process

7. On 10 May 2006, the Commission issued *Reconsideration of* Regulatory framework for voice communication services using Internet Protocol, *Telecom Decision CRTC 2005-28,* Telecom Public Notice CRTC 2006-6 (Public Notice 2006-6). A copy of the Order in Council was appended to Public Notice 2006-6.

8. In light of the Order in Council, the Commission invited comments pertaining to the reconsideration of Decision 2005-28, as well as any other matters that might be pertinent to the regulatory framework for VoIP services. Comments from parties were due on 5 June 2006, and reply comments from parties were due on 15 June 2006.

9. The Commission noted that the record of the proceeding initiated by *Regulatory framework for voice communication services using Internet Protocol*, Telecom Public Notice CRTC 2004-2, 7 April 2004, as amended by Telecom Public Notice CRTC 2004-2-1, 22 July 2004, would form part of the record of the Public Notice 2006-6 proceeding.

10. The Commission issued interrogatories to a number of parties on 31 May 2006. Responses to those interrogatories were to be filed by 15 June 2006.

11. The Commission received comments, reply comments, and/or responses to interrogatories from Access Communications Co-operative Limited (Access Communications); a combined submission from Aliant Telecom Inc. (Aliant Telecom),[1] Bell Canada, Saskatchewan Telecommunications (SaskTel), and Société en commandite Télébec (Télébec) (collectively, the Companies);[2] ARCH Disability Law Centre; the British Columbia Public Interest Advocacy Centre on behalf of the British Columbia Old Age Pensioners' Organization et al.; the Canadian Cable Systems Alliance Inc. (CCSA); the City of Calgary; the Coalition for Competitive Telecommunications (the Coalition); a combined submission from Cogeco Cable Inc. (Cogeco), Quebecor Media Inc. (QMI), and Rogers Communications Inc. (RCI) (collectively, the Competitors);[3] Comwave Telecom Inc.; Cybersurf Corp. and its subsidiaries (collectively, Cybersurf); FCI Broadband, a division of Futureway Communications Inc.; (FCI Broadband); James Bay Cree Communications Society; l'Union des consommateurs; MTS Allstream Inc. (MTS Allstream); Nortel; OneConnect; Primus Telecommunications Canada Inc. (Primus); the Public Interest Advocacy Centre as counsel for the Consumers' Association of Canada and the National Anti-Poverty Organization (collectively, the Consumer Groups); the Quebec Coalition of Internet Service Providers (QCISP); Rothschild & Co. on behalf of RipNET Limited; Shaw Communications Inc. (Shaw); Shift Networks Inc. (Shift); TELUS Communications Company (TCC); Vonage Canada Inc. (Vonage); Yak Communications (Canada) Inc. (Yak); and the Yukon Government.

12. While the positions of the interested parties have necessarily been summarized in this Decision, the Commission has carefully reviewed and considered the submissions of all parties.

Overview of issues raised in this proceeding

13. The Companies, TCC, and the Coalition requested that the Commission change its original determination and forbear from the economic regulation of local VoIP services. The remainder of the interested parties, which included competitive local exchange carriers (CLECs), VoIP resellers,[4] consumer organizations, and government bodies, among others, supported maintaining the status quo.

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

[2] Aliant Telecom, Bell Canada, SaskTel, and Télébec submitted individual responses to interrogatories. SaskTel and Télébec submitted supplementary comments and/or reply comments in addition to those filed by the Companies.

[3] Cogeco, QMI (on behalf of Videotron Ltd.), and RCI submitted individual responses to interrogatories.

[4] "VoIP resellers" refers to local VoIP service providers (other than Canadian carriers) that lease services or facilities from local exchange carriers, such as PSTN access and numbers, that are used in the provision of local VoIP services.

14. In Part A of this Decision, the Commission sets out its determinations regarding its reconsideration of Part III of Decision 2005-28 related to parties' forbearance requests.

15. In Part B of this Decision, the Commission sets out its determinations regarding its reconsideration of certain issues arising from Part IV of Decision 2005-28 related to the VoIP regulatory framework. In particular, the Commission reconsiders the issues raised by parties regarding local number portability (LNP), reseller access to numbers, directory listings, equal access, contribution, and the VoIP access condition. In addition, the Commission considers a proposal for a new technical framework.

16. In Part C of this Decision, the Commission sets out its determinations regarding certain information that was filed in confidence as part of this proceeding.

17. Finally, the Commission sets out its overall conclusion regarding its reconsideration of Decision 2005-28.

Part A: Reconsideration of forbearance requests

Positions of parties

18. With respect to the subject of market definition, all parties that commented on this issue were of the view that local VoIP services and circuit-switched local exchange services were or could be considered to be in the same relevant market.

19. Shaw submitted that the fundamental purpose of the two services was the same. It also submitted that VoIP service was marketed and offered in the same manner as local exchange service. It submitted, further, that they were used in the same way and were purchased as substitutes or replacements for one another. The CCSA and the Competitors noted that there was widespread agreement that VoIP service was a close substitute for traditional circuit-switched telephone service. The Competitors submitted that, as a result, it was consistent with economic and competition law principles to treat them in the same manner for regulatory purposes. Several other parties agreed with this view.

20. The Competitors submitted that in Decision 2006-15, the Commission had conducted an extensive review of the state of competition in the local exchange market in Canada, and that it had embraced principles of analysis that were commonly used in economics and competition law.

21. The Competitors further submitted that until the Commission's tests for forbearance could be satisfied, it was not appropriate to consider forbearance with respect to VoIP services. They suggested that if VoIP hastened the loss of significant market power (SMP), forbearance applications would follow; if not, there was no justification for forbearance. The Competitors also suggested that there was significant risk in granting premature forbearance, since it might freeze competition at existing levels and never permit it to reach levels sufficient to protect consumers from the negative effects of ILEC market power.

22. The Companies and TCC were of the view that the Commission should forbear from regulating local VoIP services pursuant to section 34 of the Act. The Companies noted that section 34 of the Act referred to forbearance from a "service or class of services." They submitted that simply because two services were in the same market did not mean they had to be regulated in the same manner. The Companies noted that mobile wireless services, Internet services, and satellite telephone services were not subject to the same regulatory regime as local exchange services, even though they could be in the same market.

23. TCC submitted that ILEC residential and business access-independent VoIP services should be forborne on a service-wide basis, while ILEC residential and business access-dependent VoIP services should be forborne in those areas where users had access to competing services provided over the network of at least one other full facilities-based provider.

24. The Companies and TCC noted that the Commission had allowed for greater pricing flexibility for local VoIP services in *Bell Canada proposal for VoIP service pricing in Ontario and Quebec*, Telecom Decision CRTC 2005-62, 20 October 2005 and *Bell Digital Voice Service*, Telecom Decision CRTC 2006-11, 9 March 2006 (Decision 2006-11), without altering its finding that VoIP and local exchange services were in the same market.

25. TCC submitted that forbearance under subsection 34(1) of the Act would be consistent with the Telecommunications Policy Review Panel report (the TPR report)[5] recommendation that new services be presumptively forborne. TCC also submitted that local VoIP services should be forborne pursuant to subsection 34(2) of the Act, since the facts supported a finding that competition for ILEC local VoIP services was sufficient to protect the interests of users.

26. The Companies submitted that they were not incumbents in the provision of local VoIP services or Internet services, and that they had no SMP in relation to such services. TCC also submitted that it lacked market power with respect to the provision of local VoIP services. The Coalition suggested that since there were many VoIP service providers and barriers to entry were low, no VoIP service provider, including the ILECs, had SMP.

27. TCC submitted that while section 25 of the Act required that ILEC services be tariffed, section 34 of the Act gave the Commission significant discretion to maximize reliance on market forces to protect the interests of users. It suggested that the Commission should use this discretion to let market forces operate in the VoIP environment.

28. The Companies noted that in 2005, Cogeco, RCI, Shaw, and Videotron Ltd. had together expanded their VoIP footprint to over 50 percent of Canadian homes and had reported having 460,000 VoIP customers among them.

29. TCC noted that Shaw had deployed VoIP in all major areas of British Columbia and Alberta, and suggested that Shaw will have deployed VoIP across all of its systems in Western Canada by the end of 2006 or early 2007. TCC submitted that when the deployment was complete, Shaw would address 88 percent of households in British Columbia and Alberta. TCC also submitted that Shaw had approximately 150,000 subscribers to its digital phone service and

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[5] *Telecommunications Policy Review Panel: Final Report 2006,* March 2006. In the recitals of the Order in Council, a number of references are made to the TPR report's recommendations and to the consideration of them in the Governor in Council's current examination of Canada's telecom policy and regulatory framework.

was enrolling another 2,500 to 3,000 per week. TCC referred to a report prepared by its expert witness, Dr. Crandall, which noted that RCI and Shaw had a combined market value of US$30 billion, with increases in their stock prices of 135 and 64 percent, respectively.

30. The Coalition was of the view that there was no justification for regulation of local VoIP services. It submitted that ILECs did not have the ability to force customers to subscribe to their local VoIP services and to pay higher than market prices to do so. The Coalition also submitted that a significant number of the new local VoIP service providers were large, well-funded organizations that had publicly stated that they were in the market for the long haul and would not exit regardless of what regulations were applied to ILEC VoIP services.

31. The Coalition submitted that in order to comply with the TPR report's conclusions on economic regulation, the Commission should grant the ILECs the same level of forbearance as had been provided to all other service providers in Decision 2005-28.

32. The British Columbia Public Interest Advocacy Centre on behalf of the British Columbia Old Age Pensioners' Organization et al. submitted that VoIP technology had finally provided a way for facilities-based competition to enter the market and that the Commission should confirm its determinations in Decision 2005-28.

33. L'Union des consommateurs suggested that the conclusion reached by the Commission to make local VoIP services part of the same relevant market as wireline local services and the rationale used to arrive at this conclusion were still valid.

34. The Consumer Groups submitted that the Commission's analysis of market power appeared to be consistent with the TPR report's recommended approach. The Consumer Groups also submitted that in accepting that VoIP was a functional equivalent to local exchange services for the purposes of market share, the decision to apply economic regulation to ILECs that provided VoIP services was consistent with the Commission's finding of SMP in the local services market. The Consumer Groups further submitted that the approach of the Commission in Decision 2005-28 was consistent with increased reliance on market forces and a perspective that attempts to address the least intrusive path towards competition in the presence of SMP.

35. Access Communications, the Competitors, and Shaw noted that the TPR report recommended that economic regulation be maintained in those markets where SMP was found to exist. Access Communications submitted that it was apparent that the ILECs were dominant in the local telephony services market and, therefore, must continue to be regulated in a way that fostered the development of facilities-based competition in that market.

36. MTS Allstream submitted that TCC had offered no means for the Commission to distinguish between the various incarnations of the services for regulatory/forbearance purposes.

37. MTS Allstream submitted that the ILECs' approach to market power analysis, which dismissed market definition as unnecessary or irrelevant in the case of local VoIP services, must be rejected. MTS Allstream noted that the TPR report acknowledged that market definition in testing for SMP was consistent with standard competition law practices, and the Competitors noted that this approach to market power assessment was sanctioned by the Competition Bureau.

38. MTS Allstream was of the view that there were no significant differences between the TPR report's recommended framework for determining when deregulation or forbearance from price regulation should take place and the framework employed by the Commission in Decisions 2005-28 and 2006-15.

39. Shaw submitted that once one accepted that local VoIP services and local exchange services were in the same market, there was no basis for forbearance under section 34 of the Act as long as the ILECs possessed SMP.

40. The Yukon Government submitted that there was no new evidence to suggest that the Commission's determination in Decision 2005-28 was incorrect. It suggested that the Commission's approach in Decision 2005-28 was not an extension of regulation, nor a retrograde step on the path to deregulation through reliance on market forces. It submitted that, instead, it was a prudent exercise of the responsibility to balance the interests of various economic and social constituencies, and, given the Commission's track record, by no means precluded future relaxation of regulatory requirements on VoIP.

41. The Companies submitted that there was no need for economic regulatory distinctions between VoIP categories. They noted that network operators were combining IP technology with their facilities according to their network topologies, with some providers using combinations of existing transmission facilities and, in some cases, circuit-switching equipment in conjunction with IP technology. They submitted that the Commission should promote the deployment of network innovations by allowing market forces to determine the nature and roll-out of IP technology-related innovations.

42. The Competitors and Shaw submitted that the regulatory regime for local telephone service in Canada had been established to apply to this service in a competitively and technologically neutral manner.

43. The Competitors submitted that VoIP was an exciting new technology that was enabling new entry into the local telephone market and that it would erode the ILECs' dominance in the local market. They also submitted, however, that the technology should not define the service. The Competitors and Primus shared the view that the issue of whether or not to regulate a service depended on whether a carrier had SMP in a relevant market, not on the underlying technology.

44. MTS Allstream submitted that technological neutrality ensured that services that were functionally similar were treated the same, and that no service or service provider was accorded a regulatory advantage simply because it used a different technology to provision its services. MTS Allstream also submitted that the TPR report clearly stated that economic regulation should be applied symmetrically to all service providers based on whether they had SMP and regardless of the technology they used.

45. Shaw submitted that the principle of technological neutrality was an important part of the Canadian regulatory framework that encouraged use of least-cost technology to spur innovation, competition, and customer choice. The company suggested that in an environment in which technologies no longer defined services, technology no longer formed an appropriate basis for distinct regulatory regimes. Shaw submitted that the defining characteristic of local

VoIP services was not the technology being used, but the nature of the service being provided to consumers. It also submitted that VoIP could be dressed up to look like circuit-switched local services and circuit-switched local services could be dressed up to look like VoIP.

46. Shaw submitted that local VoIP services were not the same as IP technology. It suggested that all carriers were deploying IP technology to some extent in their networks in order to reduce costs and improve efficiency, and that this should not be equated with the provision of VoIP services.

47. In reply, the Companies submitted that the principle of technological neutrality should not replace the analysis the Commission performs when determining whether two services should be regulated in the same manner. They submitted, further, that the fact that the service in question might have functional similarities to another service that the Commission regulated should be irrelevant in relation to the Commission's decision to forbear.

Commission's analysis and determinations

Introduction

48. In Decision 2005-28, the Commission denied ILEC requests for forbearance from the regulation of local VoIP services. The Commission determined that local VoIP services should be regulated as local exchange services, and that the regulatory framework governing local competition as set out in Decision 97-8 and subsequent determinations applied to local VoIP service providers, except as otherwise provided in Decision 2005-28.

49. Pursuant to the Order in Council, the Commission has reconsidered these determinations.

50. The Commission stated in Decision 2005-28 that in considering the requests for forbearance, it must determine that forbearance would be consistent with section 34 of the Act. In applying that section in Decision 2005-28, the Commission used two separate approaches: one within the framework set out in *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), and one outside of that framework.

51. The first approach used an analytical framework based on principles commonly used in economics and competition policy. Under this approach, referred to in Decision 2005-28 as the Decision 94-19 framework, the determination of whether or not to forbear from regulating a service or class of services was based on a determination of the relevant market in which the service(s) is (are) offered and on whether the ILECs have market power in that market.

52. The second approach considered the arguments presented by parties seeking forbearance under section 34 of the Act that were not necessarily advanced within the Decision 94-19 framework.

53. The Commission notes that all parties to this proceeding that addressed this matter were in favour of the Commission using one or both of these approaches.

Decision 94-19 approach

54. Decision 94-19 sets out a three-step analysis for considering forbearance applications.

55. The first step in assessing competitiveness is identifying the relevant market. The relevant market is the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase. The identification of the relevant market is based on the substitutability of the services in question.

56. The second step involves determining whether a firm has market power with respect to the relevant market. Market power can be demonstrated by the ability of a firm to raise or maintain prices above those that would prevail in a competitive market.

57. The third step is to determine whether, and to what extent, forbearance should be granted.

58. With respect to the substitutability of the services in question, the Commission notes that in Decision 2005-28 it identified four factors that would assist in determining whether or not local VoIP services met the same general user requirements as circuit-switched local exchange services. These factors were: the fundamental purpose of the services; the manner in which local VoIP services were marketed and offered; whether or not consumers perceived, or could be expected to perceive, local VoIP services as close substitutes for circuit-switched local exchange services; and whether or not local VoIP services and circuit-switched local exchange services were, or would be, purchased as replacements for one another.

59. After considering these four factors based on the record of the proceeding leading to Decision 2005-28, the Commission concluded that local VoIP services satisfied, or would satisfy, the same general requirements of customers of circuit-switched local exchange services. The Commission therefore found that local VoIP services were close substitutes for circuit-switched local exchange services and, as a result, that they were part of the same relevant market as circuit-switched services.

60. As the ILECs were dominant in the local exchange services market, the Commission determined in Decision 2005-28 that it would not be appropriate to forbear from regulating local VoIP services offered by ILECs.

61. The Commission notes that service descriptions provided in responses to interrogatories in this proceeding indicate that many local VoIP services are virtually the same as circuit-switched local exchange services with respect to functionality and price. Furthermore, the Commission notes that local VoIP services are being marketed as an alternative for circuit-switched local exchange services.

62. The Commission notes that quantitative information filed in response to interrogatories shows that a significantly high proportion of VoIP customers have ported their local numbers to their VoIP services. The Commission considers that this indicates that a high proportion of VoIP customers are using local VoIP services as a replacement for local exchange services. The Commission also notes that the cost to consumers of switching services or suppliers is low.

63. The following table shows the percentage of customers who subscribed to non-ILEC VoIP service and who ported their telephone number.[6]

	2004	**2005**	**May 2006**
Percentage of numbers ported	25.9%	55.7%	67.6%

64. The Commission considers that customers, in general, perceive circuit-switched local exchange services and local VoIP services to be interchangeable, and a large proportion are purchasing the latter as replacements for the former.

65. Given the evidence in this proceeding, the Commission finds that local VoIP services and circuit-switched local exchange services are sufficiently close substitutes that they continue to form part of the same relevant market.

66. The Commission notes that all parties to this proceeding who commented on the issue agreed that local VoIP services and circuit-switched local exchange services are or could be considered to be part of the same relevant market.

67. The Commission notes that pursuant to the Decision 94-19 approach, given its finding that local VoIP services and circuit-switched local exchange services continue to form part of the same relevant market, market power must be examined with regard to the entire local exchange services market. The Commission also notes, however, that this exercise is beyond the scope of this reconsideration. Indeed, the examination of market power with respect to local exchange services was the focus of Decision 2006-15, in which the Commission established a framework for assessing forbearance applications.

Separate section 34 analysis

68. In Decision 2005-28, the Commission determined that it was inappropriate to forbear from regulating VoIP services under section 34 of the Act.

69. In addition, the Commission stated:

> The Commission considers that if forbearance were granted prematurely, the ILECs' ability and incentive to engage in the combination of targeted below-cost pricing of local VoIP services, as well as bundling strategies, prior to the entry and roll-out of other facilities-based competitors, would have a material negative impact on the potential for sustainable competition in the provision of local VoIP services, and therefore on the protection of the interests of users. These strategies would unduly impair the competitive abilities of all potential market participants, and not just those market participants who depend upon the ILECs for required services and facilities.

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[6] The Commission notes that the information in this table was provided in confidence as part of this proceeding. Following a show cause process, the Commission has determined that it is appropriate to release these figures, which represent data aggregated on a national basis. The Commission's determinations on this show cause process are contained in Part C of this Decision.

70. In the present proceeding, the ILECs' principal argument was that although VoIP is or could be considered to be in the local exchange services market, under section 34 of the Act the Commission could treat VoIP as a separate service or class of services and could regulate that class differently, or forbear from regulating it, even as other local exchange services remained regulated.

71. In support of that argument, the Companies argued that mobile wireless, Internet, and satellite telephone services were forborne even though they could be part of the same market. They also argued that the Commission had already subjected VoIP services to different regulatory treatment even though they were part of the same market as local exchange services. The Commission notes that the ILECs argued that there were, among other things, low barriers to entry and sufficient competition in the VoIP market.

72. The Commission notes that to date it has not considered mobile wireless, Internet, and satellite telephone services to be part of the same relevant market as wireline local exchange service and has consistently treated these services, for regulatory purposes, as part of separate markets. Indeed, the Commission's determinations to forbear from regulating these services were necessarily based on the assumption that they were not part of the local exchange service market at the time those determinations were made.

73. The Commission also notes that in the case of Bell Digital Voice (BDV) and similar services, it approved different tariffing treatment based on economic analysis of those offerings and their different underlying costs.

74. With respect to the suggestion that it treat local VoIP services differently from other local exchange services for the purpose of forbearance, the Commission notes that IP is being integrated into telecommunications networks gradually, with different services relying on varying proportions of circuit-switched and VoIP technology. In the Commission's view, to define a service or a class of services based on the use of a particular technology, such as IP, which could be implemented wholly or partially in a network, would lead to disputes regarding whether each service made sufficient use of IP technology to be considered part of the service or class of services that qualified for forbearance.

75. The Commission considers that such disputes would result in a significant ongoing regulatory burden for both the Commission and interested parties and, in the end, would require the Commission to be overly prescriptive in determining precisely how technology was to be implemented in order for the service to be eligible for forbearance.

76. Furthermore, the Commission considers that the introduction of IP technology to the local exchange services market represents the latest in a series of network innovations in an increasingly competitive and dynamic market. The Commission also considers that if it were to forbear from regulating either access-independent or access-dependent VoIP service, or both, based on the particular implementation of IP technology, any such determination would provide artificial incentives for the ILECs to invest in that technology, which could in turn distort the competitive market. The Commission considers that it is more consistent with the

policy objectives set out in section 7 of the Act, including the one in paragraph 7(f),[7] to maintain a technologically neutral approach to forbearance, and to focus not on the underlying technologies employed to provide telecommunications services but rather on the services themselves.

77. The Commission notes that various parties referred to the regulatory treatment of VoIP services in other countries in support of their arguments regarding forbearance with respect to local VoIP services in Canada. The Commission notes that market conditions and statutory obligations of regulatory authorities vary widely around the world, and therefore it is impossible to draw meaningful parallels to the market conditions and statutory obligations existing in the Canadian market. The Commission considers that its determinations in this Decision are consistent with its statutory obligations and with current conditions in the Canadian local exchange services market.

Conclusion

78. In light of all the above, the Commission reaffirms its finding that it would not be appropriate to forbear from regulating local VoIP services without an examination of the entire relevant market for local exchange services.

Market share loss criterion in Decision 2006-15

79. The Commission notes that the record of this proceeding demonstrates that competition in the residential local services market has developed rapidly in the last year and a half. Information supplied in responses to interrogatories in this proceeding by non-ILEC providers of local VoIP services indicates that total revenues associated with their residential local VoIP services in Canada were $3.5 million at 31 December 2004, had risen to $93.2 million by 31 May 2006, and are forecast to reach $323 million by year-end 2006 and $597 million by year-end 2007.

80. In addition, the Commission notes that low churn rates associated with new services can be an indicator of customer willingness to retain those new services. The Commission considers that average churn rates for VoIP services in 2005 and 2006 of 1.4 percent and 1.3 percent, respectively, indicate that a very large proportion of subscribers to VoIP services are retaining their new services and their service provider.

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[7] The objective set out in paragraph 7(f) of the Act is "to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective."

Non-ILEC VoIP Connections, Revenue, and Average Monthly Churn[8]

	2004 (actual)	2005 (actual)	May 2006 (actual year-to-date)	2006 (forecast)	2007 (forecast)
Connections (000) (year end)	29.7	418.8	729.4	1,075.1	1,763.1
Revenue ($M)	3.5	58.8	93.2	322.5	596.5
Average monthly churn	4.2%	1.4%	1.3%	NA	NA

81. The record of the proceeding resulting in Decision 2006-15 was focused largely on year-end 2004 figures. Based on those figures, the Commission set a 25 percent threshold for ILEC market share loss as one of the criteria for forbearance. The Commission indicated in that Decision that setting this threshold was not a precise scientific exercise, but one that sought to balance the need for competition in a relevant market to be sustainable and the desire to ensure that customers reap the benefits of competition in that market without undue delay.

82. The Commission considers that the data provided in this proceeding, which included actuals up to May 2006, indicate that growth in residential local VoIP services is resulting in significantly stronger competition in the local exchange services market. Furthermore, the Commission notes that a large proportion of the competitive share of the local exchange services market is facilities-based. The Commission considers, therefore, that local exchange competition in the residential market is more deeply rooted than it had appeared to be based on the record of the proceeding that led to Decision 2006-15. Given these changes in market conditions, the Commission considers that it would be appropriate to reassess whether or not the market share forbearance criterion threshold of 25 percent with respect to residential services set out in Decision 2006-15 continues to strike the appropriate balance between the competing interests identified in that Decision.

83. While the evidence in this proceeding has focused substantially on the residential local services market, the Commission notes that competition in the business services market has also continued to grow and might manifest similar characteristics. The Commission considers that it would therefore also be appropriate to reconsider the 25 percent market share forbearance criterion with respect to business services.

84. In Decision 2006-15, the Commission stated that it was prepared to consider applications from an ILEC requesting the removal of the local winback rule[9] in a relevant market when the applicant ILEC could, among other things, demonstrate that it had lost 20 percent of its market share in that relevant market. In light of its determination to reassess the 25 percent market share forbearance criterion, the Commission considers that it would also be appropriate to reassess the 20 percent market share loss threshold applicable to the above transitional measure related to the local winback rule established in Decision 2006-15.

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[8] The Commission notes that the information in this table was provided in confidence as part of this proceeding. Following a show cause process, the Commission has determined that it is appropriate to release these figures, which represent data aggregated on a national basis. The Commission's determinations on this show cause process are contained in Part C of this Decision.

[9] The Commission restated the local winback rule in paragraph 486 of Decision 2006-15.

85. Accordingly, coincident with this Decision, the Commission is issuing *Proceeding to reassess certain aspects of the local forbearance framework established in Decision 2006-15*, Telecom Public Notice CRTC 2006-12 to reassess these aspects of Decision 2006-15.

Part B: Reconsideration of VoIP regulatory framework

86. In Part IV of Decision 2005-28, the Commission reviewed and stated its determinations regarding a number of issues related to the regulation of local VoIP services. In this proceeding, a number of these issues were raised by different parties for reconsideration. Positions of parties regarding LNP, reseller access to NANP numbers, directory listings, and equal access are grouped together to better reflect the parties' comments; however, the Commission reconsiders these issues separately. Subsequently, the Commission reconsiders the issues of contribution and a VoIP access condition, and considers a proposal for a new technical framework.

LNP, reseller access to NANP numbers, directory listings, and equal access

Background

87. In Decision 2005-28, the Commission made the following determinations:

- that the Decision 97-8 requirement that all local exchange carriers (LECs) implement LNP would also apply to LECs providing local VoIP services;
- that local VoIP resellers, like resellers of circuit-switched local services, were able to obtain numbers and LNP from any number of LECs in the marketplace and were not unduly constrained by the lack of direct access to either; and given the Commission's determination that local VoIP services should be regulated as local exchange services, the existing rules with respect to access to numbers and LNP should apply equally to local VoIP service resellers;
- that the existing directory listings requirements for ILECs, CLECs, and resellers would also apply when they provided local VoIP services, and that directory listings should appear in the local directory where calls to and/or from that number were local calls, regardless of the geographic location of the customer's service address; and
- that the existing equal access obligation would apply to all LECs providing VoIP services.

Positions of parties

88. The Companies requested that the Commission remove the requirements associated with equal access for VoIP services, LNP for secondary numbers, and directory listings that had been imposed on local VoIP services provided by LECs in Decision 2005-28.

89. The Companies submitted that virtually all VoIP providers offered bundles that included long distance, and that by subscribing to a bundle the customer chose their long distance provider – effectively removing the incentive for customers to use equal access. They also noted that

Bell Canada had submitted in the proceeding leading to Decision 2006-11 that providing equal access for access-independent VoIP service would require Bell Canada to make substantial and costly changes to the network architecture used to provide the service.

90. The Companies were of the view that, since there was no incentive for customers of access-independent VoIP services to make use of equal access, there was no market requirement for that functionality. They suggested that if demand for equal access arose from customers, market forces would ensure it became available. The Companies noted that an application from the Canadian Cable Telecommunications Association (CCTA)[10] was currently before the Commission, requesting that the CCTA's smaller members be permitted to offer VoIP services without having to support equal access.

91. The Companies submitted that the availability of LNP for local VoIP service secondary numbers should be driven by market forces. They also submitted that LNP of secondary numbers added costs and complexity to the design of a VoIP service and, further, that the Commission's requirement for secondary number LNP would reduce the availability of secondary numbers.

92. The Companies were of the view that the choice of directory in which a number would be listed should be driven by market forces, not by regulation. They submitted that some customers might prefer to have their primary number listed in the directory associated with their physical location, even though this number might be associated with another location. The Companies noted that a directory listing was included with wireline service, while the default listing for wireless service was an unlisted number. They were of the view that VoIP customers should be able to obtain a listing in the directory associated with their location instead of the location associated with their telephone number, as they were able to in the case of wireless services.

93. The Companies submitted that a customer with several telephone numbers could be listed in many directories, and that establishing listings in several directories was unnecessarily costly for the service provider and the local ILEC.

94. Shift submitted that local VoIP service providers registered as resellers should be granted direct access to NANP numbers and should be subject to LNP regulations. Shift also submitted that lack of direct access to NANP numbers and the LNP database seriously eroded resellers' ability to market their products by reinforcing consumer perception that the ILECs ultimately controlled telephony resources.

Reply comments

95. Cybersurf and MTS Allstream submitted that the Commission should reject the Companies' request to remove the requirements associated with equal access for VoIP services, LNP for secondary numbers, and directory listings of local VoIP services.

96. Cybersurf submitted that equal access, LNP, and directory listings of VoIP numbers constituted important access requirements, and that the removal of these requirements would be a major setback for competition. The company also submitted that there were markets in which it

[10] The Commission notes that the CCTA ceased to operate in February 2006. Sponsorship of this application was transferred to the Canadian Cable Systems Alliance.

could not provide its VoIP service at all, or the nature of the service was limited because of the unavailability of local numbers, LNP, or access to ALI (Automatic Location Identification) databases for the purpose of providing enhanced 9-1-1 service. Cybersurf submitted, further, that it could only obtain these functions from CLECs in those geographic areas in which CLECs operated, since CLECs were much more willing to enter into arrangements to provide these functions and features using their arrangements with ILECs.

97. MTS Allstream was of the view that the implementation of equal access and LNP for a local VoIP service was no more complex than for circuit-switched local services and, if anything, the associated costs might be considerably less. It submitted that the cost of establishing directory listings was minimal. MTS Allstream noted that Decision 2005-28 indicated that the Decision 97-8 obligations should apply equally to LECs providing local VoIP services and that to do otherwise would result in the creation of artificial distinctions between equivalent local services based purely on technological considerations.

98. Yak submitted that the Companies' request to remove the equal access requirement should be denied, and that the Companies had not offered any new evidence or arguments in favour of removing it. Yak also submitted that the Commission should affirm the directive in Decision 2006-11 that Bell Canada must implement equal access capabilities for its BDV Lite service within one year.

99. Yak submitted, further, that in addition to enabling a local telephone service customer to select a preferred interexchange carrier long distance provider, equal access provided dial-around service, which enabled any local telephone service customer to dial a number to access the network of a long distance service provider other than the customer's preferred interexchange carrier. Yak argued that these features were absolutely essential in order for it to provide long distance services. The company also argued that market forces and competitors' negotiating power had never been sufficient in Canada to compel incumbent telephone companies to offer equal access to competitors.

100. Primus submitted that equal access and LNP were key features of the local competitive market, and that the Companies' proposal to remove the requirement for equal access and their proposed limits on LNP would increase the ILECs' ability to stifle competition.

101. Vonage submitted that the Companies had not offered any evidence in support of their request to eliminate the availability of LNP for secondary numbers. It also submitted that from the outset of local competition, the inability to port a number had been recognized as a fundamental barrier to entry. Vonage requested that the Companies' proposal with respect to removing the requirement for LNP and directory listings be rejected.

Commission's analysis and determinations

LNP

102. Subsequent to its ruling with respect to LNP for VoIP services in Decision 2005-28, the Commission examined this issue in the context of Bell Canada's access-independent BDV Lite service in the proceeding leading to *Bell Digital Voice Lite service,* Telecom Order CRTC 2005-397, 2 December 2005.

103. The Commission considers that the Companies' comments in the current proceeding have not provided any new evidence on this issue. The Commission notes that, with respect to providing LNP for secondary numbers for access-independent VoIP services, the Companies have not provided any quantitative information regarding customer demand or any specific additional evidence regarding difficulties and costs. The Commission further notes that no other LEC in this proceeding stated that the provision of LNP would be problematic.

104. The Commission considers that eliminating the requirement for LECs to provide LNP for LEC VoIP services would treat some providers of local exchange services in a preferential way based solely on the underlying technology that is used to provide that service. The Commission remains of the view, expressed in Decisions 97-8 and 2005-28, that it is necessary to impose equivalent LNP obligations on all LECs, regardless of the technology used.

105. Accordingly, the Commission **denies** the Companies' request for removal of the requirements for LNP for secondary numbers associated with local VoIP services.

Reseller access to NANP numbers

106. With respect to Shift's request that resellers be granted direct access to NANP numbers and be subject to LNP requirements, the Commission considers that Shift has not demonstrated that circumstances have changed materially since the issuance of Decision 2005-28. The Commission considers that its determinations in Decision 2005-28 remain appropriate and, therefore, the current rules regarding access to NANP numbers established in Decision 97-8 should continue to apply.

107. Accordingly, the Commission **denies** Shift's request that VoIP service providers registered as resellers be granted direct access to NANP numbers and be subject to LNP requirements.

Directory listings

108. Under the current rules for directory listings, a telephone company lists telephone numbers in the directory associated with that number's exchange, and customers can choose to not have their numbers listed.

109. The Commission considers that the current rules for directory listings remain appropriate for VoIP services, since the purpose of a VoIP secondary number is often for the customer to have a local presence in another market. The Commission further considers that customers often will have their VoIP secondary numbers listed in the directory associated with that number's exchange, customers can choose to not have their secondary number listed, and service providers may offer customers the choice of having their secondary numbers listed elsewhere, where there is sufficient demand.

110. Accordingly, the Commission **denies** the Companies' request to remove the requirements associated with directory listings imposed on local VoIP services provided by LECs.

Equal access

111. Subsequent to Decision 2005-28, the Commission examined the issue of equal access for VoIP services in the proceeding leading to Decision 2006-11. In Decision 2006-11, the Commission reiterated its concern regarding the possibility of a LEC conferring undue or unreasonable preference with respect to access to its networks. It considered that consumers should continue to have options by being able to select interexchange carriers when subscribing to a VoIP service from a LEC. As a result, the Commission considered that Bell Canada should implement equal access capabilities for BDV Lite service within one year.

112. The Commission considers that the Companies have not provided any specific additional evidence regarding the difficulties and costs associated with the provision of equal access for access-independent VoIP services.

113. The Commission notes that no other LEC in this proceeding stated that the provision of equal access would be problematic. The Commission further notes that MTS Allstream submitted that provision of equal access was no more difficult for local VoIP service than it was for circuit-switched local services.

114. The Commission considers that eliminating the equal access requirement for LECs in relation to the provision of VoIP services would result in artificial distinctions based on technology. The Commission remains of the view, expressed in Decisions 97-8 and 2005-28, that it is necessary to impose equivalent equal access obligations on all LECs, regardless of the technology used.

115. Accordingly, the Commission **denies** the Companies' request to remove the requirement that LECs providing local VoIP services must provide equal access.

Contribution issues raised by SaskTel

Background

116. In Decision 2005-28, the Commission determined that residential local VoIP service providers were eligible to receive a subsidy from the National Contribution Fund (NCF) if they provided both the underlying access and local service components, and met all the other criteria established by the Commission in order to be eligible for a subsidy. The Commission also determined that residential local VoIP service providers would receive the same subsidy amount per residential network access service (NAS) that was being paid to LECs providing residential local service in high-cost serving areas (HCSAs) using circuit-switched technology.

117. In a letter dated 13 October 2005, SaskTel requested clarification regarding its proposal that the physical location of the VoIP access, not the location associated with the telephone number, be used to establish the amount of the subsidy entitlement. In a letter dated 1 May 2006, Commission staff provided its view that both the telephone number and the physical location of the subscriber's network access should be used to make this determination, and that both the telephone number and the physical access must be associated with the same ILEC wire centre in order for a residential local VoIP service to be eligible for a subsidy.

Positions of parties

118. SaskTel submitted that the VoIP contribution regime should require a VoIP CLEC to provide residential local VoIP services that met the Basic Service Objective in the entire ILEC exchange or wire centre coverage area in order to be eligible for a subsidy from the NCF. SaskTel submitted that if a local VoIP service provider only offered service in the urban areas of an HCSA exchange, the current subsidy per residential NAS amount would overcompensate the service provider, since the costs to serve the urban areas of an HCSA exchange were significantly less than the average cost to serve the entire exchange.

119. SaskTel also submitted that the Commission should reject the Commission staff opinion provided in the 1 May 2006 letter and should rule that the amount of subsidy to be received by the VoIP service provider be determined based upon the location where an access was situated, irrespective of the location normally associated with the telephone number.

120. In SaskTel's view, one feature that made many VoIP services attractive to customers was the ability to eliminate the traditional association of telephone number and physical location. SaskTel submitted that endorsement of the Commission staff opinion could lead VoIP service providers to require residential customers in HCSAs to obtain a primary telephone number associated with the ILEC wire centre in which they were physically located, thus denying this subset of residential customers one of the many innovative service features that VoIP technology would normally make available to them. SaskTel suggested that such an outcome would be a direct contradiction of the objectives set out in paragraphs 7(f) and 7(g) of the Act.

Reply comments

121. With respect to SaskTel's first request, MTS Allstream noted that the current subsidy mechanism had been established in Decision 97-8, not Decision 2005-28, and submitted that SaskTel's request was therefore outside the scope of the present proceeding. MTS Allstream also submitted that the current subsidy mechanism had never been intended to be recalibrated on a competitor-by-competitor basis, and that the subsidy mechanism as it currently stood was technologically neutral.

122. With respect to SaskTel's second request, MTS Allstream submitted that the subsidy eligibility criteria for local VoIP services provided in the staff opinion were equivalent to those established for circuit-switched local services, and that, as a consequence, the subsidy was provided on a technology-neutral basis. MTS Allstream noted that under SaskTel's proposal, a local VoIP service provider that provided a local VoIP service and the underlying network access to a residential customer in an HCSA could be eligible several times over for HCSA subsidies – for each primary number and for each secondary number provided within the ILEC HCSA exchange where the access was physically located, and for each "virtual number" located in a foreign exchange that was provided to the same residential customer.

123. Access Communications submitted that SaskTel's proposals would hinder the development of competition in HCSAs in Saskatchewan.

Commission's analysis and determinations

124. The Commission notes that in Decision 97-8 it did not impose either a requirement for CLECs to serve every NAS within a wire centre, or a requirement for them to serve every NAS in the entire ILEC exchange, in order to be eligible to receive a subsidy. The Commission further notes that the issue raised by SaskTel regarding the costs to serve the urban areas of an HCSA exchange relative to the average cost to serve the entire exchange for local VoIP service providers is no different than for non-VoIP CLECs. The Commission considers that SaskTel's request, if approved, would result in a subsidy mechanism that would not be technologically neutral. The Commission notes that modification of the subsidy mechanism for non-VoIP service providers is beyond the scope of this proceeding.

125. Accordingly, the Commission **denies** SaskTel's request that the contribution regime require a VoIP CLEC to provide service in the entire ILEC exchange or wire centre coverage area in order to be entitled to receive a subsidy.

126. With respect to SaskTel's second request, the Commission notes that customers of circuit-switched local voice services receive access to both the network and the local service – a component of which is the local telephone number – and that the determination of the HCSA band is based on both the physical location of the access and the location associated with the telephone number. The Commission further notes that the amount of subsidy per residential NAS varies by HCSA band.

127. The Commission considers that the determination of the HCSA band associated with a given residential local VoIP service should be based upon both the subscriber's telephone number and the physical location of the subscriber's network access component. In addition, given that there are instances in which wire centres in HCSAs may form part of a local calling area that includes wire centres that are not in an HCSA, both the telephone number and the physical access must be associated with the same ILEC wire centre in order for a residential local VoIP service to be eligible to receive a subsidy.

128. Accordingly, the Commission **denies** SaskTel's request that the physical location of the VoIP access, not the location associated with the telephone number, be used to establish the amount of the subsidy entitlement. The Commission determines that both the telephone number and the physical access must be associated with the same ILEC wire centre in order for a residential local VoIP service to be eligible for a subsidy.

VoIP access condition

Positions of parties

129. Vonage and Cybersurf submitted that the Commission should re-examine the need for an access condition that would prohibit a Canadian carrier from restricting its broadband customers from dealing with an alternative service provider of the customer's choice. Vonage cited the Part VII application filed by Cybersurf, dated 4 November 2005 (Cybersurf's Part VII application). Vonage noted that the TPR report called for this type of condition, in the absence of a provision preventing unjust discrimination pursuant to subsection 27(2) of the Act.

130. TCC submitted that the issue of access conditions in favour of access-independent local VoIP service providers had been raised, but that no party had alleged any problems in Canada. TCC further submitted that creating an access condition for access-independent VoIP providers with no evidence to justify its adoption would be contrary to the provisions of paragraph 7(f) of the Act.

131. The Companies submitted that until the Act was amended, subsection 27(2) of the Act remained the appropriate mechanism for resolving access disputes.

Commission's analysis and determinations

132. In Decision 2005-28, the Commission considered that it could rely on subsection 27(2) of the Act, where appropriate, to prohibit a Canadian carrier from restricting its broadband customers from dealing with an alternative service provider of the customer's choice. The Commission also considered that any such issues could be addressed on a case-by-case basis using expedited procedures and denied parties' requests for the imposition of an access condition.

133. The Commission notes that the only specific complaint related to access conditions identified in the current proceeding is Cybersurf's Part VII application. The Commission considers that under the Act, the current mechanism remains appropriate for resolving access disputes.

134. Accordingly, the Commission **denies** the requests of Vonage and Cybersurf to re-examine the need for an access condition at this time.

QCISP-proposed technical framework

135. QCISP proposed a framework, involving 11 technical components, to provide greater flexibility for the provision of local services over retail Internet services or wide area networking services.

136. In Decision 2005-28 the Commission ruled that the CRTC Interconnection Steering Committee (CISC) was the appropriate venue to resolve technical issues pertaining to the provision of VoIP services. Subsequent to that Decision, CISC working groups analyzed various VoIP-related technical issues and have provided reports to the Commission. The Commission notes that QCISP has been an active participant in these working groups.

137. In *IP-to-IP interconnection – Follow-up to Decision 2005-28*, Telecom Decision CRTC 2006-13, 16 March 2006, the Commission approved a CISC consensus report on IP-to-IP interconnection interface guidelines. The report also indicated that CISC planned further consideration of technical documentation on IP-to-IP interconnection guidelines produced by various standards-writing bodies and other organizations, in order to provide additional guidelines for IP-to-IP interconnection.

138. Accordingly, the Commission concludes that the technical issues raised by QCISP in this proceeding should continue to be resolved in CISC working groups.

Part C: Determinations regarding information filed in confidence

Introduction

139. In letters dated 26 July and 10 August 2006, the Commission requested that companies that had provided data in confidence as part of this proceeding show cause as to why the Commission should not publish certain information on a nationally aggregated basis.

140. The Commission requested that the companies comment on the release of the following information on a nationally aggregated basis:

a) actual and forecast of total number of customers, total number of connections, and total revenues for access-dependent and access-independent VoIP services;

b) actual and forecast of total number of customers, total number of connections, and total revenues for business and residential VoIP services;

c) actual and forecast of total number of customers, total number of connections, and total revenues for VoIP services supplied by ILECs, cable companies, and VoIP providers;

d) average monthly churn rates, averaged across non-ILEC service providers based on connections; and

e) percentage of telephone numbers that were ported to a VoIP service, averaged across non-ILEC service providers based on connections.

141. Responses were received from Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and Bell Canada (collectively, Bell Canada/Bell Aliant); SaskTel; TCC; RCI; Shaw; Cogeco; MTS Allstream; FCI Broadband; Primus; and James Bay Cree Communications Society.

Positions of parties

142. MTS Allstream, Primus, SaskTel, FCI Broadband, and James Bay Cree Communications Society did not object to the release of the information listed above on a nationally aggregated basis.

143. Bell Canada/Bell Aliant and TCC objected to the disclosure of certain information with respect to ILECs.

144. RCI submitted that, generally, it provided year-end guidance publicly for the current year in January of that year and it did not provide multiple-year guidance. RCI also submitted that it did not believe it was appropriate to disclose any aggregated numbers for years beyond the year for which companies had provided guidance.

145. In RCI's view, the proposed disclosure of confidential information would permit public insight into the overall pricing intentions of the cable industry, since average prices could be derived from the total revenue and total number of connections data that the Commission had proposed to place on the public record. RCI submitted that, consequently, disclosure would cause it direct and specific harm by providing information of great competitive value to the company's competitors on the public record. Further, RCI submitted that the public interest that would be served by the release of the data would be minimal, if any, and that it did not outweigh the direct harm that might result from the disclosure.

146. Cogeco submitted that it concurred with RCI's view that it would not be appropriate to disclose any aggregated numbers for years beyond the fiscal year for which companies had provided public guidance to the financial community.

147. Shaw submitted that it did not offer, on a regular basis, specific forecasts on anticipated growth in Shaw Digital Phone subscribers or associated revenue. Shaw submitted that, instead, its approach to guidance was generally limited to consolidated, company-wide financial metrics. Shaw further submitted that it was concerned that the Commission's disclosure of VoIP forecasts in the manner proposed could permit parties to derive company-specific information about Shaw – notably its subscriber forecasts, revenue projections, and pricing intentions – beyond what was possible through the company's normal reporting and disclosure procedures.

148. Shaw submitted that public disclosure of even nationally aggregated VoIP forecasts served no public interest purpose and could cause the company specific and direct harm. It therefore opposed the Commission's proposal to publish VoIP forecasts.

149. Shaw contended that ILEC out-of-territory VoIP services should be aggregated into the non-ILEC VoIP service metrics, both to provide a complete picture of VoIP development and to reduce the possibility that individual competitor churn statistics might be derived through the Commission's disclosure.

Commission's analysis and determinations

150. The Commission notes that disclosure of information for which confidentiality has been claimed must be assessed in light of sections 38 and 39 of the Act and section 19 of the *CRTC Telecommunications Rules of Procedure*.

151. The Commission considers that the expectation that specific direct harm might result from disclosure is not, by itself, sufficient to justify maintaining a claim of confidentiality. In certain circumstances, the Commission considers that substantial harm from disclosure may still be outweighed by the public interest in disclosure.

152. The Commission considers that there is significant public interest in the disclosure of information concerning the status of competition in the local exchange services market. The Commission notes that the objectives of the Act as set out in section 7 include the following: "to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective." In the Commission's view, the disclosure of specific information pertaining to VoIP competition would provide

the Commission and stakeholders with an efficient and effective tool to assess the extent to which the Commission's regulatory frameworks and determinations are fulfilling the Canadian telecommunications policy objectives set out in section 7 of the Act. In particular, the Commission notes that disclosure of such information is required for the purposes of its determinations in this proceeding.

153. The Commission considers that the data set out in paragraph 154 below is aggregated to a level that is sufficient to prevent the derivation of specific data points that the parties have argued are sensitive. The Commission also considers that disclosure of data at this level of aggregation would result in little direct harm to the parties that have provided information.

154. In the Commission's view, the public interest in disclosing the information set out below on a nationally aggregated basis outweighs any specific direct harm that may result from such disclosure. In light of the above, the Commission determines that it is appropriate to release the following information that was filed in this proceeding, aggregated on a national basis:

- actual and forecast connections and revenue, aggregated to the level of non-ILEC VoIP service providers;
- average monthly churn rates, averaged across non-ILEC service providers based on connections; and
- percentage of telephone numbers that were ported to a VoIP service, averaged across non-ILEC service providers based on connections.

Overall conclusion

155. In light of all the foregoing, the Commission reaffirms the regulatory regime for local VoIP services established in Decision 2005-28.

156. The dissenting opinions of Commissioners Cram, Langford, and Noël are attached.

Secretary General

Dissenting opinion of Commissioner Barbara Cram

VoIP again

I agree with the majority's reaffirmation of the regulatory regime for local VoIP services established in Decision 2005-28, however I disagree with their decision to reassess certain aspects of the local forbearance framework.

We were unanimous – weren't we?

The initial unanimous forbearance Decision 2006-15 was issued on April 6, 2006. This was a long awaited decision with the Commission setting out the ground rules for deregulating certain markets. Finally, we had provided certainty to the telephony market and it was left to the market to compete without the distraction of regulatory uncertainty, wrangling and gaming. The regulatory bargain had been made and as with other bargains, such as Price Cap, compromises were made. Now, everyone including the Commission, had to adhere to the bargain.

Within 2 months and one week the Commission chose to consider changing the bargain by commencing a process to decide if in fact wireless phones were now a substitute for wireline phones and therefore part of the local market subject to forbearance rules. This was done at the Commission's initiative. While some may argue that this proceeding injected uncertainty into the forbearance regulatory regime, others would say the impact may be minimal.

Within less than 5 months from the initial unanimous decision my colleagues have now chosen to reassess the core of the original decision, the market share loss threshold. Again, this is done at the Commission's initiative. The Commission has broken the regulatory bargain and will now leave the telephony market in uncertainty.

Nothing is new

Further I am skeptical as to the basis upon which the majority has chosen to undertake this review. I would have liked to believe my colleagues were as aware as I that the competition would become strong and "deeply rooted" based on the record of the initial proceeding. The competitors were after all the largest cable companies in Canada consisting of Rogers, Shaw, Videotron and Cogeco, cable companies with considerable infrastructure who were "there to stay" as Mr. Shaw said in that proceeding. The market strategy was then to "own the customer" by selling video/voice/internet and, now wireless. The sole recourse for these companies was to compete vigorously or get out of business. And although these are Canada's largest cable companies, their revenues are dwarfed by those of the incumbent telephone companies. My conclusion as a result of the initial hearing and the relative size of the competitors was that the competition would indeed be strong and in colloquial terms I believed there would be "a fight to the death". Apparently, the majority did not come to the same conclusion or anticipation. I question their basis for this. Regrettably, instead of being pleasantly surprised, the majority has chosen to subject the market to suspense and uncertainty again.

A duopoly

As with the deferral account decision (Decision 2006-9), I believe this decision of the majority will impact the newer innovative competitors more than established competitors. Once again their business plans will have to be reassessed taking into account the uncertainty of this review. Whereas there may have been a better than marginal chance of succeeding with satellite/wireless or any other new technologies under the 5 month old forbearance rules, these parties will now halt any plans pending yet another lengthy proceeding. It seems the majority is wedded to the present technologies and has accepted the fact that competition in Canadian telephony will now be a duopoly.

Only in the footprint of the largest cable companies

For those cable companies that are not the largest four this decision may marginalize their financial case for upgrading their infrastructure, which many have not yet done, leaving them with the only recourse of getting out of the business. Thus not only would Canadian local telephony market be a duopoly but only in the footprint of the largest four cable companies and monopoly elsewhere. This footprint excludes large portions of British Columbia north of Vancouver, east and west of the Calgary-Edmonton corridor and north of Edmonton, all of Saskatchewan except Saskatoon and a few smaller cities, everywhere in Manitoba except Winnipeg, north of the triangle and Ottawa in Ontario, north and west of the Montreal-Quebec City corridor, and large swaths of Newfoundland and New Brunswick.

And only in the residential market

Contrary to the majority decision, I can find virtually no "similar characteristics" of the business market to the residential local services market. Lenders will not lend money for duplicative networks. There is and will be no ubiquitous facilities based competitor. The majority of this market depends on wholesale access with many barriers such as access to structures and rights of way. Thus the market by its very nature is more tenuous and already subject to large extraneous uncertainties such as the recommendations in the Telecom Policy Review, including one that there be a reassessment of our findings on essential facilities. The uncertainty created by the majority's decision may lead to more exiting the business, putting present plans on hold or, as has happened before, declaring bankruptcy.

I regret that I see nothing to gain from this review and no rationale for doing a review. Worse, I believe the uncertainty caused by the launching of such a review could freeze, perhaps forever, the potential for competition in large parts of Canada.

Dissenting opinion of Commissioner Stuart Langford

I agree with the majority that the regulatory regime for local voice over internet protocol (VoIP) services decision is correct and should be reaffirmed. I disagree absolutely, however, with the majority's determination, set out in paragraphs 79 to 85 of its decision and the Public Notice emanating from them, to reconsider the suitability of one of the forbearance criterion established just four months ago in unanimous Decision 2006-15. In my view, today's majority ruling is both procedurally odd and, on the basis of the records of this and the Forbearance proceedings, difficult to justify.

Procedures:

Directed to do so by government order, the Commission initiated a review of its VoIP decision on 10 May 2006. This reconsideration process began just a month and four days after another process, to establish a framework for the forbearance from regulating local exchange services, concluded in a unanimous decision (Decision 2006-15). While both the VoIP and Forbearance processes dealt with competitive issues and the overarching question of when market forces could safely be relied upon to replace regulatory oversight, they were separate and distinct proceedings. Each had its own extensive record and each gave rise to a stand-alone Commission ruling.

This separation was entirely appropriate. After all, the VoIP proceeding was narrowly focused on the challenges of characterizing a new development in communications technology and deciding if or how to regulate some or all of those providing it. The Forbearance proceeding, on the other hand, was a far-reaching exercise intended to test conflicting competitive theories and to establish base points and a structure for future forbearance applications. VoIP dealt with a specific application, while Forbearance set the stage for applications to come.

Today's majority decision threatens to confuse the two. In reaction to a few statistics forming part of the record in one proceeding, the VoIP reconsideration, the majority may have cast doubt on the appropriateness of Commission conclusions in another, the Forbearance criteria decision. In my opinion, this may result in confusion, regulatory uncertainty and demands for a piecemeal review of most if not all of the other criteria set down in Decision 2006-15, a unanimous decision that is only four months old.

Money, churn and speed:

Why has the majority done this? Their explanation is contained in paragraphs 79 to 85 of their decision. In my view, it is far from persuasive. Competition, the majority says, "has developed rapidly in the last year and a half." Customers are subscribing to competitors' products. Competitor revenues are up. Churn rate is low; that is, people who try VoIP products offered by cable companies and others appear to like them. To this I say: So what?

No doubt we now have newer statistics on market share. But, arguably, all this more recent information does is reinforce both the forecasts provided to the Commission by former monopoly service providers and the informed opinions of new entrants on what competitors can expect by way of market share in their first years of operation.

A 2004 Merrill Lynch study[1] relied upon by Bell and other ILECs in the proceeding leading to the original VoIP decision,[2] predicted that the competitors would have a 3.5% market share (448,000 subscribers) by year end 2005. In their Petition[3] to the Governor in Council to vary Decision 2005-28, the former monopolies predicted cable telephony market share to be around 2 or 3% by the end of 2005. They were right on both counts. Lee Bragg, Co-CEO of EastLink, to date Canada's most consistently successful new entrant in the telephony market, may also have been correct when he said that the first 5 or 6% of an ILEC's customers are relatively easy to lure away. After that, the hard work begins.[4]

Statistics:

Actual figures filed by the former monopolies during the VoIP reconsideration proceeding show that competitive VoIP providers had signed up 419,000 subscribers by year end 2005. By the same time the cable companies' share of the national telephony market was 2.4% (308,458 subscribers). The statistics for 2005 and part of 2006 that have prompted the majority to partially revisit Forbearance are hard to characterize as a surprise. They seem to do no more than confirm information available when the Forbearance decision was unanimously taken. If the projections for the years 2006 and 2007 turn out to be correct, perhaps all that will signify is that EastLink's experiences are typical of what new entrants with an acceptable product can expect.

What is a surprise is the majority's reaction to developments which, based on the record of the Forbearance proceeding, it had every reason to anticipate. Suddenly, in its own words, the majority appears persuaded that, based on subscriber statistics, "local exchange competition in the residential market is more deeply rooted than it appeared to be based on the record of the proceeding that led to Decision 2006-15." Again, I say: So what? Why are market share statistics produced in one proceeding in and by themselves suddenly so relevant to the task of testing the suitability of forbearance criteria established in another?

In paragraph 245 of Decision 2006-15, the Commission unanimously rejected the notion that, "market share should be used to measure ILEC market power." In rejecting the former monopolies' contention that, "market share loss or competitor market share gain, could by itself constitute a bright-line test justifying forbearance," the unanimous Forbearance decision concluded: "A market share number, by itself, however, does not provide sufficient guidance on the future sustainability of competition."

More statistics:

The majority also makes much of what it sees as the competitive providers' high revenue levels and low subscriber "churn" rates. As revenue levels are nothing more than an arithmetical exercise, a product of subscriber numbers multiplied by subscription rates, the second line in the majority's paragraph 80 table is no more than a retelling of the first. At any rate, even if it did bring new information to the table, which in my view it does not, it is irrelevant to the exercise of setting forbearance criteria. The Commission unanimously said as much in paragraph 252 of

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1 Merrill Lynch, *Everything Over IP, VoIP and Beyond.* 12 March 2004.

2 The Companies' comments in proceeding leading to Decision 2005-28, at paragraph 151, footnote 60.

3 Bell et al. Petition to the Governor in Council, 28 July 2005.

4 Forbearance proceeding transcript, 29 September 2005 at page 1346.

Decision 2006-15: "…the Commission considers that neither households served nor gross revenues are appropriate methods for calculating a market share number for the purposes of the local forbearance framework."

As for churn rate, well of course it's low. Other Commission rules, rules established to partially offset the historically-based competitive advantages enjoyed by the former monopolies, make it easier for new entrants to retain the customers they attract in the early days of competition. And when it comes to cable company telephony, make no mistake; these are early days. The following are the launch dates for cable-offered VoIP products in Canada: Cogeco: 18 June 2005, Rogers: 1 July 2005, Shaw: 14 February 2005 and Videotron: 24 January 2005. The most senior of these new entrants to the telephony marketplace has been in the field for just over a year and a half. On the other hand, Bell Canada, to quote its website, has been marketing its products for a lot longer: "For 125 years Bell Canada has served Canadians' communication needs."

Churn in context:

To level the playing field between new and established competitors, specific rules, among other things, prevent the former monopolies from selling below cost or from selectively offering low prices to some customers in a rate band but not to all. As well, they limit the former monopolies' efforts to win back lost customers. For three months after a subscriber switches his or her business to a competitor, a former monopoly is forbidden from contacting that subscriber in an attempt to lure it back. The regulatory rationale for these asymmetric competitive rules is that they are necessary at this time to permit sustainable competition to take hold in a market that since time out of mind has been the exclusive domain of the former monopolies. Small wonder, then, in light of these restrictions, that churn rates are low. Probably, all this statistic means is that, love them or hate them, Commission rules intended to achieve not merely competition but sustainable competition are working as planned.

A questionable conclusion:

On the strength of market share numbers evolving as predicted and low churn rate statistics, the majority comes to a conclusion. It finds that, "growth in residential local VoIP services is resulting in significantly stronger competition in the local exchange services market," competition that is "more deeply rooted than it appeared to be based on the record of the proceeding that led to Decision 2006-15." On the strength of this conclusion the majority has, today, initiated a process aimed at testing one element of the Forbearance decision, the Commission's unanimous ruling that one pre-condition to an ILEC forbearance application is a market share loss of 25%.

A non-issue:

If I read the majority decision correctly, what really seems to have impressed its authors is the speed with which VoIP providers have captured market share. Competition, the majority notes, "has developed rapidly." What puzzles me about this is the fact that nowhere in the extensive Forbearance decision is the speed of market share loss discussed. It was simply a non-issue. When it came to market loss, what preoccupied all parties and the Commission in the process resulting in Decision 2006-15 was the challenge of setting a market loss percentage, not how quickly or slowly that percentage materialized. Nowhere in the unanimous decision's 535 paragraphs is speed even mentioned. The question wrestled with was how high, not how fast.

In paragraph 247 of the Forbearance decision the Commission narrates its struggle to come up with a market share loss criterion that will be, "at a sufficiently high level that the Commission can have confidence that a critical mass of customers have decided to receive their local exchange services from competitors…". In paragraph 248, the decision is made: "The Commission considers that below 25 percent market share loss, competition in a relevant market would be unlikely to be sustainable in a forborne environment…". The relevance of how long it takes to reach 25 percent is not mentioned.

Demand and scope:

No party to the VoIP reconsideration proceeding called for a partial review of the Forbearance proceeding. Nothing on the record of this proceeding prompted any of the parties to call for a process like or similar to that initiated today by the majority's Public Notice. Yet, the majority on its own initiative has done so. One wonders why and, more particularly, why of all the criteria established in Decision 2006-15, market share and churn statistics produced on the record of one proceeding caused the majority to focus on such a narrow aspect of another proceeding?

If the speed of VoIP market penetration truly is pertinent to the merits of a forbearance application, why should it be relevant only to the 25 percent market loss criterion? Why not re-evaluate some of the other criteria in light of this development? Arguably, speed of market penetration is pertinent to the finding of the existence or non-existence of "rivalrous behaviour", for example, or to choosing an appropriate method of testing an ILEC's competitor quality of service standards.

Alternative roads to relief:

Finally, it is pertinent to ask why the majority prefers to see the Commission take a proactive role in reviewing a unanimous decision made just four months ago? It is not as though parties who disagree with elements of Decision 2006-15 are without resources or remedy avenues and, therefore, reliant for relief upon Commission-initiated processes. The former monopolies in public statements have been openly critical of almost every aspect of the Forbearance decision. All of these companies have regulatory divisions and the financial wherewithal to retain experienced outside counsel and supportive expert witnesses should they think it necessary.

These companies are fully cognizant of the process options open to them, options such as review and vary applications and/or appeals to the courts or the Governor in Council, some of which have already been exercised. There is no need for the Commission to start the ball rolling, as it were, on the former monopolies' behalf. The proceeding initiated by the public notice issued concurrent with today's majority decision may result in an improved forbearance application process. It may. Just as easily, however, it may result in regulatory uncertainty and a plethora of applications which in turn may cast a cloud of doubt over the Forbearance decision in its entirety and Commission procedures generally. The risk that improvement rather than confusion will ensue is one I would not have taken on the basis of the information that the majority finds persuasive.

Dissenting opinion of Commissioner Andrée Noël

On 12 May 2005, the CRTC issued Decision 2005-28, the most notable effect of which was to regulate the provision of voice over Internet Protocol (VoIP) services by incumbent local exchange carriers (ILECs) while permitting competitive carriers, including large cable carriers, to provide these same services without rate regulation.

I did not agree with the Commission's position at that time, nor did my colleague Andrée Wylie, the former Vice-Chair of Broadcasting. I still do not agree with that position.

Even though the Commission concludes that VoIP service is equivalent to primary exchange service, a view which I do not share, in my opinion the Commission should have forborne from regulating VoIP services for all the players pursuant to section 34 of the *Telecommunications Act* (the Act) because VoIP is a class of services in which none of the telecommunications carriers, whether ILECs or competitive local exchange carriers (CLECs), had a dominant position in May 2005.

I would like to quote my colleague, Andrée Wylie, who quite correctly wrote the following in her dissenting opinion attached to Decision 2005-28:

> The legislative criteria for forbearance by the Commission from the exercise of some of its powers or the performance of some of its duties under the *Telecommunications Act* (the Act) in relation to the provision of a telecommunications service are set out expressly and solely in section 34. They are:
>
> (a) consistency with the telecommunications policy objectives set out in section 7 (subsection 34(1));
>
> (b) the development of competition in the provision of voice over Internet protocol (VoIP) service sufficient to protect the interests of users of VoIP service (subsection 34(2)); and
>
> (c) compliance with the requirement that the establishment or continuance of a competitive market for the provision of VoIP service is not likely to be impaired unduly (subsection 34(3)).
>
> I cannot agree with the majority that their application to the provision of VoIP service requires that any VoIP service provided by incumbent local exchange carriers (ILECs) in the territory where they provide traditional local wireline telephone service be subject, whether offered on a stand-alone basis or in a bundle of services, to the prior approval of tariffs, while VoIP service provided by competitors is not.

She added:

> I would have exercised the discretion inherent in the language of section 34, on balance, in favour of forbearance from the requirement of prior approval of tariffs for any VoIP service for any provider. **I would have opted for market**

> **forces, as encouraged by paragraph 7(f) of the Act, rather than for static tariff constraints imposed on some providers of VoIP service and not on others, to create a dynamic climate in which, consistent with many of the other policy objectives of section 7, reliable and affordable VoIP and related services of high quality are accessible to as many Canadians as possible in all regions of Canada (paragraph 7(b))**, the efficiency and competitiveness of Canadian telecommunications are enhanced (paragraph 7(c)), regulation, where required, is efficient and effective (paragraph 7(f)), research and development in Canada in the field of telecommunications are stimulated and innovation in the provision of telecommunications services is encouraged (paragraph 7(g)), and there is a response to the economic and social requirements of the users of telecommunications services (paragraph 7(h)). (emphasis added)

And then wrote:

> The decision of the majority not to forbear from the requirement of prior tariff approval for local VoIP service provided by the ILECs is informed by the fact that **there is, as yet, little competition in Canada in the provision of traditional local wireline circuit-switched telephone service**, often referred to as primary exchange service (PES), despite the regulatory framework for facilities-based competition established by the Commission eight years ago in *Local Competition*, Telecom Decision CRTC 97-8, 1 May 1997, while the Commission maintained pricing constraints on the provision of PES by the ILECs. (emphasis added)

However, this situation has changed dramatically over the past 15 months.

Today, it is the cable companies who actually have a head start over the ILECs in providing VoIP services.

In paragraphs 74 and 75 of this Decision, my colleagues express their concern over the possibility that the Commission will be deluged by requests for dispute resolution to determine whether a given service should or should not be forborne from regulation if a service or class of services is defined on the basis of technological criteria. I believe that the majority has given more weight to the potential administrative burden than to the other factors that should be given consideration.

Rather than placing such importance on the administrative burden, I would, like my colleague Andrée Wylie, opt for greater reliance on market forces as contemplated in paragraph 7(f) of the Act.

My conclusion is that, except for emergency services, privacy protection, access to underlying structures and telephone number portability, the Commission should forbear from regulating VoIP services.

However, I am in full agreement with the majority decision set out in paragraphs 82, 83 and 84 to review certain aspects of the regulatory framework for local competition established in Decision 2006-15.