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Chairman:

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June 22, 2005

SENT BY E-MAIL

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A ON2

Dear Ms. Rhéaume:

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

Attached herewith are the Comments of the Coalition for Competitive Telecommunications pursuant to the procedures in the above-noted Public Notice.

Yours sincerely,

Ian C. Russell
Chairman
Coalition for Competitive Telecommunications

c: Interested Parties

Coalition Advisors

Osler, Hoskin & Harcourt LLP
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CANADIAN RADIO-TELEVISION AND

TELECOMMUNICATIONS COMMISSION

COMMENTS

OF THE

COALITION FOR COMPETITIVE TELECOMMUNICATIONS

Forbearance from Regulation of Local Exchange Services

Telecom Public Notice CRTC 2005-2

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Comments of the Coalition for Competitive Telecommunications

Forbearance from Regulation of Local Exchange Services

Telecom Public Notice CRTC 2005-2

June 22, 2005

I. INTRODUCTION & OVERVIEW

1. These Comments are filed by the Coalition for Competitive Telecommunications (the "Coalition") pursuant to paragraph 43 of *Forbearance from Regulation of Local Exchange Services*, Telecom Public Notice CRTC 2005-2, dated April 28, 2005 ("P.N. 2005-2"), and the procedures set out therein.

2. The Coalition is comprised of leading Canadian business trade and service associations ("member associations") that collectively represent more than 12,000 Canadian companies, including The Association of Canadian Acquirers; The Association of Canadian Travel Agencies; The Canadian Depository for Securities; Canadian Manufacturers & Exporters; Megatrade Communications Services Corp.; The Canadian Newspaper Association; Insurance Bureau of Canada; Société de gestion du réseau informatique des commissions scolaires; The Investment Dealers Association of Canada; and The Investment Funds Institute of Canada.

3. In the following sections, the Coalition provides its Comments on the issues of relevance to business consumers of telecommunications services arising from P.N. 2005-2. The Coalition intends to participate in the public consultation to be held by the Commission on September 26 - 29, 2005 in Gatineau, Quebec.

4. The member associations of the Coalition, as well as the thousands of individual companies represented by one or more of the member associations, are business customers of Canadian telecommunications service providers. As a group, these business customers require a wide array of retail business telecommunications services. Telecommunications services, including local, long-distance, data and other services, are a key input in the day to day operations of these business customers, and virtually all

others. Telecommunications expenditures comprise a significant portion of the operational budgets of the business customers represented by the Coalition's member associations.

5. Business and institutional users of telecommunications services treat such services as part of the broad array of ICT (Information and Communications Technology) inputs necessary to ensure modern and efficient operations. In many cases, it is absolutely essential to deal with suppliers, customers and among divisions or offices within the business or institution via electronic communications. Digital communications have become the norm and means by which most businesses in Canada operate. For the vast majority of ICT services, Canadian business and institutional users select and purchase their services through the normal market process. Equipment and services are reviewed, comparative prices and quality are assessed and a supplier is selected. The terms are negotiated and set out in a contract. In the case of large purchasers and/or large users, the selection process often involves an RFP process resulting in a lengthy, detailed multi-year contract. Even smaller purchases of relatively standardized services (e.g. cellular telephone service for small business) involve essentially the same process on a reduced scale.

6. The process of seeking proposals, assessing alternatives and selecting a supplier is a process which businesses are more than simply accustomed to: this is a critical business process which they apply daily to all of their operations. The skills developed in this regard can play a major role in determining the overall success of the business. Accordingly, if a business user has the opportunity to engage in the process of supplier selection and contract negotiation, that user generally would prefer this process rather than have these outcomes controlled by another party, such as a regulatory authority. In other words, where the opportunity exists, or could exist, to employ the freely-negotiated contract model for input services, including all telecommunications services, businesses and institutional users will generally prefer the contract model. In the language of sections 7(h) and 7(f) of the *Telecommunications Act*, respectively, the "requirements of users of telecommunications services" are best met when the users themselves play a direct and major role in defining the terms and conditions on which services are provided to them, and when market forces are allowed to determine supply and pricing.

7. In order for such an approach to function, it is clear that there must be more than one supplier willing to offer service to the business in question. However, whenever that requirement is met, as noted above, a process of free contract negotiations is the model or process which business prefers and which business requires. In the view of the Coalition, this contract-based approach should be given the maximum opportunity to apply to the market for business telecommunications services. There are significant opportunities, as discussed further below, to apply this approach to the market for local exchange services in Canada.

8. The Coalition has participated in a number of prior CRTC proceedings advocating, in broad terms, greater reliance on market forces. The *Telecommunications Act* expressly calls on the CRTC "to ensure that regulation, where required, is efficient and effective"(emphasis added)[1]. It does so in a provision of Canada's objectives for telecommunications that clearly subordinates the use of regulation to the forces of the marketplace. The Coalition also notes that while Parliament specifically expected the Commission to respond to the interest of users, our legislators were altogether silent regarding protection of the interests of service providers. In the Coalition's view, the omission of any reference to promoting or protecting the needs or interests of service providers is significant and was not an oversight. In every case, users' needs and views should be considered paramount. Having regard to the provisions of section 7 of the *Act*, any protection of service providers, if and when necessary, should be at most a secondary priority and simply a means to achieve the goal of better responding to the needs of users.

9. However, from the perspective of business users, the Commission appears in recent years to have inverted the statutory priorities of the *Act* by proposing measures that respond primarily to the interests of service providers even when those measures would be clearly harmful to the requirements of users. The most prominent recent example was the measures proposed by the Commission in *Review of Price Floor Safeguards for Retail Tariffed Services and Related Issues*, Telecom Public Notice CRTC 2003-8. In that proceeding and others, there appeared to be an implicit but consistent assumption by the Commission that users' interests are best protected by focussing first on the needs of

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[1] Section 7(f) of the *Telecommunications Act*.

service providers. Regrettably, this imbalance or inversion of the relative weighting of the statutory priorities persists. The Commission continues in many decisions and public notices (including the present one at paragraph 12) to give equal if not greater weight to the interests of service providers than to the needs and interests of customers and users.

10. The Coalition encourages the Commission to allow negotiated contract arrangements, as freely determined by users and suppliers, to play a leading role in the provision of all telecommunications services, including local services. Where choice is available to a business customer, the ability of the customer to exercise that choice (or the threat by the customer to do so) constitutes a powerful and effective discipline on suppliers. It also constitutes the remedy which business customers apply to all their other suppliers and is far quicker, more efficient, more certain and more effective than any regulatory system.

11. The Coalition applauds the Commission for implementing forbearance over a number of years in many telecommunications submarkets. From a business customer point of view, the market mechanism is operating well in these submarkets. Customers negotiate with suppliers according to their needs. Service providers are forced to respond to and anticipate the needs of customers as well as the competitive actions of other suppliers.

12. Accordingly, the Coalition encourages the Commission to establish through this proceeding a framework that will allow business customers and their chosen service providers to move from the historic railway model of regulated tariffs to a model in which business local exchange services will be subject to free contract negotiations and the intrinsic protections and safeguards built into the laws of supply and demand. The Coalition notes and endorses the Commission's expressed intent (in paragraph 9) to establish "clear criteria" that will determine when it is appropriate to forebear. In this regard, the Coalition also endorses the Commission's statement (at paragraph 32) that the process for considering forbearance applications should "ease regulatory burden while ensuring that regulation, where required, is efficient and effective". In the Coalition's view, this is a very important consideration. In recent months, the Commission has gone to considerable lengths[2] to reduce regulatory delay and provide greater clarity. With the

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[2] For example, see Telecom Circular CRTC 2004-2, Expedited Procedure for Resolving Competitive Issues; Telecom Decision 2005-25; Telecom Decision 2005-27; Telecom Circular CRTC 2005-6.

pace of change in telecommunications markets and ICT services generally, these steps by the Commission were essential and are to be commended. With regard to the local exchange market, it will be necessary, as the Commission has stated, to establish clear criteria for considering forbearance applications. The Coalition has some specific proposals in this regard which are discussed below.

13. In the following paragraphs, the Coalition will address the questions posed by the Commission in Telecom Public Notice 2005-2. The Coalition will discuss a general framework and certain principles which, in its view, should be applied to introduce forbearance in local exchange markets. The Coalition will not be filing detailed economic, costing, marketing or technical studies on the local exchange markets or on the various service providers. Such data is in the hands of the telecommunications service providers themselves and the Commission. The Coalition expects that, through the course of this proceeding, much of that data will be placed on the record by those parties. Instead, the Coalition will strive to provide the Commission in this proceeding with the evidence that it is uniquely positioned to provide, namely, the views of Canadian business users of telecommunications services on their requirements from this increasingly critical sector, one that is fundamental to the success of their business operations. These perspectives of Canadian business users cannot be put forward authoritatively or credibly by any service provider participating in this proceeding. Nor can the needs and requirements of Canadian business users of telecom services be defined by the Commission itself acting as a proxy for business customers. Only business users of telecommunications services can offer the Commission an enumeration of their own needs and requirements. This evidence is required to be taken into account in arriving at a decision in this proceeding if the Commission is to remain faithful to the statutory objectives of the *Telecommunications Act* and the express expectations of Parliament in section 7 of the *Act*.

14. The Coalition notes that the Commission has framed its approach and its questions in the Public Notice according to the framework established in Review of the Regulatory Framework, Telecom Decision CRTC 94-19. In the Coalition's view, that broad framework, including its Competition Law analysis, was appropriate when developed a decade ago and remains appropriate for this proceeding.

II. THE LOCAL EXCHANGE SERVICES WITHIN THE SCOPE OF THIS PROCEEDING

15. The Commission has indicated that local exchange services used by business and residential customers to access the PSTN are within the scope of this proceeding. Certain services, such as public telephone services, have been excluded.

16. The Coalition has reviewed the lists of services filed by the various incumbent carriers (ILECs) in response to Paragraph 24 of the Public Notice. There is largely agreement on most of the services to be considered in this proceeding. In Telecom Decision 2005-35, the Commission recently finalized the lists of local services within the scope of this proceeding.

III. THE APPROPRIATE RELEVANT MARKETS FOR FORBEARANCE (SERVICES AND GEOGRAPHIC)

17. The Commission has asked the parties to provide views with respect to the appropriate services and geographic components for each relevant market. The Coalition notes, at the outset, that this is likely to be one of the most important issues in this proceeding. If the relevant market is not properly defined, the appropriate criteria to assess market power would be applied on an incorrect or irrelevant basis and thus would be meaningless. Forbearance could be approved too quickly or too slowly. The result would be a loss of the dynamic efficiencies and supplier responsiveness that are the most important benefits of a competitive market. Accordingly, the Coalition agrees with the observation of the Commissioner of Competition, in the letter filed May 20, 2005 in this proceeding, that "services market definition is a key issue in this proceeding on which evidence will be filed."

18. With regard to the definition of the appropriate services market, as noted above, the Coalition submits that there is a near consensus among most parties on the scope of local services to be included in this proceeding. This is not likely to be a difficult issue for the Commission to resolve.

19. Of much greater importance is the matter of the geographic scope of the relevant market. This issue is likely to occupy considerable time and attention in this proceeding. It is essential that the Commission reach a sound, reasoned conclusion, well-founded in

economics and competition law principles. Otherwise, Canadians will not enjoy the benefits of competition in local services as soon as they should.

20. The Public Notice notes (in Paragraph 24) that Aliant Telecom's forbearance application suggests the exchange as the appropriate geographic area. The Commission notes that other possibilities are (but not limited to) operating territory, province or local calling area.

21. In considering this issue, the Coalition begins by noting the terminology and language used by the Commission in the Public Notice as well as by the industry more generally to describe the services in question: local exchange services. These services are, by definition and by description, local in nature. They are offered and provisioned by suppliers and used by customers on a local basis. For example, a local exchange service in Toronto is not, from either a customer or a supplier point of view, a reasonable substitute for a local exchange service in Montreal or Halifax. Even within a single telephone company territory or a single province, the same analysis applies: a local exchange service in Vancouver is not a substitute for a local exchange service in Penticton.

22. Accordingly, in terms of the geographic scope of the relevant market, the operating territory of a telephone company is not relevant. Similarly, the geographic boundaries of a province are meaningless for these purposes.[3] Customers seek and use local exchange service to meet their need to call within a local calling area. Local service providers, both incumbent and new entrant, plan their service and market it generally on a local calling area basis.[4] Finally, a telephone company's local exchange boundary is a geographical demarcation that generally holds less meaning for business or residential customers and

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[3] Note that both such criteria would also be difficult to apply since some ILECs cover more than one province, many cover less than an entire province and, furthermore, most incumbent telephone companies now operate beyond their traditional service territory.

[4] The Coalition notes that new entrants and WSPs are not required to ensure that their local calling areas match precisely those of the incumbent.

does not usually correspond in the same way that the local calling area does to the range of local calls the customer can actually place.[5]

23. Accordingly, of the various possibilities identified by the Public Notice to define the relevant geographic area, the Coalition supports the use of the local calling area. As discussed above, this definition of the relevant market appears to reflect the actual conduct in the market of both suppliers and customers. By comparison, other suggested geographic definitions, such as operating territory or province, would be artificial and unrelated to the observable market behaviour of both service providers and customers.

IV. APPROPRIATE CRITERIA TO BE APPLIED TO DETERMINE WHETHER A RELEVANT MARKET IS SUFFICIENTLY COMPETITIVE FOR FORBEARANCE

24. The determination of when a market "is or will be subject to competition sufficient to protect the interest of users",[6] thus requiring the Commission to forbear, is a question which may be determined by quantitative criteria, qualitative criteria or a combination of both. As discussed above, the Coalition strongly endorses the Commission's expressed intent[7] to establish "clear criteria" consistent with the framework set out in Telecom Decision 94-19. Given the need for certainty, clarity and the Commission's desire for a process that will ease the regulatory burden,[8] the Coalition strongly urges the Commission to adopt criteria for determining this issue which are quantitative and easily determinable as a question of fact. Conversely, the Commission should avoid adopting criteria which require any significant qualitative judgments. Otherwise, the Commission, customers and the industry will be faced with the near certain prospect of lengthy proceedings and arguments over qualitative issues in numerous local exchange markets across Canada. The delays, uncertainty and regulatory costs to all parties, including the Commission, would burden the whole sector needlessly and divert resources away from

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5 The Coalition notes that in some cases, there is a substantial or even complete overlap between an exchange and a local calling area. In those cases, the relevant geographic market would be the same under either definition.

6 Section 34(2) of the *Telecommunications Act*.

7 At paragraph 9 of Telecom Public Notice 2005-2.

8 See paragraphs 32 and 33 of the Public Notice.

more worthwhile goals, such as investment in and marketing of new, advanced telecommunications services for Canadian customers.

25. Therefore, having regard to the objectives of clarity, certainty, efficiency and economy, the Coalition proposes that the Commission consider and adapt certain of its existing forbearance models which have already proven to operate well and which can serve as useful precedents.

26. More specifically, the Coalition proposes an adaptation of the model developed by the Commission for forbearance or deregulation of the basic service rates for Class 1 incumbent cable television licensees.[9] Pursuant to that model, a Class 1 incumbent cable licensee can apply to have its basic rates deregulated providing it can demonstrate that:

(a) the basic service of one or more other licensed distribution undertakings is available to 30% or more of the households in the cable licensee's service area; and,

(b) it has lost 5% or more of its subscribers since the basic service of another licensed BDU first became available in its licensed service area.

27. The second criteria respecting market share loss is required to be supported by an opinion prepared by the incumbent cable licensee's auditor, in accordance with Section 5815 of the *Canadian Institute of Chartered Accountants Handbook*. The procedure established by the Commission for cable deregulation applications does not involve any hearing. However, the Commission may intervene and suspend a licensee's proposal for relief from rate regulation, pending further consideration of the proposal, its receipt of additional information or the completion of a public hearing into the matter. Section 47 also empowers the CRTC to disallow a licensee's proposal following such a suspension, or without any suspension at all. Furthermore, the proposed deregulation takes effect 60 days after the application unless the Commission intervenes.

28. The record before the Commission over many years in regard to cable deregulation applications demonstrates that this model is clear, simple to apply and not dependent on

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[9] See Public Notice CRTC 1997-150 and section 47 of the *Broadcasting Distribution Undertaking Regulations*.

qualitative judgments. As a result, these applications generate very little controversy. If applied to local exchange services, this model would relieve the industry and the Commission itself from what might otherwise be a heavy and time consuming regulatory burden.

29. An alternative model and useful precedent for forbearance is that developed by the Commission for forbearance of high capacity DDS interexchange private line services.[10] The Commission defined the relevant geographic market for these services as the route between a city pair on which more than one provider offers these services using facilities with a capacity of DS-3 or greater. New entrants are required, on a semi-annual basis, to file with the Commission a report identifying routes on which they have established capacity that meets the Commission's criterion. A regulated carrier may also file its own evidence of the existence of at least one other carrier operating transmission facilities over the route in question and offering to provide digital private line services on that route. On receipt of this evidence, the Commission does not conduct any formal hearing or public process. Rather, the "Commission expects to quickly issue an order, without further process, granting forbearance to the Companies in question for these particular routes, based on the criterion having been met."(emphasis added) [11]

30. The Commission has applied this framework since 1999 and, over the years as facilities have been constructed, has granted forbearance in respect of hundreds of routes across Canada. As with the framework for basic cable rate deregulation, discussed above, the framework for forbearance of digital interexchange private line services relies on clear, quantitative factual criteria. The existence of more than one facilities-based provider, each of which offers digital services over the route in question, is considered by the Commission to be sufficient evidence to establish that the market is competitive and that no one supplier has "substantial market power".[12]

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[10] See Telecom Decision 97-20 and Telecom Order CRTC 99-434.

[11] Telecom Order CRTC 99-434 at Paragraph 5.

[12] "Substantial marker power" is the terminology used by the Commission in the current Public Notice at Paragraph 14.

31. Two points should, in the Coalition's view, be noted regarding this forbearance model or precedent. Firstly, the digital interexchange services in question are purchased almost exclusively by business and institutional customers, the same segment of customers represented by the Coalition. If there were market failures occurring or any abuse of dominance or other signs of substantial market power under this forbearance framework, one would have expected that, over the last six years, the Commission would have heard complaints from business customers that the market was not sufficiently competitive to protect their interests. The Coalition is not aware of any case being brought to the Commission by business customers of digital interexchange private line services requesting re-regulation of this market. In the absence of such complaints by customers, the Commission can conclude that competition under the forbearance framework established in Decision 97-20 and Telecom Order 99-434 has been successful.

32. Secondly, in regard to the specific forbearance criteria adopted by the Commission in respect of these digital private line services, it is noteworthy that the Commission did not stipulate that any particular level of market share loss was a necessary precondition. In its analysis of market power, the Commission described the existence and supply of competitive facilities as "the most important factor".[13]

33. Accordingly, having regard to the foregoing models and precedents which the Commission has successfully applied for over five years, the Coalition would propose that, in the market for business local exchange services, the Commission adopt the following three criteria for forbearance:

(a) Evidence of the existence of two or more providers offering business local exchange services in a local calling area; and

(b) Evidence of the loss of market share of 5% or more by the incumbent local exchange provider in the local calling area. Such loss would be measured from the time of entry of the alternate service provider(s);

(c) Regardless of whether the above two criteria are met, in any case where a business or institutional customer solicits, receives and chooses among multiple

[13] Telecom Decision 97-20 at Paragraph 92.

offers (or proposals) of local exchange services from the incumbent provider and one or more new entrants within the local calling area, the resulting contract for local exchange services, whether it be with the incumbent or another provider, should be deemed to be legally valid and binding under the *Telecommunications Act* without further review or approval by the Commission. In effect, business and institutional customers would be free to contract for such local services, without regulatory constraint or approval, just as they do now for all other ICT services. Business and institutional customers, more than any other customers, are in a position to assess and protect their own economic interests. The Coalition submits that they should be free to do so.

34. The foregoing criteria can and, in the Coalition's view, should be implemented as prerequisites to and conditions of forbearance, pursuant to Sections 24 and 34 of the *Act*.

35. In the Coalition's submission, the presence of active competitors in a market and their willingness to offer services to customers is the most relevant evidence of a competitive market. Competitors who are present and actively soliciting business in a market exert a powerful influence over the market (in this case, defined as the local calling area).

36. There will, undoubtedly, be some concerns expressed by certain parties that forbearance for incumbent local exchange services may lead to anti-competitive conduct, including predatory pricing. While such concerns must be assessed and treated seriously, in the Coalition's view, the Commission's actual experience to date with forbearance in other sub-markets demonstrates that these concerns have, in general, not been borne out. The Commission has forborne in respect of many other markets including terminal equipment, most data services, digital private lines, switched toll services, retail Internet services, etc. In addition, as noted above, the Commission has instituted a forbearance regime for incumbent cable basic rates. If there were evidence of systematic predatory pricing in those forborne markets, one would expect that it would have been brought before the Commission. However, when and if there are particular cases of alleged or apparent abuse in forborne markets, they can be and have been dealt with effectively as warranted either by the Commission or by the Competition Bureau. The Commission's track record to date on forbearance offers compelling evidence that:

(a) the broad predictions of anti-competitive conduct have not materialized in actual fact; and

(b) regulatory authorities have more than ample statutory tools and powers to redress anti-competitive conduct where it arises.

37. Therefore, in light of the Commission's success overall in implementing forbearance for both telecommunications services and basic cable rates, the suggestion or the possibility that some anti-competitive conduct might occur is not a valid reason to refuse to implement forbearance for local services.

38. Concerns regarding potential anti-competitive pricing by an incumbent have been evaluated by the Commission many times in the past. In general, there is no economic rationale or incentive to engage in anti-competitive or predatory pricing unless the predator is able to recover its losses and re-establish control or dominance. These issues were explored, for example, in the proceeding that led to the Commission's framework for deregulation of incumbent cable basic rates (Public Notice CRTC 1997-25). As noted by the Commission there, "the CCTA's response to this issue was that there would be no economic incentive for cable distributors to engage in such activities...".[14] In the same Decision, the Commission reiterated the comments on this topic of the Director of Investigation and Research:

> The Director of Investigation and Research (Competition Bureau) maintained that, given the current market dominance of the cable companies, the possibility of predatory pricing behaviour cannot be totally ruled out, but the potential for such behaviour is low. The Director also cautioned that putting in place rigid price floors or other pricing rules such as those proposed by some parties, in anticipation of predatory pricing, could have the undesirable effect of dampening price competition.[15]

39. Having considered the evidence and submissions, the Commission then concluded:

> The Commission considers that the public interest would be harmed where an incumbent, after lowering its rates in an attempt to eliminate the competition, is subsequently able to raise them above competitive levels and, thereby, recover its previously lost revenues. This is practicable, however, only in circumstances where there are significant barriers to the ability of competitors to enter the

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[14] Paragraph 44 of Public Notice CRTC 1997-25.

[15] Paragraph 45 of Public Notice CRTC 1997-25.

> market. The Commission's view is that new competitors, whether DTH, wireless or wireline, will be able to easily enter the market, so that, as soon as the cable operator raises its rates above competitive levels, the competitor(s) will enter (or re-enter) the market and thus pressure the cable operator to reduce its rates.[16]

In the Coalition's submission, the foregoing analysis by the Director of Investigation and Research and by the Commission of the potential for predatory pricing applies equally to the market for local exchange services. In this regard, the Coalition notes that the major cable companies are large, well-financed enterprises which have in place their own physical network as well as long standing relationships with millions of customers. Thus, their entry or re-entry into the local exchange services market would be very likely and relatively simple if a forborne incumbent local services provider were to try to raise its prices above cost-based competitive market levels. In addition, in such circumstances, entry or re-entry by independent VoIP providers would be even more likely since they have very low costs and low barriers to entry.

40. In conclusion, the Coalition submits that the criteria for forbearance proposed above reflect Commission precedents and actual experience to date, respect Competition Law principles and, if adopted, would create a reasonable framework for forbearance in respect of local exchange services.

V. WHAT COMMISSION POWERS AND DUTIES SHOULD BE FORBORNE

41. As the Commission notes, the *Act* permits the Commission to forbear, in whole or in part, conditionally or unconditionally, from the exercise of any powers under Sections 24, 25, 27, 29 and 31.

42. The Commission has, over many years, developed extensive experience in regard to the appropriate powers of the *Act* which can be dispensed with as markets become competitive. Having regard to those prior cases, the Coalition would propose that, subject to certain conditions discussed below, the Commission forbear from the exercise of its powers under Sections 25, 27, 29 and 31 in respect of local exchange services which meet the criteria for forbearance. Section 24 must be retained to address the

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[16] Paragraph 46 of Public Notice CRTC 1997-25.

preconditions to forbearance as well as certain other conditions, set out below, that should apply after forbearance.

43. The appropriate preconditions or prerequisite criteria for forbearance in respect of local exchange services, as proposed by the Coalition, have been described above. The Coalition expects that the preconditions to forbearance would be set out clearly in the Commission's decision at the conclusion of this proceeding.

44. Following any forbearance, there are additional conditions which should apply pursuant to Section 24. For example, the Commission has imposed on the incumbent carriers many requirements with respect to access, interconnection and wholesale services for the benefit of CLECs, competitive inter-exchange carriers, wireless service providers or customers. The Coalition has assumed that these conditions and arrangements would continue to apply under any forbearance for local exchange services. There is no suggestion in the Public Notice that this would not be the case. For example, the Coalition would assume that the confidentiality requirements in respect of customer information would continue to apply, as they currently do for both the incumbent carriers, the CLECs and indirectly resellers.

45. The Coalition would also propose an additional condition for the protection of all customers. The Commission should make clear and explicit, as a condition under Section 24, that no provider of local exchange services, including all forborne service providers, is permitted to offer a local exchange service which blocks or degrades access to any other service provider. This condition would ensure that customers have complete freedom to use any local exchange service to reach any other service, ISP, VoIP service, etc. Although such cases of blockage or degradation of access to another service provider could be dealt with *ex poste* on complaint, the Coalition believes that regulatory certainty and clarity for customers and service providers requires that the Commission make this policy a clearly stated condition under Section 24. Such a condition would eliminate any debate between customers, service providers or the Commission as to what the Commission's policy is in this regard. Thus, any disputes that might arise could be handled under the Commission's Expedited Hearing Process in order to determine, purely as a question of fact, whether the policy is being respected.

VI. WHAT POST-FORBEARANCE CRITERIA AND CONDITIONS SHOULD APPLY

46. The Commission has asked whether post-forbearance criteria, conditions or safeguards should be established including, possibly, "triggers" which would result in either automatic de-forbearance or a review of the appropriateness of forbearance.

47. The Coalition has set out in the preceding section the conditions which should, in its view, continue to apply after forbearance. These conditions reflect current, long-standing policies of the Commission to ensure that customers or competitors have access to services. These conditions would not, however, impose rate or tariff regulation on retail local exchange services.

48. The Coalition would strongly oppose a regime in which there were "triggers" that result in automatic de-forbearance or an automatic review of the appropriateness of forbearance. In its many prior forbearance rulings, the Commission has not imposed any such condition which would, in effect, result in automatic reversal of forbearance. As in the case of other sub-markets, there is no need for such a condition in the market for local exchange services.

49. The Coalition notes that it is always open to the Commission at any time, on application or on its own motion, to review or vary a prior decision if it can be established that it should not continue to apply. If there is evidence of local exchange services competition failing in general or of a market failure in a particular local calling area, any party is free to bring that evidence before the Commission. This is the case for all other forborne services. There should be no different treatment for forborne local exchange services.

VII. THE APPROPRIATE PROCESS FOR FUTURE APPLICATIONS FOR FORBEARANCE

50. As described above, the Coalition strongly endorses the Commission's expressed intent to establish "clear criteria"[17] and to ease the regulatory burden[18] in regard to the procedure for local exchange services forbearance. That is why the Coalition has

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[17] Paragraph 9 of Public Notice CRTC 2005-2.

[18] Paragraphs 32 and 33 of Public Notice CRTC 2005-2.

recommended criteria which are based on quantitative measures and/or clearly determinable, observable facts. These criteria do not involve a subjective assessment of the quality or strength of competition. Without clear, objective criteria, the Commission will not succeed in "eas[ing] the regulatory burden while ensuring that regulation, where required, is efficient and effective"[19], as Parliament has expressly expected of the Commission.

51. In terms of the process to be followed in any local calling area, the Coalition would endorse a process modeled on the processes, as described above, for forbearance of digital inter-exchange private lines and for deregulation of basic cable rates. More specifically, upon the filing of evidence that the criteria are satisfied, the Commission would "...quickly issue an order, without further process, granting forbearance...".[20] Having regard to the experience to date with forbearance of private line markets and basic cable rates, there is no need for a hearing or comment procedure to be adopted in the case of forbearance for local exchange services. Furthermore, given the number of local markets in Canada, a public hearing process (including a written comment and reply process) in respect of each area proposed for forbearance would be unworkable. With regard to the third of the three criteria proposed by the Coalition above (i.e. the business customer soliciting and selecting from multiple offers and negotiating a contract), there would be no need for a filing or an order approving such a contract. The Commission's Decision in this proceeding establishing the framework for forbearance would make clear that such contracts are valid and binding as between the parties (unless and until the Commission or the Competition Bureau specifically intervenes on such a contract).

VIII. POSSIBLE TRANSITION REGIME PRIOR TO FORBEARANCE

52. The Commission has asked parties to comment on the possibility of a transition regime prior to forbearance that would provide incumbent local exchange providers with more flexibility while maintaining tariff regulation of these services. For example, the Commission asks whether a more flexible, transition regime might lessen or remove the

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[19] Paragraph 32 of Public Notice CRTC 2005-2.

[20] Telecom Order 99-434 at paragraph 5.

existing constraints on promotions or the prohibitions on contact with customers under the win back rules.

53. The Coalition opposes the establishment of a transitional regime. The Commission has not applied a transitional approach in other markets which have been opened to competition and are now forborne. For example, the markets for switched toll services, terminal equipment, digital private lines and basic cable services were historical monopolies. The Commission opened these markets to competition and did not apply a "transitional" approach to such markets.

54. The economic tests and competition law principles of the framework set out in Decision 94-19 should be applied to the relevant markets for local exchange services. No other market constraints or tests should apply. The market for local exchange services is a market which is susceptible to analysis by these economic and competition law principles just as any other market is. It is unnecessary and wrong in principle for the Commission to depart from its own criteria and principles by devising a new approach to forbearance.

55. In this regard, the Coalition would note that currently the local exchange services market in Canada is subject to three layers of regulation. The first and most historic form of regulation is the requirement to file tariffs and to obtain prior approval of all tariffs for local exchange services. This form of regulation has been applied in various forms by the Commission and its predecessors to local services in Canada, originally under the *Railway Act* and now under the *Telecommunications Act*, for nearly a hundred years. Secondly, superimposed on this tariff regime, is the Price Caps regime. Since 1998, the Commission has imposed a complex array of price constraints (in terms of baskets of services) on most local exchange services. Thirdly, superimposed on the prior two systems of regulation is an additional layer of market conduct restraints. These apply constraints or obligations to the incumbent provider primarily in relation to the local services market. This third layer of market conduct regulation includes the bundling rules, win back rules, constraints on promotions, affiliate rules and competitor interface rules (e.g. co-location, transfer of service, number portability, etc.). The cumulative effect of these three layers or systems of regulation is that the market for local exchange services is now subject to more onerous, complex regulation than it was many decades

ago during the monopoly era, long before competition in local (or any other) services was contemplated.

56. Any proposal to simply remove or lessen certain aspects of the "third layer" of regulation respecting incumbent market conduct falls far short of real reliance on market forces, consistent with the objectives of the *Act*. Such a half-measure cannot be described in any sense as "forbearance" or an advancement. It would merely move the current three-layer regulatory system partway back towards the historical monopoly regulatory regime that was in place for many decades before there was any local competition.

57. The Coalition would not support such a transition proposal primarily because it would mean that, in the market for local services in Canada, regulated tariffs and regulatory rules would continue to largely define the local services market. Local service rate structures, rate levels and relationships, as well as service changes would continue to be almost entirely determined, directly or indirectly, by regulatory action. Under such a regime, the actions and behaviour of both the incumbents and the new entrants are overwhelmingly determined by reference to the architecture and detailed construction of regulatory decisions. In effect, the "market" remains effectively managed or centrally planned by the regulator.

58. This is not a regime which, in the Coalition's view, should continue any longer than absolutely necessary. This is certainly the Coalition's interpretation of Parliament's intention for the Canadian telecommunications industry. Where markets are, in fact, subject to competition, according to the criteria proposed above, they should be forborne. Otherwise, under a "market" essentially managed by the regulator, Canadian customers and the Canadian economy will not achieve the benefits of *dynamic* market behaviour, which are the most important benefits from a customer point of view. Canadian customers have realized the benefits of dynamic competition in many other telecommunications markets, including toll services, terminal equipment, data services, wireless services, Internet services, etc. However, for local services, such benefits will not accrue to customers or to the economy in general if the Commission retains, any longer than absolutely necessary, a system of static "regulated competition" in which

regulatory decisions are the primary driver of the "market". Accordingly, the Coalition would oppose a transitional regulatory regime for local exchange services.

IX. ALIANT TELECOM'S FORBEARANCE APPLICATION

59. The Coalition will not be providing any detailed comments, at this stage, on the particulars of the Aliant Telecom forbearance application. The Coalition's intention in these Comments is to focus on the broad national framework that should apply to assess forbearance in all local exchange services markets across Canada. Nevertheless, the Coalition notes that, if the criteria and framework proposed by the Coalition above were applied to the local exchange services markets served by Aliant Telecom, it appears clear that forbearance would be granted in a number of the local exchange markets in that territory.

X. CONCLUSION

60. This is an important proceeding for all customers, but particularly for Canadian business customers. In this proceeding, the Coalition seeks to bring to bear the perspective of Canadian business telecommunications users. The *Telecommunications Act* expressly states that it is Canada's policy to rely on market forces for the provision of telecommunications services and that regulation, where required, be efficient and effective and "respond to the economic and social requirements of users".[21] Notably, the *Act*'s objectives are entirely silent with respect to the needs or requirements of service providers. In this proceeding, the Coalition urges the Commission to focus primarily on the interests of telecommunications users.

61. The benefits of dynamic competition in telecommunications markets are clear to Canadian business. Significant benefits for Canadian users and the economy in general have already been achieved by removing regulation and allowing market forces to prevail in many other telecommunications sub-markets: toll services, data services, digital private lines, wireless services, retail Internet services, etc. In the view of Canadian business, these benefits should be extended as soon as possible to the local services market.

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[21] Sections 7(f) and (h) of the *Telecommunications Act*.

62. The Coalition has defined a framework, including clear terms and conditions, which would allow competition, rather than regulation, to shape the local services market in Canada. This framework includes, as described above, a specific provision to allow Canadian businesses to rely on private, negotiated contracts for local exchange services, should they wish to do so. Private contracts freely negotiated between business customers and their chosen suppliers are the norm for other ICT goods and services. This mechanism works extremely well within the broad framework of the law of private contract and competition law. The telecommunications regulatory framework should permit the same contract processes to apply to local exchange services.

63. As noted above, the Coalition will be participating in all subsequent stages of this proceeding including the public consultation to be held by the Commission in September.

64. On behalf of Canadian business customers, the Coalition urges the Commission to be forward looking and open to change in this proceeding. Adoption of a new framework, as proposed by the Coalition, would fulfill the objectives set out by Parliament in the *Act* and deliver significant benefits to Canadian customers and the Canadian economy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF JUNE, 2005

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