

Mailing Address:

World Exchange Plaza
15 O'Connor Street
Suite 880
Ottawa, Ontario
K1P 1A4
Attn.: Tony Stikeman

Tel: 613 566 7053
Fax: 613 566 2026
Email: stikeman@tactix.ca

Chairman:

Ian C.W. Russell
Investment Dealers
Association
of Canada



**Coalition for Competitive Telecommunications /
Coalition pour une concurrence en télécommunications**

September 15, 2005

SENT BY E-MAIL

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Ms. Rhéaume:

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

Attached herewith is the Argument 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

Dsler, Hoskin & Harcourt LLP
tactix Government Consulting

**CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**

**ARGUMENT
OF THE
COALITION FOR COMPETITIVE
TELECOMMUNICATIONS**

Forbearance from Regulation of Local Exchange Services

Telecom Public Notice CRTC 2005-2

Coalition for Competitive Telecommunications
World Exchange Plaza
Suite 880, 45 O'Connor Street
Ottawa, ON K1P 1A4
Tel: (613) 566-7053
Fax: (613) 566-2026
stikeman@tactix.ca

September 15, 2005

Argument of the Coalition for Competitive Telecommunications

Forbearance from Regulation of Local Exchange Services

Telecom Public Notice CRTC 2005-2

September 15, 2005

Introduction

1. In its Comments filed June 22, 2005 in this proceeding and as elaborated in its responses to interrogatories received from the Commission and other parties, the Coalition has set out its proposals with respect to the appropriate framework for forbearance of local exchange services. The Coalition relies on those submissions as the most complete statement of its proposals.
2. To briefly summarize, the Coalition has called for the following:
 - (a) Much greater emphasis to be placed on the interests of customers (as required by the objectives of the *Telecommunications Act*) and less on the welfare of particular suppliers of services;
 - (b) A framework which will permit business customers, when given a choice of suppliers, to freely negotiate the terms of their service contracts without further regulatory approvals;
 - (c) Forbearance criteria for local exchange services which are simple to administer, quantitative (not qualitative) in nature and which do not entail a public proceeding (in the same way that the framework for deregulation of basic cable rates does not entail a public proceeding);
 - (d) A definition of the relevant geographic market based on the local calling area;
 - (e) Three criteria to determine when forbearance is appropriate:

- (i) Evidence of the existence of two or more providers offering business local exchange services in a local calling area;
 - (ii) 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); and
 - (iii) Regardless of whether the above two criteria are met, in any case where a business or institutional customer solicits, receives and chooses among multiple 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.
- (f) No post forbearance criteria (other than conditions which apply to all LECs);
 - (g) No process for automatic triggering of re-regulation (a process not applied to other forborne markets);
 - (h) No intermediate transition regime as a partial step to forbearance.
3. In this Argument, the Coalition will focus solely on two of the most important issues (in the Coalition's view) in this proceeding: the relevant geographic market and the appropriate criteria for forbearance. At this stage of the proceeding, the Coalition considers it useful to make some observations on the record to date on these two key issues.

The Relevant Market for Forbearance

4. The relevant market for the purposes of forbearance must be defined in terms of the relevant services market and the relevant geographic territory. The definition of the relevant services does not appear to be especially difficult or contentious. However, this is somewhat less true for the relevant geographic market. The Coalition agrees with the comments in this regard of the CCTA:

In this proceeding, defining the relevant geographic market is a more challenging exercise than defining the relevant product market.¹

5. Discussions of the state of competition in local services have frequently been conducted in Canada over the last seven years on the basis of aggregated national data on the relative market shares of the various types of providers. In such discussions, the market share figures for all incumbent carriers are frequently aggregated on a national basis. The Commission itself engaged in such analysis in its Annual Report to the Governor in Council on the state of competition in Canada.
6. What is striking about the record of this proceeding to date is that it is clear from the submissions of most parties that national data are not regarded as relevant to a forbearance analysis of the state of competition in the local services market. Like the market for inter-exchange digital data services (which is defined on a city-pair basis), the market for local exchange services actually consists of a series of sub-markets tied to particular geographic areas across Canada. The only issue to be determined in this regard is what geographic area is truly relevant to the services market in question. The majority of submissions to this point in the proceeding favour adoption of geographic areas much smaller than the whole country, the operating territory of the ILEC or the province. The Coalition has proposed the use of the local calling area associated with each city, town or community as the relevant geographic area.
7. In reviewing the record on this issue, the Coalition finds particularly noteworthy the views on this point of two parties which have absolutely no interest in perpetuating the market position of the incumbent telephone companies: the Consumer Groups and the CCTA. Both parties have noted that, as indicated in the Public Notice, the possible

¹ Comments of the CCTA, June 22, 2005 at para. 36.

geographic market definitions include the ILECs original operating territory, the province or the local calling area. Both parties reject the ILEC operating territory and the province as the relevant geographic market. They conclude by advocating adoption of a much smaller geographic market.

8. The Consumer Groups originally proposed, after assessing the various sub-national possibilities, that the local calling area is appropriate. The Consumer Groups explained their conclusion as follows:

An ILEC's operating territory or a province are both well defined and provide an element of historical integrity that may be viewed as a reasonable basis for market definition purposes. However, in the Consumer Groups' submission, each of these areas is too large to be considered appropriate since competitive conditions in one city or region of a province or ILEC territory have little necessary relationship to conditions in another city or region.

The other remaining geographic boundary is the local calling area as defined by the ILEC and approved by the Commission. This area has been established on the basis of a number of technical, social and political considerations, including an assessment of the community of interest of customers living within the local calling area.

Just as the geographical limits of a local exchange may change over time, the factors used to determine a local calling area may also change, so as to suggest an expansion or contraction in the local calling area. However, the Consumer Groups note that these factors are largely independent of the ILEC and, as such, can be viewed as providing a more 'objective' basis for setting a geographic boundary that will have direct consequences for all market participants.

In light of these considerations, the Consumer Groups submit that the appropriate geographic boundary for the purposes of forbearance of local exchange services should be the local calling area.² [emphasis added]

The Coalition understands that the Consumer Groups now support the Local Interconnection Region (LIR) as the relevant market.

9. The Coalition agrees with the Consumer Groups original proposal that the local calling area is objective and relevant because it reflects the community of interest of customers. The essential characteristic of "local exchange service" is that it provides customers a local connection to the local area. Furthermore, as the Coalition has pointed out, local

² Comments of the Consumer Groups, June 22, 2005 at paras. 38, 41, 42 and 44.

exchange service is provisioned and offered by suppliers on a local basis, generally using facilities (owned or leased) within the local area. Accordingly, the local nature of the market is reflected in the objectively observable conduct of both customers and suppliers in this market. From a supply and a demand point of view, the local calling area is the most meaningful geographic market.

10. By contrast, the ILEC service territory or the province (which are often different) have no logical relationship to the manner in which local service is actually used by customers or provided by service providers. The CCTA largely concurs with this assessment, proposing that the relevant geographic market be defined as the LIR or, in certain cases, an aggregation of contiguous LIRs. As the Coalition noted in its original Comments, a local exchange service in one part of a province, such as Victoria, B.C., is clearly not a substitute for local exchange service in Penticton, B.C. Similarly, local service in Sydney, N.S. is not a substitute for local service in Halifax. There is no logical reason to deem the two cities to be in the same market. Supply and demand conditions in the two areas may be the same or different but, in any case, the competitive conditions in one of these cities is of no value or relevance to a forbearance analysis of competitive conditions in the other. The two towns or cities within the province are clearly different markets for both customers and suppliers.
11. While there may be cases where the LIR largely corresponds to the local calling area, as between these two alternatives, the Coalition strongly favours the local calling area. This geographic area corresponds, as noted above by the Consumer Groups, with the local calling patterns and community of interest which have led to the current scope of “free” local calling areas. The Commission’s tests in terms of defining and expanding such areas are well known and clearly defined based on consumer calling. If two exchanges have “free” local calling (according to standard Commission criteria), they are likely to be regarded by both end users and suppliers as part of the same market. By contrast, the LIR is unlikely to coincide with a natural market as seen by consumers. Consumers have simply no concept of what an LIR is. In point of fact, the LIRs are aggregations of many local exchanges as determined by the Commission in order to simplify physical network interconnection arrangements for CLECs. They are an engineering and carrier planning construct. The size of an LIR will vary greatly depending on the configuration of host

switches and remote switches used in the network of the individual ILEC. These network design variations reflect the engineering technology evolution of the individual ILEC. Towns which are similarly distant from each other or from a major urban centre (but within the same ILEC) may or may not be within the same LIR depending on purely historical engineering decisions of the ILEC regarding its host/remote network configuration. These network configurations are also not consistent across the ILECs. Such engineering design decisions ignore political or municipal boundaries and community calling patterns. Accordingly, as a wholly artificial regulatory/engineering construct, LIRs have simply no relevance to customers and are inappropriate as a means to define the relevant market.

12. An important consideration for customers in regard to defining the geographic market is to ensure that the area is not so large that there are significant pockets of customers in a post-forbearance market that, in fact, have no choice of supplier. Such customers would be captive customers of a forborne monopoly. From a business customer point of view (and presumably from a residence customer perspective), this scenario would be completely unacceptable. The Coalition expressed its concerns in this regard in an interrogatory response:

From a customer point of view it would be quite disturbing to be declared to be within a competitive forborne market that is defined geographically in such a way that there are 'significant isolated pockets of uncontested customers'. The customers within such pockets would not have the benefit of competitive choice, nor the protection of a regulated price. This is another reason (in addition to those set out above) why the relevant geographic market should not be defined as broadly as the province or the ILEC service territory. The relevant market should be defined, as the Coalition and others have advocated, as the local calling area.³

13. The Coalition notes that the Consumer Groups have also expressed similar concerns with any definition of the relevant market that includes too large an area.⁴

³ See Coalition (CRTC) 20 JUL05-204 at page 2 of 3.

⁴ See Comments of the Consumer Groups, June 22, 2005 at para. 38.

Appropriate criteria to be applied to determine whether a relevant market is sufficiently competitive for forbearance

14. In its Comments of June 22, 2005 in this proceeding, the Coalition proposed a forbearance model that has as its objectives clarity, certainty, efficiency and economy. Drawing on the success of the basic cable rate deregulation model and the framework for forbearance of digital interexchange private line services, the Coalition proposed a similar practical test for forbearance for local exchange services.
15. As noted above, The Coalition proposed 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 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.
16. The Coalition notes that several parties to this proceeding have proposed analogous tests. For example, the Companies and SaskTel propose a forbearance test based on a 5% market share loss by the ILEC, consistent with the basic cable rate deregulation test. Like the Coalition's, the Companies' proposal would separate the residential and business

markets for the purposes of applying forbearance criteria. Under the Companies' proposal, for purposes of calculating share loss in business markets, "local connections" would need to be determined for each of the business primary local, Centrex and digital trunk services markets. Local connections would include, at a minimum, the connections provided by ILECs, CLECs, cablecos, access independent VoIP providers, MEUs, and resellers (including systems integrators). According to the Companies, wireless-only local connections should also be considered for business markets, but in recognition of challenges in collecting such data, the Companies would exclude these local connections from the share loss calculation.

17. Similarly, Aliant's proposal is based on existing Commission precedents of frameworks for forbearance designed to produce an expedited result based on a clear objective test, namely, the frameworks for forbearance from inter-city digital private line and for basic cable rate de-regulation. Aliant proposes that the forbearance criteria for local exchange services be set at a 5% actual loss of market share by the ILEC in an exchange.
18. Telus also proposes separate consideration of the residential and business local exchange markets. Telus submits that the Commission should forbear from regulating local exchange services in the business market where there is a full facilities-based CLEC offering business local exchange service throughout its serving area and that full facilities-based CLEC has 5% of the total business NALs and NAL-equivalents in its serving area.
19. The Coalition notes that the CCTA similarly proposed a test for forbearance in the *residential* local exchange market that combines both an objective assessment of market share loss (of 30% by the ILEC) with a more subjective assessment of the existence of competitive alternatives in the relevant geographic market.⁵
20. While the Coalition shares the views of these other parties that evidence of market share loss and the existence of competitive alternatives will ensure competition sufficient to protect the interests of users, it does not necessarily follow that, in the absence of these

⁵ The CCTA submitted that the residential and business local exchange services markets are distinct markets subject to unique competitive conditions but did not propose a test for forbearance applicable to the business local exchange services market.

factors, regulation is required to protect the interests of users. This is especially so in the case of business users of telecommunications who are clearly capable of determining their own economic interests and are not in need, or want, of regulatory protection.

21. In this regard, the process of seeking proposals, assessing alternatives and selecting a supplier is a critical business process which most businesses skilfully apply in all of their operations. The third criterion of the Coalition's proposed test for forbearance reflects this fact and calls on the regulator to recognize and respect freely-negotiated contracts for business telecommunications services whether or not the other criteria for forbearance have not been met.
22. The Coalition notes that its third criterion simply applies to telecommunications the same free contractual model that applies to most other business inputs. Adoption of this model would move the regulatory framework for business local exchange services closer to meeting the objectives expressed in subsections 7 (f) and (h) of the *Telecommunications Act*. Namely, "to foster increased reliance on market forces for the provision of telecommunications services to ensure that regulation, where required, is efficient and effective" and "to respond to the economic and social requirements of *users* of telecommunications services".
23. In this regard, the Coalition's third criterion responds to the almost universal call for increased reliance on market forces that has been expressed by many of the parties to this proceeding in the context of the concurrent Telecom Policy Review.
24. For example, in its submission to the Telecom Policy Review Panel, the CCTA submitted that a successful Canadian communications policy would recognize that regulatory intervention should be limited to addressing market failures.⁶ MTS Allstream proposed that Canada's telecommunications policy objectives should be amended to create and maintain conditions under which market forces can govern the provision of telecom services, by fostering all forms of competition; and to ensure that regulation, where required, is effective, efficient, and consistent.⁷ The Competition Bureau called for the

⁶ CCTA Comments at para. 14-15

⁷ MTS Allstream Comments at p. 81

creation of a regulatory objective that would direct the CRTC to adopt the regulatory measure, or take the decision, that is least intrusive in the marketplace.⁸ Finally, the National Competition Law Section of the Canadian Bar Association called for a reversal of the presumption from regulation to competition, stating that regulation should be the exception, not the rule, in the economy as a whole.⁹

25. The Coalition considers that where a business or institutional customer solicits, receives and chooses among offers and then negotiates a contract for the provision of local exchange services (i.e., the Coalition's third criterion is met), the market is working exactly as it should. In such cases, there is no market failure for regulatory intervention to address. The resulting contracts should be deemed to be valid and binding. As with all their business dealings, these customers and their suppliers would still be subject to the provisions of the *Competition Act*.
26. The Coalition considers that, at least with respect to large business customers, abusive conduct by suppliers is unlikely in such contract negotiations. Large businesses often have a degree of countervailing power and the ability to attract new competitors to make a proposal. As noted by Aliant in Aliant(Competition Bureau)20Jul05-08 PN 2005-2:

...it is Aliant's experience that its large business customers have considerable negotiating power. Large business customers typically solicit services by RFP processes, which may seek a single supplier of a complex array of services, only some of them still subject to regulation. The Commission is familiar with the efforts made by Aliant to accommodate these very large customers even now, under regulation. Customers who can exert this sort of countervailing market power in the face of regulation have nothing to fear from forbearance... In some cases these very large customers have a credible option of self-supply. Further, existing competitive suppliers are eager to serve them, and to expand or extend their facilities as required. Their business alone can be enough to draw a competitor into the market. This has been Aliant's experience – a contract from one very large customer brought a competitive Centrex supplier into an urban area in Atlantic Canada where it had not previously existed. A supplier of services, once established, can extend its services to all parts of the exchange through use of unbundled loops from the ILEC.

27. Furthermore, the Coalition notes that the addition of its third criterion to the test for forbearance avoids some of the impracticalities associated with dividing the business market by different customer groups as suggested by the Commission in

⁸ Bureau Comments at paras. 37-43

⁹ CBA Section Comments at p. 4.

Coalition(CRTC)20Jul05-207 PN 2005-2. The Coalition accepts that there might be some appeal to attempting a division of the business market into, for example, the segments proposed by the Companies (i.e., business primary exchange service, Centrex and digital trunk services). However, the Coalition considers that categorizing customers into such segments will often be made on arbitrary distinctions and will likely result in many disputes over classification being brought before the Commission.

28. The Coalition's third criterion avoids the administrative and practical problems of classifying business customers. It allows the market players themselves to self-select out of the regulated framework when they choose to enter into freely negotiated contracts following a bidding process. The mechanism is based on objectively determinable conduct of the market participants. Accordingly, the third criterion is self-administering and avoids the potential inefficiency and regulatory disputes associated with arbitrary segmentation of the business local exchange services market. (e.g. medium sized business versus Enterprise customers). Aliant specifically noted the administrative practicality of the Coalition's third criterion as an important advantage of the Coalition's proposal:

It avoids the need to define what an Enterprise customer is, which is not a straightforward task in itself, and is further complicated by the fact that an Enterprise customer in a smaller ILEC's territory might not even be ranked as a large customer if it were in the territory of the largest ILEC.¹⁰

Conclusion

29. In this Submission, and in its earlier filings in this proceeding, the Coalition has proposed a clear, practical framework to determine when and where forbearance is appropriate for local exchange services. The Coalition submits that its proposals on the central issues, such as market definition and criteria for forbearance, build on prior Commission forbearance models appropriately adapted to the local services market. Business customers have had considerable (and generally positive) experience with the operations of free unregulated markets for many other telecommunications services. They are anxious to engage in the same market process for local services as soon as possible. With the framework proposed by the Coalition, customers and suppliers will be able to operate

¹⁰ Aliant(CRTC)20Jul05-207 PN 2005-2

freely as they do in all other ICT markets. The Coalition urges the Commission to proceed with the adoption of the framework we have proposed as quickly as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF SEPTEMBER, 2005

---End of Document---