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October 6, 2005

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

Dear Ms. Rhéaume:

Re: Telecom Public Notice CRTC 2005-2  
Forbearance from regulation of local exchange services

1. Pursuant to the Commission's directives in Telecom Public Notice CRTC 2005-2, *Forbearance from regulation of local exchange services*, FCI Broadband and Yak Communications (Canada) Inc. file the attached Reply Argument.
2. An electronic copy of this submission is provided to the Commission and interested parties by email.

Yours truly,

Kelly Collins  
Legal and Regulatory Affairs

Attachment

Canadian Radio-television and  
Telecommunications Commission

Telecom Public Notice CRTC 2005-2,  
*Forbearance from regulation of local exchange services*

REPLY ARGUMENT

OF

FCI Broadband,

A division of Futureway Communications Inc.

and

Yak Communications (Canada) Inc.

October 6, 2005

1. This submission constitutes the Reply Argument of FCI Broadband, a division of Futureway Communications Inc. (FCI) and Yak Communications (Canada) Inc. ("Yak"), collectively the Competitors.
2. The Competitors filed recommendations with the Commission in their June 22, 2005 submission recommending criteria for the commission to apply when determining whether local exchange markets are sufficiently competitive for forbearance; the powers and duties of the Commission which could be forborne in a competitive market; the post-for parents criteria and conditions that should apply; and, recommendations for a transitional regime.
3. FCI Broadband and Yak continue to be concerned over the possibility that the Commission may, as a result of this proceeding, take initial steps towards forbearance of the ILECs' local exchange services or introduce a transitional regime. The Competitors submits that considerations of forbearance and/or reducing or eliminating regulatory safeguards developed for the creation of a competitive market, are premature.
4. The companies' views and recommendations are set out in the June 22, 2005 submission, answers to interrogatories and the written Argument, dated August 15, 2005. However, as a result of information made available during the course of this proceeding and other developments in the industry, the Competitors have an increased concern over continued availability of interconnection arrangements and wholesale services.
5. In the June 22, 2005 submission by FCI Broadband, and Yak, the companies observed that the Commission recognizes the "significant technical and financial barriers to entry" in the local exchange service market.<sup>1</sup> Among other things, the Commission has stated:

The Commission notes that competitors in the local wireline market continue to face *substantial barriers to entry* which, among other things, limit their ability to expand their networks. For example, competition in the local wireline market is particularly capital intensive and, therefore, has evolved on a narrow geographic basis. In addition, access issues related to municipal rights-of-way, support structures and multi-unit buildings, some of which are before the courts, continue to remain unresolved. As stated in the GIC - report, *resolution of these issues is crucial to facilities-based competition.*<sup>2</sup> (Emphasis added)

6. Indeed, interconnection, access arrangement and availability of wholesale services should be a primary consideration for the Commission when developing criteria to be used to determine when it is appropriate to forbear from regulating local exchange services. The matter is of such importance that FCI Broadband and Yak propose that, prior to granting forbearance to the ILECs, the Commission should hold a public consultation to develop a more viable wholesale access regulatory framework. This should include the development of rules to implement changes to the ILEC carrier services group, a list of wholesale/interconnection services, cost-oriented prices for such services, and terms and conditions of service.

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<sup>1</sup> Telecom Decision CRTC 2005-27, Telecom Decision CRTC 2005-27, Review of price floor safeguards for retail tariffed services and related issues, paragraph 148.

<sup>2</sup> Telecom Public Notice CRTC 2003-1, Review of winback promotions, paragraph 13.

7. Other parties in this proceeding have made similar observations. Cybersurf, in its oral presentation to the Commission stated:

...we submit that the establishment and enforcement of an appropriate regulatory regime for wholesale services that competitors require from the ILECs to provide their own local services must be a precondition to forbearance of ILEC local services.<sup>3</sup>

8. For its part, MTS Allstream has stated:

In the case of the ILECs' local services, there are several instances where the ILECs have not fully unbundled and tariffed all of the underlying facilities and services that are used to provision those services, including, but not limited to, all of the underlying local access and transport services that are used by the ILECs to provision IP-based local telephony services such as managed VoIP services. All of these facilities and services must be unbundled prior to any Commission decision to forbear in the local services market because these facilities are used to provide services that are functionally substitutable for the ILECs' Time Division Multiplexing (TDM) -based local voice telephony services.<sup>4</sup>

9. It is also important to note that these requests come from companies that are not full facilities-based competitors but provide the market with the level of competition and innovation which would not otherwise exist.

10. The Competitors believe that the creation of a robust wholesale market and well-defined interconnection and access arrangements is a necessary precondition to forbearance from regulation of the ILECs' local exchange services.

11. In the UK, OFCOM has also identified the need for a robust wholesale market and the consequences in its absence<sup>5</sup>:

"1.17 Enduring economic bottlenecks in fixed telecoms networks remain. By this we mean not just parts of the network where BT has significant market power (SMP), but those areas where effective, infrastructure-based competition is unlikely to emerge in the medium term. This may be due to the fundamental economics of building competing infrastructure, or in some cases due to market factors such as barriers to customers switching suppliers.

1.19 We believe that UK telecoms regulation has yet to overcome the problems of enduring economic bottlenecks combined with lack of equality of access to these parts of the network. The problem of enduring economic bottlenecks is that the economies of scale and sunk costs of telecoms networks, especially for fixed access networks, are particularly hard for new entrants to overcome. Yet if new entrants do not build their own fixed access or backhaul networks, they are reliant instead on BT to provide wholesale access to its network. They then face the problem of inequality of access. Those who rely on BT to provide such access have experienced twenty years of:

- slow product development;
- inferior quality wholesale products;
- poor transactional processes; and
- a general lack of transparency.

1.20 While individually each issue might seem immaterial, cumulatively they make the reality of competing against a vertically-integrated player an economically unattractive proposition."

<sup>3</sup> Transcript, September 28, 2005, paragraph 4048

<sup>4</sup> MTS Allstream(CRTC)20Jul05-206

<sup>5</sup> OFCOM, Strategic Review of Telecommunications Phase 2 consultation document, issued 18 November 2004

12. Such a proceeding is particularly important at a time when applications facilities are becoming controlled by fewer and fewer companies and alternatives to the ILECs' wholesale services are diminishing. A by-product of the consolidation of the Canadian telecommunications industry is that the remaining competitors are becoming even more reliant on access to incumbent services and facilities. Competitors have always been dependent on the incumbents for underlying services, and often had to pay out more than 50% of operating revenues in acquiring incumbent services. But as new facilities-based entrants emerged, they could and did buy from each other. Not only did such arrangements lessen dependence on the ILECs, but the increasing competitiveness of this wholesale market forced all suppliers to provide lower prices and better prices. With the reduction in the number of facilities-based competitors, however, the competitiveness of the wholesale market is decreasing, and the reliance on the ILECs is increasing. BCE's recent acquisition of Group Telecom and Rogers' acquisition of Call-Net just a couple of months ago has significantly lessened facilities-based competition and left few choices for wholesale services to companies like Yak.
13. Yak notes that industry consolidation and lack of resale/wholesale opportunities are factors in the criticism that Canada's wireless industry is now facing. Yak notes that Canada's wireless subscriber penetration – 47 wireless subscribers for every 100 people – is significantly lower than the United States. Further a recent OECD study found that Canada ranks just 27<sup>th</sup> in wireless penetration out of 30 countries and that average wireless customer in Canada pays 60 per cent more than they would under a U.S. plan. Factors noted include less competition than the U.S. market. There are six or seven national companies in the U.S. market, while only now 3 in Canada.<sup>6</sup>
14. The dwindling supply of facilities-based providers in the Canadian market is relevant for this proceeding. Smaller companies like Yak are forced to rely more heavily on the ILECs. Should the Commission decide to forebear from retail price regulation of the ILECs' local telephone services, they would have greater opportunity to limit competition from smaller companies. Reducing the number of wholesale services available, introducing onerous terms and conditions, delays and price squeezing are some of the ways that the ILECs can make it difficult to compete. In the context of considering forbearance for ILEC retail services, the Companies submits that it is an opportune time to consider instituting a more viable interconnection and wholesale/access regulatory framework.
15. Interconnection of competitors' networks with the telephone companies' local networks has been a mainstay of the Commission's policy in allowing competition. Since 1979, when the Commission first created the interconnection arrangements between a facilities-based private line company and Bell, the Commission has mandated interconnection arrangements between wireless and wireline companies, between long-distance companies and the ILECs (and later all LECs), and between CLECs and ILECs.
16. The provision by ILECs of wholesale services to competitors is less well developed. There are numerous examples of where incumbents were required to provide wholesale services, such as unbundled local loops by telephone

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<sup>6</sup> See "Canada greatly lags U.S. in wireless penetration", *Globe & Mail*, October 5, 2005, page B3.

companies and third party Internet access to cable company facilities. There are other examples where the Commission has denied wholesale services, for example the Commission's refusal to permit new entrants a resale discount on ILEC local telephone services in Decision 97-8. It is the combination of interconnection arrangements and wholesale services which make it possible for new entrants to compete with the ILECs.

17. At the product level, wholesale customers should have access to the same, or substantially similar, wholesale/interconnection products as the ILECs' own retail products, at the same prices and using the same, or substantially similar, transaction processes as the incumbents' own retail activities. Institutional behavioral changes on the part of the ILECs should also be examined. Currently there is no institutional incentive for incumbents to treat competitors in an equal manner to their own retail activities.
18. The Competitors are aware that in Public Notice 2005-2, the Commission excluded competitor services from the scope of this proceeding, however, the Competitors are concerned that forbearance of local exchange services may lead to the implicit finding that ILECs also do not have market power in the underlying access facilities used to provide interconnection and other competitor services. This in turn could lead to the loss of certain essential competitor services. Indeed, as outlined in Yak's oral presentation, there are indications that is already beginning and in this proceeding the ILECs seem to suggest that once retail forbearance has been granted the wholesale regulatory framework should also be dismantled.
19. The views expressed by the ILECs, with the exception of MTS Allstream, in this proceeding are in contrast to the position adopted by the Commission when it first to endorsed the concept of local competition. In Decision 94-19, the Commission stated:

All parties agreed that, in general, bottleneck services should be unbundled. Competition, however, may benefit if this concept is applied to the provision of other network services over which the telephone companies exercise a high degree of market power. For example, while the provision of local channels is technically competitive, the telephone companies are, in most areas, the only provider of such services and are virtually always the dominant supplier. Accordingly, the Commission considers that services subject to dominant supply should be unbundled to the greatest extent practicable.

In general, the Commission considers that the development of unbundled tariff components should flow from two sources. First, where the telephone company introduces a new competitive service, tariffs are to be filed for all of the underlying bottleneck components used in the provision of that service. Second, where a competitor requests a specific component, the telephone company is to file a proposed tariff, whether or not the telephone company itself uses that component. Where the telephone company is of the view that it is not feasible to offer a particular component on an unbundled basis, it is to so indicate to the Commission, on a timely basis, setting out its reasons.

20. The Competitors believe that the wholesale and interconnection arrangements which it and other competitors require are in jeopardy. In fact, as outlined in Yak's oral presentation, the potential threats to competition that Yak identified in the VoIP proceeding last year are becoming a reality.

21. Equally relevant is that after considering the evidence in the proceeding leading to Order 2001-184, the Commission concluded that “entrants in the local market face substantial barriers to entry, which limit their ability to expand their networks and acquire customers through self-supply of such facilities” and that “not extending the current mandated access period for near-essential facilities would make it more difficult for entrants to acquire the critical mass of customers necessary to make entry and expansion of their own networks economic, and would significantly limit the development of competition in the local exchange market.”
22. The Commission’s determination in Order 2001-184 is equally applicable in 2005 but the Competitor submits that more work needs to be done to create a viable wholesale regime.
23. Among other issues, the Competitors recommend such a proceeding consider the issues identified by MTS Allstream in its response to interrogatory MTS Allstream(CRTC)20Jul05-206. In addition, the Competitors submit that the Commission should take action to expedite the development of IP to IP interconnection standards. This matter has been studied by CISC for more than two years with no tangible results. The CISC work has not kept pace with technology or the evolution of the telecommunications market. FCI Broadband and Yak are but two of many competitors now using IP-based technology to provide telecommunications services. However, the existing interconnection rules require companies such as FCI Broadband and Yak to interconnect using a technology developed for a circuit-switched network.
24. These and other matters should be addressed by the Commission.
25. The evidence of this proceeding suggests that more work and consideration of issues is required on the wholesale/access front. Yak urges the Commission to carefully consider whether the criteria it develops for forbearance of local services will have direct or indirect consequences for competitor services, and competitors’ ability to obtain the necessary wholesale and interconnection arrangements needed to compete with the ILECs.
26. Given the importance that continued access to interconnection arrangements and wholesale services has for competitors and the development of competition, Yak recommends that, prior to granting forbearance to the ILECs, the Commission should hold a public consultation to develop a more viable wholesale access regulatory framework. This should include the development of rules to implement changes to the ILEC carrier services group described in our response to CRTC-206(c), a list of wholesale/interconnection services, cost-oriented prices for such services, and terms and conditions of service.
27. As a facilities-based competitor, FCI Broadband has an additional access concern. FCI Broadband finds it increasingly difficult to construct new facilities to serve customers. In order for FCI Broadband to install new facilities, rights-of-way permits must be obtained from municipalities. This requirement arises each time FCI Broadband requires access to public property and multiple approvals and excessive security deposits are frequently required for each construction project.

28. Approvals take many months and, in cases where applications are denied, alternate routes must be considered. FCI Broadband's size works to its disadvantage when negotiating with municipalities. FCI Broadband is not as readily recognized as Bell nor does it have the long-standing relationship with municipalities enjoyed by Bell. FCI Broadband's applications to municipalities for rights-of-way access are frequently regarded as a lower priority. In Decision 2005-6, the Commission noted the disadvantages that competitors face compared with ILECs:
- ...to the extent ILECs have agreements in place that they may rely on to construct additional facilities, the Commission considers that competitors will likely continue to experience disadvantages relative to ILECs with respect to the need to negotiate and obtain relevant municipal agreements regarding the construction of such facilities.<sup>7</sup>
29. Each rights-of-way application requires payments to the municipality. Where these charge are excessive, FCI Broadband must evaluate alternatives such as leasing facilities, re-routing the facilities, reselling services, and postponing or abandoning the project. Obviously, evaluating the alternatives results in additional delay before the project commences and before services offered.
30. Recently, access to rights-of-way and access to support structures have become more difficult to obtain. Certain hydro utilities have refused FCI Broadband access to their poles, demanded excessive payments and required FCI Broadband to transfer ownership of dark fibre (without charge) to the hydro utility in exchange for access to support structure.
31. Any of these problems can take many months before FCI Broadband can conclude that it has reached an impasse. Filing an application with the Commission remains an option but the process leading to a decision can far exceed the timeframes for the construction project. In this regard, FCI Broadband notes that it was 11 months from the time MTS Allstream filed an application with the Commission seeking access to the Light Rail Transit land in Edmonton until the Commission issued its decision.<sup>8</sup>
32. It is often overlooked that, unlike almost all other competitive industries, new entrants into local exchange service markets must rely on the incumbent for essential and near-essential facilities and services for successful entry. Unless interconnection and all of the associated services are readily available, at a level of quality equal to that which the ILECs provide themselves, interconnection becomes a barrier to entry.
33. In adopting quality of service standards for competition related services, the Commission stated that:

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<sup>7</sup> Telecom Decision CRTC 2005-6, *Competitor Digital Network Services*, paragraph 77.

<sup>8</sup> Telecom Decision CRTC 2005-36, Part VII Application by Allstream Corp. seeking access to Light Rail Transit (LRT) lands in the City of Edmonton



The purpose of the Q of S regime for competitors, including the RRP for competitors, is to ensure that all competitors receive a Q of S from the ILECs of a sufficiently high level to *enable the competitors to compete on a level playing field* with each other and with the ILECs.<sup>9</sup> (Emphasis added)

The Commission agrees with the CLECs that monitoring service intervals and standards is appropriate to foster local telephone competition. It is therefore appropriate to establish indicators to monitor certain service intervals and standards negotiated in CISC and approved by the Commission subsequent to Decision 97-16.<sup>10</sup>

34. As noted above, the absence of a quality of service for essential and near-essential services from the ILECs puts competitors at a significant competitive disadvantage. Indeed, as noted by the Commission, CLECs cannot effectively compete without the supply of services at a quality of service level sufficiently high to enable competitors to compete on a level playing field with each other and the ILECs.
35. The Competitors are aware that the Commission has implemented a rate adjustment plan that encourages ILECs to correct quality of service problems as quickly as possible. In Decision 2002-34, the Commission determined the supply of services at a quality of level was so important to successful competition that "the trigger for rate adjustments on ILEC competitor services should apply as soon as the quality of service indicator shows a substandard result for one month".<sup>11</sup>
36. As noted above, quality of service and enforcement of standards are critically important for the creation and maintenance of competitive markets. The Competitors believe that the Commission should continue to monitor the ILECs' quality of service to ensure that, even after the implementation of local exchange service forbearance, the quality of service, and reliability of services provided to competitors by ILECs continues to receive a sufficiently high level to enable competitors to compete.
37. In the past year FCI Broadband has experienced a significant loss of customers due to the ILECs inability to meet quality of service standards. Missed serving dates, delayed repair times and unavailable facilities coupled with an extensive wait, have caused FCI Broadband to lose customers who were unwilling to wait any longer or were simply so frustrated with the process, took their service back to the ILEC. In the last example, it is not sufficient to explain to the customer that the delay is not that of FCI Broadband's, but is a result of the underlying ILEC. Said customer does not want to and should not have to be put through the aggravation or the further wait. Accordingly, it is not sufficient for the ILEC to have to pay a penalty for quality of service issues. Rather, the ILEC must be mandated to meet the quality of service standards or face significantly worse penalties.

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<sup>9</sup> Telecom Decision CRTC 2005-20, Finalization of quality of service rate rebate plan for competitors, paragraph 31.

<sup>10</sup> Telecom Decision CRTC 2001-217, CRTC creates new quality of service indicators for telephone companies, paragraph 54.

<sup>11</sup> Telecom Decision CRTC 2002-34, Regulatory framework for second price cap period, paragraph 776.

38. The Commission should also be cognizant that entry into the local exchange services market requires high sunk costs and long lead times, which act as barriers to entry. A company, the size of FCI Broadband, must carefully evaluate each opportunity to expand into a new serving area. Long before service is offered to customers, the company must build local facilities in the area which will be served. FCI Broadband has done this in 13 communities, including Aurora, Castlemore, Keswick, Maple, Markham, Milton, Newmarket, Oakridges, Richmond Hill, Streetsville, Thornhill, Unionville, and Woodbridge.
39. FCI Broadband and Yak are relatively small companies operating in a very large telecommunications market in Canada. Nevertheless, the companies have been active participants in this proceeding. The outcome of this proceeding will have significant implications for the companies and other relatively small CLECs and resale-based companies. Such competitors provide an important form of competition, different from that provided by larger CLECs and the cable companies. The Competitors request that the Commission take into account the implications of the criteria of the Commission develops for forbearance from regulation of local exchange services and the impact that forbearance will have on competition, particularly smaller companies.
40. While it is not necessary to review the technical arrangements for access to support structure, the Competitors believe that the Commission should review general accessibility to support structures by competitors and determine methods for making such accessibility more efficient.
41. FCI Broadband and Yak appreciate the opportunities to make submissions to be Commission during the course of this proceeding and the efforts of the Commission in this review of competition in local exchange markets and criteria for forbearance.

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