



September 15, 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. This written Argument is filed by Shaw Cablesystems G.P. (Shaw), in accordance with Telecom Public Notice CRTC 2005-2, *Forbearance from regulation of local exchange services*.
2. Copies of this submission are provided to all parties included on the Commission's Public Notice 2005-2 Interested Parties list.

Yours truly,

Shaw Cablesystems G.P.

Ken Stein
Senior Vice President,
Corporate and Regulatory Affairs

cc: Interested Parties

**Canadian Radio-television and
Telecommunications Commission**

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

**ARGUMENT OF
Shaw Cablesystems G.P.**

September 15, 2005

Introduction

1. Shaw Cablesystems G.P. (Shaw) has participated in this proceeding both through the Canadian Cable Telecommunications Association (CCTA) and on behalf of itself. Shaw's active participation in the proceeding should be taken as an indicator of the importance the Commission's findings will have on Shaw's ability to compete in the local telephone market.
2. Shaw has been assessing the viability of entering the local telephone market for the past 3 years. It was not until earlier this year that Shaw Digital Phone became available in Calgary and, subsequently, in Edmonton and Winnipeg. The decision to enter these markets was not an easy one. Shaw carefully considered economic, technical and operational requirements to enter the local telephone market as well as the regulatory regime which the Commission created for competition in the local exchange market, the regulatory safeguards introduced to promote competition (e.g., winback rules) and the interconnection arrangements with ILECs, created by CISC and ordered by the Commission. An assessment of these and other business factors led Shaw to take the risks and commit substantial capital and human resources to compete with the ILECs. Having just entered the market, it now appears that the Commission is considering making substantial changes to the regulatory regime which underpinned Shaw's entry in the first place.
3. Understandably, Shaw is very concerned about the Commission's commitment to ensuring that sufficient regulatory safeguards will remain in place, necessary to prevent the ILECs from exercising their market dominance and power to the detriment of competitors.
4. Shaw competes against MTS, SaskTel and Telus within its operating area. These three ILECs had 2004 revenues 4.8 times that of Shaw, cash flow 4.6 times that of Shaw, and investments in property, plant and equipment 4.3 times that of Shaw. Telus alone has cash flow 3.7 times that of Shaw. No matter how it is measured, Shaw is up against competitors which are much larger, with substantially more resources.
5. The ILECs would have the Commission believe that there is very few steps that Shaw and other cable companies need to complete in order to provide local telephone services.

With existing cable plant in place, the ILECs would have the Commission believe that there is little more than "flipping a switch" to provide the service. Telus, in its June 22, 2005 submission says "Cable LECs are, or soon will be, nearly ubiquitous, full facilities-based competitors in most major ILEC serving areas"¹ and that they "are largely independent of the ILECs and require little from the ILECs or any other LEC in order to offer service".² Such assertions are wrong and misleading.

6. In this Argument, Shaw explains why it requires the cooperation of the ILECs and how the lack of that required cooperation has caused Shaw significant problems entering local exchange markets and acquiring customers. The ILECs' contention that cable companies have ubiquitous networks ready to provide local telephone service is also incorrect.
7. Shaw must upgrade and test its plant to ensure that it is capable of carrying two-way voice traffic. Although in most areas the plant is already equipped for Internet service, further testing is required to make certain that there is no noise ingress or points of congestion which would affect the quality of voice service. Additional plant upgrades could include the "hardening" of the plant, replacement of taps, replacement or addition of two-way amplifiers, segmenting nodes, and supplementing transport facilities. The acquisition of switches, gateways, software, amplifiers and other equipment can extend from two to six months, depending on the availability of the equipment from vendors. If the equipment is of a type or software version which has not yet been deployed in the Shaw network, further testing and training on the equipment for plant personnel may be required. Shaw's network operations centre may require modification or updating for the monitoring of new equipment or new nodes. In some cases the type and vintage of equipment that can be used by Shaw is dictated by the ILEC.
8. In cases where Shaw requires the installation of interconnection facilities, additional transport facilities or two-way amplifiers, Shaw must first acquire access to the ILEC's or a third party support structure. Each unique access to support structure requires an application, whether pole or conduit. Responses to support structure applications can take anywhere from three weeks to six months. In some cases, occurring with greater frequency in British Columbia and Alberta, responses to the support structure

¹ Comments of Telus Communications Inc., June 22, 2005, paragraph 107.

² Ibid., paragraph 110.

applications can take more than twelve months and in many cases have been denied altogether. When access to support structure is denied, the Shaw planning department must reassess the requirements and determine whether alternate routes are possible. This, in turn, leads to a further round of support structure applications and an additional waiting period.

9. Many homes passed will have cable drops requiring upgrades to facilitate two-way digital services. In these cases, Shaw must schedule truck-rolls and technician time for the installation or upgrade and associated testing. In addition to the significant costs associated with this labour-intensive work, the upgrade of cable drops to accommodate local telephone service to homes passed would exceed three to four months, depending on the demand for service.
10. In addition, not all homes passed by Shaw's network have cable drops installed into the premises. Installation of cable drops or access facilities into buildings requires the crossing of private and public property. This frequently adds a level of complication and negotiations with the property owner, resulting in delay and additional costs. Even in those cases where crossing private property is not an issue, Shaw requires the use of specialized equipment for underground drilling to avoid the cutting of sidewalks, driveways, gardens and other obstacles and further increasing the cost of service.
11. Shaw believes that there are three critical points that the Commission must consider when developing the criteria for forbearance from regulation of local exchange services and in respect of the Aliant forbearance application. They are:
 1. The ILECs have the opportunity, capability and incentive to prevent entry by Shaw and other competitors.
 2. The existing regulatory safeguards are not effective at preventing ILEC anti-competitive and predatory behaviour and at promoting competition.
 3. The Commission should move cautiously.
12. In addition to explaining why these three points are important to the outcome of this proceeding, Shaw also summarizes its position and recommendations regarding each of the questions posed by the Commission in Telecom Public Notice CRTC 2005-2.

The ILECs have the incentive, capability and opportunity to prevent entry by Shaw and other competitors.

13. The ILECs would like to keep 100% of the market share and not confront any price competition in local exchange markets. If maintaining monopoly status is no longer feasible, a second-best alternative for the ILECs is to concede some market share in exchange for regulatory concessions. The concessions that the ILECs have requested are significant and they include forbearance of local exchange services, removal of the winback restrictions, removal of promotion restrictions, elimination of bundling safeguards, and removal of rate averaging requirements.
14. The ILECs' incentive to discourage entry is neither new nor unexpected. The Commission has repeatedly observed the ILECs incentive to discourage competition in local exchange markets. In May, when the Commission released Decision 2005-28, it was observed that "it would be rational to expect the ILECs, in a forbore environment, given their current dominance in the provision of local exchange services, to seek to protect their dominant position".³
15. The ILECs' incentive to "protect their dominant position" is of limited concern, so long as they do not have the ability or opportunity to do so. Very few companies in any competitive market have the opportunity to act on similar incentives. However, the ILECs differ from competitors in other markets. In fact, the ILECs' opportunity to act on these incentives distinguishes them from almost all other companies that operate in competitive markets. The ILECs have an *incentive and opportunity* to prevent or forestall competitors from entering the local exchange market.
16. It is this combination of incentive and opportunity which requires continued regulation of the ILECs.
17. There is a substantial difference between forbearance of the local exchange market and forbearance of all other forms of telecommunications services. In the local exchange market Competitors, including Shaw, must rely on the ILECs' cooperation and supply of

³ Telecom Decision CRTC 2005-28, *Regulatory framework for voice communication services using Internet Protocol*, paragraph 163.

services and facilities in order to compete. Without the ILECs' cooperation to interconnect with their networks, access their support structures and port telephone numbers, Shaw literally cannot provide a competitive local telephone service.

18. In recent years, the Commission has forbore from regulating the ILECs' terminal equipment, WAN services, interexchange private line services, data services and long-distance services. These markets have become sustainably competitive to varying degrees. Based on this experience with forbearance, it could be mistakenly concluded that forbearance will be successful in local exchange markets. This would be an incorrect conclusion because none of these services require the sophisticated type of interconnection and access to competitor services that are required by local competitors in the local exchange market.
19. Unlike other services, competitors must rely on the initial cooperation of the ILECs to obtain interconnection of networks, CCS7 interconnection, construction of shared cost facilities, connection to the ILECs' E9-1-1 tandems, and testing for all of the arrangements. Ongoing cooperation of the ILECs is also mandatory. Competitors must rely on ILECs for the continued supply of local transit service, EAS transport service, access to the E9-1-1 database, cooperation to port telephone numbers, provision of customer listings in the telephone directories, supply of message relay service, access to support structure, access to operational support systems, and cooperation to complete the customer transfer processes. Many competitors must also depend on the ILECs for co-location and supply of unbundled local loops.
20. The absence or delay of any one of these requirements will have a significant impact on a competitor's inability to provide local services. The absence or delay of more than one of these requirements can undermine a competitor's ability to compete and remain viable.
21. There are no other telecommunications services where competitors must rely on ILECs to such an extent as the case with local telephone service. Losing appreciation of the dependence competitors must place on ILECs can lead to the development of forbearance criteria that fails to properly take into account the nature of the competitive local exchange market.

22. Clearly, the ILECs desire forbearance of local exchange services. They have said so in this proceeding. In addition, they have appealed Decision 2005-28 to the Governor in Council to overturn the Commission's determination that Voice over Internet Protocol be treated as a regulated service.⁴ The ILECs have also launched public campaigns and lobbying efforts to obtain deregulation of local exchange services. Forbearance of local exchange services is an important objective for them. Noncompliance with interconnection requirements and regulatory safeguards puts local exchange service forbearance at risk and this risk is possibly the only incentive for ensuring interconnection requirements are met.
23. As a new local telephone service competitor, Shaw has experienced, and continues to experience, the effects of the ILECs non-compliance. These are identified in more detail in the following section. When disputes arise, and cannot be resolved on a bilateral basis, Shaw has the option of referring the matter to the Commission for resolution. However, the disputes happen all too frequently.
24. Recently, Quebcor Media Inc. filed a Part VII application requesting the Commission to comply with the winback restrictions. Shaw is also beginning to witness violation of the winback rules and use of targeted promotions by the ILECs, as Shaw Digital Phone becomes available to more customers.
25. Shaw has experienced and continues to experience the consequences of the ILECs noncompliance. Currently, Shaw is delayed or refused access to Telus support structures, Telus will only port a maximum of 100 telephone numbers per day, which is about 15% of normal porting activity and MTS Allstream currently refuses to port numbers in Manitoba when customers are provisioned with MTS Allstream DSL-based services.
26. This behavior enhances the ILECs' market power. Customers that chose to Shaw's Digital Phone service are prevented from obtaining service by the action of the ILECs. It not only affects the customers who are denied service but, as their negative experiences are

⁴ Petition to the Governor in Council to Vary Telecom Decision CRTC 2005-28, Regulatory Framework for Voice Communication Services using Internet Protocol, by Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications, Telebec, and Telus.

made public and repeated in the marketplace, Shaw has a progressively more difficult time obtaining new customers.⁵

27. As noted in Shaw's June 22, 2005 submission, it is unrealistic to bring each problem encountered with Telus and other incumbents to the Commission for arbitration. The process to resolve a dispute is lengthy and the Commission is understandably reticent to order carriers how and when to perform construction work. Support structure disputes between Shaw and Telus also often have lengthy and detailed histories, which make them difficult to present to the Commission for resolution.
28. There is a direct relationship between forbearance of local exchange services and the ILECs' adherence to interconnection requirements and regulatory safeguards. Currently, the ILECs have an incentive but are somewhat constrained by the Commission's safeguards to engage in unchecked anti-competitive conduct. The existence of tariffs, regulations and regulatory safeguards help prevent the ILECs from making full use of their market dominance and power to the detriment of competitors. In a market where ILEC local exchange services are not regulated by the Commission, the opportunity to act on the incentive to prevent or limit a competitor's ability to compete is increased substantially.
29. Shaw fully anticipates that the ILECs will make it more difficult for Shaw to access support structure, port telephone numbers, and interconnect and new markets. With negligible costs associated with engaging in anti-competitive behavior, the ILECs would take full advantage of their incentive and opportunity to limit competition.
30. If the Commission were to forbear from regulating the ILECs' local exchange services, the ILECs would have better opportunity to deny or delay interconnection arrangements and disregard regulatory safeguards. Making interconnection more difficult would effectively discipline competitors from entering or expanding services in the market and, since it is not the Commission's practice to impose fines or penalties, the consequences of non-compliance are low.

⁵ In response to Bell(CRTC)20Jul05-206, Bell says "incumbency can actually work against the ILECs". Shaw does not believe there is any merit in this suggestion.

31. In an environment where the ILECs' local exchange services are no longer regulated by the Commission, the benefits of noncompliance with the interconnection requirements and regulatory safeguards would outweigh the costs of noncompliance for the ILECs.
32. Competitors will always require local interconnection and other arrangements from the ILECs in order to compete. However, this does not mean that local exchange services should never be forborne. Once interconnection is obtained, support structure access runs smoothly, the local exchange market is sufficiently competitive, and competitors have gained a sufficiently strong market position, the negative effect on competitors will be lessened. Only when competition is sufficiently established should local exchange forbearance be considered.
33. Shaw also notes that the *Telecommunications Act* prevents the Commission from forbearing from the regulation of local exchange services when, by doing so, the establishment or continuance of a competitive market would be impaired. The *Telecommunications Act* states:

34(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services.

34. Forbearance of ILEC local exchange service would have a twofold impact on competitors. First, with all of the benefits of incumbency and overwhelming market share, the ILECs could adjust rates to levels that prevent or impede competitors from entering. In this regard, it is important to note that the ILECs have the incentive and ability to engage in predatory pricing to prevent, forestall or remove competition.⁶ Second, because the ILECs are "gatekeepers" to the public switched telephone network, they can prevent or delay competitors from obtaining the ability to provide competitive local exchange services. If a competitor is prevented from interconnecting, accessing support structures or porting telephone numbers it is also effectively prevented from competing. Furthermore, customers and potential customers will quickly become weary of a CLEC that is unable to act on its service offerings, even if it is prevented from doing so by the actions of the ILECs.

⁶ Telecom Decision CRTC 2005-28, *Regulatory framework for voice communication services using Internet Protocol*, paragraph 163.

35. In its determinations in this proceeding, the Commission should recognize that the ILECs have a strong incentive to prevent or delay competitive entry. Currently, the opportunity to act on this incentive is somewhat constrained through interconnection requirements, regulatory safeguards and, most significantly, the opportunity to engage in anti-competitive behavior is constrained by a key objective to obtain local exchange forbearance. A decision in favour of local exchange forbearance would provide the ILECs with greater opportunity to act on the incentive to prevent or delay competitive entry.

The existing regulatory safeguards are not fully effective at promoting competition.

36. Shaw entered the local exchange markets this Spring and since then has learned that the regulatory regime is not fully effective in preventing anti-competitive behaviour. Shaw continues to experience very difficult barriers to entry which have been created by the ILECs, sometimes contrary to the Commission's directives.
37. The Commission ordered implementation of local number portability (LNP) because it was determined that LNP was essential for the creation of a competitive market. The Competition Bureau made a similar observation in this proceeding. The Competition Bureau stated:

The Bureau views local number portability as an essential feature of a deregulating local telecommunications markets. Absent the ability to seamlessly move from the dominant provider to a competitor, customers may be reluctant to switch suppliers thereby diminishing the opportunity for competitive markets to evolve. This is particularly so in the business market where, absent number portability, the costs of switching can be significant and impact on the anticipated revenues for a customer. Switching costs include changing calling cards, letterhead and advertising in addition to lost sales, supply and investment opportunities as numbers in telephone directories and ads are out of date. Local number portability, in contrast, encourages competition by enabling customers to shop for better deals and better product offerings.⁷ (Emphasis added)

⁷ Competition Bureau(CCTA)20July05-8

38. As Bell points out in an interrogatory response, "[w]hen a customer chooses to leave an ILEC, whether an ILEC or a CLEC, and wishes to port his/her number, that ILEC must assist in the number porting process".⁸ However, as Shaw has learned, barely 6 months into the introduction of its Shaw Digital Phone, the ILECs frequently do not cooperate. Currently, Telus is refusing to process more than 100 telephone numbers per day for Shaw. Apparently, this restriction will continue so long as Telus is in a labour dispute with its union, which appears may take many months to resolve. During this time, Shaw simply cannot acquire customers who have indicated an interest and desire in subscribing to Shaw's Digital Phone by porting their local telephone numbers.
39. Furthermore, Shaw was not provided any advanced notification that these problems would arise. It was not until after Shaw signed and committed to provide service to customers that it learned that the numbers would not be ported and customers denied service. As a result, Shaw has lost these customers, who may not return when porting eventually is made available. In addition, other potential customers will learn out these problems and may refuse to try Shaw's Digital Phone.
40. This is not a reciprocal problem. The ILECs enjoy approximately 98% of the residential market share. The vast majority of telephone numbers are ported from an ILEC to a CLEC. Very few telephone numbers are ported from CLECs to ILECs. If Shaw experienced labour disputes, similar to those that Telus, it would have little or no effect on the ILECs.
41. MTS Allstream does not have any current labour problems, as far Shaw is aware. Nevertheless, MTS Allstream is also refusing to port numbers to Shaw. Customers who have indicated a desire to obtain Shaw's Digital Phone service, by porting their numbers, are denied the opportunity by MTS Allstream if they happen to be customers of that company's DSL-based services. In other words, MTS Allstream simply refuses to port numbers to Shaw for customers that subscribe to MTS Allstream's high-speed Internet service and/or MTS TV.

⁸ The Companies(Shaw)20Jul05-5

42. MTS Allstream has reported that it has more than 114,000 high-speed Internet customers in Manitoba and more than 41,000 and MTS TV customers in Winnipeg. Shaw estimates that the MTS TV customers alone represent approximately 18 percent of residential local exchange service customers in Winnipeg.⁹ None of these customers are available to Shaw, in spite of Commission directives and CISC guidelines which require MTS Allstream to port numbers.
43. Refusing to provide access to support structure is another means used by the ILECs to prevent Shaw from offering Digital Phone. As set out in response to interrogatory Shaw(CRTC)20July05-907, the introduction of Shaw Digital Phone can occur only after substantial network upgrades have been completed. These network upgrades, ongoing maintenance and network growth frequently require access to the ILECs' support structure. Among other things, Shaw must segment nodes, supplement fibre facilities and upgrade amplifiers and drops which require access to the ILECs' support structures.
44. For some time now, Shaw has experienced significant difficulties accessing Telus support structure. In some cases, support structure applications have been refused outright and, in other cases, permission to access to support structure has taken six to 12 months to obtain and has resulted in delays to outside plant construction of up to 18 months. The consequences of these difficulties have meant that Shaw has been forced to postpone the introduction of new services in some areas.
45. One such example of delays and refusal of access by Telus arose from a request to access Telus support structure in Powell River, BC. Shaw made an application for use of the poles in October 2004. Shaw had received no reply on requests for follow-up until March 2005. Shaw was then notified that in order to use the poles Telus would need to undertake "make ready work". Shaw was ready to proceed when Telus advised that they considered the make ready work to be "discretionary" and were not willing to undertake the work because it was of no value to Telus. After negotiations between Shaw and Telus planners, Telus refused to consider the applications and returned them to Shaw. This scenario has been repeated many times within British Columbia over the last 18 months.

⁹ MTS, Q2 Quarterly Report

46. Becoming a competitor with attractive services with a potential to succeed in the local exchange market requires more than merely requesting interconnection from an ILEC. A successful facilities-based competitor must confront and resolve numerous problems with ILECs, which are service-affecting. The magnitude and frequency of these problems are unique to facilities-based competitors, and unique to telecommunications. The ILECs and competitors in other industries do not face similar problems.
47. Some parties have observed that the Commission "has put in place a regulatory regime for cable access to ILEC-controlled support structures, including the rates that may be charged".¹⁰ Unfortunately, however, Commission directives and tariffs alone are insufficient to ensure that access to support structures is available. The same is also true for access to rights-of-way.
48. As a result of its historical position as a monopoly service provider or due to the nature of ownership, the ILECs in western Canada enjoy important advantages over competitors in respect of gaining access to municipal rights-of-way.
49. Shaw currently has negotiated agreements with some municipalities for rights-of-way. The costs, difficulties and delays which confront Shaw for access to support structure are repeated many times over for access to rights-of-way. The Commission is well aware of the problems that Shaw has faced in obtaining access to the City of Vancouver right of ways. The evidence of such delays is well documented. There is a growing movement within municipalities to follow the City of Vancouver's lead and delay or refuse Shaw access to rights-of-way. Many municipalities continue to dispute the Commission's jurisdiction and refuse to acknowledge the Ledcor principles, set out by the Commission in Decision 2001-23.¹¹ It is not uncommon for Shaw to receive agreements from municipalities where there are annual fees for usage of the rights of way or suggestions that the municipality should be compensated in other ways outside of the agreement if access is to be obtained.

¹⁰ See for example Competition Bureau(Yak)20July05-14

¹¹ Telecom Decision CRTC 2001-23, *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*.

50. Even though the Commission has rendered decisions with principles and directories regarding access to rights-of-way, these have been subject to appeal, reinterpretation, delay and outright refusal to comply by some municipalities. Although appeals can be made to the Commission for resolution of disputes, it frequently takes many months for particular problems to be identified and documented sufficiently for an application. Even then, an application must be prepared and comments received from the parties before the Commission can issue a decision. This process, from beginning to end, can easily take 12 months. This is much longer than potential customers are willing to wait for service, particularly in a market where alternatives from the ILECs are more readily available.

51. The Commission has noted that competitors are at a disadvantage compared to ILECs for access to support structures and rights-of-way. For example, the Commission has noted:

In addition, ILECs can rely on existing support structures such as poles, conduits and entrance conduits to more readily expand their networks. On the other hand, the competitors have significantly fewer support structures, and accordingly rely on the ILECs' support structures to expand their networks. The use of the ILEC support structures *is subject to availability and provisioning intervals*, which in turn will generally impact the competitors' provisioning intervals with respect to their own customers. In the Commission's view, *such considerations constitute an additional constraint for competitors*.¹² (Emphasis added)

...the Commission considers that *competitors are at a disadvantage vis-à-vis the ILECs with respect to matters such as municipal approvals, network ubiquity, and access to support structures*.¹³ (Emphasis added)

52. In Public Notice 2003-1, the Commission observed that competitors face "substantial" barriers to entry including "access issues related to municipal rights-of-way, support structures and multi-unit buildings"¹⁴.

53. Shaw's experience suggests that the Commission has under-estimated the significance of the problem facing facilities-based competitors. The absence of timely access to support structure and rights-of-way frequently prevent Shaw from providing service. They are substantial barriers to entering local exchange markets and maintaining existing

¹² Telecom Decision CRTC 2005-6, *Competitor Digital Network Services*, paragraph 76

¹³ *Ibid.*, para. 122

¹⁴ Telecom Public Notice CRTC 2003-1, *Review of winback promotions*, para. 13.

networks. Unfortunately, it does not appear that these barriers will be removed any time soon.

54. The Commission has repeatedly issued directives, orders and decisions, which set out the rates, terms and conditions before access to support structures and rights-of-way. Yet the problems persist. As noted in Shaw's June 22, 2005 submission:

Access to support structures is a particular problem for Shaw and has been a perennial problem in the industry. Shaw notes that, shortly after the Commission acquired jurisdiction over federally regulated carriers, one of its first proceedings examined access to support structures by cable companies.¹⁵ That was 28 years ago and access to the ILECs' support structures continues to be a major constraint for Shaw's ability to provide services to customers.

55. The challenge for the Commission is to be more responsive to problems as they arise and more diligent in enforcing the requirements and safeguards. Unless and until access to support structures and rights-of-way are removed as barriers to entry, forbearance of local exchange services should not be contemplated.

The Commission should move cautiously.

56. As soon as the Commission issues its decision on framework, including the criteria, for forbearance from the regulation of residential and business local exchange services, Shaw expects that there will be a flood of applications from the ILECs. As noted above, they have been and will continue to be relentless in their pursuit of forbearance for local exchange services.
57. The Commission is also under increasing pressure to forbear from regulating local exchange services as a result of the appeal to Cabinet for review of Decision 2005-28 and the regulatory review which is currently underway. Persistence and repetition are not reasons to forbear from regulation of the local exchange services market.

¹⁵ Telecom Decision CRTC 77-6, *Bell Canada, Tariff for the Use of Support Structures by Cable Television Licensees*.

58. In Public Notice 2005-2, the Commission also indicated that it would consider a transitional regime that provides ILECs with more regulatory flexibility prior to forbearance. If the Commission decides to implement a transitional regime this will come at the sacrifice of existing regulatory safeguards.
59. Shaw recommends that the Commission stand fast in its objective to create a fully competitive local exchange services market. No one in this proceeding would dispute that competition provides a better range of services, at lower prices. The enhancement of efficiency and competitiveness of Canadian telecommunications, and the fostering of increased reliance on market forces for the provision of telecommunications services are two items of Canada's telecommunications policy. The question in this proceeding is not how to maintain residual competition while affording the ILECs maximum flexibility. The question in this proceeding is how much regulatory flexibility is consistent with the development and creation of a fully competitive local exchange market. Indeed, as noted above, the *Telecommunications Act* prohibits the Commission from forbearance, if doing so would likely impair the establishment of a competitive market.
60. There is a substantial way to go before the local exchange services market can be considered fully competitive. The facts are well-known to the Commission;
- Competitors' share of retail lines increased from 3.9% in 2002 to 4.3% in 2003;¹⁶
 - Competitors' share of residential lines increased from 2.0% in 2003 to 3.2% in 2004; while their share of business lines remained relatively stable at approximately 11%;¹⁷
 - Competitors' share of local residential revenues increased from 1.1% in 2002 to 1.9% in 2003, while their share of business revenues decreased from 8.1% to 7.9%;¹⁸
 - Facilities-based competition in local services has been in place in Canada for nearly eight years and yet, as of the end of 2003, the ILECs accounted for 98% of

¹⁶ *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets*, November 2004

¹⁷ Telecom Public Notice CRTC 2005-11, *Bell Canada proposal for VoIP service pricing in Ontario and Quebec*

¹⁸ *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets*, November 2004

local residential revenues and 92% of local business revenues across the country;¹⁹ and,

- In the long distance service market, which has been competitive for thirteen years, only 41% of residential subscribers have tried a long distance provider other than an ILEC.²⁰

61. The Commission's observations about the status of local competition reveals local competition is not developing at a rate that will result in sustainable Canada-wide facilities-based local competition in the foreseeable future.²¹ Sustainable facilities-based local competition will not occur in the foreseeable future because there are a number of prerequisites which do not yet exist. Among other things:

- sustainable competition can only be achieved if CLECs have the opportunity to develop a stable customer base;²²
- resolution of access issues related to MDUs is of central importance to the development of local competition and in particular facilities-based competition, and the achievement of end-user choice;²³
- cable companies – with the exception of EastLink – have virtually no experience in either the residential or business market for local exchange services, and will therefore have to build expertise in serving telephone customers;²⁴
- the use of the ILEC support structures is subject to availability and provisioning intervals, which in turn will generally impact the competitors' provisioning intervals with respect to their own customers. In the Commission's view, such considerations constitute an additional constraint for competitors;²⁵

¹⁹ Decision 2003-45, *Provision of telecommunications services to customers in multi-dwelling units*, paragraph 160

²⁰ *Ibid.*

²¹ Telecom Decision CRTC 2005-14, *Competitive local exchange carrier access to incumbent local exchange carrier operational support systems*

²² Telecom Decision CRTC 2004-04, *Call-Net Part VII Application – Promotion of local residential competition*, paragraph 119

²³ Decision 2003-45, *Provision of telecommunications services to customers in multi-dwelling units*, paragraph 124

²⁴ Telecom Decision CRTC 2005-28, *Regulatory framework for voice communication services using Internet Protocol*, paragraph 156

²⁵ Telecom Decision CRTC 2005-6, *Competitor Digital Network Services*, paragraph 76

- competitors are at a disadvantage vis-à-vis the ILECs with respect to matters such as municipal approvals, network ubiquity, and access to support structures;²⁶
- CLECs have significant start-up and ongoing costs. CLECs must lease services or facilities from the ILECs to serve many of their customers;²⁷
- CLECs may also face difficulties accessing tenants in multi-dwelling buildings, and in accessing municipal rights-of-way and non-carrier support structures. All of these considerations can limit the size of the market an entrant can serve, thus, in essence, becoming barriers to entry;²⁸ and,
- the regulation of local exchange services remains necessary given the weak state of competition in the local exchange services market.²⁹

62. Parties in this proceeding have explained to the Commission that all of these issues remain and that it is inappropriate to consider the forbearance of local exchange service markets while competitors face these difficulties.

63. There is increasing pressure on the Commission from the ILECs to forbear from regulating local exchange services and remove the regulatory safeguards in place to help develop facilities-based competition. Unless and until the ILECs can show that the existing problems for local competitors have been removed, the Commission should move cautiously in introducing local forbearance, lifting regulatory safeguards, or introducing a transitional regime.

Summary of Proposals for the Creation of Local Forbearance Criteria

64. In its June 22, 2005 response to Public Notice 2005-2, Shaw provided specific recommendations concerning the criteria for use by the Commission when considering applications from all ILECs for the forbearance of local exchange markets. This section provides a summary of Shaw's recommendations.

²⁶ *Ibid.*, para. 122

²⁷ Telecom Decision CRTC 2002-34, *Regulatory framework for second price cap period*, paragraph 151

²⁸ *Ibid.*

²⁹ Telecom Public Notice CRTC 2004-2, *Regulatory framework for voice communication services using Internet Protocol*, paragraph 15

65. The ILECs have overwhelming market share, they benefit from 100-years experience in the local exchange market, residential customers exhibit a reticence or inertia to move from ILEC services, the ILECs control interconnection access, municipalities delay access to rights-of-way to competitors and provide them on terms that discriminate against competitors, building owners impose delays, costs and requirements which are often not imposed on ILECs, ILECs have access to detailed customer information which enable them to constrain competitors, and the ILECs have financial power and depth of resources not available to new entrants. Most significantly, the ILECs act as gatekeepers because they control access to support structures and number porting to the detriment of competitors.
66. Combined, these advantages give the incumbent telephone companies substantial market power, which, if not constrained, will be used to prevent or forestall competition. The advantages enjoyed by the ILECs are not available and likely will not ever be available to competitors.
67. The development of a fully competitive local exchange services market will develop if, and only if, the Commission continues to exercise its authority under the *Telecommunications Act* to prevent the telephone companies from acting on their incentive and opportunity to suppress competition. Indeed, Canada's telecommunications policy objectives will be realized only if the Commission continues to regulate the ILECs' local exchange services.
68. None of this is new to the Commission. Since 1979, when competition in the supply of interexchange private line services was introduced, the Commission has observed the difficult barriers to the formation of competition. The Commission has consistently recognized that the transition from monopoly to workable competition requires regulation and Canada is still only in the very early stages of local telephone service competition. The transition from monopoly to workable competition has only begun and the Commission's regulation of the ILECs' local telephone services is necessary for the foreseeable future.
69. For assessing ILEC applications for the forbearance of local exchange service, Shaw recommends that the Commission use the approach it originally developed in Decision

94-19, which was consistent with competition policy literature and jurisprudence. The approach included the following four steps:

- 1) the Commission should forbear when a market becomes workably competitive;
- 2) a market cannot be workably competitive if the dominant firm possesses substantial market power;
- 3) market power is a function of three factors:
 - a) market share held by the dominant firm;
 - b) demand conditions affecting responses of customers to a change in price of the product or service in question; and
 - c) supply conditions affecting the ability of other firms in the market to respond to a change in the price of the product or service;
- 4) high market share is a necessary but not sufficient condition for market power, other factors must be present to enable a dominant firm to act anti-competitively.

70. This approach is a useful framework but requires more detail for it to work for the local telephone market. Demand conditions considerations should include an assessment of customers' willingness to switch local service providers. At the current time, it is unknown whether there is a temporary hesitancy until customers become familiar with the concept of local competition or if customer inertia is a permanent characteristic of the local exchange service market, particularly among residential consumers. A full assessment of customer inertia is required before the Commission grants an application for local telephone service forbearance.

71. The Commission should also take note of specific supply conditions and barriers to entry which exist for local competition. Shaw has experienced significant delays and costs arising from access to support structures, multi-tenant buildings, rights-of-way, access to and ease of interconnection arrangements with the ILEC, high sunk costs and lengthy construction periods. These will likely persist as Shaw enters new exchanges.

72. Of these barriers to entry, access to ILEC support structures is a significant and persistent problem. Unreasonable and costly requirements, long and unnecessary delays in obtaining answers to applications for use of duct and pole space, and unjustified refusals for use of support structure prevent Shaw from providing services. In spite of directives

from the Commission, ILECs provide themselves with advantages that are not available to Shaw. The combined actions of forestalling and preventing Shaw's use of ILEC support structure with granting itself more favourable access to support structure has prevented and will continue to delay, impede and preclude Shaw from entering new local telephone service markets.

73. To take explicit recognition of the problems confronting new competitors, Shaw recommends that an application for local telephone service forbearance be automatically rejected, unless the ILEC can show:
 - 1) conclusive evidence that customers are no longer reluctant to change local service providers, when offered lower prices from competitors;
 - 2) conclusive evidence that competitors have access to support structure on terms that are at least as favourable as the terms the ILECs enjoy and demonstration that delays, onerous and unnecessary requirements and additional costs of accessing the ILECs' support structure are eliminated;
 - 3) conclusive evidence that access to rights-of-way and access to buildings no longer exists and that the ILEC proposing the forbearance of local exchange service does not have an advantage or receive any preference, not available to CLECs, with respect to any of these forms of access; and
 - 4) it is fulfilling its competitor quality of service obligations, and has consistently done so for a period of 24 months, for services needed by CLECs to provide local exchange services.
74. In addition to these factors, Shaw recommends that the Commission make a full assessment of the sunk costs and the time to entry, which act as a barrier to entry and can make the market unworkably competitive.
75. Regarding the Commission's powers and duties which should be forborne, Shaw recommends that, should the Commission decide to forbear regulating local exchange

service rates, the Commission retain its powers and duties pursuant to sections 24 and 27(2), which state:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

27(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

76. Shaw also recommends that the Commission forbear from the section 31 authority, which permit ILECs to file tariffs for the limitation of liability associated with the provision of local telephone services. If the Commission approved limitation of liability, the ILECs would gain an advantage that is not available to CLECs. Alternatively, if the Commission permits the ILECs to limit liability for local exchange services, pursuant to section 31, CLECs should be provided the same opportunity.
77. Notwithstanding any forbearance decision the Commission may issue for local telephone services, the Commission should continue to regulate the following:
- access to support structures,
 - access to multi-tenant buildings,
 - access to rights-of-way,
 - quality of service standards for services provided by ILECs to CLECs,
 - all interconnection arrangements and services associated with interconnection (e.g. co-location),
 - the requirement for ILECs to provide complete telephone books,
 - 9-1-1 service, Enhanced 9-1-1 service and access to 9-1-1 service by CLECs,
 - directory assistance databases,
 - the requirement that ILECs permit the resale of services,
 - message relay service, and
 - privacy safeguards.
78. In the Public Notice, the Commission recognizes that establishing a framework and criteria for assessing local exchange service forbearance applications is not enough. The Commission also needs to develop criteria that should apply after local exchange service are forborne. This is important because forbearance of local telephone services may, with experience, prove to be contrary to the policy objectives in the *Telecommunications Act*.

79. Shaw proposes three indicators which should trigger a review of forborne local telephone service markets. First, the Commission should re-regulate an ILECs' local exchange services if competitors are experiencing substantial or increasing problems in accessing support structures. Second, if an ILEC surpasses the pre-forbearance market share levels and the ILEC has been able to sustain a price premium of 5% or more for a period of 12 months or longer, the Commission should conclude that the ILEC has market power and the market is not workably competitive. Finally, the Commission should re-regulate when an ILEC fails to meet or exceed the quality of service standards for competitors.
80. The Commission asked whether there should be a transitional regime that provides ILECs with more regulatory flexibility prior to forbearance. In Shaw's view, the Commission has already granted the ILECs very significant regulatory flexibility in competing with new entrants. Regulatory flexibility for the promotion of local telephone service was granted the ILECs in Decision 2005-25. In recent months, the ILECs have benefited from the expedited tariff approval process, provided on an *ex parte* basis. A recent example is Telecom Order CRTC 2005-223 which approved, on an interim basis, an *ex parte* tariff application for Bell Canada's Digital Voice service. In it, the Commission approved a range of rates which were filed in confidence and remain confidential. The ILECs, in many respects, are already unregulated and it would be harmful to the development of local exchange service competition if the Commission lifted any more of the safeguards.

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