



Telecom Decision CRTC 2007-9

Ottawa, 8 February 2007

Forbearance from the regulation of high capacity/digital data services interexchange private line services on certain additional routes

Reference: 8638-S1-01/98

In this Decision, the Commission forbears, with some conditions, from regulating high capacity/digital data services interexchange private line services on those additional routes on which the competitors of several incumbent local exchange carriers now offer or provide such services at DS-3 or greater bandwidth.

1. In *Follow-up Proceeding to Telecom Decision CRTC 97-20: Establishment of criterion and process for considering further forbearance for High Capacity/DDS interexchange private line services*, Telecom Order CRTC 99-434, 12 May 1999 (Order 99-434), the Commission directed the competitors of several incumbent local exchange carriers (ILECs) that provided telecommunications services to file a semi-annual report, on 1 April and 1 October of each year. In the report, the competitors were to identify the interexchange private line (IXPL) routes on which they provided or offered to provide high capacity/digital data services (DDS) IXPL services (IXPL services) to at least one customer, at the equivalent of DS-3 or greater bandwidth, using terrestrial facilities from a company other than the ILEC or an affiliate of the ILEC. The Commission stated that, upon being satisfied that one or more competitors met this criterion, it would proceed to forbear from the regulation of IXPL services on those particular routes without further process, given that the evidence on which the forbearance determination would be made stemmed from the competitors.
2. The Commission received October 2006 filings from the following competitors: Axia SuperNet Ltd. (Axia), Bell Canada on behalf of Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and NorthernTel, Limited Partnership (collectively, Bell Canada et al.), Bragg Communications Inc. carrying on business as EastLink (EastLink), Hydro One Telecom Inc. (HydroOne), Kenora Municipal Telephone System (KMTS), Manitoba Hydro, MTS Allstream Inc. (MTS Allstream), Navigata Communications Ltd. (Navigata), Northwestel Inc. (Northwestel), Ontera, Rogers Cable Communications Inc. (RCCI), Saskatchewan Telecommunications (SaskTel), SCBN Telecommunications Inc. (SCBN), Shaw Cable Systems G.P. on behalf of Big Pipe Inc. (Big Pipe), TELUS Communications Company (TCC), and Quebecor Média inc. for Vidéotron ltée (Vidéotron).

Background

3. The Commission's power to forbear from regulating a telecommunications service or class of services provided by a Canadian carrier originates from section 34 of the *Telecommunications Act* (the Act), which reads as follows:

34. (1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

(2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services.

(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.

(4) The Commission shall declare that sections 24, 25, 27, 29 and 31 do not apply to a Canadian carrier to the extent that those sections are inconsistent with a determination of the Commission under this section.

4. The Canadian telecommunications policy objectives set out in section 7 of the Act include the following:

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

...

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

...

(h) to respond to the economic and social requirements of users of telecommunications services.

5. The Commission established a framework for considering whether to forbear from regulation in *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19). In that Decision, the Commission noted that the assessment of competitiveness began with a definition of the relevant market, as the relevant market formed the basis for the entire forbearance exercise. The relevant market was essentially the smallest group of products and geographical area in which a firm with market power could profitably

impose a sustainable price increase. The Commission also established a number of criteria to be examined when determining whether a market was competitive including the market shares of the dominant and competing firms, demand and supply conditions, the likelihood of entry into the market, barriers to entry into the market, and evidence of rivalrous behaviour.

6. In *Stentor Resource Centre Inc. - Forbearance from regulation of interexchange private line services*, Telecom Decision CRTC 97-20, 18 December 1997 (Decision 97-20), pursuant to section 34 of the Act and in accordance with the framework set out in Decision 94-19, the Commission forbore in large part from the regulation of the IXPL services provided by the former Stentor-member companies (the large ILECs) on certain routes. In that Decision, the Commission found that forbearance under subsection 34(1) of the Act from the regulation of the routes at issue would be consistent with the Canadian telecommunications policy objectives set out in section 7 of the Act, including paragraphs 7(c) and (f). The Commission also found that it would be appropriate to forbear under subsection 34(2) of the Act on the basis that the forborne services were or would be subject to a level of competition sufficient to protect the interests of users of these services. Finally, pursuant to subsection 34(3) of the Act, the Commission found that to forbear would not impair unduly the establishment or continuance of a competitive market for the forborne services.
7. In Order 99-434, the Commission determined that, given that the IXPL market was route-specific, forbearance from IXPL services on a given route would be granted upon the Commission being satisfied that one or more competitors of an ILEC was/were offering or providing IXPL services at the equivalent of DS-3 or greater bandwidth to at least one customer while using terrestrial facilities from a company other than the ILEC in question or an affiliate of the ILEC.
8. In Order 99-434, the Commission directed the competitors to report to the Commission semi-annually on their IXPL routes that met the above-mentioned criterion. The Commission stated that it expected to quickly issue an order granting forbearance to the appropriate ILECs for the routes in question based on the criterion having been met, once the Commission had received the reports. The Commission determined that the scope of forbearance would be the same as in Decision 97-20. The Commission also stated that the ILECs were not precluded from submitting applications for forbearance with respect to IXPL services on routes not identified by competitors.
9. In Telecom Order CRTC 99-905, 17 September 1999 (Order 99-905), the Commission extended the IXPL forbearance process of Order 99-434 to Québec-Téléphone, now part of TCC, and Télébec ltée, now Société en commandite Télébec (Télébec). In Order 99-905, the Commission also determined that the scope of forbearance would be the same as in Decision 97-20.
10. With respect to the scope of forbearance, in Decision 97-20 the Commission forbore from the exercise of its powers and the performance of its duties under sections 25 and 31, and subsections 27(1), 27(2), 27(4), 27(5), and 27(6) of the Act. In that Decision, the Commission found it appropriate to impose conditions pursuant to section 24 of the Act with respect to the protection of customer confidential information. The Commission also imposed conditions preventing the bypass of Canadian telecommunications services and facilities. In addition, the Commission retained its powers pursuant to section 24 of the Act to impose future conditions on the forborne services provided by the ILEC, where circumstances warrant.

11. Further, the Commission considered it appropriate to retain its powers pursuant to subsection 27(3) of the Act with regard to compliance with powers and duties not forborne from exercising in that Decision.
12. Subsequent to Decision 97-20, the Commission forbore from exercising its powers and duties under section 29 of the Act in relation to forborne IXPL services provided by TCC in *TELUS' application for forbearance from section 29 of the Telecommunications Act with respect to forborne interexchange private line and long distance services*, Telecom Decision CRTC 2003-77, 19 November 2003 (Decision 2003-77). The Commission later forbore from exercising its powers and duties under section 29 of the Act with respect to forborne IXPL services provided by Bell Canada, Aliant Telecom Inc. (now part of Bell Aliant), MTS Allstream, and SaskTel in *Aliant Telecom, Bell Canada, MTS Allstream and SaskTel - Forbearance from section 29 of the Act for agreements related to forborne domestic toll services and forborne interexchange private line services*, Telecom Decision CRTC 2004-80, 9 December 2004 (Decision 2004-80).

Commission's analysis and determinations

13. For the October 2006 reporting period, the competitors submitted reports on numerous IXPL routes. As requested, the competitors identified previously forborne routes and new routes on which they were providing or offered to provide IXPL services to at least one customer, at the equivalent of DS-3 or greater bandwidth while using terrestrial facilities from a company other than the ILEC or an affiliate of the ILEC.
14. The Commission remains of the view that it would only be appropriate to forbear from the regulation of IXPL services along the IXPL routes where at least one competitor is offering or providing such services to at least one customer, at the equivalent of DS-3 or greater bandwidth, using terrestrial facilities other than from the ILEC(s) or an affiliate of the ILEC(s) in the respective exchanges.
15. The Commission identified all routes submitted by competitors which it considers do not meet the criteria set out in Order 99-434. For example, the Commission notes that KMTS reported a route from Kenora to Winnipeg on which KMTS would be the only company offering or providing IXPL services. The Commission considers that it would not be appropriate to forbear from the regulation of IXPL services along this route or other similar routes unless an unaffiliated company also offers or provides IXPL services along the same route.

Application of subsections 34(1), (2) and (3) of the Act

16. Pursuant to subsection 34(1) of the Act, the Commission finds as a question of fact that to refrain from the exercise of its powers and the performance of its duties to the extent set out in this Decision with respect to the regulation of the IXPL services on the routes listed in the Appendix is consistent with the Canadian telecommunications policy objectives set out in section 7 of the Act.
17. Pursuant to subsection 34(2) of the Act, the Commission also finds as a question of fact that the IXPL services on the routes listed in the Appendix are subject to a level of competition sufficient to protect the interests of users and that, therefore, to the extent set out in this Decision, it is appropriate to refrain from regulating the IXPL services provided on these routes.

18. Pursuant to subsection 34(3) of the Act, the Commission finds as a question of fact that refraining from regulating the IXPL services on the routes listed in the Appendix, to the extent set out in this Decision, is unlikely to impair unduly the continuance of a competitive market for these services.
19. In light of all of the above and based on the reports filed pursuant to Order 99-434 by Axia, Bell Canada et al., Big Pipe, EastLink, Hydro One, KMTS, Manitoba Hydro, MTS Allstream, Navigata, Northwestel, Ontera, RCCI, SaskTel, SCBN, TCC, and Vidéotron, the Commission finds that the IXPL services on the routes listed in the Appendix satisfy the criteria under section 34 of the Act for a forbearance determination by the Commission.
20. The Commission's determinations on the extent to which it is appropriate to refrain from the exercise of its powers and the performance of its duties under sections 24, 25, 27, 29, and 31 of the Act are set out below.

Section 24

21. Section 24 of the Act provides that
 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.
22. The Commission considers that it is appropriate to retain its powers, pursuant to section 24 of the Act, to ensure that the confidentiality of customer information continues to be protected. Accordingly, the Commission directs the ILECs whose territories include one or more of the IXPL routes listed in the Appendix to this Decision (the affected ILECs), on a going-forward basis, to incorporate, where appropriate, the existing conditions regarding the disclosure of confidential customer information to third parties into all contracts and any other arrangements for the provision of the IXPL services forborne from regulation in this Decision.
23. The Commission considers that it is also appropriate to retain sufficient powers under section 24 of the Act to specify possible future conditions upon the forborne services provided by the affected ILECs, where circumstances so warrant.
24. The Commission notes that the restrictions against the bypass of Canadian telecommunications services and facilities were terminated in *Regulatory regime for the provision of international telecommunications services*, Telecom Decision CRTC 98-17, 1 October 1998. Therefore, there is no need to impose a condition in this regard pursuant to section 24 of the Act as was done in Decision 97-20.

Section 25

25. Section 25 of the Act provides that
 25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

(2) A joint tariff agreed on by two or more Canadian carriers may be filed by any of the carriers with an attestation of the agreement of the other carriers.

(3) A tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by the Commission and shall include any information required by the Commission to be included.

(4) Notwithstanding subsection (1), the Commission may ratify the charging of a rate by a Canadian carrier otherwise than in accordance with a tariff approved by the Commission if the Commission is satisfied that the rate

(a) was charged because of an error or other circumstance that warrants the ratification; or

(b) was imposed in conformity with the laws of a province before the operations of the carrier were regulated under any Act of Parliament.

26. The Commission considers it appropriate that the affected ILECs no longer be required to file tariffs and obtain the Commission's approval in respect of the forborne IXPL services provided on the routes listed in the Appendix to this Decision. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 25 of the Act with respect to the forborne IXPL services on the routes listed in the Appendix to this Decision.

Section 27

27. Section 27 of the Act provides that

27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

(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.

(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.

(4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

(6) Notwithstanding subsections (1) and (2), a Canadian carrier may provide telecommunications services at no charge or at a reduced rate

(a) to the carrier's directors, officers, employees or former employees; or

(b) with the approval of the Commission, to any charitable organization or disadvantaged person or other person.

28. The Commission considers that there is no need to apply the regulatory standards for "just and reasonable" rates to rates that are set in a competitive market. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(1) of the Act with respect to the forborne IXPL services provided on the routes listed in the Appendix to this Decision.
29. Similarly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(2) of the Act with respect to the forborne IXPL services on the routes listed in the Appendix to this Decision.
30. The Commission will also refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(4) of the Act with respect to the affected ILECs. The Commission will also refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(5) of the Act for all the ILECs, since these subsections relate to subsection 27(1) of the Act, with respect to the forborne IXPL services on the routes listed in the Appendix to this Decision.
31. The Commission will also refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(6) of the Act with respect to the forborne IXPL services on the routes listed in the Appendix to this Decision since it does not wish to limit their pricing.
32. The Commission considers it necessary to retain its powers under subsection 27(3) of the Act with respect to compliance with powers and duties not forborne from exercising in this Decision.

Section 29

33. Section 29 of the Act provides that

29. No Canadian carrier shall, without the prior approval of the Commission, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting

(a) the interchange of telecommunications by means of their telecommunications facilities;

(b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or

(c) the apportionment of rates or revenues between the carriers.

34. The Commission considers it appropriate to forbear from the exercise of its powers and the performance of its duties under section 29 of the Act with respect to the routes forborne in this Decision in the following manner:

- Consistent with Decision 2004-80, Bell Aliant, Bell Canada, MTS Allstream, and SaskTel are not required to obtain approval of agreements related to IXPL services provided on the IXPL routes listed in the Appendix to this Decision; and
- Consistent with Decision 2003-77, TCC is not required to obtain approval of agreements related to the forborne IXPL services provided on the IXPL routes listed in the Appendix to this Decision when operating as an ILEC in British Columbia and Alberta.

Section 31

35. Section 31 of the Act provides that

31. No limitation of a Canadian carrier's liability in respect of a telecommunications service is effective unless it has been authorized or prescribed by the Commission.

36. The Commission considers it appropriate that the affected ILECs be able to limit their liability, without regulatory approval, with respect to the provision of the forborne IXPL services on the routes listed in the Appendix to this Decision. Any provision limiting liability in existing contracts or arrangements will continue to remain in force until their expiry. A contract or arrangement will be deemed to terminate on the date or in the manner provided therein as of the date of this Decision, notwithstanding extensions provided for therein.

Declaration pursuant to subsection 34(4) of the Act

37. In light of the above and pursuant to subsection 34(4) of the Act, the Commission declares that the following sections of the Act do not apply to the affected ILECs' IXPL services on the routes identified in the Appendix to this Decision:

- section 24 of the Act, except with respect to the conditions pursuant to section 24 of the Act set out in this Decision with respect to the confidentiality of customer information and any future condition that the Commission may impose, pursuant to this section of the Act;
- section 25 of the Act;

- section 27 of the Act, except with respect to subsection 27(3) of the Act in relation to compliance with powers and duties not forborne from exercising in this Decision;
- section 29 of the Act; and
- section 31 of the Act.

Tariff filings

38. The Commission directs the affected ILECs to issue, within 45 days, tariff pages removing the tariffs for the IXPL services on the routes identified in the Appendix, effective on the date of issuance of the tariff pages.

Secretary General

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>

***New IXPL routes that qualify for forbearance based on
the October 2006 reports from competitors pursuant to Order 99-434***

<i>ILEC A</i>	<i>Exchange A</i>	<i>Exchange B</i>	<i>ILEC B</i>
TCC	Calgary AB	Okotoks AB	TCC
MTS Allstream	Selkirk MB	Winnipeg MB	MTS Allstream
Bell Aliant	Bear River NS	Halifax NS	Bell Aliant
MTS Allstream	Brandon MB	Winnipeg MB	MTS Allstream
MTS Allstream	Thompson MB	Winnipeg MB	MTS Allstream
Bell Canada	Clarkson ON	Niagara Falls ON	Bell Canada
Bell Canada	Toronto ON	Welland ON	Bell Canada
Bell Canada	Québec QC	St-Hyacinthe QC	Bell Canada
Bell Canada	St-Hyacinthe QC	Ste-Marie-de-Beauce QC	Bell Canada
Bell Canada	St-Hyacinthe QC	Trois-Rivières QC	Bell Canada
Bell Canada	Montréal QC	St-Constant QC	Bell Canada
Bell Canada	Montréal QC	Thetford Mines QC	Bell Canada