



Bell Aliant Regional Communications, Limited Partnership
Bell Canada

12 January 2007

Mr. Masood Qureshi
Competition Bureau
Place du Portage I
50 Victoria Street
Gatineau, Québec
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Dear Mr. Qureshi:

Mirko Bibic
Chief, Regulatory
Affairs
Bell Canada

Subject: Consultation on the Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry

1. Bell Canada and Bell Aliant Regional Communications Limited Partnership (collectively, the Companies) are pleased to provide comments on the Competition Bureau's (the Bureau) Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (the TAB) dated 26 September 2006.

2. The Companies appreciate the Bureau's continued effort, through the release of Guidelines, Bulletins, as well as statements from the Commissioner and other senior officials, to provide guidance to the business community and consumers about its enforcement approach to the *Competition Act* (the *Act*). The Companies particularly welcome this opportunity to participate in the elaboration of the draft Bulletin.

3. The Companies wish to submit the following comments on the TAB. Failure to address any specific element of the TAB should not be taken as agreement or concurrence with such element, where such agreement or concurrence would be contrary to the Companies' interests.

A - General Comments

4. The Companies note that the TAB indicates that "[n]othing in this Bulletin deviates from the Abuse Guidelines". This is reassuring as the Companies firmly believe that the analytical framework for reviewing issues relating to abuse of dominance in the telecommunications industry should be the same as is applied in any other Canadian industry. Given the absence of any new jurisprudence specific to telecommunications since the issuance of the Bureau's Enforcement Guidelines on the Abuse of Dominance Provision (the Abuse Guidelines), it is not surprising that the Bureau should announce that it will follow its traditional approach to assessment of abuse of dominance issues in the telecommunications sector.

5. This is reinforced by the fact that while the Bureau has noted that many telecom services and products, including terminal equipment, long distance services, wireless mobile services, retail Internet and interexchange private lines, have operated in an unregulated competitive environment for a considerable period of time, the Bureau has not referred to (and the Companies are unaware of) any recent enforcement actions taken by the Bureau in the telecom field that could lead one to reasonably conclude that the Abuse Guidelines are inadequate.

6. In the Companies' view, the Abuse Guidelines already describe the types of practices that could constitute abuse of dominance in the telecom sector. In addition, the Abuse Guidelines (along with the Merger Enforcement Guidelines) also already provide sufficient guidance for assessing issues related to market definition and analysis of significant market power.

7. From the Companies' perspective, the competitiveness of the markets in which unregulated telecom services are currently offered and the absence of enforcement activity in relation to these services underlines why the TAB does not provide additional guidance or insight on the Bureau's enforcement approach to forborne telecom services.

8. The TAB currently restricts its scope to "conduct in the telecommunications industry to the extent that the Canadian Radio-television and Telecommunications Commission (CRTC) has made a determination to refrain from regulating such conduct". With respect to conduct in the telecommunications industry that remains subject to CRTC regulation, the TAB is currently silent, even though the Bureau observes that the telecom sector is in the midst of transition from sector-specific regulation to laws of general application, namely the *Act*. In the Companies' view, the development of the TAB presents an opportunity to address this area and provide guidance to industry participants, who will have to address the application of competition policy to the telecommunications industry where it remains regulated. The application of competition policy to regulatory initiatives is a key concern since economic regulation of the telecommunications industry, to the extent it remains relevant, should rely to a far greater extent on market forces and competition law policy and principles.

9. Accordingly, the Companies encourage the Bureau to revise the TAB to include a discussion, pursuant to its competition advocacy role, on how competition law principles would apply to examinations of abuse of dominance, market definition or market power issues where telecom services remain subject to economic regulation by the CRTC, and on how reliance on these competition principles may assist in effecting an efficient and timely transition away from sector-specific regulation.

10. Given the above comments, the following comments address substantial existing points in the TAB.

B - Specific Comments on TAB

a) Paragraph 1.4 - Prevalence of abuse of dominance in telecom

11. The Companies have concerns about the following sentence: "certain acts are more likely to be the subject of an abuse of dominance complaint in the telecommunications industry, given the nature of the sector." The Companies note the TAB's reference to the Telecommunications Policy Review (TPR) Report's pages 3-24 and 3-25, but finds little support there for the Bureau's statement. The Companies interpret the sentence to mean that complaints of abuse of dominance involving telecom services are more likely in the telecom sector. However, if the Bureau is stating, rather gratuitously, that abuse of dominance is of

particular concern in the telecom sector, this would certainly be viewed as an unsubstantiated statement to which the Companies strongly object. As noted above, although many aspects of telecommunications services and products have been forborne for years (and thus subject to Bureau scrutiny), no abuse of dominance case has been taken with respect to any of these.

12. There is no historical or factual basis for an assertion that in an unregulated, competitive environment actual abuse is to be expected, although the Bureau "...may receive a significant number of complaints within this sector." As the Bureau is well aware, there are often strategic reasons for parties to raise issues with the Bureau, which upon closer scrutiny fail the requisite provisions of the *Act*. It would be helpful if the wording were clarified to avoid possible misinterpretation.

b) Paragraphs 4.2 and 4.2.2 - Upstream Access

13. Consistent with its approach in other sections, with respect to essential facilities and more broadly to upstream access issues, the TAB limits the Bureau's involvement to allegations of anti-competitive acts with respect to unregulated facilities¹.

14. The TAB defines an "essential" facility as "an input that provides the firm controlling it with the power to lessen or prevent competition in a relevant downstream market."² The TAB adds that section 79 is concerned with the abuse of such market power where it results in a substantial harm to competition, but not the exercise of any market power inherent in the essential facility. The TAB then identifies necessary conditions for any denial of access to this facility to raise an issue under the *Act*.

15. These conditions are:

- 1 - a firm is dominant in the upstream/wholesale market, which necessarily requires that it is not practical or feasible for competitors to duplicate the facility in question (or substitute other inputs);
- 2 - the same firm is dominant in the downstream/retail market in which the facility is an input;
- 3 - an anti-competitive denial of access;
- 4 - an actual or likely substantial lessening or prevention of competition in the downstream market.

16. The TAB rightly confirms that where a firm does not have market power in the downstream market, the denial of access to the facility cannot amount to an abuse of dominance.

17. The Companies understand that with respect to conditions of access to wholesale inputs, the TAB signals that the Bureau may take enforcement action with respect to anti-competitive conduct (though not the mere exercise of market power) where such behaviour injures competition downstream, and that once a wholesale telecom service ceases being subject to regulation, its offering will be analyzed according to the Bureau's usual enforcement framework.

18. This being said, it is important in the Companies' view to stress that the Bureau's approach is limited to unregulated services, and that enforcement action would only follow

¹ TAB, page 15.

² TAB, page 17.

credible evidence that anti-competitive conduct was harming competition. As a general principle, the Bureau would rely on market forces to govern wholesale relationships.

19. Accordingly, the Bureau's approach to, and definition of, essential facilities must be read in the overall context of the *Act*, where non-criminal commercial behaviour is lawful unless, and until, the Competition Tribunal concludes otherwise pursuant to an *ex post* review. This is very different from the current *ex ante* approach under the *Telecommunications Act*, where

- a) wholesale services must be provided pursuant to a tariff pre-approved by the CRTC, unless forborne, and
- b) mandated wholesale access extends well beyond essential facilities (as defined by the CRTC) to also include near-essential and non-essential facilities.

20. The Companies submit that the Bureau should clearly state, possibly in the additional section dealing with the application of competition policy to sector-specific regulation proposed above, that its definition of essential facilities for *ex post* enforcement purposes (the definition in the existing TAB) is conceptually too broad to form the basis of an *ex ante* regime where access is mandated upfront irrespective of actual harm to competition.

21. In any event, where and when the CRTC decides to de-regulate wholesale access, the Bureau clearly indicates in the TAB that it is well-positioned to take necessary enforcement action in the interest of maintaining and promoting competition.

c) Paragraph 4.4 - Targeting

22. The Bureau, noting that some "telecommunications industry participants have argued that such pricing may have an effect similar to predatory pricing"³, devotes a whole page of the TAB to the issue of targeting. While it is helpful that the TAB makes clear that the Bureau would require considerable ancillary evidence in support of a claim that targeting constituted an anti-competitive act, the Companies are concerned that the TAB's focus on "targeting" may result in an unnecessary competitive chill, especially among incumbent telecom operators.

23. The Companies note that reference to "targeting" is virtually absent from the Abuse Guidelines (which the TAB is stated to adhere to), being limited merely to a footnote discussing the Competition Tribunal's rejection of the Bureau's targeting case in *Tele-Direct*⁴ where the Tribunal stated that "[t]argeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition"⁵. This dismissal represents the only discussion of targeting in Canadian competition law.

24. Given that "targeting" has never been found to be an anti-competitive act under Canadian competition law, the TAB should explicitly state that targeting is, in the telecom industry just as in other industries, "a decidedly normal competitive reaction".

³ Possibly here the TAB refers to arguments made to the CRTC. If these arguments have been raised with the Bureau, they have not resulted in publicly disclosed investigations, and certainly not in cases.

⁴ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, [1997] 73 C.P.R. (3rd) 1 (Comp. Trib.)

⁵ *Tele-Direct*, at paragraph 593.

Conclusion

25. The Companies appreciate the Bureau's efforts to clarify its enforcement approach and thanks the Bureau for the opportunity to submit these comments on the TAB. The Bureau's approach is an important consideration for the Companies and their affiliated companies, since many of their operations are subject to the application of the *Act*. As mentioned earlier, a presentation of the application of competition law principles to those telecom services that remain currently subject to economic regulation would be preferred.

Yours truly,



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Denis Henry
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