



447 Gondola Point Road, Quispamsis, New Brunswick E2E 1E1 • www.ccsa.cable.ca
tel: 506.849.1334, fax: 506.849.1338

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Mr. Masood Qureshi
Competition Bureau
Industry Canada
50 Victoria Street,
Gatineau, QC
K1A 0C9

VIA EMAIL: qureshi.masood@cb-bc.gc.ca

Dear Mr. Qureshi:

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

1. The Canadian Cable Systems Alliance Inc. (“CCSA”) has reviewed the Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (“Draft Bulletin”), published by the Competition Bureau on September 26, 2006. CCSA is filing the following comments in response to the Draft Bulletin.
2. CCSA currently represents over 90 independent cable operators which serve, in the aggregate, approximately 850,000 Canadian analog television subscribers and a growing number of digital television subscribers. Many CCSA Members Companies also offer two-way broadband communications, including High-Speed Internet access to their customers as local Internet Service Providers. Those companies have opportunities to leverage their broadband networks to establish themselves as competitors in the local telephone services market using Voice-over-Internet-Protocol (VoIP).
3. The provisions for dealing with complaints of abuse of dominance in the telecommunications industry will be increasingly important for companies competing in the provision of local telephone services. Currently, these services are subject to regulation under the Telecommunications Act by the Canadian Radio-television and

Telecommunications Commission (CRTC). Where these services are granted forbearance, however, it falls to the Competition Bureau to investigate any complaints of abuse of dominance, under sections 78 and 79 of the *Competition Act* (the Act).

4. CCSA submits that the prospect for effective and sustainable competition in the provision of local telephone services, particularly in smaller, non-urban communities, will critically depend on the effectiveness and timeliness of the enforcement of the provisions against abuse of dominance by the incumbent local exchange carriers (ILECs). There are a number of aspects of the Draft Bulletin that raise concerns for CCSA and its Member Companies.
5. First, there remain significant barriers to entry for competitors in the local telephone services market. As the Draft Bulletin acknowledges, barriers to entry are an important indicator of an established firm's ability to exercise its market power.
6. CCSA agrees with the assessment at page 12 of the Draft Bulletin that the maturity of a market can create a barrier to entry. The ILECs are "firmly entrenched" in the local services market. The ILECs have longstanding and close relationships with customers and good reputations in the provision of telephone services. This is particularly significant in the market for local telephone services since consumers regard their local telephone service as an essential lifeline to their community and in case of emergencies. The essential nature of local telephone service means consumers are less willing to switch to an alternate service provider. It is important that the assessment of the barriers to entry in the local telephone services market take into account the market's maturity and the substantial degree of inertia among consumers.
7. Another barrier to entry that is particularly acute in the local telephone services market is the critical dependence of competitors on obtaining interconnection with the ILEC in the market. Competitors must interconnect with the ILECs in order to provide local telephone services. Interconnection between local service competitors and ILECs is not widespread outside of the more densely populated urban centres of Canada.
8. The important role of interconnection was recognized in the Telecommunications Policy Review Panel Final Report (TPRP Report).¹ Difficulty obtaining interconnection creates a major barrier to entry for competitors. Notwithstanding this, refusal to provide interconnection is not considered an anti-competitive act pursuant to s. 78 of the Act, as noted in the TPRP Report.² While current CRTC regulations require the ILECs to provide interconnection, the process to negotiate and finalize the specific arrangements with the ILEC can take several months. The differences in cable companies' operating territories and those of the ILECs could result in forbearance being granted in an area where a smaller cable company has not yet launched telephony service. While a cable company may have facilities in place, these facilities cannot be used to offer telephony services until interconnection is achieved. As a result, the ILECs could have the opportunity to engage in anti-competitive behaviour in these areas.
9. The ability to delay entry through the interconnection process provides the ILEC with the opportunity to grant itself a significant competitive advantage. The local interconnection

¹ TPRP Report, March 2006, pages 3-10 and 3-30.

² Ibid., page 3-25.

negotiation process must be repeated for each new region that a competitor wishes to enter. In each case, the ILEC is given advance notice of the prospective entry by a new competitor. Such circumstances simply do not arise in other markets. In the case of direct-to-home (DTH) satellite competition, for example, the competitors' services were available across Canada from the first day the service was launched. DTH companies did not need to negotiate interconnection with the incumbent cable distribution companies in any market at any time. The ILECs, by comparison, have significant advantages relative to their competitors by virtue of their ability to gain advance notice and control the pace of entry by each competitor in each geographic area.

10. At page 15 of the Draft Bulletin it states that

Under the facilities-based entry model, many of the opportunities for a potentially dominant firm to raise the costs of its rival may be absent since the entrant's network operates, to a large part, independently from that of the incumbent firm. Many of the remaining opportunities for a dominant firm to disadvantage its rivals may involve conduct that remains subject to regulation (e.g., number portability, interconnection, and access to support structures).

11. Cable companies that compete in the local telephone services market are facilities-based, however, they must establish interconnection with the ILEC, gain access to the ILECs' support structures and arrange for number portability. As the Draft Bulletin acknowledges, the ILECs have opportunities to disadvantage cable competitors through such provisions. ***CCSA recommends that the Competition Bureau clarify that the CRTC will continue to have jurisdiction respecting complaints of anti-competitive behaviour that are the result of an ILEC's provision of number portability, interconnection, and access to support structure.***

12. In addition, cable companies competing in the local services market may also require other facilities from the ILEC in order to cover gaps in their serving territory, or grow to sufficient scale and recover their investments. The relatively small size of cable competitors in many non-urban markets means that their requirements will represent a small proportion of the overall volume of orders from competitors for the ILECs facilities, possibly resulting in below standard quality of service for small cable competitors. This provides the ILEC with the opportunity to significantly lessen competition in non-urban areas through poorer quality of service to small competitors. It is highly likely that small, locally-based cable competitors will provide the only facilities-based competition in these regions.³ The Competition Bureau must take into account the potential for the ILECs to abuse their dominant position by providing below standard quality of service to these competitors.

13. Another issue raised by the Draft Bulletin with which CCSA has concerns is the ability of the ILECs to engage in targeted pricing in the telecommunications industry, as discussed in section 4.4. At page 21 of the Draft Bulletin, it states:

³ To the extent wireless service providers have sufficient network coverage in non-urban areas, the provision of such services to date have not constrained the market behaviour of the ILECs.

One example of the difficulty in addressing targeted pricing is that the theory of anticompetitive targeted pricing depends on the assumption that the dominant firm can target the customers lost to a competitor and not its remaining customers. However, this may be difficult, depending upon the behaviour of the dominant firm's customers.

14. The local telephone services market has characteristics that distinguish it from a typical market. The ILECs have detailed knowledge of every customer for local telephone services that a competitor may approach. The ILECs gained this knowledge by virtue of their longstanding monopoly position and the fact that nearly every residential household and business operator has been a customer of an ILEC. Because ILECs serve more than 90% of all local telephone service customers, and even higher percentages in non-urban areas, virtually every customer that a competitor may seek to gain is likely to be an existing customer of the ILEC. Such an overwhelming advantage for an incumbent firm is not typical in most markets.
15. The near-perfect market demand information afforded the ILECs allows them to surgically target individual customers with specific offers. ILECs use their detailed information to contact specific customers with tailored offers. The ILECs do not need to broadly advertise their discounts in order to attract customers that would not otherwise approach the ILEC. As a result, potential customers that are not contacted may have no knowledge of the type of discounts available to the targeted customers. This enables the ILECs to limit the overall cost of offering targeted price discounts by directing their efforts to specific customers, rather than offering discounts to a broader base of customers. This reduces the ILECs' risk of targeted pricing to a degree not commonly found in other markets.
16. The ILECs also have access to detailed information that could provide them with another significant advantage over their competitors. ILECs can obtain information on when a customer is about to switch to an alternative local service provider before that customer actually switches.⁴ When a competitor wants to add a local telephone service customer, frequently that customer will want to keep the same telephone number. As a result, a number porting request is sent to the ILEC in advance of the customer changing suppliers. If proper care is not taken to protect that information, the ILEC can use this advance notice to contact the customer and offer special incentives or take other steps to discourage the customer from switching. ***CCSA proposes that the Bulletin should be revised to clearly indicate that use of the porting information by the ILEC in advance of the customer's service being ported to the competitor is considered an anti-competitive act pursuant to s. 78 of the Act.***
17. The significant advantage the ILECs have due to their position as the former monopoly suppliers of local telephone service to virtually every customer presents a unique challenge to prospective competitors. ILECs can use their detailed customer information to increase churn or customer turnover of the competitor, thereby raising that competitor's costs. This affords the ILECs with the opportunity to prevent competitors from gaining and retaining a sufficient customer base to sustain economic entry. In addition, the ILECs' information on the typical telecommunications spending patterns of virtually every customer enables them to target the high-value customers. Such actions decrease the potential profits for

⁴ For a discussion of where this has occurred in the past, see Telecom Decision CRTC 2003-45.

competitors while improving the ILECs' profits. This is particularly damaging to small cable companies competing in non-urban areas, which lack the scale and resources of the ILECs.

18. CCSA submits that a proper assessment of whether targeted pricing is anti-competitive needs to address the unique characteristics of the local telephone services market. In particular, full consideration must be given to the advantages the ILECs have in that market in terms of near-perfect demand information that allows them to limit economic entry by competitors. The assessment must not dismiss the significant opportunities and incentives ILECs have to engage in an anti-competitive behaviour to the detriment of competitors.
19. The ILECs' advantages are currently constrained by competitive safeguards imposed and enforced by the CRTC. A forborne ILEC, however, would face no such constraints. It is important, therefore, that the Competition Bureau have the expertise and resources to quickly address any instances of anti-competitive behaviour that arise.
20. The ability of the Competition Bureau to respond to instances of anti-competitive behaviour in an effective and timely manner is another area of concern for CCSA and its Member Companies. The TPRP Report recognized that, when there are no *ex ante* restrictions on anti-competitive behaviour, then "*ex post* enforcement should be swift, and penalties should be severe enough to act as a meaningful disincentive to such conduct."⁵
21. There is strong evidence to suggest that the existing legislative framework and practices of the Competition Bureau are ill-suited to the unique challenges of the emerging competitive landscape in local telephone services. The TPRP Report recognized the specific economic and technical conditions of telecommunications markets and argued that "it will be important to have the capability to address allegations of anti-competitive conduct in a timely and effective manner."⁶ The TPRP Report went on to recommend that a new agency, rather than the Competition Bureau, be given the authority over complaints of anti-competitive conduct in telecommunications services.⁷
22. The TPRP Report identified a number of concerns with leaving the Competition Bureau responsible for complaints over anti-competitive conduct in telecommunications services. These included:
 - An inappropriate framework for resolving competitive disputes or providing ongoing monitoring and supervision of sector-specific competitive safeguards;
 - Lack of sufficient sector-specific knowledge of the telecommunications market;
 - Reliance on a two-stage process for investigating complaints, resulting in significant time lags that would preclude the timely resolution of disputes that arise on a fairly frequent basis and require prompt resolution; and
 - Oversight by the Competition Tribunal, which does not view itself as a regulator that monitors behavioural remedies on an ongoing basis.⁸

⁵ TPRP Report, March 2006, at page 3-21.

⁶ *Ibid.*, at page 4-14.

⁷ *Ibid.*, at page 4-25. The TPRP Report recommended that the new agency, the Telecommunications Competition Tribunal, draw on the expertise and staff of the CRTC and the Competition Bureau.

⁸ *Ibid.*, at page 4-14.

23. CCSA is also concerned that the nature of the current process used by the Competition Bureau to handle competitive disputes lacks openness and transparency. A complainant may not have any opportunity to participate in the process or knowledge of the progress or resolution of its complaint after it has been filed. This contrasts with the open, public process employed by the CRTC that allows a party the opportunity to view and respond to the arguments of the other party to the dispute.

24. ***If competition in local telephone services is to be sustainable, all participants in the market – ILECs and competitors alike – must know that anti-competitive behaviour will result in swift and severe penalties.*** Without such assurances, the ILECs will face no serious deterrent from acting to disadvantage their competitors. Cable companies, especially smaller players in non-urban markets, cannot be expected to accept such unreasonable risks of competing in the market. The TPRP Report summarized the risk succinctly in its statement:

In today's more competitive markets, a breach of the law or regulatory rules has the potential to provide a significant advantage to the transgressor and a permanent disadvantage to its competitors, by altering market share or even putting a smaller competitor out of business.⁹

25. ***CCSA supports the recommendation of the TPRP Report that a new agency be established to oversee and enforce the abuse of dominance provisions that will be applied to the telecommunications industry. This agency must have the expertise and authority to respond effectively to any instances of anti-competitive behaviour that occur in the industry in a timely manner.*** These changes are necessary to ensure the provisions of the Draft Bulletin protect against the lessening or prevention of effective competition in the telecommunications industry by existing or potential competitors.

26. CCSA appreciates the opportunity to submit its comments in relation to the Draft Bulletin and thanks the Competition Bureau for that opportunity.

Yours truly,



Christopher J. Edwards
Vice-President, Corporate & Regulatory Affairs

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⁹ Ibid., at page 9-34.