Response of the Public Interest Advocacy Centre to the Draft Information Bulletin on the Abuse of Dominance Provisions As Applied to the Telecommunications Industry

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Overview

On September 26, 2006, the Competition Bureau issued a draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry with a request for public comment by December 29, 2006, recently extended to January 12, 2007. It describes the Bureau's approach to the application of the relevant provisions of the *Competition Act*[1] associated with abuse of dominance. It is noted, in the Bulletin, that it parallels, or at least does not deviate from the Enforcement *Guidelines on the Abuse of Dominance Provisions* issued in 2001.

The Public Interest Advocacy Centre (PIAC) is a non-profit Ottawa based organization whose principal objectives are associated with the interests of ordinary and vulnerable consumers of important public services such as telecommunications. To that end, PIAC has represented such consumers and groups representing such consumers in proceedings in the Canadian Radio-Television and Telecommunications Commission (CRTC) for the last 30 years. PIAC has also been a frequent participant to the extent that resources allow in competition law reform and consultation processes of the Bureau on issues of concern to its constituencies.

PIAC agrees with the issuance of documents, such as the proposed Bulletin, as part of a "transparent and predictable enforcement policy". It is understood that because the enforcement principles are of general application they must be sufficiently broad to enable their use in diverse circumstances.

[1] R.S.C. 1985, c. C-34

In general terms, the Bulletin correctly catalogues the considerations in play in any review of a potential circumstance of abuse of dominant position. PIAC's subsequent comments are meant to constructively improve the approach of the Bureau to telecommunications issues that is in keeping with the *Competition Act* purpose set out in subsection 1.1, "to maintain and encourage competition in Canada… in order to provide consumers with competitive prices and product choices".

The Bulletin notes that purpose of the inquiry under statutory provisions of sections 78 and 79 of the *Competition Act*, "what is of concern is not the existence of dominance (i.e., the exercise of market power) but conduct that maintains or enhances market power.[2] This means that in telecommunications markets which have been forborne from regulation by the CRTC, the consumer remedy for oppressive treatment and service by a provider exercising market power is re-regulation in accordance with the *Telecommunications Act*, unless that provider is engaging in a "practice of anticompetitive acts".

The general thrust of telecommunications policy of the last decade and a half has been to create competitive market conditions that would enable the achievement of customer protection and the extensive public interest objectives that are set out in section 7 of the *Telecommunications Act*. It should be expected that the operation of the preferred framework of market forces in the delivery of telecommunications products and services will be policed swiftly and efficiently by competition enforcement authorities so that resort to re-regulation is unnecessary. In important public utilities such as telecommunications, Canadians will not be content to wait for markets to behave in accordance with ideological and untested constructs, as opposed to the reality of anticompetitive behaviour of the dominant provider.

We will discuss later in this response some specific problems with the proposed Bulletin which may warrant such criticism. However, in general, it is PIAC's view that the Bulletin should reflect more of the importance of the maintenance of competition in telecommunications markets and less

[2] Bulletin, footnote 51.

emphasis on the formalistic analyses that the Bureau will undertake to avoid finding conduct within the meaning of sections 78 and 79.

It must also be noted that the Bureau has had a rather unhappy history from the consumer standpoint in this industry associated with approvals of mergers based upon similar considerations of substantially preventing or lessening competition. In the Canadian wireless industry, for example, merger approvals by the Bureau have resulted in wireless industry ownership largely resident in three wireline carriers with which wireless carriers were supposed to be competitive. The approvals made a shambles of the federal government's rollout strategy of digital wireless of a decade before and have been identified as a possible contributor to Canada's mediocre performance with respect to pricing, service options and penetration.

One must speculate whether the common-sense scepticism that would ordinarily be initially applied to the examination of a number of these proposals was eventually trumped by theoretical views of the markets and/or efficiencies to be gleaned. There is a worrisome lack of compelling research from telecommunications markets themselves justifying some of the more theoretical aspects of the Bulletin.

There are a number of specific issues which we would wish to discuss that we hope will be helpful in the preparation of the final Bulletin. These include:

- Impact of the Proposed Order Changing the CRTC's Local Forbearance Decision 2006-15
- Importance of Market Share
- Bureau Market Judgment
- Alternative Case Resolutions

Impact of Proposed Order Changing the CRTC's Local Forbearance Decision

On December 11, Industry Minister Bernier announced the intention of the government to order a change in the CRTC's conditions for forbearance from regulation of local telephone service provided by incumbent local exchange carriers (ILECs). This proposed order was subject to public comment prior to being made final, which has been provided by PIAC, and has been attached to this response document.

We do not propose to revisit the submissions made with respect to the wisdom of the proposed order, and its effect upon consumer protection and the achievement of objectives under the *Telecommunications Act*. We are, however concerned that what is in our view, a flawed analysis may infect the efficacy of the abuse of dominance provisions that might be available to deter anti-competitive conduct by providers. This could come about, for example, by adoption of highly optimistic views concerning the operation of the market and indifference to the current realities that are apparent in the decade and one half after the onset of competition in long distance services. If the Bureau is content with a fiction that the potential capacity of the cable industry to expand their networks is sufficient to dispose of potential abuse of dominance complaints against incumbent or established telecommunications providers, then consumers will be justified in the belief that a regulated monopoly with inefficiencies equitably allocated has been exchanged for an unregulated monopoly (or at best a duopoly) with the burdens of marketplace dominance inequitably distributed.

Importance of Market Share

As has been indicated, PIAC is concerned with the ready substitution of speculation for market realities in relation to the assessment of the existence of market power. Certain objective facts such as market share and number of competitors seem to be playing second fiddle to unproven assumptions about barriers to entry, technological innovation, etc.

It is one thing to rebut a mechanistic approach to market share: it is quite another to box it entirely out of existence with conjecture based on blue sky promises of the incumbent telecommunications industry.

For example, while the proposed Bulletin bemoans the difficulty of measuring market power directly [3], it fails to make note of a commonly accepted test of market concentration, namely the Herfindahl-Hirshman Index ('HHI"). It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.

As the US Department of Justice, Antitrust Division notes:

> The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.
>
> Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. [4]

We would note that the values currently obtained through the use of this index in many telecommunications markets, including local telephony, drive conclusions about market concentration and potential market power that are at odds with the current government position. Nevertheless, an objective test such as HHI and previous experience in those markets should be given more weight in the determination of market power than theoretical musings not borne out by market performance.

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[3] Bulletin, p.10

[4] http://www.usdoj.gov/atr/public/testimony/hhi.htm

Competition Bureau Market Judgment

Regulators must frequently make judgment calls with respect to the regulated industry or practice which may be done on the basis of incomplete information or on the best understanding of the facts as presented without the benefit of hands-on industry experience. This is no different for the Bureau whose superintendence of marketplace misconduct is far-reaching throughout the economy.

We would, however, advise caution in relation to Bureau efforts to sanitize otherwise assailable practices such as predatory pricing by attempting to analyze the likely success of the predator's strategy[5]. While it is true that it is the state of competition rather than the health of competitors that is the concern of the *Act* and the Bureau, efforts to predict success or failure of the misconduct should be undertaken rarely. At a minimum, in this example, the establishment of the fact of pricing below avoidable costs to drive competitors from the market should place an onus upon the predator to demonstrate there is no anti-competitive effect. The telecommunications market is replete with examples of pursuit of strategies by market players that are initially difficult to fathom. The Competition Bureau should not try to play market analysts or business case evaluators where the objective facts have been clearly made out.

Alternative Case Resolutions

We would note the Bureau proposes resolution of abuse of dominance complaints by way of a resolution agreement between the parties. However, if the concern of the Bureau is the health of competition, and not the competitors *per se*, we question how the Bureau will know it has the right parties to any proposed consent agreement. Who is representing marketplace consumers denied access to products and services at better levels of quality and price as a result of abuse of dominant position?

[5] Bulletin, p. 20

Conclusions

As we have noted herein, PIAC would prefer that the Bulletin employed an approach to the enforcement of abuse of dominant position in the telecommunications industry that relied more on objective rather than subjective criteria. The importance of the telecommunications industry to Canadian society and the economy demand an approach that ensures that anti-competitive conduct be swiftly sanctioned. We cannot afford to indulge in speculation about the problems being remedied by assumed capacity to respond or lack of barriers to entry- an analysis that is likely informed more by theory than experience.

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