

December 29, 2006

VIA EMAIL AND COURIER

Information Centre
Competition Bureau
Industry Canada
50 Victoria Street
Gatineau, Québec
K1A 0C9

Dear Sirs/Mesdames:

**Subject: Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (the "Draft Bulletin")
September 26, 2006**

1. Primus Telecommunications Canada Inc. ("Primus Canada") and Comwave Telecom Inc. ("Comwave") (jointly, the "Companies") seek to comment on the above-referenced Draft Bulletin.
2. The Companies support the Bureau's efforts in providing guidance on the application of the abuse of dominance provisions of the *Competition Act* to the telecommunications industry. It is the Companies' understanding that the Bureau's consultation paper does not purport to alter any existing legislation or regulation. Rather, it merely endeavours to elaborate on the approach it would take to dealing with competitive concerns in forborne markets. The regulation and prohibition of abuse of dominance is integral in the telecommunications industry, which is comprised of duopolies in most regions and monopolies in others. Further, anti-competitive acts can be fatal to the existence of non-dominant and non-facilities-based competition, which includes competitors such as Primus Canada and Comwave. In this regard, our comments below focus on the interpretation and application of the abuse of dominance provisions as they relate to non-facilities-based competition.

Introduction

Primus Canada

3. Primus Canada is the largest alternative reseller of telecommunications services in Canada. We are an independent, standalone Canadian corporation, with an all-Canadian management team and a majority Canadian Board of Directors. Primus Canada has its

head office in Toronto, and has offices in Vancouver, Toronto, Markham, Oakville, London, Windsor, Ottawa, Montreal and Edmundston.

4. Primus Canada is wholly-owned by Primus Telecommunications International, Inc. based out of McLean, Virginia. As such, Primus Canada is prohibited by the foreign ownership restrictions set out in the *Telecommunications Act*, the *Radiocommunication Act* and the *Direction to the CRTC (Ineligibility of Non-Canadians)* from owning or operating any transmission facilities or holding any broadcasting licences. Nonetheless, Primus Canada has made considerable contribution to the Canadian economy and has invested over \$300 million in permitted network infrastructure in Canada since 1997.

5. Primus Canada offers services in all regions of the country, including wireline and wireless services, Internet, data centre and managed services, Voice-over-Internet Protocol, (VoIP) and long distance services. Since entering the Canadian telecommunications market, Primus Canada has offered Canadians competitive choice and pricing, by offering a broad range of low cost, high quality innovative and competitive services to over one million Canadian residential and business consumers. Given the above, Primus Canada is a crucial component of the Canadian telecommunications market.

Comwave

6. Comwave is one of Canada's premiere providers of Voice over Internet Protocol (VoIP) services in Canada, committed to offering local and long distance services that enhance the choice of Canadian consumers of telecom services. Since our VoIP service launch in mid-2004, we have attracted tens of thousands of customers from across the country as our footprint continues to expand to more and more locations. As a reseller, we depend on the numbering and local number portability services offered by Local Exchange Carriers (both CLECs and ILECs) and are, therefore, particularly interested in ensuring that, as the mantle for regulation is passed from the Commission to the Bureau, resellers are not disadvantaged in any way.

Comments on the Draft Bulletin

Section 3.2 Market Share

7. In this section the Draft Bulletin identifies a number of market share measures that it would consider using in an abuse of dominance case. Although it lists several possible measures, there is no indication of what measure(s) the Bureau considers most relevant to any particular telecommunications market. The Companies submit that it would be helpful to the industry if the Bureau were to clearly identify which measure of market share it considers most relevant to a specific market.

8. For example, in its assessment of the local telephone market, the CRTC uses measurement units known as NAS and NAS equivalents in the local market. The detailed descriptions of these two measures can be found at paragraph 254 of *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, 6 April

2006. The Companies submit that the Draft Bulletin should indicate whether the Bureau would adopt this approach and/or if it would use that measure or another in the case of forborne local telephony markets. Other reasonable examples for the Bureau to use would be minutes of voice and data traffic for long distance services and the number of subscribers for high-speed Internet services.

9. Either way, the Companies submit that this document should be more specific as to what market share measures the Bureau will utilize in any particular market. Inclusion of specific measures for specific markets will help competitors focus their efforts on tracking ILEC market share measures and behaviour.

10. At the very least, the Draft Bulletin should attempt to provide a list of the potential telecommunications markets and a sub-list of the associated market share measures that it would consider using.

11. The Companies also note that the issue of joint market share is only peripherally noted in this section of the Draft Bulletin. Joint dominance is a common occurrence in the Canadian telecommunications industry and, therefore, the Companies submit that there ought to be a more detailed discussion in the Draft Bulletin regarding joint market share in the telecommunications industry, particularly in the context of a joint dominance case.

Section 3.3 Barriers to Entry

12. The Companies submit that the last paragraph in this section, which attempts to provide examples of barriers to entry in the telecom industry, lacks the specificity and detail necessary to assist abuse of dominance complainants in identifying barriers to entry across the entire market. The foreign ownership barrier to entry is very well defined and very specific but the other potential barriers listed by the Bureau in this paragraph are at an impossibly high level of generality so as to be not very helpful to companies that may be contemplating an application to the Bureau. Here too, the various categories listed by the Bureau should be as wide in scope as possible and provide competitors with detailed advance indications of what the Bureau considers to be a barrier to entry.

13. For example, in addition to the foreign ownership restrictions the Draft Bulletin lists "access to rights of way, allocation of spectrum and other regulatory obligations imposed on providers of specific services..." The Companies submit that for this section to be of greater assistance to parties that may wish to apply to the Bureau for relief, it should give the industry as many specific indications in advance as to what would be recognized as a barrier to entry. In this regard, the Companies note that Module 5, "Competition Policy", of the World Bank's Telecommunications Regulation Handbook sets out a non-exhaustive list of the most-commonly recognized barriers in the telecom industry, including:

- government restrictions such as monopoly franchises or restrictive licensing practices;
- economies of scale

- high fixed/capital costs; and
- intellectual property rights such as copyright and patent protection.

14. As a specific example, it would be useful if the Draft Bulletin were to provide a short list of barriers associated with “access to rights of way.” The Companies submit that Commission staff could assist the Bureau in this respect.

15. In summary, the Draft Bulletin should take the opportunity to be as clear and as specific as possible. Greater clarity will assist all parties and may even have its own deterrent effect on anti-competitive behaviour.

Part 4 Anti-Competitive Acts

16. Part 4 of the Draft Bulletin deals with anti-competitive acts, as those are defined in the *Competition Act* and provides examples of certain types of anti-competitive acts that are common to, or unique in the telecommunications industry.

17. As set out above, Primus Canada is wholly owned by its US parent, and as such is restricted in the extent that it can invest in transmission facilities and wireless licenses. Accordingly, Primus Canada’s competitive activities in Canada are limited in its sole capacity as a reseller of telecom services. Comwave, while Canadian, currently operates on a resale basis as well. As a result, the Companies are completely dependent on (and at the mercy of) the wholesale facilities, services, rates and quality of the incumbent and other network owners in Canada. In this position, the Companies have a clear vantage point and first-hand experience, on the types of anti-competitive acts that occur in the Canadian telecommunications industry.

18. In our view, it would assist the industry if there were more detailed examples of anti-competitive acts specific to the telecommunications industry set out in Part 4 of the Draft Bulletin, and in particular, with reference to each subheading of subsection 78(1) of the *Competition Act*.

19. For example, Primus Canada has observed an anti-competitive situation in which a dominant facilities-based telecom company (which was also the sole or main supplier of a wholesale telecom service), required a competitor, as a condition of acquiring wholesale services, to limit its associated retail service to certain geographic and customer markets prescribed by the dominant player. If the competitor did not accept these restrictive terms, it would be denied access to the wholesale service, for which there was no viable alternative. Such behaviour would have likely been considered an anti-competitive act in accordance with subsection 78(1)(h) of the *Competition Act*, being the act of requiring or inducing a supplier to sell only or primarily to certain customers, with the object of preventing a competitor’s entry into, or expansion in a market. In this example, the dominant player and the wholesale supplier are the same entity, which is common in, and somewhat unique to, the telecommunications industry. Nonetheless, the result is the same – the competitor’s expansion or entry into the market was limited or negatively affected by

the imposition of restrictions or limitations by the dominant player, through the bargaining power of its wholesale monopoly arm.

20. For its part, Comwave has experienced first hand anti-competitive behaviour on the part of its facilities-based supplier of numbering resources, which unilaterally amended the contract between it and Comwave in a number of ways significantly damaging to the operations of Comwave. This includes severely limiting the number of telephone number orders the wholesale provider would process in a given month as well as the number of LNP ports it would process in a day; refusing to port numbers belonging to its own customers; and completely forgoing the requirement to provide ex ante notice for authentication purposes of numbers being ported away from Comwave. In combination, these restrictive terms seriously hampered Comwave's efforts to operate its business in a sustainable fashion. Some or all of this activity would likewise be considered anti-competitive acts as set out in subsection 78(1)(h) of the *Competition Act*.

Section 4.2 Entry Models

21. In the first full paragraph on page 15 of the Draft Bulletin, the Bureau identifies three distinct models of competitive entry: facilities-based entry; entry via unbundled network elements; and, resale and sharing. However, as it expands on its thoughts in this section, the Bureau fails to follow through with a discussion on all of competitive entry models identified in the first sentence of the paragraph. In fact, by the last half of this same paragraph, the resale model is simply dropped from consideration by the Bureau. As resellers with national scope and as consumers of the information in this document the Companies submit, that it would be extremely helpful if the Bureau were to provide a complete and rounded consideration of all three entry models, including resale, throughout this section.

22. As resellers with national scope (and as a consumer and user of the information that is to be provided in the final version of the Draft Bulletin), it would be extremely helpful if the Bureau were to provide a complete and rounded discussion of all three entry models, including the resale model. In particular, the Companies makes the following suggestions, specifically:

- (a) A definition of "resale" should be included in the first full paragraph on page 15. One possible definition of resale is "the subsequent sale or lease on a commercial basis, with or without adding value, of a distinct telecommunications service or distinct telecommunications facilities provided by a supplier on a wholesale basis."
- (b) At some point in this section the Draft Bulletin should discuss the opportunities for a potentially dominant firm to raise the costs of a reseller in the same manner that it has done for facilities-based and unbundled network element entry. Even if the Bureau does not consider that there are many opportunities for this type of activity, the Draft Bulletin should state that to be the case.

Section 4.2.1 Margin Squeezing

23. From the Companies' perspective, the issue of margin squeezing in the telecommunications market spans regulated and forborne services and as a result, determining how best to address competitive complaints about margin squeezing is at best a daunting task for competitors. Perhaps the clearest example of what the Companies consider margin squeezing is currently found in the high-speed Internet access market.

24. We note that the retail rates of both the ILECs and cable television companies are forborne while their respective wholesale services continue to be regulated. The Companies' do not propose to go into great detail on that market's current retail/wholesale rate relationship other than to say that in various ILEC operating territories across the country, ILEC retail rates, for example, continue to be *below* the wholesale rates for similar services.

25. Tariffed service charges are also one of the significant problems faced by the ILECs' competitors who are also customers. By way of example, Aliant's wholesale ADSL access service has service charges of \$99 per access regardless of whether the associated access is 2 or 5 Mbps. However, on its unregulated retail side, customers are not charged this installation fee. Primus Canada also notes that MTS has a similar tariffed \$100 service charge that is imposed on its competitor/customers but not on its retail customers. Unable to pass this charge onto their end users, competitors have no choice but to absorb these charges.

26. Similar issues exist in the instance of monthly rates for access. In many cases the ILECs identify their monthly "regular" rate and then offer a significant discount if the customer opts for a 12 month contract. For example, MTS' retail *Lightning* product which is regularly priced at \$40.95 per month is available at the current year-long promotional rate of \$29.95 a month plus, once again, free installation. The monthly promotional access rate alone is a discount of approximately 27% discount off of the advertised monthly rate. The tariffed wholesale rate for ADSL access is currently \$24.

27. These virtually permanent promotional offers by the ILECs, as well as similar promotions by the cable companies, leave competitors such as Primus Canada and others with very little margin for the other tariffed charges associated with these wholesale services and its own internal operations. Comwave, for its part, has evaluated the potential of this market numerous times over the years. Each time, Comwave has concluded that the cost of wholesale access provides insufficient margins and, as a result, the company has refrained thus far from entering the market. This is a clear example of the anticipated outcome of the anti-competitive behaviour described in subsection 78(1)(a) of the *Competition Act*.

Abuse of Dominance and Section 27(2) of the *Telecommunications Act*

28. The Companies support the Bureau's efforts to define the application of the abuse of dominance provisions of the *Competition Act* in the context of the telecommunications industry. However, in respect of enforcement action against such activities and the remedies required to redress such activity, we are of the view that the CRTC is better positioned to deal with claims of anti-competitive behaviour in the telecommunications industry, under section 27(2) of the *Telecommunications Act*, which prohibits undue preferences and unjust discrimination. Even where the CRTC has granted forbearance, it can, and in most cases, does, retain powers under section 27(2) and as such, this subsection provides a necessary and critical check on the activities of the incumbents.

The Burden of Proof under the Competition Act is Onerous

29. The burden of proof to be met under section 79(1) of the *Competition Act* is a difficult one. In order to make a remedial order, the Commissioner must establish each of the elements described in section 79(1) including product and geographic markets, market power, practice of anti-competitive acts and any mitigating factors that may remove the inference that the activity in question was intended as an anti-competitive act. By contrast, the burden of proof under subsection 27(2) of the *Telecommunications Act* is less onerous. Under that section, the complainant must demonstrate that the carrier has provided an undue preference to itself or unjustly discriminated against another party, and of particular note, there is no requirement under section 27(2) to examine any mitigating factors as is required by section 79(1) of the *Competition Act*. Under section 27(2), the CRTC will determine whether the carrier provided or did not provide an undue preference or discrimination.

The Process Under the Telecommunications Act is More Straightforward

30. The process for proceeding with an abuse of dominance case under the *Competition Act* has proven to be slow and expensive. Further, there is no guarantee that the case will be pursued under the *Competition Act* process, as the Commissioner has the power to decide to not challenge a complaint after review.

31. By contrast, a complaint of anti-competitive behaviour brought under section 27(2) of the *Telecommunications Act*, brought as a Part VII application is subject to specific time requirements for response and intervention, and further, the CRTC has an expedited process by which it can deal with cases on an accelerated basis. In comparison to section 79(1) complaints, section 27(2) cases are dealt with more efficiently and quickly.

The CRTC has the Expertise to Handle Cases

32. Although the Bureau has staff that specialize in the telecommunications industry and can assist with an abuse of dominance case in the industry, the CRTC is the expert and industry regulator and as such, is best equipped to deal with all issues affecting industry

stakeholders. This expertise results in the CRTC moving more efficiently and quickly on cases, thereby reducing process. Further, as the industry regulator, the CRTC can make industry-wide policy on the enforcement of anti-competitive behaviour, in contrast to the Bureau process, in which Tribunal decisions establish competition law principles, rather than industry-wide policy.

33. This is not to say that the Bureau has no place in dealing with abuse of dominance in the telecommunications industry. On the contrary, the Bureau's experience and expertise in handling claims of abuse of dominance in other industries would be incredibly beneficial to the telecommunications industry in those instances where the CRTC is completely forborne from its 27(2) powers.

Conclusion

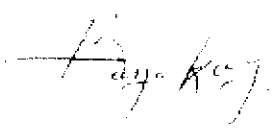
34. As the telecommunications industry transitions to a competitive industry, the Bureau has an important role to play. Primus Canada and Comwave, as efficient competitive entrants who must rely on use of the regulated wholesale services available from the ILECs and cablecos who are the dominant player in most markets, have a vested interest in ensuring that abuse of dominance is discouraged and that enforcement action against anti-competitive acts is taken.

35. In our view, the Information Bulletin is an important step in the Bureau's increasing involvement in the telecommunications industry and we thank you for the opportunity to comment on the Information Bulletin. We encourage the Bureau to continue to work with the CRTC to create an appropriate and effective regulatory framework to discourage anti-competitive behaviour in the telecommunications industry.

Yours truly,


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Primus Telecommunications Canada Inc.

Yours truly,


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