

Willie Grieve  
Vice-President  
Telecom Policy & Regulatory Affairs

(780) 493-6590 Telephone  
(780) 493-6519 Facsimile  
[willie.grieve@telus.com](mailto:willie.grieve@telus.com)

January 12, 2007

**SENT BY FAX (1-819-953-8546)**  
**AND BY E-MAIL ([qureshi.masood@cb-bc.gc.ca](mailto:qureshi.masood@cb-bc.gc.ca))**

Mr. Masood Qureshi  
Competition Bureau  
Place du Portage I  
50 Victoria Street  
Gatineau, Quebec K1A 0C9

Dear Mr. Qureshi:

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

1. TELUS Communications Company (“TELUS”) is pleased to have the opportunity to submit these comments on the *Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (the “Draft Bulletin”) issued by the Commissioner of Competition (the “Commissioner”) on September 26, 2006.
2. TELUS supports the use of a consultative process, such as the one the Commissioner has undertaken in this case, for the review of draft information bulletins. TELUS also appreciates the Commissioner’s willingness to provide guidance on the Competition Bureau’s enforcement approach under sections 78 and 79 of the *Competition Act* (“CA”) to conduct in the telecommunications industry and TELUS enthusiastically supports the move from a regulated to competitive environment that is anticipated in the Draft Bulletin.

3. However, as explained in more detail below, TELUS believes that the issuance of an information bulletin respecting the application of section 79 of the CA to the telecommunications industry is *unnecessary* in the present regulatory environment. Under TELUS' interpretation of the current legislation, where a telecommunications carrier has a dominant position in relation to a service or class of services, the rates, facilities, terms and conditions and quality of service in relation to such service(s) will continue to be regulated by the CRTC pursuant to the *Telecommunications Act*. Accordingly, there is very limited scope for the application of section 79 of the CA in relation to such service(s).
4. Furthermore, to the extent that section 79 of the CA may, at some time in the future, apply to telecommunications services provided in markets where a telecommunications carrier is found to be dominant (and sector-specific regulation is not otherwise applied), that telecommunications carrier should be subject to the same competition law and rules as any other firm in the economy. In TELUS' view, the Competition Bureau's general *Enforcement Guidelines on the Abuse of Dominance Provisions* ("General Abuse Guidelines") are as sufficient for the telecommunications industry as they are for any other sector or industry. In this regard, TELUS is concerned that the Draft Bulletin creates a misleading and inaccurate impression that the Competition Bureau intends to enforce section 79 differently and perhaps more aggressively for the telecommunications industry than for other industries.
5. Nevertheless, TELUS recognizes that not only is the industry itself experiencing rapid technological change but the regulatory and legal landscape is changing too. Until legislative changes are made to the *Telecommunications Act* and possibly to the CA, the information in the Draft Bulletin will be most useful as evidence in the CRTC's current proceeding, *Review of regulatory framework for wholesale services and definition of essential service*, Telecom Public Notice CRTC 2006-14 ("PN 2006-14"), to consider the regulatory regime for telecommunications wholesale services.

6. Therefore, for the reasons outlined in this letter, TELUS requests that Competition Bureau withdraw the Draft Bulletin on the application of section 79 of the CA to the telecommunications industry. When legislative change is imminent and the shape of the relationship between the CRTC and the Competition Bureau has been settled, TELUS would welcome the opportunity to comment on a draft bulletin if one were considered necessary at that time.

**A. ISSUANCE OF THE DRAFT BULLETIN IS UNNECESSARY**

7. A bulletin regarding the enforcement of the abuse of dominance provisions of the CA in the telecommunications sector is unnecessary, given that under the present law there is very limited scope for section 79 of the CA to apply to the conduct of a telecommunications carrier in relation to services where the carrier enjoys a dominant position. In effect, the Draft Bulletin provides advice on a provision of the CA which does not apply to most situations of dominance in the telecommunications industry due to the application of the regulated conduct defence. Accordingly, it is of very limited value.
8. Section 79 of the CA applies only to conduct by dominant firms; that is, firms with market power. The Commissioner has no jurisdiction to intervene to control anti-competitive acts by telecommunications carriers in relation to services or markets where such carriers have market power, because such services and markets remain subject to extensive economic regulation by the CRTC under the *Telecommunications Act*. To the extent that the conduct of a telecommunications carrier is regulated, the regulated conduct defence, discussed in detail in the Competition Bureau's recently issued *Technical Bulletin on "Regulated" Conduct*,<sup>1</sup> applies. In that bulletin, the Competition Bureau states that as a result of the application of the regulated conduct defence, "the [Competition] Bureau will not pursue a matter under any provision of the [CA] where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and providing a regulator the authority to itself take, or to authorize another to take, action inconsistent with the [CA], provided

---

<sup>1</sup> *Technical Bulletin on "Regulated" Conduct*, Competition Bureau Canada, June 2006.

the regulator has exercised its regulatory authority in respect of the conduct in question.”<sup>2</sup>

9. Under the present law, comprehensive regulation of telecommunications carriers in relation to a service or class of services will continue until such time as the CRTC determines that the market for such services is characterized by “competition sufficient to protect the interests of users” (*Telecommunications Act*, s. 34(2)). In the past, the CRTC has endorsed an approach to forbearance that relies on market power principles imported from competition policy.<sup>3</sup> The Government of Canada’s December 11, 2006 proposed Cabinet Order that will vary CRTC Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services* (the “Cabinet Order”), also relies on market power principles.<sup>4</sup>
10. While there will be a considerably greater scope for local forbearance in light of the proposed Cabinet Order, the test continues to be a “market power” test and, in fact, more closely mirrors the Competition Bureau’s market power test. Where a telecommunications carrier continues to enjoy market power (whether under the CRTC’s standards or under one of the tests suggested in the Cabinet Order) in relation to a particular service or class of services, it will continue to be subject to comprehensive regulation under the *Telecommunications Act*. Accordingly, the CA (including section 79) does not apply by virtue of the application of the regulated conduct defence, and the Commissioner will lack the jurisdiction to intervene in relation to such services.
11. The test for determining whether a firm “substantially or completely controls” a market (*i.e.*, is dominant) under section 79 the CA is also a market power test.

---

<sup>2</sup> *Technical Bulletin on “Regulated” Conduct*, at p.6.

<sup>3</sup> In this connection see CRTC Telecom Decision 94-19, *Review of Regulatory Framework*.

<sup>4</sup> On December 11, 2006, the Government announced its proposed Order to vary the CRTC Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services*; by establishing a revised framework for the deregulation of retail telephone prices charged by the incumbent telephone companies. In this regard, the Government is proposing to (i) replace the CRTC’s market share test with a test that emphasizes the presence of competitive infrastructure, (ii) use smaller, more appropriate geographic areas, (iii) reduce the number of competitor quality of service indicators that incumbent telephone companies are required to meet prior to forbearance being granted and (iv) end certain marketing restrictions.

Accordingly, at the point when forbearance is granted, the incumbent telecommunications carrier no longer enjoys market power, and, accordingly, there can be no concern about market dominance. This point was explicitly acknowledged by the Commissioner in her August 15, 2005 submission to the Telecommunications Policy Review Panel (the “TPR Panel”), where she wrote:

94. Prior to forbearing under subsection 34(2) from the exercise of its powers under subsection 27(1) to ensure just and reasonable rates, the CRTC must conclude that the service is or will be subject to competition sufficient to protect the interests of users. Once it reaches this conclusion, it follows that the Commission should equally forbear from the exercise of all of its powers under section 27 of the *Telecommunications Act*. This is the case since it is not clear how competition sufficient to protect the interests of users with respect to rates under subsection 27(1) would be insufficient to protect users' interests with respect to subsection 27(2). *Indeed, once regulated companies are no longer found to have market power, reliance on the general provisions of the Competition Act, rather than sector-specific regulation under the Telecommunications Act would be more appropriate.* [emphasis added]

Accordingly, there can be no legitimate complaint under section 79 of the CA immediately following forbearance, because there will be no firm with market power.

12. TELUS acknowledges that in a situation where market power re-emerges after forbearance is granted (*e.g.*, where a competitor exits the market), and where there is anti-competitive conduct, the Competition Bureau would *potentially* have jurisdiction to examine the conduct of a dominant telecommunications carrier. Under the present law, such jurisdiction is “potential” only, because (1) most existing forbearance orders are conditional, and therefore the CRTC continues to have jurisdiction to address most abusive conduct; (2) under the current *Telecommunications Act*, the CRTC may re-regulate services if market power re-emerges and (3) it is not clear whether the new regulatory regime for telecommunications will provide for re-regulation in such circumstances. The TPR Panel suggested that there should first be an inquiry into whether the available remedies under competition law are sufficient protection. If they are found to be insufficient, the service should be re-regulated.<sup>5</sup> To the extent that the

---

<sup>5</sup> TPR Panel, *Final Report 2006*, at 3-15.

CRTC retains jurisdiction under a forbearance order, and to the extent of any re-regulation, the Competition Bureau will lack the jurisdiction to address anti-competitive conduct by a dominant telecommunications firm, again by virtue of the regulated conduct defence.

13. Similarly, the CRTC also continues to regulate services that it deems to be “essential” or “near-essential” facilities. For the purposes of identifying the components of the telecommunications industry that it will continue to regulate, the CRTC determines certain facilities, functions and services to be essential or near-essential. Such determination by the CRTC of “essential facilities” is relevant for purposes of the CA only to the extent that if the CRTC determines a facility to be essential or near-essential it will regulate it, thereby ousting the application of the CA and the jurisdiction of the Commissioner. In this regard, TELUS will be responding to the CRTC’s proceeding initiated by PN 2006-14 to provide input on those services which should be deemed to be “essential” and which will therefore continue to be regulated by the CRTC. (TELUS also expects that the Competition Bureau will respond in that proceeding to provide its respective views on those issues.) TELUS will also use the CRTC’s proceeding to comment on the essential facilities doctrine and the Competition Bureau’s views on how it should be employed in Canada, either by the CRTC or by the Competition Bureau if the CA becomes the governing legislation for abuse of dominance claims in telecommunications.
14. Thus, under the present law, the Competition Bureau’s jurisdiction to examine the conduct of a telecommunications carrier in relation to services for which the carrier is a “dominant” provider is very circumscribed. Accordingly, the content of the Draft Bulletin is of limited practical value at the present time except to the extent that it may serve as evidence of the Commissioner’s views in the PN 2006-14 proceeding.

**B. TO THE EXTENT THE CA APPLIES, THE SAME CA RULES APPLY TO TELECOMMUNICATIONS INDUSTRY AS TO ANY OTHER INDUSTRY**

15. TELUS welcomes and, as represented by its submissions to the TPR Panel and the CRTC, has encouraged and continues to encourage the transition of the telecommunications industry from a regulated to a competitive environment.
16. To the extent that the CA applies to TELUS, TELUS expects to be subject to the same competition rules as any other firm. Given that the CA is a statute of general application, for the purposes of section 79, the General Abuse Guidelines are sufficient for the telecommunications sector as they are for any other sector.
17. TELUS is concerned that the Draft Bulletin creates the perception that the telecommunications industry would be held to a different and perhaps even higher standard and that section 79 will be applied differently to conduct in the telecommunications industry than in other industries. This perception is supported by the fact that much of the Draft Bulletin consists of a general discussion of certain parts of the General Abuse Guidelines and in some cases this discussion is inconsistent with or different with the General Abuse Guidelines. This alone suggests that the Competition Bureau is applying different principles when considering the application and enforcement of section 79 to the telecommunications industry. A differing standard for telecommunications would run contrary to the underlying notion that the CA is a law of general application.
18. Furthermore, this suggests that the Draft Bulletin would take precedence over the General Abuse Guidelines. This is contrary to TELUS understanding of the status of information bulletins in the Competition Bureau's hierarchy of tools for providing guidance. This perception is now significantly exacerbated by the recent proposal to amend section 79 to include sector-specific administrative monetary penalties--that is, to impose significantly different and harsher consequences for conduct by a telecommunications firm than that which may be imposed on firms in other industries for the same conduct or more egregious conduct.

19. Broad comprehensive pronouncements by the Competition Bureau denominated as guidelines or bulletins, lacking evidentiary context, can be perilous at the best of times. In TELUS' view, where such guidance relates to an industry that is by the Commissioner's own admission facing unprecedented change and innovation<sup>6</sup> and which is in the throes of fundamental legal and regulatory change, the difficulties are exponentially increased.
20. In TELUS' view, comprehensive guidance to the telecommunications industry beyond generalizations and commonplace knowledge (which is not meaningful guidance for the industry) will not succeed because:
  - (a) the Competition Bureau's jurisdiction in respect of the telecommunications industry is in a state of transition and a comprehensive bulletin, such as the Draft Bulletin, is not a flexible or timely instrument to inform the industry about the Competition Bureau's enforcement experience and views as these will evolve as the regulatory regime governing the industry evolves,<sup>7</sup>
  - (b) given the dynamic state of the industry where increasing convergence and emerging technologies are having and may be expected to continue to have a significant impact on the competitive conditions of the industry (*i.e.*, redefining markets; undermining conditions for the creation or maintenance of market power; dismantling barriers to entry; and changing cost structures), it is difficult for the Competition Bureau to clarify in any meaningful manner the Competition Bureau's positions on the elements of section 79 (including, for example, market power, barriers to entry, anti-competitive acts) in the absence of a factual context. There is also a serious risk of the Competition Bureau locking itself into positions that

---

<sup>6</sup> *Comments of the Commissioner of Competition to the Telecommunications Policy Review*, August 15 2005, at para. 5.

<sup>7</sup> For example, since the Bureau's release of the Draft Bulletin the Government has made two significant announcements: (a) on December 7, 2006, it proposed amendments to section 79 of the CA ( the very section addressed by the Draft Bulletin) to allow the Competition Tribunal to order telecommunications service providers to pay an administrative monetary penalty of up to \$15 million in cases of abuse of dominant position; and (b) on December 11, the Government announced the proposed Cabinet Order.

will be difficult to reverse because parties will have relied on the positions set out in a bulletin to guide their own conduct.

21. Accordingly, TELUS requests that Competition Bureau withdraw its information bulletin on the application of section 79 of the CA to the telecommunications industry. When legislative change has been accomplished, or at the very least is imminent and the shape of the relationship between the CRTC and the Competition Bureau has been settled, TELUS would welcome the opportunity to comment on a draft bulletin, if one were considered necessary.

### **C. CONCLUSIONS AND RECOMMENDATIONS**

22. For the foregoing reasons, TELUS strongly urges the Competition Bureau to withdraw the Draft Bulletin at this time. If and when the Competition Bureau determines that there is any need for telecommunications sector-specific advice regarding the application of any provision of the CA, TELUS recommends that the Competition Bureau consider whether an Information Bulletin or some other instrument is best suited for the purpose.
23. TELUS would be very pleased to discuss these comments with the Competition Bureau and to participate in any future consultation process affecting the telecommunications industry.

Yours truly,

*{original signed by Willie Grieve}*

Willie Grieve  
Vice-President  
Telecom Policy & Regulatory Affairs

EE/sa