



Telecom Decision CRTC 2005-13

Ottawa, 9 March 2005

Union des consommateurs, Public Interest Advocacy Centre and Option Consommateurs – Automatic dialers and modem hijacking

Reference: 8665-U11-200407090

1. The Commission received an application from Union des consommateurs, Public Interest Advocacy Centre and Option Consommateurs (the Consumer Groups), dated 7 July 2004, filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, seeking a variety of consumer protection measures and remedies to combat modem hijacking caused by automatic dialers. This application was served on, among other parties, Aliant Telecom Inc. (Aliant Telecom), Bell Canada, MTS Allstream Inc. (MTS Allstream), Saskatchewan Telecommunications (SaskTel), Société en commandite Télébec (Télébec) and TELUS Communications Inc. (TCI) (collectively, the Respondents).
2. Modem hijacking occurs when software containing automatic dialers is downloaded, sometimes surreptitiously, onto subscribers' computers through their Internet connection. The dialers connect the subscribers' computer to a website through the subscribers' modem, triggering long distance charges often to countries with high long distance rates, without the subscribers' involvement. In the cases where the subscriber intentionally downloads the automatic dialer software, the long distance charges serve as a proxy for payment for access to the content of the site.
3. On 7 January 2005, when the ongoing negotiations between the Consumer Groups and the Respondents proved unsuccessful, the Commission advised the Consumer Groups and the Respondents that it would adjudicate this matter on an expedited basis, in accordance with the expedited process established in *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004.
4. The matter was heard by a panel of three Commissioners on 25 February 2005. In addition to the oral component of the proceeding and the 7 July 2004 application, the Commission considered the Respondents' answers dated 15 November 2004, the Consumer Groups' reply dated 10 December 2004, the Consumer Groups', Aliant Telecom's, Bell Canada's, MTS Allstream's and TCI's arguments dated 26 January 2005, Bell Canada's and Télébec's (jointly), and TCI's rebuttals dated 26 January 2005, SaskTel's argument dated 27 January 2005, and the Consumer Groups' and Respondents' responses dated 28 January 2005 to Commission interrogatories.

Regulatory framework

5. Sections 24, 27(1) and (2) and 31 of the *Telecommunications Act* (the Act) state:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

31. No limitation of a Canadian carrier's liability in respect of a telecommunications service is effective unless it has been authorized or prescribed by the Commission.

6. The Respondents' Terms of Service state that subscribers are responsible for calls placed from their telephone. For example, article 9.1 of Bell Canada's Terms of Service states that:

9.1 Customers are responsible for paying for all calls originating from, and charged calls accepted at, their telephones, regardless of who made or accepted them.

7. In *Forbearance – Regulation of toll services provided by incumbent telephone companies*, Telecom Decision CRTC 97-19, 18 December 1997 (Decision 97-19), the Commission determined that there was sufficient competition to forbear from most of its powers and duties regarding toll services. The Commission also determined that:

- It was appropriate to retain section 24 powers to impose future conditions upon the offering and provision of toll services, where circumstances so warrant;
- It would forbear from the exercise of its powers under subsection 27(2), except in limited circumstances; and
- In view of the competitive nature of the market it would be appropriate to forbear from exercising its powers to prescribe limitations of liability with respect to section 31, with the exception that its decisions with regard to limitations of liability would continue to apply to provisions in existing contracts or arrangements.

8. In *Terms of Service – Disconnection for partial payment of charges*, Telecom Decision CRTC 2004-31, 11 May 2004 (Decision 2004-31), the Commission determined that, in accordance with the incumbent local exchange carriers' (ILECs') approved Terms of Service,

the ILECs were not permitted to suspend or terminate (disconnect), or threaten to disconnect, a customer's tariffed services if that customer had made partial payments sufficient to cover that customer's outstanding arrears for tariffed services, whether or not there remained outstanding arrears for non-tariffed services.

Issue: Whether the Commission should impose consumer protection measures and remedies on the Respondents to combat modem hijacking

9. In order to combat modem hijacking, the Consumer Groups requested that the Commission direct the Respondents to implement a variety of consumer protection measures and remedies:

Measures to combat modem hijacking

- Implement education and awareness campaigns, including providing information to subscribers in the form of billing inserts and information in the white pages;
- Make changes to internal procedures with respect to customer service training and the linking of rebates to other services;
- Implement programs to track and report modem hijacking related complaints on a quarterly basis; and
- Implement technical solutions such as chargeback mechanisms and the provision of security tools.

Remedies

a) Subscriber liability

- Provide rebates to subscribers for some past and all future long distance charges incurred as a result of modem hijacking.

b) Unjust discrimination and undue preference

- Require the Respondents to treat all fraudulent long distance charges and all long distance customers in the same manner regardless of the services they subscribe to.

c) Collection notices

- Require the Respondents to modify their collection notices.

Measures to combat modem hijacking

10. The Consumer Groups submitted that the Commission could not rely on the Respondents to take proactive measures to combat modem hijacking, since any such measures were not in their financial interest. In support, the Consumer Groups stated that, despite the fact that the Respondents had been aware of modem hijacking for a number of years, they only recently

implemented measures to combat this problem, largely as a result of this Part VII application.

11. The Respondents submitted that they had taken, and would continue to take when appropriate, a variety of measures to respond to subscribers' concerns, including many of the measures proposed by the Consumer Groups. The Respondents further submitted that the steep reduction in complaints since these measures had been implemented was evidence of the effectiveness of these measures. Furthermore, the Respondents submitted that some of the measures proposed by the Consumer Groups were difficult, expensive or impractical to implement. The Respondents added that subscriber awareness and vigilance in ensuring the security of their computers was the best long-term solution. The Respondents therefore submitted that there was no need for the Commission to impose additional measures to combat modem hijacking.

Commission analysis and determination

12. The Commission considers that the Respondents have already undertaken many of the measures requested by the Consumer Groups to combat modem hijacking. For example, the Commission notes that each of the Respondents has implemented education and awareness campaigns, implemented tracking reports and have selectively blocked country codes to some countries such as Sao Tome and Principe, Nauru and Cook Islands. Many of the Respondents have also sent billing inserts or have included announcements on their bills advising their subscribers of the practice of modem hijacking.
13. The Commission notes that the number of subscriber complaints received by the Commission and the Respondents shows a marked reduction since the Respondents put in place their programs. For example, the Commission received over 950 complaints regarding modem hijacking in May 2004 and less than 50 complaints in December 2004.
14. Therefore, the Commission considers that these measures have been effective and have had a significant impact in reducing the number of complaints of modem hijacking. The Commission further considers that the competitive nature of the long distance market and the Respondents' own business interest to appropriately respond to their subscribers' concerns, will help ensure that the Respondents continue to address any future problems that may arise because of modem hijacking.
15. Accordingly, the Commission finds, at this time, that the Consumer Groups have not demonstrated that the measures taken by the Respondents are insufficient to address the public's concerns arising from modem hijacking.
16. The Commission notes, nevertheless, that, while there has been a marked reduction in the number of complaints regarding modem hijacking, the problem still exists and will likely continue to exist. Consequently, it expects the Respondents to continue their efforts to inform and educate subscribers, and to increase these efforts as required. For example, the Commission expects the Respondents to continue tracking complaints regarding modem hijacking and to make them available to the Commission, upon request. The Commission also expects the Respondents to continue monitoring long distance traffic, blocking direct dial calls to countries where they deem it appropriate or necessary, and implementing other technical

solutions. The Commission further expects the Respondents to continue to educate and inform subscribers through billing inserts, public service announcements, electronic mailings, Internet postings and other forms of communication. The Commission notes that it is in the interest of all long distance service providers to inform and educate their subscribers regarding modem hijacking.

Subscriber liability

17. The Consumer Groups submitted that the Commission had retained jurisdiction over basic toll service and other long distance services when bundled with another regulated service such as local exchange service. They also submitted that the Commission had not anticipated modem hijacking and dialer fraud when it forbore from regulating liability for long distance services and submitted that "fraud unravels everything". Therefore, the Commission had authority to revisit its determination to forbear from regulating the long distance market or to impose conditions pursuant to section 24 of the Act. Further, based on their interpretation of the Respondents' Terms of Service, the Consumer Groups submitted that subscribers were not liable for the long distance charges since the dialers, not the subscribers, placed the disputed long distance calls.
18. The Consumer Groups added that holding the Respondents wholly liable for subscriber long distance charges incurred due to dialers, would provide an effective incentive to the Respondents to take all appropriate measures to combat modem hijacking.
19. The Respondents submitted that the Commission had forborne from sections 27(1) and 31 of the Act with regard to long distance service. Accordingly, the Commission had allowed the Respondents and subscribers to determine how they would share the responsibility for long distance charges and had allowed market forces to ensure that rates were just and reasonable. The Respondents added that the Commission could not require the Respondents to grant credits or refunds to their subscribers without reversing its forbearance decisions. The Respondents submitted that this would amount to Commission intervention in the sharing of responsibility between the Respondents and their subscribers, or the setting of rates, both of which were forborne. However, the Respondents submitted that they each offered varying forms and amounts of credit for disputed long distance charges as a goodwill gesture. The Respondents further submitted that the powers retained by the Commission under section 24 of the Act did not give the Commission the authority to impose any relief retroactively, as requested in the remedies.
20. The Respondents submitted that, as stated in their terms of service, their long distance subscribers were responsible for all charges incurred via their telephone lines, regardless of how the charges were incurred or who incurred them. Further, the Respondents submitted that if subscribers were not held responsible for calls made through dialers because a live person did not place the call, then subscribers would also not be held responsible for calls made via other automated dialing technology, including speed-dialers and satellite set top boxes. The Respondents also submitted that, if fraud existed, they were not party to it as they had no control over the Internet sites their subscribers visited, the content downloaded and whether or not the subscribers chose to install security software on their computers. As such, the Respondents submitted that they could not, and should not, be held responsible for

subscribers' choices.

Commission analysis and determination

21. The Commission considers that subscribers are best positioned to have control over calls placed from, or accepted over their telephone line, and to be aware of the use that can be made of software installed on their computers. The Commission also considers that, while the Respondents may find that it is in their interest to inform and protect their subscribers against modem hijacking, subscribers have the primary responsibility to control the security of their computers. Furthermore, as noted above, the Commission expects that the Respondents will continue to take appropriate measures to combat modem hijacking. In light of the above, the Commission finds that, in this case, there is insufficient evidence to relieve subscribers of their liability for long distance calls placed from dialers.

Unjust discrimination and undue preference

22. The Consumer Groups submitted that the Respondents discriminated against their subscribers who had incurred long distance charges as a result of modem hijacking in violation of section 27(2) of the Act. First, the Consumer Groups noted that these subscribers were treated differently from subscribers who disputed other long distance charges as a result of home invasions or calling card fraud. In the latter cases, subscribers were offered full refunds, did not receive billing and collection notices and were not threatened with disconnection of their long distance service. Second, the Consumer Groups submitted that the Respondents conferred an undue preference on themselves by not absorbing all fraudulent long distance charges or, in some cases, by offering larger rebates where subscribers purchased certain services from the Respondents.
23. The Respondents submitted that there was no unjust discrimination. They also submitted that in like circumstances, all subscribers disputing long distance charges due to dialers were offered the same remedy and/or services. The Respondents further submitted that they could not determine whether long distance calls originated from a person or a dialer nor could they determine whether calls were placed from voluntarily installed dialers, with the subscriber's knowledge and participation or whether they were surreptitiously installed without the subscriber's knowledge or involvement.
24. TCI submitted that it offered a first-time 100% refund to subscribers who already subscribed or chose to subscribe to its Call Gate service, a long distance call management service. TCI added that subscribers who did not subscribe to its Call Gate service or chose not to subscribe to it received a 50% credit. TCI submitted that subscribers were responsible to ensure that their computers were secure and that it was reasonable to provide a greater discount to those subscribers who took steps to protect themselves against unwanted long distance charges.
25. Aliant Telecom submitted that, in the long run, refunds were an ineffective method of combating modem hijacking and that it was therefore its intention to gradually phase out its refund policy. Initially, Aliant Telecom offered a 100% first-time rebate to any of its long distance subscribers. Subsequently, only subscribers of Aliant Telecom's long distance service

and Internet services would receive a 100% first-time rebate and then, over time, the rebate would be reduced from 100% to some lesser percentage to be determined. Ultimately, Aliant Telecom would discontinue the rebate plan.

Commission analysis and determination

26. The Commission considers that there are differences between how long distance charges are incurred as a result of home invasion or calling card fraud and how long distance charges are incurred for calls placed from dialers. For example, the Commission notes the degree of control that subscribers have over their computers and the fact that some subscribers intentionally install the dialers. In the Commission's view, these differences justify the Respondents implementing different rebate policies.
27. In the context of a highly competitive service like long distance, the Commission considers that it is appropriate for the Respondents to develop policies that respond to their particular circumstances, to their markets and to their subscribers' needs and concerns. Accordingly, the Commission finds that the Respondents are not unjustly discriminating against subscribers that incur long distance charges as a result of modem hijacking. The Commission further finds that the Respondents have not conferred an undue preference on themselves by not absorbing all fraudulent long distance charges or, in some cases, by offering larger rebates where subscribers purchased certain services from the Respondents.

Collection notices

28. The Consumer Groups submitted that the Respondents threatened to disconnect subscribers' local service for disputed long distance charges in arrears, even though the payment for local service was current. In support, the Consumer Groups provided an example of a Bell Canada disconnection notice advising a subscriber that Bell Canada may discontinue some or all its services to the subscriber if payment or suitable arrangements were not made. The disconnection notice also stated that, where service was disconnected, a reconnection charge applied and a deposit or alternative could be required.
29. Bell Canada submitted that the wording on its collection notices was generic. These notices were meant to respond to a variety of circumstances and were sufficiently clear, in its view, to allow subscribers to conclude that their local service would not be disconnected for non-payment of disputed long distance charges.

Commission analysis and determination

30. The Commission notes that, pursuant to the Respondents' Terms of Service and Decision 2004-31, the Respondents are prohibited from disconnecting, or threatening to disconnect, a tariff service, such as local service, where a subscriber fails to pay non-tariff charges.
31. The Commission considers that a subscriber receiving Bell Canada's generic collection notice would reasonably take that notice as a threat to disconnect his/her local service for failure to pay the non-tariff charges. Accordingly, the Commission considers that Bell Canada is in

violation of Decision 2004-31 and its Terms of Service.

32. The Commission, therefore, **directs** Bell Canada to modify its collection notice to ensure that it complies with Decision 2004-31 and related provisions of its Terms of Service. Bell Canada must file with the Commission a copy of its revised collection notice, in both official languages, within 30 days of the date of this decision.
33. The Commission also **directs** the Respondents to make any appropriate modifications, as required, to ensure that their collection practices comply with Decision 2004-31 and related provisions of their Terms of Service.

Secretary General

This document is available in alternative format upon request, and may also be examined in

PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>