Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2007-35

Ottawa, 25 May 2007

Framework for forbearance from regulation of high-speed intra-exchange digital network access services

Reference: 8640-C12-200507618 and 8640-B2-200401506

In this Decision, the Commission determines the framework for forbearing from regulating high-speed intra-exchange digital network access (high-speed DNA) services and metropolitan wavelength services (MWS). The Commission finds that the relevant geographic market for forbearance for high-speed DNA services is the wire centre, and for MWS, the census metropolitan area. The Commission also sets out the forbearance criteria and the appropriate scope of forbearance for those services, and disposes of Bell Canada's application for forbearance from the regulation of high-speed intra-exchange digital services and MWS. In this Decision, the Commission forbears, to the extent specified, from the regulation of Bell Canada's high-speed DNA services in a number of wire centres and from the regulation of the company's MWS in Toronto, Montréal, and Ottawa census metropolitan areas.

Introduction

1. On 23 February 2004, Bell Canada filed a Part VII application requesting that the Commission refrain wholly and unconditionally from exercising its powers and performing its duties under sections 24, 25, 27, 29, and 31 of the *Telecommunications Act* (the Act) in relation to the provision of the following high-speed intra-exchange digital services (intra-exchange HSDS) that Bell Canada currently provides or will provide in 119 exchanges:

    - Digital Network Access (DNA) services at transmission speeds of DS-3 and above;
    - Access Special Routing (ASR) service at transmission speeds of DS-3 and above;
    - High-Speed Metro (HSM) service;
    - various Special Facilities Tariffs (SFTs) for similar services; and
    - future services in the same class as the above-listed services.

2. In *Framework for forbearance from regulation of high-speed intra-exchange digital services*, Telecom Public Notice CRTC 2005-8, 30 June 2005, as amended by Telecom Public Notice CRTC 2005-8-1, 22 July 2005, and Telecom Public Notice CRTC 2005-8-2, 28 October 2005 (Public Notice 2005-8), the Commission considered that Bell Canada's application raised policy issues that were common to all large incumbent local exchange carriers (ILECs) and that the establishment of a framework would help facilitate the future deregulation of intra-exchange HSDS. Such a framework would include a market definition and clear criteria that the Commission would use to determine when it is appropriate to forbear from regulating intra-exchange HSDS.

3. The Commission received submissions, reply comments and/or responses to interrogatories from Aliant Telecom Inc., now part of Bell Aliant Regional Communications, Limited Partnership (Bell Aliant);[1] Bell Canada and Télébec, Société en commandite (formerly Société en commandite Télébec) (Bell Canada/Télébec); MTS Allstream Inc. (MTS Allstream) on behalf of itself and Rogers Telecom Inc. (RTI); Quebecor Media Inc. (QMI); Saskatchewan Telecommunications (SaskTel); TELUS Communications Inc. (TCI) (including the former TELUS Communications (Québec) Inc.), now TELUS Communications Company (TCC);[2] Xit télécom Inc.; PUC Telecom Inc.; Veridian Energy; Réseau d'informations scientifiques du Québec Inc.; Peterborough Utilities Services Inc.; the Canadian Cable Telecommunications Association (CCTA);[3] Cobourg Networks Inc.; Cogeco Cable Inc.; Hydro Québec; Rogers Cable Communications Inc. (RCI); Rogers Cable Communications Inc. on behalf of itself, RTI, and Rogers Wireless Inc. (Rogers);[4] the United Telecom Council of Canada (UTC) on behalf of itself and Agilis Networks (Sudbury Telecommunications), Enersource Telecom Inc., FibreTech Telecommunications Inc., FibreWired (Guelph Hydro Communications), FiberWired (Hamilton Hydro), Halton Hills Fibre Optics Inc., Hydro One Telecom, Maxess Networx, Oakville Hydro Communications (Blink), SCBN Telecommunications Inc., Telecom Ottawa Limited and Toronto Hydro Telecom; FCI Broadband, a division of Futureway Communications Inc. (FCI); Brascan Power Corporation (Great Lakes Power Limited); Niagara Regional Broadband Networks; and Cybersurf Corp. The record of this proceeding closed with the filing of reply comments dated 10 November 2006.

4. While not all of the parties' positions have been documented in this Decision, the Commission has carefully reviewed and considered all submissions.

5. In this Decision, the Commission will consider the following issues:

   I – Relevant market;

   II – Forbearance criteria;

   III – Appropriate scope of forbearance;

   IV – Process to consider future forbearance applications;

   V – Post-forbearance criteria and conditions; and

   VI – Disposition of Bell Canada's forbearance application.

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[1] On 7 July 2006, Bell Canada's regional wireline telecommunications operations in Ontario and Quebec were combined with, among other things, the wireline telecommunications operations of Aliant Telecom Inc., Société en commandite Télébec, and NorthernTel, Limited Partnership to form Bell Aliant Regional Communications, Limited Partnership (Bell Aliant).

[2] Effective 1 March 2006, TCI assigned and transferred all of its network assets and substantially all of its other assets and liabilities, including substantially all of its service contracts, to TELUS Communications Company (TCC).

[3] The Commission notes that the CCTA ceased to operate in February 2006.

[4] In this proceeding, RCI filed evidence either by itself or with multiple parties. For the purpose of this Decision, RCI refers to Rogers Cable Communications Inc. and Rogers refers to submissions made by RCI with affiliates and/or other parties.

I – Relevant market

6. In *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission described the relevant market as the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase. Each relevant market, therefore, will have both a product and a geographic component.

(a) The relevant product market

Positions of parties

7. Bell Canada/Télébec, supported by Bell Aliant and SaskTel, submitted that intra-exchange HSDS was divided into two product markets: a) intra-exchange high-speed DNA services, including digital services at DS-3, OC-3, and OC-12 speeds (hereinafter referred to as high-speed DNA services), and Ethernet service, including associated ASRs and SFTs, and b) HSM service and similar optical services (hereinafter referred to as metropolitan wavelength services or MWS). Bell Canada/Télébec also submitted that, in light of the fast-changing nature of the technology underlying these services, the Commission should forbear from regulating future services that would be part of the same class of services in the relevant product market.

High-speed DNA services

8. Bell Canada/Télébec indicated that on the basis of functionality, pricing and supply substitutability, high-speed DNA services were part of the same relevant product market.

9. Bell Canada/Télébec submitted that DNA services below DS-3 speeds did not provide the bandwidth required to support large data applications and were therefore not in the same relevant product market. Bell Canada/Télébec also submitted that, while DNA services at DS-3 and higher speeds could serve as weak substitutes for lower speed services, the opposite was not true.

10. Bell Canada/Télébec submitted that high-speed DNA services at DS-3 speeds and above were provisioned over fibre facilities while lower speed DNA services were provisioned over copper-based facilities. Bell Canada also submitted that once a local fibre-based competitor provided one high-speed service over a fibre network, it was likely to provide other high-speed services over the same network in order to maximize the profitability of its network. Bell Canada/Télébec further submitted that fibre-based competitors could provide all high-speed DNA services if they installed the appropriate pair of line cards at the customer's premises and the central office (CO).

11. Bell Canada/Télébec indicated that the Commission had previously found that higher-speed services could be in different product markets than lower-speed services. The companies noted that in *Stentor Resource Centre Inc. – Forbearance from regulation of interexchange private line services*, Telecom Decision CRTC 97-20, 18 December 1997, the Commission concluded that interexchange private line services were subject to more competition than lower-capacity services.

12. Bell Canada/Télébec also noted that in *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005, as amended by Telecom Decision CRTC 2005-6-1, 28 April 2006 (Decision 2005-6), the Commission found that high-speed DNA services should be classified as Category II competitor services because their competitive supply conditions were different from those of lower-speed digital access services. Bell Canada/Télébec further noted that in *Regulation under the Telecommunications Act of certain telecommunications services offered by "Broadcast Carriers"*, Telecom Decision CRTC 98-9, 9 July 1998, the Commission determined that, based on access speed, there were two markets for certain underlying telecommunications facilities related to Internet services – the lower and higher speed access service markets.

13. The UTC submitted that, under competition law, the identification of a well-defined product market had to take into account the substitutes and other market features of the service in question, such as functionality, price, and quality. The UTC submitted that, from a demand-side perspective, a high-speed DNA service was not a viable substitute for another high-speed DNA service at a different speed.

14. The UTC added that, although each of the high-speed DNA services could accommodate the same applications, they varied significantly in terms of capacity and price. The UTC submitted that DS-3 services could be provisioned over copper or fibre and were standard off-the-shelf products that could be provisioned on a near-ubiquitous basis. Regarding OC-3 and OC-12 services, the UTC stated that, although an OC-12 service had four times the capacity of an OC-3 service, customers would not use four OC-3 services instead of one OC-12 service because of the difficulty in integrating the four OC-3 services and the price differences.

15. QMI submitted that DS-3, OC-3, and OC-12 services were part of the same product market. The company argued that, while customers might not consider high-speed DNA services as substitutes for one another, the network and technical characteristics of these services would allow a carrier providing one speed of high-speed DNA service between two locations to also provide other speeds between the same locations within a reasonable time frame.

16. The CCTA indicated that DS-3 service was in a distinct product market. The CCTA indicated that, because DS-3 service could be provisioned on a ubiquitous basis over copper facilities, competitive conditions applicable to that service were different from those applicable to higher capacity DNA-type services provisioned exclusively on fibre.

17. MTS Allstream submitted that all data access and transport services (e.g. Asymmetric Digital Subscriber Line (ADSL), low-speed and high-speed DNA services, MWS and high-speed Ethernet services) were part of the same product market, regardless of the transmission speed and access technologies. According to MTS Allstream, from a demand perspective these services provided similar functionality and had similar service attributes. MTS Allstream added that, from a supply perspective, these services could be provisioned over the same local access and transport facilities with very minor changes to customer premises and CO equipment. MTS Allstream noted that the Commission had consistently rejected the notion of defining service markets on the basis of technology.

18. Bell Canada/Télébec submitted that Ethernet service was a substitute for high-speed DNA service and that Ethernet service at 100 megabits per second (Mbps) and at 1 gigabit per second (Gbps) speeds should be included in the relevant product market with DS-3, OC-3, and OC-12 services.

19. Bell Canada/Télébec noted that, in the proceeding that led to *Ethernet services*, Telecom Decision CRTC 2004-5, 27 January 2004, as amended by Telecom Decision CRTC 2004-5-1, 6 February 2004, MTS Allstream and RTI had submitted that customers were migrating with ease from DNA to Ethernet services. MTS Allstream had concluded that Ethernet and DNA technologies, although different, basically met the same needs for customers. Bell Canada/Télébec submitted that businesses were indifferent to the underlying technology that provided their high-bandwidth transmission service, as long as the service was reliable and cost-effective.

20. The UTC submitted that high-speed DNA and Ethernet services were not in the same product market because of functionality, capacity, and provisioning differences. In support of its position, the UTC argued that there was a significant difference in service level commitments for Ethernet service compared with high-speed DNA service that resulted in different prices between the two services. The UTC submitted that customers requiring Ethernet service tended to be small to medium-sized businesses and public sector users, whereas larger businesses used high-speed DNA services, such as OC-3 and OC-12.

21. The CCTA and QMI submitted that Ethernet services were distinct from high-speed DNA services. QMI submitted that Ethernet service not only provided point-to-point connectivity, but that Ethernet also was a managed service with customer premise equipment (CPE) generally included as part of the service. While certain customers might view Ethernet service as a substitute for point-to-point high-speed DNA service in certain circumstances, QMI submitted that significant differences in service characteristics such as managed service, CPE, shared bandwidth, and lower sustained speed demonstrated that Ethernet services were in a different product market.

22. Bell Canada/Télébec submitted that there was no need to separately consider the competitive conditions of ASRs and SFTs because they were specifically related to high-speed DNA services.

23. The UTC submitted that SFTs and ASRs were non-standard fibre facility-based services customized according to specific needs, not substitutes for high-speed DNA services.

24. MTS Allstream indicated that retail ASR arrangements fell within the relevant product market. According to the company, individual SFTs should also be part of the same relevant product market if they included services with functionalities that were equivalent to high-speed DNA, ADSL, Ethernet, or MWS.

MWS

25. Bell Canada/Télébec and QMI submitted that MWS was in a different product market from high-speed DNA services, as the minimum transmission speed of MWS was much higher than the transmission speed of OC-3 and OC-12 services. Bell Canada/Télébec noted that MWS

was a fully managed service providing customers the option of purchasing different levels of service protection and network reliability guarantees. QMI added that MWS provided low latency and mission critical data transport at speeds exceeding 1.25 Gbps. QMI also noted that MWS was typically used for storage area networks and data centre back-up applications.

Commission's analysis and determinations

26. The Commission notes that proposals for the relevant product market vary from a narrow to a broad approach. For example, the UTC is of the view that each individual data access service is in a separate product market because customers would not perceive them to be substitutes for one another. However, MTS Allstream indicated that the relevant product market included all data access and transport services, including lower-speed and higher-speed DNA services, ADSL, Ethernet services, and MWS.

27. In the Commission's view, services with similar service characteristics and offered at comparable rates are substitutable and can be used by customers for the same purposes. The Commission considers that services that are substitutes for each other are in the same relevant product market. The Commission also considers that services in separate product markets may be grouped together if supply characteristics for these services demonstrate that they should be part of the same product market.

28. The Commission notes that MWS is a managed interconnection solution that provides customers with access and connectivity between two or more locations within a metropolitan area. The Commission also notes that MWS provides customers with high-speed end-to-end redundant network connections required for mission critical data applications. The Commission considers that, based on the specific needs of the customers requiring MWS, MWS is in a unique product market because customers requiring MWS do not consider other data services as substitutes. The Commission also considers that MWS supply characteristics demonstrate that MWS is in a separate product market because providers of low-speed and high-speed DNA services, Ethernet, or ADSL services cannot provide MWS without significant equipment and facility investments.

29. The Commission considers that, from a demand perspective, customers use low- and high-speed DNA service, ADSL, and Ethernet service for different communication needs, as these services differ significantly.

30. The Commission notes that lower-speed access services such as DS-0, DS-1, and ADSL services are generally used by customers for plain old telephone services and/or data applications, such as video-on-demand, Internet, and client access to corporate networks. The Commission also notes that, while some customers may consider certain higher-speed access services such as DS-3 or Ethernet acceptable substitutes for DS-0, DS-1, and ADSL services, customers who require high-speed DNA services have specific data application requirements, such as high capacity, low latency, multiple applications, and mission critical data transport requirements that cannot be deployed over DS-0, DS-1, and ADSL services.

31. The Commission is of the view that DS-3 and higher-speed DNA service customers would not consider DS-0, DS-1, and ADSL services as acceptable substitutes for their needs. The Commission considers that high-speed DNA services customers would not view ADSL as a viable substitute because of its asymmetric characteristics and bursty nature.[5]

32. The Commission also considers that high-speed DNA customers would not view Ethernet services as viable substitutes. The Commission notes that Ethernet services are offered as shared access services, on a best-efforts basis, at an unspecified bit rate. In contrast, high-speed DNA services are offered as dedicated access services on a guaranteed basis at a committed bit rate. The Commission also notes that the pricing of comparable speeds of high-speed DNA is significantly higher than that of Ethernet services because of their different characteristics.

33. Therefore, the Commission considers that customers requiring dedicated access services would not view shared access services as viable substitutes for high-speed DNA services, and would be willing to pay significantly higher prices for high-speed DNA services than for comparable Ethernet services.

34. The Commission also considers that, from a customer's perspective, each DNA service is a separate and distinct product market. For example, a customer requiring DS-3 service would not view DS-0, DS-1, OC-3, or OC-12 service as a substitute for DS-3 service because of their different bandwidth and associated prices. Nor would a customer requiring OC-12 service view the lower bandwidth provided by DS-0, DS-1, DS-3, and OC-3 services as a viable substitute for OC-12 service.

35. In light of the above, the Commission concludes that the demand characteristics and the pricing of DS-0, DS-1, DS-3, OC-3, OC-12, ADSL, and Ethernet services are sufficiently different that customers would not view them as substitutes for each other.

36. The Commission considers that the supply characteristics of DS-3, OC-3, and OC-12 services are such that a carrier providing any of these services between two locations could cost-effectively provide DS-3, OC-3, and OC-12 services over the same fibre facilities in a timely fashion because all high-speed DNA services are supplied over the same fibre facilities.

37. The Commission also considers that provisioning DS-3, OC-3, or OC-12 service is strictly a question of the level of bandwidth required by a customer. The Commission further considers that a competitor's ability to cost-effectively respond in a timely fashion to an ILEC's significant price increase for any high-speed DNA service will constrain the market power of an ILEC for those services.

38. The Commission therefore determines that supply conditions justify the aggregation of DS-3, OC-3, and OC-12 services into a single relevant product market.

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[5] The asymmetric characteristic refers to the higher bandwidth availability for downstream transmission compared to upstream transmission. The bursty nature refers to the variation in available bandwidth based on line and network conditions.

39. However, the Commission is of the view that the supply characteristics associated with low-speed DNA services (DS-0 and DS-1) are different from those of high-speed DNA services because low-speed DNA services can be ubiquitously provisioned over copper facilities.

40. The Commission considers that ADSL, DS-0, DS-1, and Ethernet service providers would not be able to provide DS-3, OC-3, and OC-12 access services without investing, in some cases significantly, in additional equipment and facilities. The Commission therefore considers that, from a supply perspective, ADSL, DS-0, DS-1, and Ethernet access services cannot be grouped in the same relevant product market as DS-3, OC-3, and OC-12 access services.

41. In light of the above, the Commission determines that high-speed DNA services and MWS are two different product markets.

42. Regarding SFTs, the Commission considers that, as each one is unique, each should be examined on a case-by-case basis to determine whether forbearance for the high-speed DNA service offered pursuant to the SFT is warranted.

43. The Commission notes that ASRs are not distinct services, but rather alternative and redundant routes for high-speed DNA services provisioned by the service provider. The Commission therefore considers that the treatment of ASRs should be equivalent to the regulatory treatment of the service(s) to which it is linked.

44. Regarding future services, the Commission finds that, in a geographic market where it has forborne from the regulation of high-speed DNA service or MWS, the forbearance framework will also apply to new service offerings that have equivalent characteristics to high-speed DNA service and MWS, as the case may be.

(b) The relevant geographic market

45. The parties submitted comments on the appropriateness of using the local exchange, the route, the wire centre, or the census metropolitan area (CMA) as the relevant geographic market for forbearance from regulation of high-speed DNA services.

Positions of parties

The local exchange

46. Bell Canada/Télébec proposed the local exchange as the relevant geographic market. The companies submitted that the relevant geographic market encompassed the area around the route where a competitor would find it profitable to expand its network in response to an ILEC price increase. Bell Canada/Télébec indicated that as a result, an ILEC could not durably and profitably increase its prices above competitive levels, as this would induce a competitor to extend coverage of its network.

47. Bell Canada/Télébec submitted that, where competitors could not extend coverage of their networks in response to an ILEC price increase, they could avail themselves of Competitor Digital Network (CDN) services, which allowed them to connect within a local exchange

without self-provided facilities. Bell Canada/Télébec also submitted that the local exchange was a well-known geographic unit within which competitive conditions tended to be relatively homogeneous, and where obtaining data on the presence of competitive alternatives was administratively feasible.

48. TCC also considered that the local exchange, although arbitrary, was the most administratively manageable area across which a competitor would likely expand service.

49. QMI supported the use of the local exchange as the relevant geographic market. QMI submitted that since high-speed DNA services were defined in terms of their geographic scope (i.e. point-to-point connections within a local exchange), using the local exchange as the relevant geographic market appeared to have some natural relevance. QMI also submitted that barriers to entry and expansion could vary significantly between local exchanges and considered that an exchange-by-exchange analysis of such barriers could be required.

50. The UTC indicated that the local exchange was only relevant to the ILECs' networks and was practically irrelevant for point-to-point, high-volume fibre facilities. The UTC submitted that choosing the local exchange relied on the assumption that competitors could easily and economically expand their networks in response to a significant price increase above competitive levels. The UTC submitted that this was not the case because no other carrier enjoyed the broad-based coverage of the ILECs' fibre networks. In the UTC's view, significant barriers to entry, such as access issues, made extension of fibre networks to unserved areas expensive. The UTC added that competitors would hesitate to expand their networks to local exchanges knowing that, by doing so, they would allow ILECs to apply for forbearance.

51. The CCTA submitted that the local exchange was not appropriate because competitors did not have the rights-of-way, support structure, and building access arrangements required to quickly and efficiently respond to the ILECs. The CCTA also submitted that ILECs could abuse their market power if forbearance were extended to geographic areas where competition was neither present nor likely to happen within a reasonable time frame.

52. MTS Allstream submitted that the local exchange, or any geographic area smaller than the local exchange, was inconsistent with the nature of the services, which were provided on a metropolitan or regional basis. MTS Allstream also submitted that the local exchange boundaries were relics of the ILECs' networks and were becoming increasingly irrelevant, especially in the provision of next-generation services.

53. MTS Allstream submitted that, since Ethernet and MWS were not structured or provided on a local exchange basis, it would be inconsistent to forbear from regulating high-speed DNA service on a local exchange basis. MTS Allstream also submitted that, since high-speed DNA services were provided over multiple local exchanges, forbearing on a local exchange basis would facilitate pre-emptive and anti-competitive conduct by the ILECs by allowing them to reduce prices on portions of a route going through a forborne local exchange to counterbalance higher rates in regulated local exchanges.

The route

54. The UTC was of the view that the route was the relevant geographic market. The UTC indicated that, given the route-specific nature of high-speed DNA services, transport between other point-to-point links was not a substitute for a specific route. The UTC submitted that the ability to expand coverage, such as capital resources and access to rights-of-way and to buildings, argued in favour of a more limited geographic market. The UTC further submitted that administrative complexity should not deter the Commission from choosing the most appropriate geographic market definition.

55. The CCTA and Rogers indicated that the nature of high-speed DNA service, in particular the requirement to extend fibre optic facilities to customer premises, supported the use of a very localized geographic market. The CCTA submitted that demand-side substitution was unlikely, as a route connecting two other points could not satisfy the needs of an end-user. The CCTA also submitted that it could not be assumed that competitors would expand their networks to encompass an end-user's premises.

56. Rogers submitted that access to rights-of-way, buildings, and support structures limited competitors' abilities to expand their networks. Rogers also submitted that high-speed DNA services were similar to interexchange private line service and should have the same geographic market, namely the individual route.

57. Bell Canada considered that using the route as the relevant geographic market ignored a supplier's ability to extend its reach to other routes in a reasonable time frame. Bell Canada submitted that the route did not correspond to the nature of high-speed DNA services, which was to provide connectivity between the end-user's premises and the ILEC's rate centre.

58. In TCC's view, forbearing on a route-specific basis would lead to an unwieldy number of applications. The company submitted that the most appropriate way to determine the relevant geographic market was to examine whether the provider of a specific route faced competition in the area from potential entrants in position to compete for that route.

59. FCI submitted that the appropriate market for high-speed DNA services was the route. However, FCI also submitted that if the Commission considered that the route was not practical, the Commission should adopt the wire centre as the relevant geographic market.

The wire centre

60. Bell Canada considered that the wire centre was not appropriate because high-speed DNA service providers now ignored wire centres when providing services to end-users by using shorter, alternative routes. Bell Canada also considered that all wire centres within a local exchange would likely exhibit similar competitive conditions, and choosing the local exchange instead of the wire centre was therefore appropriate. Bell Canada further considered that, because of the number of wire centres in Canada, choosing the wire centre would be administratively burdensome.

The CMA

61. MTS Allstream was of the view that the relevant geographic market was the CMA. The company submitted that high-speed DNA and equivalent access and transport services were typically provisioned on a metropolitan or regional basis. MTS Allstream indicated that the CMA more closely matched the nature of high-speed DNA service from the customers' and the suppliers' perspectives.

62. QMI expressed concern with material variations in competitive conditions, namely barriers to entry that could exist within CMAs. QMI submitted that the Commission could not forbear under subsection 34(2) of the Act in respect to areas where barriers to entry had not been uniformly removed, since it could not reasonably be said, in such circumstances, that the interests of all users would be protected by competition.

Commission's analysis and determinations

High-speed DNA services market

63. The Commission considers that the geographic market for forbearance must be sufficiently contained so that demand conditions within the geographic area are uniform or near-uniform. In the Commission's view, a more contained geographic area will help reduce large pockets of uncontested customers[6] and will reduce the ILECs' ability to divert revenues generated from uncontested customers to prevent competitive entry in more competitive areas.

64. The Commission notes that, from a demand perspective, a customer served from a specific route will not use neighbouring routes as substitutes. The Commission also notes that, where a competitor does not have facilities on a route served by the ILEC, the ILEC has the market power to impose a sustainable price increase on that route. Conversely, the Commission notes that where a competitor has facilities on a route served by the ILEC, that competitor has overcome barriers to entry and can prevent an ILEC from imposing a sustainable price increase on that route.

65. Accordingly, the Commission considers that the route is the relevant geographic market.

66. However, the Commission must examine if supply conditions demonstrate whether, from a practical perspective, routes can be aggregated in order to determine the appropriate geographic market for forbearance. The Commission considers that supply conditions in neighbouring routes can limit an ILEC's ability to profitably impose a sustainable price increase. The Commission is of the view that this would encourage potential entrants with fibre facilities in the surrounding area of the route to expand their network presence and provide service on the route.

67. The Commission also considers that, because of the large number of high-speed DNA service routes, the regulatory and administrative burden of processing the applications would not provide an orderly transition to a forborne market.

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[6] An uncontested customer represents a customer who does not have access to competitive high-speed DNA service provisioned over non-ILEC facilities.

68. The Commission notes that many parties proposed the local exchange as the appropriate geographic market. The Commission also notes that certain urban local exchanges have multiple wire centres with different rate bands and different retail high-speed DNA rates. The Commission notes that ILECs can currently sustain price differences within a local exchange in a regulated environment by offering one price level in one part of the exchange while offering lower prices in other parts. The Commission considers that choosing the local exchange as the relevant geographic market for high-speed DNA could leave large pockets of uncontested customers and would not restrict the ILECs' ability to sustain such price differentials.

69. Accordingly, the Commission considers that the local exchange, or any geographic area greater than the local exchange, is not an appropriate geographic area for the purpose of forbearing from the regulation of high-speed DNA service.

70. The Commission notes that the wire centre is a well-defined geographic area that corresponds to how the ILECs provision and price their high-speed DNA service. The Commission also notes that it regulates the high-speed DNA rates at the wire centre level. The Commission further notes that high-speed DNA rates, which are based on rate bands, can differ significantly between contiguous wire centres within the same local exchange. Furthermore, the Commission notes that, from a supply perspective, the wire centre corresponds to the ILECs' network structure and encompasses all the routes served by a single point of presence, namely the ILEC CO.

71. The Commission considers that, in contrast with the route and the local exchange, the different high-speed DNA rates show the ILECs' ability to sustain higher prices in different wire centres and also demonstrate that they have more market power in certain wire centres.

72. The Commission also considers that the wire centre, although it may not correspond perfectly to the geographic area where competitors and ILECs have network presence, is sufficiently contained to allow the practical aggregation of routes, while limiting pockets of uncontested customers, and to incite competitors to enter the wire centre where an ILEC decides to raise its prices significantly. The Commission is of the view that the size of the wire centre strikes an appropriate balance between demand-side substitution (pockets of uncontested customers) and competitor network presence to ensure that the high-speed DNA service market is sufficiently competitive.

73. The Commission considers that choosing the wire centre as the relevant geographic market will not be overly burdensome administratively because applications for forbearance will be limited to wire centres where high-speed DNA service is available. The Commission also considers that the forbearance process set out in this Decision will simplify and facilitate the disposal of future forbearance applications.

74. In light of the above, the Commission finds that the wire centre is the appropriate geographic market for forbearance in the high-speed DNA service market.

MWS market

75. The Commission notes that MWS is offered to a very small number of large, telecommunications savvy businesses requiring very high intra-city bandwidth for end-to-end managed network solutions customized to their specific needs in order to connect multiple locations over multiple local exchanges. The customer defines the geographic area over which the service will be provided. The Commission considers that the relevant geographic market for MWS must be sufficiently large to encompass the geographic area over which MWS customers currently require the service and as their need for it expands.

76. The Commission considers that, from a demand perspective, an MWS customer would not consider another MWS customer's service as a substitute and, therefore, the relevant geographic market is customer-specific.

77. However, the Commission must examine if supply conditions demonstrate whether, from a practical perspective, customers can be aggregated in order to determine the appropriate scope of forbearance. The Commission notes that MWS customers tend to enter into long-term agreements that generate substantial revenues for the service provider. The Commission also notes that MWS customers generally use a rigorous bidding process in order to choose the MWS service provider that best meets their service requirements. The Commission further notes that, because of the significant revenues generated by agreements and customers' specific service requirements, information filed on the record of this proceeding indicates that MWS service providers always provision MWS over their own facilities and will extend their network, where none exists, in response to demand.

78. The Commission considers that, from a supply perspective, the revenues generated by the provision of MWS provide the incentive to competitive service providers to overcome barriers to entry and expand service in unserved areas. The Commission also considers that the significant revenues associated with MWS will allow competitive service providers to provision MWS over their own facilities where ILECs significantly increase their prices. The Commission therefore considers that the appropriate geographic market for forbearance from the regulation of MWS can expand beyond MWS customer-specific service requirements.

79. The Commission considers that the CMA is stable and well-defined, its boundaries will not likely be subject to important changes over short periods of time, and it is sufficiently large to encompass the geographic area over which customers currently require MWS and will likely require the service in the future.

80. Accordingly, the Commission finds that the CMA is the appropriate geographic market for forbearance for the MWS market.

II – Forbearance criteria

81. In the following section, the Commission will establish a framework for forbearance for high-speed DNA service and MWS, including clear criteria to determine when it is appropriate to forbear from regulating such services.

(a) High-speed DNA services

Positions of parties

82. Bell Canada proposed as a test that the Commission forbear from regulating high-speed DNA services in a local exchange if that exchange had one or more fibre-based competitors providing high-speed DNA service to at least one customer.

83. Regarding fibre-based access facilities, Bell Canada submitted that carriers had no incumbent network advantage, and placement of fibre facilities in the access network created a "green field" opportunity for incumbents and new entrants alike. Bell Canada further submitted that the mere presence of non-ILEC fibre supply in a local exchange indicated that competitors had incurred the sunk cost of fibre construction and faced, on a going-forward basis, the same opportunities and challenges regarding intra-exchange fibre expansion that an ILEC faced in extending its fibre network to end-user locations.

84. Bell Canada submitted that, if an ILEC had a fibre supply advantage within a local exchange, CDN tariffs nullified such an advantage by providing competitors with ready access to ILEC supply at terms and prices set by the Commission. Bell Canada also submitted that CDN tariffs gave competitors essentially the same market reach as the ILEC, eliminating any potential access, entry, and expansion issues. Bell Canada further submitted that ignoring competitor access to ILEC CDN tariffs to provide competitive service could result in instances where forbearance would be denied even where market forces were sufficient to protect the interests of consumers.

85. Bell Canada submitted that the Commission had taken decisive actions to eliminate barriers to competition

- in *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001, the Commission found that the Act gave it authority to arbitrate and fix conditions of access between Canadian carriers and municipalities; and

- in *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003, the Commission established conditions, principles, and guidelines to assist owners of multi-dwelling units (MDUs) and local exchange carriers (LECs) to negotiate just and expedient conditions of access to MDUs.

86. Bell Canada submitted that the Commission should not rely on market share as an indicator of market power. In Bell Canada's view, market share was an indicator of past successes in winning customers and did not reflect competitors' future ability to win customers. The company submitted that there was no need to take market share into account when barriers to entry were low.

87. Bell Canada noted that, in the public proceeding initiated by *Forbearance from regulation of local exchange services*, Telecom Public Notice CRTC 2005-2, 28 April 2005, the Competition Bureau had submitted that the criteria based upon the alternative facilities ready

to serve customers were superior to market share thresholds for telecommunications markets. Bell Canada submitted that the most appropriate means to calculate market share was by reference to either capacity or assets available for the provision of high-speed DNA services, within each relevant geographic market.

88. TCC submitted that relying on market share to measure market power was not appropriate in the high-speed DNA service market. In its view, the Commission should grant forbearance when at least two facilities-based providers had made significant investments in facilities within a geographic area, and served customers predominantly using their own facilities.

89. According to the UTC, the Commission should rely on market share as it provided evidence of the degree to which competitors had succeeded in entering a market. The UTC submitted that an ILEC should be eligible for forbearance when its market share dropped below 35 percent in a given market. Otherwise, the Commission should conduct a more detailed market examination consistent with Decision 94-19.

90. The UTC submitted that the Commission should not rely on the fact that competitors had access to ILEC-provided facilities through their CDN tariffs to forbear from regulating those facilities, as the classification of CDN services could change.

91. QMI submitted that the following criteria should be met prior to forbearance being granted:

    a) there should be at least two other service providers providing the same class of service;

    b) each of these service providers should have significant network facilities within the relevant geographic market;

    c) each of these service providers should have unimpeded access to rights-of-way, support structures, buildings and inside wire throughout the relevant geographic market;

    d) in the case of managed services, each service provider should have expertise and resources to provide the required managed services, as demonstrated by the successful delivery of such services to customers in the relevant geographic market; and

    e) the ILEC should not have a market share greater than 50 percent.

92. MTS Allstream submitted that there was no need to adopt a more streamlined process for analyzing forbearance applications for digital access and transport services than the one set out in Decision 94-19.

93. FCI submitted that forbearance should be granted when competitors had high-speed DNA-capable facilities connected to over 70 percent of the commercial buildings within each wire centre.

94. RCI proposed the following forbearance criteria:

a) there must be at least one non-ILEC supplier with significant facilities within the relevant geographic market (a lower threshold may be appropriate in low-demand markets);

b) competitors must have at least 30 percent of the retail high-speed DNA market share in the local exchange, or 20 percent in the wire centre; and

c) all the underlying local access components, transport facilities, and ancillary services upon which the ILEC provisions or could provision its retail high-speed DNA service must have been made available to competitors under mandatory wholesale competitor services tariffs. In low-demand areas, these tariffs must be priced at cost, plus a 15 percent mark-up.

Commission's analysis and determinations

95. As stated in Public Notice 2005-8, the Commission is establishing a framework for forbearance for high-speed DNA services, including clear criteria to determine when it is appropriate to forbear from regulating such services, to help facilitate the future deregulation of the high-speed DNA service in an efficient and effective manner. Given the large number of wire centres, the Commission considers that it is necessary to set up an administratively simple and streamlined regulatory framework for high-speed DNA service to ensure that applications are disposed of efficiently and effectively.

96. The Commission considers that its forbearance framework should not only take into account the state of the market at one point in time, but should also determine whether the conditions within a wire centre are such that the market is likely to become competitive within a reasonable time. As such, the Commission considers that its forbearance framework should rely on indicators that demonstrate competitors' ability to compete not only at the time of an ILEC forbearance application, but also in the future.

97. The Commission considers that forbearance is only appropriate in markets where barriers to entry have been sufficiently overcome, or are likely to be overcome within a reasonable time to ensure competitors' continued presence and expansion. Despite past Commission decisions alleviating barriers to access support structures and buildings, and to facilitate the negotiation of municipal access agreements, the Commission notes that competitors often have to overcome those barriers when responding to a new service offering, particularly with regard to building access. The Commission considers that all these issues continue, or have the potential, to be barriers to competitive entry and expansion of fibre optic intra-exchange access facilities. The Commission therefore considers that there must be sufficient evidence that competitors have addressed, and can address, barriers to entry and expansion before forbearance is warranted.

98. The Commission notes that Bell Canada's proposed test relies solely on the presence or absence of competitor fibre-optic facilities in the local exchange as the determining factor of market power. The Commission finds merit in a test that relies on competitor high-speed DNA-capable network presence to determine whether forbearance is appropriate. The

Commission considers that, with respect to high-speed DNA services, a test that relies on competitor network presence within a wire centre is a better indicator of the state of competition than market share. The Commission considers that market share information provides a historic view of competition in the relevant market. In contrast, a test that relies on competitor market presence reflects competitors' current and potential ability to respond to ILEC activity in the relevant market using facilities supplied by an alternative source.

99. However, the Commission considers that the mere existence of very limited competitor network presence (e.g. the provision of one high-speed DNA service in a wire centre) is insufficient to demonstrate sustainable competition to prevent ILECs from raising or maintaining prices above those that would prevail in a competitive market. The Commission notes that the evidence on the record indicates that ILECs can sustain higher prices for their high-speed DNA services in wire centres where competitor network presence is very limited. Conversely, the Commission notes that, in wire centres where customers have a bigger requirement for high-speed DNA service, competitors' network presence is more extensive, despite barriers to entry. The Commission further notes that, in wire centres with greater competitor network presence, ILEC prices for high-speed DNA services are lower.

100. In the Commission's view, the more high-speed DNA-capable networks competitors have within a wire centre, the more they are able to provide a competitive alternative to the ILECs and force ILEC rates for high-speed DNA service downward. The Commission is also of the view that forbearance for high-speed DNA service should not be predicated on the availability of ILEC CDN services within a wire centre. The Commission considers that ILEC-supplied CDN service would not contribute towards the sustainability of a high-speed DNA market because it would perpetuate competitors' dependency on ILEC high-speed DNA facilities and continued regulation of underlying facilities for the provision of high-speed DNA services. The Commission therefore considers that, in order for forbearance to be appropriate, the competitors should be able to independently and reasonably offer customers an alternative to ILECs' high-speed DNA services over their own facilities; that is, competitors should own and operate the underlying transmission facilities.

101. In the Commission's view, an effective and efficient way to measure independently provided competitor network presence in a wire centre is to identify the number of buildings connected to competitors' high-speed DNA-capable networks within a wire centre. The Commission considers that this number is an appropriate indicator of the strength of competition in a market now and in the future, including the ability of competitors to overcome barriers to entry and expansion.

102. The Commission considers that, in arriving at the appropriate competitor network presence[7] criterion, it is not necessary to ensure competitive supply parity with the ILEC, i.e., to ensure that competitors are present in as many buildings as the ILEC. Rather, the Commission is of the view that it is sufficient to ensure that there is, and will be, sustained competition in the forborne market.

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7 In this context, competitor network presence is the ratio of buildings connected to the competitors' high-speed DNA-capable networks, divided by the total number of buildings connected to all service providers' high-speed DNA-capable networks. Multiple competitor connections to a building are counted as one connection, while ILEC and competitor connections to a building are counted as two connections.

103. The Commission considers that forbearance would be unduly delayed if it were only granted when competitors have network presence parity with the ILECs. Conversely, the Commission considers that forbearance would be premature if it were granted where competitors do not have any network presence. In the Commission's view, competitor network presence should provide an appropriate balance between competitive supply parity and situations where competitors have no high-speed DNA-capable facilities. The Commission considers that a competitor network presence of 30 percent would provide a proper balance.

104. In the Commission's view, a competitor network presence of 30 percent would generally provide this balance because it would demonstrate that competitors have been able to overcome barriers to entry and have sufficient presence within a wire centre to provide a viable competitive alternative to the ILEC.

105. However, regarding wire centres with fewer than 25 buildings connected to high-speed DNA-capable networks (small markets), the Commission notes that competitor network presence could be misleading. The Commission notes that in small markets, the addition of one high-speed DNA-capable building would have a significant impact on competitors' and ILECs' market presence. For example, in a market with nine high-speed DNA-capable buildings, the addition of one building to a service provider's network would increase its network presence by 10 percent, thus making network presence an unreliable and potentially misleading indicator of market power.

106. Accordingly, the Commission considers that the competitor network presence criterion of 30 percent is only meaningful when applied to wire centres that report 25 or more connected buildings. In the Commission's view, in wire centres with 25 or more connected buildings, the fluctuation in network presence caused by service providers entering or exiting one building would be too small to affect the reliability of the competitor network presence criterion.

107. Accordingly, the Commission determines that forbearance is warranted in wire centres with 25 or more buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks and with competitor network presence of 30 percent or more.

108. Regarding wire centres with 25 buildings or more connected to an ILEC's and/or competitors' high-speed DNA-capable networks, but with competitor network presence below 30 percent, the Commission considers that the combination of various factors, such as proximity to the 30 percent threshold, the total number of buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre, and contiguity to wire centres where forbearance for high-speed DNA service has been granted, may demonstrate that these markets are sufficiently competitive to warrant forbearance. In such instances, the Commission considers that an ILEC should be provided with the opportunity to adduce evidence in support of forbearance.

109. The Commission considers that in small markets, competitor network presence needs to be complemented to ensure that market competitiveness is accurately measured. The Commission further considers that evidence of rivalrous behaviour within each small market, together with competitor network presence, would demonstrate a competitor's interest in aggressively

expanding and competing in that market. In the Commission's view, rivalrous behaviour is demonstrated by falling ILEC prices; vigorous and aggressive marketing activity, including, but not limited to, bidding activity; and expanding scope of competitor activity.

110. Accordingly, in small markets, the Commission will assess evidence of rivalrous behaviour along with information on competitor network presence to determine whether competition is sufficiently sustainable to forbear from regulation.

111. In summary, the Commission considers that forbearance for high-speed DNA services is warranted in the following circumstances:

a) there are 25 or more buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre and a competitor network presence of 30 percent or more;

b) there are 25 or more buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre and, although competitor network presence is below 30 percent, the presence of other factors demonstrates that the wire centre is sufficiently competitive to warrant forbearance; and

c) there are fewer than 25 buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre, and competitor network presence, complemented with evidence of rivalrous behaviour, demonstrates that the wire centre is sufficiently competitive to warrant forbearance.

(b) MWS

Positions of parties

112. Bell Canada submitted that there were few sales opportunities for MWS and it faced competition from a variety of providers, such as municipal electric utilities and equipment providers. Bell Canada also submitted that MWS customers solicited requests for proposals from as many providers as possible and made their selection based on their specific business needs. Bell Canada further submitted that evidence of lost bids in the MWS market demonstrated that there was rivalrous behaviour in that market.

113. Bell Canada submitted that high sunk investment costs were the only significant barriers to competitive entry for MWS. Bell Canada claimed that in the Toronto, Montréal, and Ottawa markets where it provided MWS, competitors had already incurred the investments associated with market entry and there was therefore no need for continued regulatory oversight.

114. The UTC and QMI submitted that the tests they proposed to determine if forbearance was appropriate for high-speed DNA service should also be used to determine whether forbearance was warranted in the MWS market.

115. MTS Allstream considered that MWS was part of the data access and transport services market and submitted that the Commission should continue to apply the Decision 94-19 approach for the disposition of MWS forbearance applications.

Commission's analysis and determinations

116. As with the regulatory framework for high-speed DNA services, the Commission is of the view that the regulatory framework for MWS forbearance should be administratively simple and streamlined, should take into account the current and potential future state of competition in each geographic market, and should ensure that competitors have sufficiently overcome barriers to entry to ensure a sustainable competitive marketplace.

117. The Commission notes that there are few sales opportunities for MWS. The Commission also notes that MWS customers are sophisticated and knowledgeable of telecommunications products, and select service providers based on specific needs and requirements. The Commission further notes that MWS revenues tend to be significant, providing ILECs and competitors with the incentive to expand their networks despite barriers to entry associated with municipal access agreements and access to support structures and buildings.

118. The Commission considers that the only significant barrier to entry to the MWS market is high capital investment. As a result, the Commission considers that the forbearance criteria should be based on evidence of rivalrous behaviour in a market such as competitive bidding activity in the CMA. The Commission also considers that such evidence would demonstrate that suppliers responding to MWS demand in a particular CMA have the capability – and can expand their capability – to provide MWS.

119. The Commission considers that evidence of rivalrous behaviour would also indicate that providers have overcome barriers to entry, including the high investment costs associated with market entry. The Commission therefore considers that evidence of rivalrous behaviour, primarily in the form of bid responses, is sufficient to demonstrate that the market is competitive enough to warrant forbearance.

120. Accordingly, the Commission determines that it will forbear in CMAs where an ILEC provides evidence of rivalrous behaviour. In the absence of competitive bidding evidence, the ILEC may obtain forbearance where it can demonstrate that it no longer has market power in the CMA, pursuant to the competition economics and law approach set out in Decision 94-19.

III – Appropriate scope of forbearance

121. The Commission notes that subsections 34(1) and (2) of the Act empower the Commission to forbear in whole or in part, conditionally or unconditionally, from the exercise of any power or the performance of any duty referred to therein.

122. The Commission received submissions from parties with respect to the appropriate degree of forbearance from its powers and duties set out in sections 24, 25, 27, 29, and 31 of the Act as well as with respect to certain obligations imposed by the Commission pursuant to its powers under these sections.

123. The Commission has set out below the positions of parties and its conclusions with respect to each of those sections of the Act with respect to the scope of forbearance.

(a) Section 24

Positions of parties

124. Bell Canada/Télébec submitted that the Commission, in prior forbearance proceedings, retained its powers under section 24 of the Act on speculative grounds in the event that future conditions beyond those prescribed by the Commission might be required. Bell Canada/Télébec also submitted that retaining section 24 powers on speculative grounds created uncertainty for industry stakeholders and was contrary to paragraphs 7(*c*) and (*f*) of the Act. Bell Canada/Télébec further submitted that the Commission should forbear completely and unconditionally from applying section 24 of the Act, except to retain powers to impose conditions that govern carrier treatment of confidential customer information and to impose conditions and principles to help LECs and building owners negotiate appropriate access agreements for MDUs.

125. MTS Allstream submitted that the Commission could retain its section 24 powers to ensure that the Commission's rules regarding disclosure of confidential customer information to third parties continued to apply. The company also submitted that the Commission could retain its section 24 powers to support any determinations made by the Commission pursuant to subsection 27(2) of the Act, and impose conditions as may be required in the future.

Commission's analysis and determinations

126. The Commission considers it appropriate to retain its powers pursuant to section 24 of the Act to ensure that the confidentiality of customer information continues to be protected. The Commission is of the view that, without such a condition, commitments to protect confidential information would be voluntary and may not be sufficient to adequately protect the interests of customers.

127. The Commission considers that issues surrounding MDU access persist, indicating that market forces may not be sufficient to ensure reasonable and equitable access by competitors to serve customers in MDUs. By retaining its powers under section 24 of the Act regarding LEC access to MDUs and the MDU access condition previously imposed pursuant to section 24 of the Act, the Commission also considers that it will have the necessary powers to take action to ensure that LECs and building owners negotiate fair and equitable access agreements.

128. In light of the service characteristics of the high-speed DNA service and MWS markets, and the criteria established in this Decision for forbearance for high-speed DNA services and MWS, the Commission does not consider it necessary to retain its section 24 powers for any other purpose.

129. Accordingly, the Commission considers that, where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a geographic area, it would be appropriate for the Commission to retain its powers pursuant to section 24 of the Act to ensure

a) that the existing conditions regarding disclosure of confidential information to third parties will continue to apply, and that conditions regarding disclosure of confidential information are imposed as may be needed in the future; and

b) fair and equitable MDU access to LECs, including the MDU access condition.

(b) Section 25

Positions of parties

130. Bell Canada/Télébec submitted that the Commission should forbear completely and unconditionally from its tariff approval powers under section 25 of the Act.

131. MTS Allstream submitted that the Commission could forbear completely from applying section 25 of the Act, provided that the Commission's forbearance test was fully met and all of the barriers to entry were successfully addressed.

Commission's analysis and determinations

132. The Commission considers that a market that meets the forbearance criteria set out for high-speed DNA or MWS is sufficiently competitive, and there is no need for ILECs to file and obtain Commission tariff approval for those markets.

133. Accordingly, the Commission considers that, where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a geographic area, it would be appropriate for the Commission to refrain from the exercise of all of its powers and the performance of all of its duties under section 25 of the Act.

(c) Section 27

Positions of parties

134. Bell Canada/Télébec submitted that the Commission should forbear completely and unconditionally from applying subsection 27(1) of the Act with respect to the high-speed DNA and MWS markets. Bell Canada/Télébec argued that no high-speed DNA and MWS service provider had market power in the local exchanges where it was requesting forbearance. Bell Canada/Télébec submitted that to maintain oversight over just and reasonable rates for ILECs when this power has been forborne in respect of competitive service providers in the same market would give rise to market distortions and would be inequitable.

135. Bell Canada/Télébec also submitted that the Commission should forbear completely and unconditionally from its subsection 27(2) powers in respect of ILECs and competitive local exchange carriers alike. Bell Canada noted that, in *Forbearance – Services provided by non-dominant Canadian carriers*, Telecom Decision CRTC 95-19, 8 September 1995 (Decision 95-19), the Commission only retained its powers pursuant to subsections 27(2) and (4) of the Act regarding issues of access to the networks of competing carriers, and the resale

and sharing of their services, because it considered that open access to telecommunications networks would be in the public interest and would enhance the efficiency and competitiveness of the Canadian telecommunications industry.

136. Bell Canada/Télébec argued that this concern did not arise in the high-speed DNA service and MWS markets because ILECs' underlying network services were competitor services. Bell Canada/Télébec submitted that the Commission's regulatory oversight over CDN services removed the need for the continued exercise of its subsection 27(2) powers on high-speed DNA services.

137. Bell Canada/Télébec submitted that the Commission should forbear from applying subsections 27(3) to 27(6) of the Act. Regarding subsection 27(3) of the Act, Bell Canada/Télébec indicated that it should only be retained in respect of the Commission's powers that were not forborne in accordance with the current framework.

138. MTS Allstream submitted that, in Decision 95-19, the Commission retained its powers under subsections 27(2), (3), and (4) of the Act in order to ensure that non-dominant carriers did not unjustly discriminate against other service providers or subscribers, or confer any undue or unreasonable preference, with respect to access to the networks of competing carriers and the resale and sharing of services. MTS Allstream submitted that the Commission should retain its powers under subsections 27(2) through 27(4) of the Act in order to ensure that the ILECs' digital access and transport services were treated in the same manner as those of other non-dominant carriers.

Commission's analysis and determinations

139. Regarding subsection 27(1) of the Act, the Commission considers that the regulatory standards of just and reasonable rates do not need to be applied to rates that are set in a competitive market. The Commission therefore considers that, where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a relevant market, it would be appropriate for the Commission to refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(1) of the Act.

140. The Commission notes that, in contrast to Decision 95-19, which dealt with competitors' retail and wholesale services, the forbearance framework set out in this Decision only addresses retail services to customers and not wholesale services. The Commission considers that its forbearance framework, because it relies on competitor presence and/or rivalrous behaviour, is sufficient to ensure that competition will be sustainable once the Commission grants forbearance.

141. The Commission therefore does not consider it necessary, as part of this forbearance framework, to ensure access to the ILECs' underlying facilities and the resale and sharing of their services to maintain market competitiveness. If changes to market conditions result in a competitive market failure, the Commission considers it more appropriate to initiate a public proceeding to review the forbearance framework.

142. In light of the above, the Commission considers that, where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a geographic area, it would be appropriate for the Commission to

a) refrain from the exercise of all of its powers and the performance of all of its duties under subsections 27(2) and (4) of the Act;

b) retain its powers under subsection 27(3) of the Act in respect to powers and duties from which the Commission does not forbear;

c) refrain from the exercise of its powers and the performance of its duties under subsection 27(5) of the Act, as it relates to subsection 27(1) of the Act; and

d) refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(6) of the Act since it does not consider it appropriate to limit the ILECs' flexibility to change their pricing in a competitive market.

(d) Section 29

Positions of parties

143. Bell Canada/Télébec submitted that the Commission should forbear completely and unconditionally from applying section 29 of the Act.

144. MTS Allstream noted that, although carrier-to-carrier interconnection agreements relating to digital access and transport services were not a common feature or characteristic of the high-speed DNA and MWS markets, the Commission might be prudent to retain its powers under section 29 of the Act for such agreements, particularly when developing guidelines for Internet Protocol (IP)-to-IP interconnection.

Commission's analysis and determinations

145. The Commission notes that high-speed DNA services are retail local access services provided by individual ILECs. The Commission also notes that MTS Allstream only submitted that it might be prudent for the Commission to retain its section 29 powers for carrier-to-carrier interconnection agreements or arrangements related to digital access and transport services. The Commission considers that MTS Allstream's submission relates to agreements associated with wholesale or competitor services. The Commission also considers that those agreements are not within the scope of this Decision.

146. Accordingly, the Commission considers that, where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a geographic area, it would be appropriate for the Commission to refrain from the exercise of all of its powers and the performance of all of its duties under section 29 of the Act.

(e) Section 31

Positions of parties

147. Bell Canada/Télébec submitted that the Commission should forbear completely and unconditionally from applying section 31 of the Act.

Commission's analysis and determinations

148. The Commission considers that, in a competitive market for high-speed DNA services and MWS, all carriers should be able to establish, through commercial negotiations with their customers, the extent and scope of any limitations on their liability. The Commission also considers that it should not regulate such limitations.

149. Accordingly, the Commission considers that, where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a geographic area, it would be appropriate for the Commission to refrain from the exercise of all of its powers and the performance of all its duties under section 31 of the Act.

Conclusion

150. Where an applicant ILEC has met the forbearance criteria for high-speed DNA or MWS in a geographic area, the Commission finds, pursuant to subsections 34(1), (2), and (3) of the Act, that

a) refraining from the exercise of its powers and the performance of its duties, to the extent specified above with respect to high-speed DNA services and MWS, is consistent with the Canadian telecommunications policy objectives;

b) the high-speed DNA and MWS markets are sufficiently competitive to protect the interests of users, such that forbearance, to the extent specified above, is warranted; and

c) forbearance from the exercise of its powers and the performance of its duties, to the extent specified above with respect to high-speed DNA services and MWS, would not likely impair the continuance of a competitive market for these services.

IV – Process to consider future forbearance applications

(a) High-speed DNA services

151. ILECs seeking forbearance from regulation of high-speed DNA service must provide the following information with their application:

a) a list of the wire centres for which the ILEC is seeking forbearance;

b) a list of all known competitors offering or likely to offer high-speed DNA services in each wire centre for which the ILEC is seeking forbearance;

c) a list of all buildings connected to the ILEC's high-speed DNA-capable network (including street address and postal code) in each wire centre for which the ILEC is seeking forbearance in the format set out in the Appendix to this Decision;

d) evidence of rivalrous behaviour for each wire centre for which the ILEC is seeking forbearance and for which the ILEC has fewer than 25 buildings connected to its high-speed DNA-capable network; and

e) a submission detailing why the ILEC believes it is entitled to forbearance in each wire centre for which it is seeking forbearance and all evidence in support of its submission.

152. The Commission directs the ILEC seeking forbearance to copy its application to all known competitors in the applicable wire centres and advise them of the Commission requirement that they provide information to the Commission on the number of buildings connected to their high-speed DNA-capable network in the format provided in the Appendix. The competitors are required to provide the requested information and may also file comments with the Commission within 30 days upon receiving the ILEC's application, serving the ILEC and all other known competitors with copies of their comments.

153. The ILEC may file reply comments with the Commission, serving copies on all other participating parties, within 10 days of the deadline for comments.

154. Where a document is to be filed or served by a specific date, the document must be actually received, not merely sent, by that date.

155. The Commission undertakes, under normal circumstances, to complete its analysis and issue its determination on the application for forbearance from regulation of high-speed DNA service in accordance with the standards developed by the Commission for applications filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*.

(b) MWS

156. ILECs seeking forbearance for MWS must provide the following:

a) evidence of rivalrous behaviour in the CMA;

b) a list of all known and potential MWS providers in the CMA; and

c) a submission detailing why the ILEC is entitled to forbearance in the CMA and all evidence in support of its submission.

157. The Commission directs the ILEC seeking forbearance to copy its forbearance application to all known competitors in the CMA.

158. Any party may file comments with the Commission, serving copies on the ILEC and other known competitors, within 30 days of the application.

159. The ILEC may file reply comments with the Commission, serving copies on all other participating parties, within 10 days of the deadline for comments.

160. Where a document is to be filed or served by a specific date, the document must be actually received, not merely sent, by that date.

161. The Commission undertakes, under normal circumstances, to complete its analysis and issue its determination on the application for forbearance from regulation of MWS in accordance with the standards developed by the Commission for Part VII applications.

V – Post-forbearance criteria and conditions

Positions of parties

162. Bell Canada/Télébec indicated that the Commission should only re-examine any forbearance determination where credible evidence existed that customers in that market were being harmed.

163. Bell Canada/Télébec submitted that, otherwise, once a market has been forborne from regulation, market forces rather than regulatory oversight should be relied upon. Bell Canada/Télébec also submitted that no de-forbearance or forbearance review triggers could necessarily indicate that a firm had market power. Bell Canada/Télébec further submitted that, where there was credible evidence of customer harm, the Commission should conduct a full market analysis using the criteria established by the Commission in Decision 94-19. Bell Canada/Télébec added that it would be appropriate for the Commission to consider de-forbearance only where it was determined that an ILEC possessed significant market power in a previously forborne market.

164. Bell Aliant also rejected de-forbearance criteria. The company submitted that in a post-forbearance environment, if market dominance led to abuse, parties would have recourse under the *Competition Act*.

165. TCC questioned whether the Commission should re-regulate to protect the interests of users in those instances where criteria that originally triggered forbearance were no longer met. TCC recommended that, in those instances, the remaining carriers should have the opportunity to show cause why the Commission should not impose tariff regulation. TCC submitted that, where carriers demonstrated that there was no market power in that market, forbearance should continue.

166. MTS Allstream submitted that where an interested party, or the Commission on its own motion, demonstrated on a *prima facie* basis that one or more of the Decision 94-19 criteria were no longer being met, the Commission should act immediately to re-regulate the services

to minimize losses to customers and competitors and to prevent any further deterioration of the state of competition in that market. MTS Allstream also submitted that other factors, such as mergers and acquisitions, could trigger the need to re-regulate the high-speed DNA service and MWS markets.

167. The UTC submitted that the prospect of re-regulation would lead to significant confusion in the marketplace and recommended a cautious approach to forbearance. The UTC further submitted that, in order to determine whether competition remained sustainable in a forborne market, the Commission should assess whether the ILEC had regained market power and whether competition was sufficient to protect the interests of users.

Commission's analysis and determinations

168. The Commission notes that the key objective in establishing forbearance criteria for high-speed DNA services and MWS is to ensure that there is sustainable competition in the appropriate geographic market in order to protect the interests of users. The Commission agrees with the position that, once forbearance is granted in a market, that decision should not be easily reversed.

169. The Commission is of the view that meeting pre-set parameters, triggers, or conditions in a forborne market would not necessarily indicate that an ILEC has regained sufficient market power, that consumers have been harmed, or that re-regulation is necessary. For example, a temporary drop below the 30 percent competitor network presence threshold does not necessarily mean that the ILEC has regained market power in a wire centre, but may only indicate that the ILEC is competing aggressively to retain and gain customers. Accordingly, the Commission considers that any post-forbearance assessment of the market conditions should be based on the facts present in an individual market at that time, not on pre-set parameters that do not take into consideration the unique circumstances of the market.

170. The Commission therefore considers that it should only initiate a forbearance review when it receives credible evidence demonstrating that the ILEC has market power in the market and that competitive market forces are not sufficient to protect the interests of consumers. Such evidence could include a material reduction in the number of competitors offering services in the relevant market, a material increase in ILEC network presence in the market, or a sustained material increase in prices to customers in the forborne market.

VI – Disposition of Bell Canada's forbearance application

(a) High-speed DNA services

171. As stated above, the Commission considers that forbearance from regulating high-speed DNA services is warranted in the following circumstances:

a) there are 25 or more buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre and a competitor network presence of 30 percent or more;

b) there are 25 or more buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks and, although competitor network presence is below 30 percent, the presence of other factors demonstrates that the wire centre is sufficiently competitive to warrant forbearance; and

c) there are fewer than 25 buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre, and competitor network presence, complemented with evidence of rivalrous behaviour, demonstrates that the wire centre is sufficiently competitive to warrant forbearance.

172. The Commission notes that Bell Canada sought forbearance for 119 exchanges. These local exchanges contain 221 wire centres. The Commission notes that there is no competitor network presence in 63 of the 221 wire centres. The Commission also notes that Bell Canada reported no network presence in 21 of those 63 wire centres. The Commission further notes that competitors reported network presence in the remaining 158 wire centres. Of those 158 wire centres, 52 were in small markets and 106 were in markets reporting 25 or more buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable networks.

173. The Commission considers that in wire centres with no competitor network presence, competitors have no independent ability to constrain Bell Canada's market power. Regarding the 21 wire centres where Bell Canada does not have network presence, the Commission considers that it has insufficient information to conclude that the company would face the same barriers to entry as competitors in those wire centres. Accordingly, the Commission finds that there is insufficient information to conclude that competition, if it occurs, will be sustainable.

174. In light of the above, the Commission determines that forbearance is not warranted at this time in the 63 wire centres where there is no competitor network presence.

Small markets

175. Regarding the 52 wire centres considered to be small markets based on the Commission's forbearance framework for high-speed DNA services, the Commission notes that Bell Canada was asked to provide evidence of rivalrous behaviour at the wire centre level during the interrogatory process of the proceeding. However, the Commission notes that Bell Canada only provided information aggregated at the exchange basis rather than on a disaggregated, wire centre basis. Without this information, the Commission is therefore unable to assess competitive market conditions in these markets at this time.

176. Accordingly, the Commission finds that there is insufficient information to forbear from the regulation of wire centres with fewer than 25 buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable networks, pursuant to section 34 of the Act.

177. As noted above, in wire centres with fewer than 25 buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable networks, Bell Canada may apply for forbearance where it can provide sufficient evidence of rivalrous behaviour specific to each wire centre.

Wire centres with 25 or more buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable networks where competitor network presence is 30 percent or more

178. The Commission notes that 31 of the 106 wire centres with 25 or more buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable networks meet the 30 percent competitor network presence criterion. Pursuant to section 34 of the Act, the Commission finds that these markets are sufficiently competitive to protect the interests of users and that forbearing from the regulation of high-speed DNA service for those wire centres is consistent with the Canadian telecommunications policy objectives and will not impair the continuance of a competitive market for high-speed DNA service.

179. The Commission therefore forbears from the regulation of high-speed DNA service in the following 31 wire centres,[8] to the extent set out in this Decision:

- Toronto exchange: Adelaide, Simcoe, Asquith, Finch, Eglinton, Donlands
- Ottawa-Hull exchange: O'Connor, Bank, Vanier, Hull, Iona, Britannia, Rideau
- Montréal exchange: Ontario, Belmont, Atwater
- Hamilton exchange: Hunter, Wentworth, Main, Lake
- Cooksville exchange: Burnhamthorpe, Dundas, Hurontario
- Streetsville exchange: Pearl
- Kitchener exchange: Water, Albert
- Kanata-Stittsville exchange: Kanata
- Brampton exchange: Walker, John
- Stoney Creek exchange: Stoney Creek
- Clarkson exchange: Clarkson

Wire centres with 25 or more buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable networks, where competitor network presence is below 30 percent

180. The Commission notes that there are a number of wire centres with 25 or more buildings connected to Bell Canada's and/or competitors' high-speed DNA-capable network, where competitor network presence is below 30 percent but where forbearance may be warranted.

181. The factors that the Commission examines to determine whether it should grant forbearance are the total number of buildings connected to an ILEC's and/or competitors' high-speed DNA-capable networks within the wire centre, contiguity with wire centres where forbearance

[8] Forbearance also applies to any ASR linked to the forborne high-speed DNA service.

for high-speed DNA service has been granted, and proximity to the 30 percent threshold for competitor network presence. The Commission notes, however, that competitor network presence is based on confidential information filed by the parties. The Commission considers that, without this information, an ILEC is unable to properly identify in which wire centres forbearance is more likely to occur.

182. The Commission considers that there would be merit in advising ILECs of the percentage of competitor network presence in wire centres with buildings connected to an ILEC's and/or competitors' high-speed DNA-capable network.

183. The Commission notes that, in a letter to be sent shortly, it is setting out a process to determine whether it is appropriate to disclose publicly the percentage of competitor network presence, and if so, what level of information should be disclosed.

(b) SFTs

184. The Commission notes that Bell Canada also requested forbearance for the following SFTs:

- SFT item D14(b) (1) OC-12 access between the customer's premises in Toronto, Ontario and Bell Canada's Adelaide St. central office; initial service period of 36 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2001-754, 2 October 2001

- SFT item D14(b) (2) OC-12 access between the customer's premises in Montréal, Quebec and Bell Canada's Belmont central office; initial service period of 36 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2001-817, 14 November 2001

- SFT item D22(b) OC-3 access located at the customer's premises and Bell Canada's Brampton, Ontario central office; initial service period of 60 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2000-685, 27 July 2000

- SFT item D22(c) OC-3 access located at the customer's premises and Bell Canada's Simcoe, Ontario central office; initial service period of 36 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2000-1009, 9 November 2000

- SFT item D22(d) OC-3 access between the customer's premises and Bell Canada's Toronto (Adelaide) central office; initial service period of 12 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2001-41, 19 January 2001

- SFT item D22(e) OC-3 access between the customer's premises and Bell Canada's Toronto (Adelaide) central office; initial service period of 36 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2001-41, 19 January 2001

- SFT item D22(f) OC-3 access between the customer's premises and Bell Canada's Toronto (Adelaide) central office; initial service period of 60 months; approved in *Bell Canada – Channels for data transmission*, Order CRTC 2001-41, 19 January 2001

- SFT item D22(g) OC-3 intra-exchange channel between two wire centres in the same exchange for a specific customer. Tariff description does not specify the wire centre. Customer must also use items D22(d), D22(e), and D22(f); interim approval granted in *Bell Canada – Channels for data transmission*, Order CRTC 2001-579, 26 July 2001

185. The Commission notes that Bell Canada offered services pursuant to the above SFTs prior to the introduction of Bell Canada's OC-3 and OC-12 access services in its General Tariff. The Commission also notes that the initial contract period for the above SFTs has elapsed. The Commission further notes that some of the above SFTs are for OC-3 and OC-12 access services provided in wire centres where the Commission has granted high-speed DNA service forbearance.

186. Regarding the SFTs for which Bell Canada has requested high-speed DNA service forbearance, the Commission needs to satisfy itself that the SFTs do not include any regulated services other than high-speed DNA services and that access services offered pursuant to the SFTs are specific to wire centres where the Commission has granted high-speed DNA service forbearance.

187. Accordingly, the Commission directs Bell Canada to provide the following information:

- details regarding the services provided pursuant to the SFT and whether any unregulated service(s) other than high-speed DNA services is/are offered together with regulated services; and

- the name of the wire centre from which the service is provided for SFTs, where the specific wire centre is not identified.

188. The Commission will issue its determination on Bell Canada's current application for forbearance for SFTs as soon as possible after receipt of the requested information.

(c) MWS

189. In accordance with the criterion established in this Decision for MWS, the Commission considers that forbearance for MWS is warranted in CMAs where an ILEC, upon application, provides evidence of rivalrous behaviour in the form of competitive bidding. In the absence of evidence of competitive bidding, the ILEC may obtain forbearance where it can demonstrate that it no longer has market power in the CMA pursuant to the competition economics and law approach set out in Decision 94-19.

190. The Commission notes that Bell Canada and/or at least one competitor reported MWS in each of the Toronto, Montréal, and Ottawa CMAs. The Commission also notes that the competitors provision all their reported MWS on their own networks. The Commission further notes that

Bell Canada provided evidence of rivalrous behaviour for each of the CMAs. Furthermore, the Commission notes that, since Bell Canada started offering MWS in 2004, the Commission has approved an application from Bell Canada to reduce its MWS rates.

191. The Commission considers that competitors can independently compete and that there is sufficient evidence of rivalrous behaviour and falling prices for MWS in the Toronto, Montréal and Ottawa CMAs for the Commission to forbear from regulating those markets. Pursuant to section 34 of the Act, the Commission finds that these markets are sufficiently competitive to protect the interests of users. The Commission also finds that forbearing from the regulation of MWS for these CMAs is consistent with the Canadian telecommunications policy objectives and will not impair the continuance of a competitive market for MWS.

192. Accordingly, the Commission grants forbearance for Bell Canada's MWS in the Toronto, Montréal, and Ottawa CMAs to the extent set out in this Decision.

Secretary General

APPENDIX

Format for data collection on high-speed DNA-capable buildings

In accordance with paragraphs 151(c) and 152 of *Framework for forbearance from regulation of high-speed intra-exchange digital network access services*, Telecom Decision CRTC 2007-35, 25 May 2007, provide, in confidence, a list of buildings across (the territory of the applicant ILEC) that are connected to your high-speed DNA-capable network. The information should be provided electronically in the following format:

Building Name	Street Address	Postal Code