



## Telecom Decision CRTC 2007-97

Ottawa, 5 October 2007

### **Elimination of the winback rules for Digital Subscriber Line Internet and higher speed access services**

Reference: 8622-B2-200705254, 8622-C6-200707317, and 8678-C12-200707870

*In this Decision, the Commission eliminates, effective the date of this Decision, the winback rules established in Order 2001-92 for higher speed access services applicable to large cable carriers, and in Telecom Decisions 2002-37 and 2003-1 for Digital Subscriber Line Internet services applicable to incumbent local exchange carriers. The Commission requests the CRTC Interconnection Steering Committee to report to the Commission within six months of the date of this Decision on whether the need for a visit of a cable carrier's technician to the end-user location of an independent Internet service provider (ISP) should be eliminated when the ISP is using cable carriers' facilities or should be subject to the request of the independent ISP.*

#### **Introduction**

1. The Commission received an application dated 5 April 2007 from Bell Aliant Regional Communications, Limited Partnership; Bell Canada; and Saskatchewan Telecommunications (collectively, the Companies) requesting that the Commission discontinue applying the Digital Subscriber Line (DSL) winback rules established in Telecom Decision 2002-37, and extended to all incumbent local exchange carriers (ILECs) in Telecom Decision 2003-1.
2. The Commission also received an application dated 10 May 2007 from Cogeco Cable Inc.; Rogers Communications Inc.; Shaw Communications Inc.; and Videotron Ltd., a wholly owned subsidiary of Quebecor Media Inc. (collectively, the Cable Carriers) requesting that the Commission discontinue applying the higher speed access service winback rules established in Order 2001-92.
3. On 25 May 2007, the Commission issued a letter informing parties that, because of the similarities between the Companies' application and the Cable Carriers' application (the Incumbents' applications), it would consider them in a single process.
4. The Commission received comments from the Companies and the Cable Carriers (collectively, the Incumbents), the Canadian Association of Internet Providers (CAIP), Cybersurf Corp. (Cybersurf), the Internet Centre Inc. (Internet Centre), Primus Telecommunications Canada Inc. (Primus), RipNET Limited (RipNET), and Télécommunications Xittel inc. (Xittel) (collectively, the independent Internet Service Providers or ISPs).
5. The record of this proceeding closed on 4 July 2007 with the filing of the Incumbents' reply comments.

## **Background**

6. In Order 2001-92, the Commission directed the cable carriers to implement winback rules prohibiting them from attempting to win back customers that had indicated their intention to transfer to competitive Internet service providers (ISPs) using the cable carriers' facilities.
7. In Telecom Decision 2002-37, the Commission directed Bell Canada to implement winback rules similar to those in place for the cable carriers. These restrictions were to prevent potential abuses that might arise from access to commercially sensitive information, such as in instances where DSL customers were in the process of switching their DSL business from Bell Canada to an independent ISP. In Telecom Decision 2003-1, the Commission directed Aliant Telecom Inc., MTS Allstream Inc., TELUS Communications Inc. (now TELUS Communications Company), and SaskTel to apply, in their respective operating territories, the winback rules prescribed for Bell Canada in Telecom Decision 2002-37. The winback rules prohibit incumbent cable carriers and ILECs from:
  - a. directly marketing to customers who, through a competitive service provider, have given notice of their intention to cancel the carrier's high-speed Internet service in order to receive service from an ISP that uses the carrier's or an affiliate's wholesale high-speed Internet service; and
  - b. offering discounts or other inducements not generally offered to the public, to customers who personally contact the carrier to give notice of their intention to cancel the carrier's high-speed Internet service in order to receive service from an ISP that uses the carrier's or an affiliate's wholesale high-speed Internet service.
8. These restrictions are effective for the period commencing on the date of receipt of the notice to cancel the high-speed Internet service and ending 90 days after the date of disconnection.

## **Issues**

9. The Commission considers that the parties' submissions in this proceeding raise the following issues:
  - I. Whether the Incumbents' applications are review and vary applications
  - II. Whether the winback rules should be eliminated
  - III. Whether the need for a visit of a cable carrier's technician to the end-user location of an independent ISP should be eliminated when the ISP is using the cable carriers' facilities

## **I. Whether the Incumbents' applications are review and vary applications**

### *Positions of parties*

10. CAIP submitted that the Incumbents' applications constituted applications to review and vary Order 2001-92 and Telecom Decision 2002-37 in which the Commission established the winback rules for DSL and higher speed access services. CAIP further submitted that the Companies' application did not meet the criteria for a review and vary application as set out in Telecom Public Notice 98-6.
11. The Companies submitted that they took no position regarding the original correctness of Telecom Decisions 2002-37 and 2003-1, and that recent developments, including the Policy Direction<sup>1</sup> and the Order in Council varying Telecom Decision 2006-15,<sup>2</sup> constituted compelling *prima facie* evidence that the continued application of the winback rules was illegal and inappropriate.

### *Commission's analysis and determination*

12. The Commission notes that the Incumbents' applications do not call into question the original correctness of Order 2001-92 or Telecom Decision 2002-37 and request that the Commission discontinue applying the winback rules on a going forward basis. Accordingly, the Commission finds that the Incumbents' applications are not review and vary applications but rather are new applications.

## **II. Whether the winback rules should be eliminated**

### *Incumbents' comments*

13. The following arguments were made regarding the discontinuation of the winback rules:
  - (a) the rules are inconsistent with the Policy Direction,
  - (b) the rules are unnecessary and outdated, and
  - (c) the rules are contrary to the *Canadian Charter of Rights and Freedoms* (the Charter).

### **(a) The rules are inconsistent with the Policy Direction**

14. The Incumbents submitted that the winback rules provided certain ISPs with a 90-day period free of competition by preventing the Incumbents from directly communicating with former customers to offer them better deals on prices and/or services even though the market for retail high-speed Internet service is highly competitive. In their view, this practice did not constitute maximum reliance on market forces and was therefore inconsistent with the Policy Direction.

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<sup>1</sup> The Governor in Council issued *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006.

<sup>2</sup> On 18 April 2007, the Governor in Council issued an Order varying Telecom Decision CRTC 2006-15, which came into force on 4 April 2007. Among other things, this Order eliminated the local winback rules as set out in Telecom Decision 2005-28.

15. The Cable Carriers argued that the winback rules were inconsistent with the Policy Direction and should be immediately eliminated because (a) they did not rely on market forces to the maximum extent feasible, (b) they were not efficient and proportionate to its purpose, (c) they did not interfere with the operation of competitive market forces to the minimum extent necessary, and (d) they shielded independent ISPs from competition.

**(b) The rules are unnecessary and outdated**

16. The Incumbents submitted that the application of the winback rules to them was unnecessary because their Carrier Services Groups (CSGs) already had safeguards in place to protect confidential customer information. The Companies further submitted that there was no evidence that the CSG rules were not working.
17. The Incumbents argued that the winback rules were outdated in light of the Order in Council varying Telecom Decision 2006-15 in which the winback rules for local exchange services were eliminated.
18. The Cable Carriers argued that the application of the winback rules for cable services was not appropriate due to the fact that competitive ISPs relied only to a limited extent on third party Internet access (TPIA) provided by cable broadcasting distribution undertakings.

**(c) The rules are contrary to the Charter**

19. The Companies argued that the winback rules restricted freedom of expression rights insofar as it prohibited any Company-initiated direct contact with former retail DSL customers for a period of three months after customers moved to another ISP. Preventing the Companies from communicating important commercial information about prices and service options to their former customers and preventing those customers from receiving that information was, in their view, a violation of subsection 2(b) of the Charter, not demonstrably justified under section 1 of the Charter. As there was, in the view of the Companies, no evidence of abuse requiring a DSL winback rules in the first place, they argued that there was no pressing and substantiating objective underlying the adoption of the winback rules.

*Independent ISPs' comments*

20. CAIP, Cybersurf, the Internet Centre, Primus, and RipNet were opposed to the elimination of the winback rules.
21. CAIP submitted that the Incumbents had failed to provide any evidence to support their argument that the retail Internet market was competitive. Accordingly, they only cited past Orders dating back to the late 1990's which granted forbearance to the ILECs' retail Internet services.
22. CAIP also submitted that the competitive landscape for the retail Internet service market had changed dramatically since the time the Commission had granted forbearance to the ILECs' retail Internet services. Approximately 93 percent of the customers were using dial-up

to access the Internet in 1997. CAIP noted that the independent ISPs' market share had declined constantly from 64 percent of the total Canadian Internet service revenues in 1997 to only 12.1 percent in 2005 as indicated in the 2006 Monitoring Report.<sup>3</sup>

23. CAIP also noted from the 2006 Monitoring Report that in 2005 the independent ISPs held 4.4 percent of the residential high-speed Internet subscribers in Canada while the ILECs and cable companies held 41.6 percent and 53.9 percent, respectively.
24. Cybersurf submitted that without the winback rules, an independent ISP would be especially vulnerable after an end-user had placed an order for retail high-speed access service from this ISP and before the installation occurred. Cybersurf was of the view that without these rules, it was easy for the Incumbents to contact the end-user to win back that customer with a special offer not generally available to the public, leading to a cancellation of the customer's order. Cybersurf submitted that the elimination of the winback rules could leave an independent ISP to incur all of the costs of convincing the customer to switch, but ultimately to obtain none of the revenues associated with the customer's subscription to that ISP's service.
25. RipNET submitted that independent ISPs were at a disadvantage vis-à-vis the ILECs especially when the High-Speed Lite service was introduced and was not made available for resale. Primus submitted that market forces alone could not be relied upon to counter the Incumbents' market power in the upstream market. In its view, as long as the Incumbents possessed market power in the upstream market, an Incumbent would be in a position to confer an unfair advantage upon itself. The Internet Centre argued that the ILECs were still in a dominant position in the DSL Internet market and that without the winback rules, an ILEC could offer inducements and disinformation regarding competitors in order to discourage transfer to a different ISP when a customer contacted the ILEC to cancel its Internet service. This would allow the ILECs to maintain their market dominance.
26. CAIP, Cybersurf and Primus submitted that the application of the winback rules was a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

*Commission's analysis and determination*

27. In the Commission's view, the following sections of the Policy Direction are pertinent to the Incumbents' applications:
  - 1(a)(i) ...the Commission should rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and
  - 1(a)(ii) when relying on regulation, the Commission should use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

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<sup>3</sup> *CRTC Telecommunications Monitoring Report, Status of Competition in Canadian Telecommunications Markets – Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services, July 2006, p. 56.*

28. Paragraph 7(c) of the *Telecommunications Act* (the Act) states that the Canadian telecommunications policy has as its objective to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.
29. The Commission notes that CAIP cited low ISP market shares in Internet services to demonstrate that the Incumbents were dominant in these markets and that the winback rules were necessary to foster competition in these markets.
30. The Commission notes that a number of competitors provide retail high-speed Internet access services, including cable companies, ILECs, and resellers. The Commission notes that in Telecom Decision 98-9 it forbore from tariff regulation of retail Internet services because it found that the retail Internet service market was highly competitive.
31. The Commission further notes that, according to the 2007 Monitoring Report,<sup>4</sup> resellers who provide high-speed Internet access services mainly use DSL and fibre facilities. The Commission further notes that after an extensive proceeding, the Commission rendered Telecom Decision 2006-77, in which it approved, on a final basis, rates for the cable carriers' TPIA services. In that Decision, the Commission mandated that changes be made to cable carriers' tariff for TPIA service with regard to rates and speed choices in order to allow independent ISPs to use the TPIA services in a manner analogous to the way they are allowed to use the ILECs' DSL and fibre facilities, in order to provide high-speed Internet services.
32. The Commission notes that it has approved procedures for the CSGs of the Incumbents to address potential abuses that might otherwise arise from access to commercially sensitive information. The Commission further notes that no evidence was filed on the record of this proceeding to indicate that these procedures are not working.
33. The Commission notes that the winback rules were first introduced and implemented in Order 2000-789 in order to facilitate competitive entry into the cable broadcasting distribution market. The Commission notes from the 2007 Monitoring Report that the number of subscribers of retail high-speed Internet access services offered by independent ISPs has increased considerably since then, from 14,000 subscribers in year 2000 to 326,000 subscribers in 2006. The independent ISPs' share of the high-speed Internet market grew from 1.0 percent in 2000 to 4.4 percent in 2005, and remained at this level for 2006.
34. During the same period, the Incumbents' base of customers grew from 1,440,000 to 7,136,000 where, in 2006, 3,095,000 were using DSL technology and 4,041,000 were using cable modem technology to access high speed Internet. In 2006, the number of households with high-speed Internet access service reached 7.5 million households or 60 percent of all Canadian households, up from 51 percent in the previous year.

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<sup>4</sup> *CRTC Telecommunications Monitoring Report, Status of Competition in Canadian Telecommunications Markets Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, July 2007.

35. In light of the level of competition in the retail high-speed Internet access services market, the Commission is of the view that the winback rules are no longer required. In regard to the objective set out in paragraph 7(c) of the Act, the Commission considers that the winback rules are no longer required to enhance the efficiency and competitiveness of the Canadian telecommunications market.
36. As the Commission is removing the winback rules for high-speed Internet access services, it is relying on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objective set out in paragraph 7(c) of the Act, consistent with subparagraph 1(a)(i) of the Policy Direction. Since the Commission is no longer relying on regulation by means of winback rules, it is not necessary to address subparagraph 1(a)(ii) of the Policy Direction.
37. Given the disposition of these Incumbents' applications, it is unnecessary for the Commission to address the Companies' arguments with respect to freedom of expression as per subsection 2(b) of the Charter.
38. Accordingly, effective the date of this Decision, the Commission eliminates the winback rules established in Order 2001-92 applicable to incumbent cable carriers and in Telecom Decisions 2002-37 and 2003-1 applicable to ILECs.

**III. Whether the need for a visit of a cable carrier's technician to the end-user location of an independent ISP should be eliminated when the ISP is using the cable carriers' facilities**

*Positions of parties*

39. Cybersurf and Xittel requested that in the event the Commission eliminated the winback rules for the cable carriers, it should eliminate the requirement and the associated fee for a visit of a cable carrier installer/technician to the premises of an end-user for the installation of a new high-speed Internet access service of an independent ISP. Cybersurf stated that experience had shown that cable technicians were sent in almost all cases even though a visit was not necessary.
40. Cybersurf stated that it had been made aware of a number of instances where a cable carrier installer had used a service visit, at the expense of an independent ISP, as an opportunity to try to convince the end-user to switch to the cable carrier's high-speed Internet access service.
41. Xittel suggested that, rather than requiring a visit from a technician from the cable carrier, the ISP installer could obtain certification that met the cable carrier's specifications to perform the required installation at the end-user location.
42. The Cable Carriers strongly objected to Cybersurf's request to eliminate the requirement and fee for a Cable Carrier installer to visit the premises of an end-user when the end-user switches to an independent ISP. Contrary to Cybersurf's suggestion that these visits were unnecessary, the Cable Carriers submitted that they were in fact critical to the ability of the Cable Carriers to ensure network integrity and the quality of other services provided to the end-user.

### ***Commission's analysis and determination***

43. The Commission notes that a visit of a technician to the end-user's premises during the installation of an ISP's service is not required with the Companies' wholesale DSL services. The Commission is of the view that the requirement for a visit of a cable technician could impede the development of competition in the high-speed Internet access market.
44. The Commission is also of the view that, because the need for a visit of a cable carrier technician at the end-user's premises during the installation is of a technical nature, this matter should be referred to the CRTC Interconnection Steering Committee (CISC).
45. Accordingly, the Commission requests CISC to report to the Commission within six months of the date of this Decision on whether the requirement for a visit of a cable carrier's technician to the end-user location of an independent ISP is necessary when the ISP is using the cable carriers' facilities or should be subject to the request of the independent ISP.

Secretary General

### **Related documents**

- *Cogeco, Rogers, Shaw, and Videotron – Third-party Internet access service rates*, Telecom Decision CRTC 2006-77, 21 December 2006
- *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15, 6 April 2006
- *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28, 12 May 2005 as amended by Telecom Decision 2005-28-1, 30 June 2005
- *Follow-up to Telecom Decision CRTC 2002-37 – Adoption of digital subscriber line winback rules*, Telecom Decision CRTC 2003-1, 17 January 2003
- *Independent Members of the Canadian Association of Internet Providers – Digital Subscriber Line Internet services by Bell Canada and Bell Nexxia*, Telecom Decision CRTC 2002-37, 27 June 2002
- *Terms and rates approved for large cable carriers' higher speed access service – Follow-up to Order CRTC 2000-789*, Order CRTC 2001-92, 1 February 2001
- *Terms and rates approved for large cable carriers' higher speed access service*, Order CRTC 2000-789, 21 August 2000

- *Regulation under the Telecommunications Act of certain telecommunications services offered by "broadcast carriers",* Telecom Decision CRTC 98-9, 9 July 1998
- *Guidelines for review and vary application,* Telecom Public Notice CRTC 98-6, 20 March 1998

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*