



Telecom Decision CRTC 2005-53

Ottawa, 14 September 2005

Aliant Telecom Inc.'s request for interim relief with respect to the local winback rule and wireline promotion rules

Reference: 8622-A53-200504953

*In this Decision, the Commission **denies** Aliant Telecom Inc.'s (Aliant Telecom) request for interim relief from the local winback rule and the rules governing local wireline promotions in the residential local exchange market in Nova Scotia and Prince Edward Island pending the Commission's determination on Aliant Telecom's application in the proceeding commenced by Forbearance from regulation of local exchange services, Telecom Public Notice CRTC 2005-2, 28 April 2005.*

The application

1. Aliant Telecom Inc. (Aliant Telecom) filed an application, dated 22 April 2005, pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, requesting interim relief with respect to the local winback rule and the rules governing local wireline promotions.
2. Specifically, Aliant Telecom requested that the Commission remove the local winback rule and the rules governing local wireline promotions in the residential local exchange market in Nova Scotia and Prince Edward Island (P.E.I.), on an interim basis, pending the Commission's determination on the company's application for forbearance in the proceeding commenced by *Forbearance from regulation of local exchange services*, Telecom Public Notice CRTC 2005-2, 28 April 2005 (Public Notice 2005-2).
3. Aliant Telecom asserted that it had suffered economic damage as a result of competition from a competitor, Bragg Communications Inc., carrying on business as EastLink (EastLink). Aliant Telecom also asserted that the local winback rule violated section 2(b) of the *Canadian Charter of Rights and Freedoms* (the Charter).
4. Aliant Telecom submitted that:
 - EastLink had established significant market share in the exchanges in which it offered service. EastLink's history showed that its market share growth was rapid during each successive year following entry into any exchange area;
 - EastLink had significant advantages as the incumbent broadcast distribution provider in Nova Scotia and P.E.I.;
 - EastLink had an established network infrastructure funded by its broadcast distribution business on which it provided telecommunications services on an incremental basis;

- EastLink had long-established relationships with residential local exchange customers as a result of its traditional role as the incumbent broadcast distribution provider;
 - EastLink included broadcast entertainment in its service bundles with telephone and Internet services and recently, as a result of an agreement with Rogers Wireless Inc., was able to include wireless services;
 - EastLink was a well-established market participant, widely recognized and accepted by customers as an alternate local service provider; and
 - EastLink had no need of the special protection from competition provided by the regulatory restrictions on Aliant Telecom.
5. Aliant Telecom indicated that the local residential service market in Nova Scotia and P.E.I. were experiencing a phenomenon that no other area in Canada had yet experienced. Aliant Telecom submitted that this was the result of an incumbent cable television provider, EastLink, effectively leveraging its existing cable facilities and relationship with customers in order to roll out residential telephone services.
 6. Aliant Telecom submitted that, at the time of the application, EastLink offered local exchange services to residential customers in many exchanges in Nova Scotia and P.E.I. and planned to provide service in many more exchanges in both provinces. Aliant Telecom also submitted that as of December 2004 EastLink had secured approximately 16 percent of the total Nova Scotia market and 12 percent of the total P.E.I. market (i.e. including those areas where EastLink did not yet offer services). Aliant Telecom submitted that EastLink's market share was at least double the provincial average in many of the exchanges in which EastLink offered local telephone service. Aliant Telecom noted that in its application for forbearance it had stated that EastLink's market share in the Halifax Metro area at the end of 2003 was 21 percent. Aliant Telecom submitted that, at the end of 2004, this number had increased to 32 percent and that this substantial increase was a convincing measure of EastLink's ability to compete. Aliant Telecom further submitted that EastLink was gaining market share more rapidly in exchanges where it had recently started offering service than in exchanges where it had made service available in earlier periods. Aliant Telecom argued that in exchanges where EastLink began providing service in 2003 EastLink's market share had reached the range of mid-teens to over 20 percent, which was consistent with considerable market presence and credibility.
 7. Aliant Telecom submitted that EastLink's successful market entry and its demonstrated ability to expand its services showed that there were not significant market barriers to competition. Aliant Telecom argued that considering its reduced market share, its continued loss of market share, and EastLink's demonstrated ability to enter markets and build a strong customer base, the competitive forces were certainly sufficiently strong to protect the interests of local telephone service customers.

8. Aliant Telecom submitted that the unnecessary regulatory constraints on its competitive response were presently impairing competition and had the effect of denying customers in Nova Scotia and P.E.I. the benefits they would otherwise be entitled to in a competitive marketplace. Aliant Telecom argued that although one of the principal benefits of the implementation of competition foreseen by the Commission was that it would give the incumbent local exchange carriers (ILECs) the incentive to be responsive and innovative, the various regulatory constraints have, in fact, severely curtailed the ILECs' ability to do so. Aliant Telecom argued that while some degree of temporary protection of nascent competitors from competitive activity might have been in the public interest, this could no longer be said of the constraints on Aliant Telecom for the benefit of EastLink. Further, Aliant Telecom submitted that the losses experienced by the public through regulatory lag were irrevocable (i.e. there was no mechanism to recover them).
9. Aliant Telecom argued that its ability to respond to competition was further hampered by its lack of pricing flexibility as a result of the typically long process associated with tariff approvals. Aliant Telecom submitted that the combination of EastLink's ability to bundle mixed services and Aliant Telecom's inability to respond competitively had caused a significant financial injury to Aliant Telecom. Aliant Telecom submitted that when local telephone customers switched to a competitor they also switched to the competitor's Internet, long distance, and other services. Aliant Telecom argued that the revenue impact was significantly greater than the lost local telephone revenue alone. Aliant Telecom submitted that this damage was unfair and unnecessary. Further, Aliant Telecom submitted that there was no mechanism to provide recovery of losses suffered during the regulatory process while the company waited on the resolution of its forbearance application. Aliant Telecom argued that this damage would continue until the Commission removed the constraints on Aliant Telecom's competitiveness.
10. Aliant Telecom also submitted that the prohibition of communication contained in the local winback rule amounted to an infringement on the rights protected by section 2(b) of the Charter. Aliant Telecom argued that its right to commercial expression in contacting its customers and customers' rights to receive those communications had been severely curtailed. Aliant Telecom submitted that, as a result, customers were no longer able to make fully informed economic choices. Aliant Telecom submitted that the Commission's local winback rule could not be saved under section 1 of the Charter.

Background

11. The Commission established local winback restrictions in the letter *Commission Decision Regarding CRTC Interconnection Steering Committee Dispute on Competitive Winback Guidelines*, 16 April 1998 (the Winback Letter Decision). Pursuant to the Winback Letter Decision, the Commission prohibited ILECs from communicating with a former customer for the purpose of winning back that customer for primary exchange service, for a period of three months. In establishing the local winback restrictions, the Commission found that such restrictions were necessary for effective competitive entry into the primary exchange services market. The Commission noted that without such restrictions ILECs would potentially be able to win back customers before local service was effectively transferred to a competitive local exchange carrier (CLEC) because ILECs controlled and had access to customer-specific information such as leased loop, directory listing, and 9-1-1 information.

12. In *Application of the winback rules with respect to primary exchange service*, Telecom Decision CRTC 2002-1, 10 January 2002 (Decision 2002-1), the Commission amended the winback rule by expanding the type of residential services that were subject to the restriction. The Commission directed ILECs to refrain from attempting to win back a residential customer, either for primary exchange or any other service, for a period of three months after the customer's primary local exchange service had been completely transferred to a CLEC. The Commission undertook this change in response to an increase in the marketing of bundled service offerings. The Commission noted that, where primary exchange services were bundled with other telecommunications services such as Internet and/or long distance, a winback of a long distance or Internet customer would also inevitably repatriate the primary exchange service, despite the fact that such service might not have been the target of the winback in question.
13. In *Call-Net Enterprises Inc. v. Bell Canada – Compliance with winback rules*, Telecom Decision CRTC 2002-73, 4 December 2002 (Decision 2002-73), the Commission found that the winback rule applied from the time the customer's decision to change service providers was communicated in a local service request. In Decision 2002-73, the Commission also found that Bell Canada had violated the local winback rule. The Commission found that continued violations of the local winback rule would harm the competitive market.
14. In *Call-Net Part VII Application – Promotion of local residential competition*, Telecom Decision CRTC 2004-4, 27 January 2004 (Decision 2004-4), the Commission extended the winback no-contact period to twelve months. The Commission found that absent the local winback rule the ILECs would have an unfair or undue advantage as a result of their knowledge of all or virtually all of the telecommunications needs, preferences, and calling patterns of the CLECs' customers. The Commission noted that targeted winback activities increased customer churn and administrative costs for all local exchange carriers (LECs). The Commission further noted that this increased churn was likely to be especially detrimental to CLECs as they did not have a large stable base of customers capable of funding their ongoing operations. The Commission accepted evidence from Call-Net Enterprises Inc. (Call-Net)¹ that customer churn decreased significantly after a customer had received service from Sprint Canada Inc. (Sprint Canada)² for a year or more.
15. In *Review of winback promotions*, Telecom Public Notice CRTC 2003-1, 15 January 2003, as amended by *Review of promotions*, Telecom Public Notice CRTC 2003-1-1, 13 March 2003 (Public Notice 2003-1), the Commission suspended consideration of applications for winback promotions and other promotions that would have had the effect of targeting customers of competitors in the local wireline market.
16. In *Promotions of local wireline services*, Telecom Decision CRTC 2005-25, 27 April 2005 (Decision 2005-25), the Commission determined that ILEC promotions in the local wireline market would be permitted, subject to a number of competitive safeguards. These safeguards specified that: promotions involving a local wireline service must be available and equally promoted across one or more entire rate bands; such promotions must not be limited to

¹Effective 7 July 2005, Call-Net's legal name has been changed to Rogers Telecom Holdings Inc.

² Effective 7 July 2005, Sprint Canada's legal name has been changed to Rogers Holdings Inc.

customers of competitors; such promotions must pass an imputation test; the combined enrolment and benefit period of a promotion cannot exceed six consecutive months; there must be no customer lock-in requirement beyond the promotion period; and there must be a minimum six-month waiting period after the expiry of the most recent promotion before an ILEC can offer a new promotion involving the same local wireline service.

17. In Public Notice 2005-2, the Commission initiated a proceeding to establish a framework for forbearance from the regulation of local exchange services and to render a decision on Aliant Telecom's application. In addition, the Commission stated it would look at the appropriateness of a transitional regime that could provide ILECs with more regulatory flexibility prior to forbearance from the regulation of local exchange services through: lessening or removing competitive safeguards on promotions and the no-contact restriction under the winback rule; permitting the *ex parte* filing of tariff applications for promotions; and the waiving of service charges for residential local winbacks.

Process

18. In a letter dated 29 April 2005, the Canadian Cable Telecommunications Association (CCTA) submitted that Aliant Telecom's application was more properly considered as part of the proceeding established by Public Notice 2005-2 and requested that the Commission issue a letter closing Aliant Telecom's application.
19. In a letter dated 6 May 2005, Aliant Telecom submitted that while the Public Notice 2005-2 process would result in a determination on its application on forbearance from the regulation of local exchange services the proceeding would not address the company's immediate need for interim relief. Aliant Telecom requested that the Commission proceed to deal with its application for interim relief and also address the issues raised by Aliant Telecom with respect to section 2(b) of the Charter.
20. The Commission received comments on Aliant Telecom's application for interim relief from Bell Canada and Saskatchewan Telecommunications (SaskTel) (collectively, the Companies), Call-Net, the CCTA, EastLink, MTS Allstream Inc. (MTS Allstream), Quebecor Media Inc. (QMI), and TELUS Communications Inc. (TCI), dated 29 June 2005. Aliant Telecom filed reply comments, dated 11 July 2005.

Test for interim relief

21. Before granting a party interim relief under subsection 61(2) of the *Telecommunications Act* (the Act), the Commission requires the party requesting the relief to demonstrate that it meets the criteria for interim relief set out by the Supreme Court of Canada (the Court) in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, as modified by the Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (the RJR-MacDonald criteria). These criteria are that:
 - there is a serious issue to be determined;
 - the party seeking relief will suffer irreparable harm if the interim relief is not granted;

- the balance of convenience, taking into account the public interest, favours granting the interim relief.

Aliant Telecom's submission

Serious issue to be determined

22. Aliant Telecom submitted that to meet this branch of the interim relief test the company was only required to show that its application was neither frivolous nor vexatious. Aliant Telecom submitted that not only was its application neither frivolous nor vexatious, the company had also demonstrated that it had a strong *prima facie* case.

Irreparable harm

23. Aliant Telecom submitted that it was the nature of the damage suffered, and not its quantum, that must be characterized as irreparable in order for this criterion to be met. Aliant Telecom argued that it was sufficient to show that the impact was serious, permanent, and might not be compensable.
24. Aliant Telecom indicated that in regulatory proceedings before the Commission there was no prospect of any compensation in damages, and accordingly, any consideration of this criterion should be limited to whether the damage was serious and permanent. Aliant Telecom further submitted that consideration should be given to the economic damage flowing from the Charter violation and the damage to the public interest that would result from a denial of relief.
25. Aliant Telecom argued that, unless the Commission provided the company with the requested interim relief, the company and the public would sustain irreparable harm as a result of an impaired competitive market.

Balance of convenience

26. Aliant Telecom submitted that the balance of convenience clearly favoured the granting of the interim relief. Aliant Telecom submitted that the local winback and local wireline promotions rules were causing significant competitive harm to Aliant Telecom; that these rules had served no legitimate public purpose; and that EastLink would not incur any compensable business or competitive loss if the Commission granted interim relief.
27. Aliant Telecom submitted that EastLink was now a well-established competitor in Nova Scotia and P.E.I., that EastLink was not restrained by any barriers to entry, and that, in fact, EastLink had certain entry advantages as a result of its position as the monopoly supplier of cable television service.
28. Aliant Telecom further submitted that, in light of the interference by the local winback rule with Charter-protected rights to the flow of information concerning competitive telecommunications services, the balance of convenience strongly favoured the granting of immediate interim relief.

Positions of parties in support of Aliant Telecom's request

29. The Companies and TCI submitted that Aliant Telecom's request for interim relief should be granted as Aliant Telecom's application had clearly met the RJR-MacDonald criteria.
30. The Companies were of the view that the fact that the Commission was conducting a proceeding to consider the framework under which to forbear from local wireline services was itself testament to the seriousness of the issues raised.
31. With respect to the criteria of irreparable harm, the Companies submitted that consumers continued to be denied the full benefits of competition in the markets where Aliant Telecom was prevented from responding to competition from EastLink. The Companies further submitted that the mounting market share losses Aliant Telecom had experienced also constituted irreparable harm to Aliant Telecom that the Commission could not compensate in damages in the event that Aliant Telecom succeeded on the merits of its application for forbearance.
32. The Companies and TCI submitted that the local winback rule and local wireline promotion rules had caused significant competitive harm to Aliant Telecom and had served no legitimate public purpose. The Companies further agreed that no compensable business or competitive loss would be incurred by EastLink if the Commission granted interim relief. The Companies submitted that based on these factors the balance of convenience favours granting interim relief.
33. TCI submitted that Aliant Telecom's request for interim relief raised a serious issue to be determined. TCI submitted that ILECs that faced competition from cable LECs, such as EastLink, urgently needed to be able to respond to competition. TCI also submitted that the longer the Commission denied relief the more irreparable harm consumers and the ILECs will suffer. TCI also supported Aliant Telecom's submissions on the balance of convenience criteria.

Positions of parties in opposition to Aliant Telecom's request

34. Call-Net, the CCTA, EastLink, QMI, and MTS Allstream submitted that Aliant Telecom had failed to meet the RJR-MacDonald criteria.
35. MTS Allstream submitted that although the need for regulatory safeguards was a serious issue, the Commission had already determined the need for the local winback rule and the local wireline promotions rules in Aliant Telecom's territory.
36. MTS Allstream also submitted that the local winback rule and the local wireline promotions rules imposed minimal restrictions on Aliant Telecom's ability to advertise and promote its services. MTS Allstream submitted that, accordingly, the maintenance of these safeguards, pending disposition of Aliant Telecom's application for forbearance, would not result in irreparable harm.
37. MTS Allstream further submitted that the balance of convenience in this instance clearly lay in maintaining the status quo, pending final resolution of Aliant Telecom's application for

forbearance, as the public interest in establishing a competitive marketplace for local residential wireline services clearly outweighed any harm that might flow to Aliant Telecom as a result of the maintenance of the local winback rule and the local wireline promotions rules in the interim period.

38. QMI submitted that the harm to sustainable competition, and hence to the broader public interest, that would flow from an interim relaxation of competitive safeguards in the local exchange services market was not distinguishable in any meaningful sense from that which would flow from a transitional relaxation of these same safeguards as contemplated by Public Notice 2005-2.
39. QMI reiterated concerns that it had raised in the Public Notice 2005-2 proceeding with respect to the aggressive use of below-cost promotions and targeted winbacks by ILECs in order to perpetuate their dominance. QMI submitted that the balance of convenience, taking into account the public interest, clearly leaned toward maintaining the local winback rule and the local wireline promotions rules until such time as it had been factually demonstrated that a given ILEC had lost its dominance. QMI concluded that, on this basis, the Commission should reject Aliant Telecom's application for interim relief.
40. Call-Net submitted that interim relief is an extraordinary remedy that the Commission should not grant lightly. Call-Net submitted that Aliant Telecom had provided insufficient evidence to support the granting of interim relief.
41. Call-Net submitted that Aliant Telecom's request for interim relief did not raise a serious issue to be determined. In Call-Net's view, Aliant Telecom's loss of 32 percent market share in some parts of its overall market over a six-year period did not raise a serious issue that warranted the granting of interim relief, particularly since Aliant Telecom continued to hold virtually 100 percent market share in other exchanges.
42. Call-Net submitted that Aliant Telecom's characterization of EastLink as a well-established cable company with a network infrastructure and customer relationships that did not require protection was misconceived. In Call-Net's view, Aliant Telecom's position ignored the reality that it was Aliant Telecom who continued to retain market power in Nova Scotia and P.E.I. and that it was the existence of that market power that required the continuation of the local winback rule.
43. Call-Net argued that the reinstatement of the ability to offer promotions in Decision 2005-25 and the new streamlined process for tariff approvals set out in *Introduction of a streamlined process for retail tariff filings*, Telecom Circular CRTC 2005-6, 25 April 2005 should eliminate Aliant Telecom's concerns with respect to promotions and the slowness of the Commission's tariff process.
44. With respect to Aliant Telecom's submissions on the Charter, Call-Net submitted that the local winback rule was plainly justifiable under section 1 of the Charter and that raising the spectre of a constitutional challenge did not transform Aliant Telecom's request into a serious issue to be tried.

45. Call-Net submitted that Aliant Telecom had not provided any evidence as to any financial injury suffered. Call-Net further argued that Aliant Telecom had not provided evidence showing that irreparable harm would be sustained by it or the public because the winback rule had impaired a functional competitive market. Call-Net submitted that to the extent the evidence filed by Aliant Telecom demonstrated that EastLink had gained market share, the evidence showed that the local winback rule had encouraged, rather than discouraged, a functional competitive market.
46. Call-Net submitted that the balance of convenience overwhelmingly supported the denial of Aliant Telecom's request for interim relief. Call-Net argued that Aliant Telecom must demonstrate that the harm that would flow from the denial of the request for interim relief would outweigh any harm that would result from an order granting the relief.
47. Call-Net argued that it would be ill-advised for the Commission to remove or modify the local winback rule on an interim basis until the merits of Aliant Telecom's allegations that the market was ripe for forbearance were fully canvassed and tested by all interested parties. Call-Net submitted that the potential consequences of premature deregulation on the telecommunications sector and on consumers, even on an interim basis, far outweighed the potential harm to Aliant Telecom of denying interim relief.
48. Call-Net submitted that interim relief would impair EastLink's ability to expand its competitive activities in the identified exchanges as well as in the numerous exchanges where, at the time of the application, there was no competition. Call-Net further submitted that denying the request for interim relief would only prevent Aliant Telecom from being able to use its dominance and deeper pockets to limit or attack competition until the merits of the local winback rule are thoroughly considered in the context of the Public Notice 2005-2 proceeding.
49. The CCTA submitted that:
 - the local winback rule and the local wireline promotions rules are necessary competitive safeguards;
 - Aliant Telecom's Charter arguments should not be considered in the context of Aliant Telecom's request for interim relief; and
 - Aliant Telecom had not met the RJR-MacDonald criteria.
50. The CCTA argued the Commission had recently reaffirmed the rules from which Aliant Telecom sought relief in Decision 2005-25 and *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28, 12 May 2005, as amended by *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28-1, 30 June 2005 (Decision 2005-28).
51. The CCTA submitted that Decision 2005-25 provided Aliant Telecom and other ILECs with a substantial degree of relief with respect to the rules governing promotions. The CCTA submitted that this relief, when combined with the relief granted to Aliant Telecom in *Review of price floor safeguards for retail tariffed services and related issues*, Telecom

Decision CRTC 2005-27, 29 April 2005 (Decision 2005-27) mitigated any harm Aliant Telecom might have experienced as a result of the local winback rule and the local wireline promotion rules.

52. The CCTA submitted that the local winback rule and the local wireline promotions rules were fundamental components of the Commission's framework for local competition.
53. The CCTA argued that, based on Aliant Telecom's estimates, the application was premised on the potential of a single competitor who had, at best, 12 to 16 percent of the combined market for which relief was sought and the presumed theoretical maximum potential to compete for no more than 64.8 percent of that market.
54. The CCTA submitted that the Commission should consider this portion of the application in the context of the Part VII application filed by Bell Canada and SaskTel (Bell Canada/SaskTel Part VII application), dated 25 April 2005, seeking the elimination of the local winback rule based on the Charter since the acceptance of Aliant Telecom's arguments with respect to the Charter would result in the permanent rescission of the local winback rule.
55. The CCTA submitted that the claims of harm made in Aliant Telecom's application were unsubstantiated. The CCTA argued that Aliant Telecom had failed to identify any relevant evidence in support of its claim that it or customers would suffer harm if the Commission did not grant the requested interim relief.
56. The CCTA further submitted that the evidence Aliant Telecom filed in support of its forbearance application did not provide a sufficient basis for granting the requested interim relief. The CCTA submitted that Aliant Telecom did not provide guidance as to how evidence pertaining to 32 exchanges supported the granting of interim relief in 213 exchanges across two provinces, including exchanges where EastLink did not, at the time of the application, and might not, in the future, offer a competing service.
57. The CCTA submitted that Aliant Telecom had overstated the extent of the restrictions applicable to its operations. The CCTA submitted, as an example, that despite having the ability to reduce residential pricing in response to competitive entry, Aliant Telecom had not done so since 2001. The CCTA also submitted that as a result of Decisions 2005-25, 2005-27, and 2005-28, Aliant Telecom now possessed a greater degree of pricing and marketing flexibility than it did when it filed the application.
58. The CCTA submitted that the local winback rule did not apply where a customer contacted the ILEC, and further, that the rule did not preclude the marketing of ILEC residential services through media or other general means.
59. The CCTA further submitted that Aliant Telecom's claims of harm set out in its application did not accord with other public statements made by Aliant Telecom. The CCTA submitted that Aliant Telecom's 2004 Annual Report indicated that, but for the labour disruption experienced in 2004, Aliant Telecom's revenues and profits would have increased. The CCTA also submitted that Aliant Telecom's first quarter financial reports for 2005 demonstrated that Aliant Telecom had not suffered significant financial injury from competition for local

exchange services and that any losses suffered were not attributable solely or even predominantly to the local winback rule or local promotions rules.

60. The CCTA submitted that the Commission had considered the question of the balance of convenience between industry stakeholders in Decision 2004-4 and concluded that the benefit to all customers of an increased competitive market outweighed any potential harm to former ILEC customers of being deprived of winback communications. The CCTA further submitted that the Commission had determined in Decision 2004-4 that the potential benefits to the CLECs of extending the no-contact period outweighed any negative impact that this measure could have on the ILECs. The CCTA concluded that Aliant Telecom had offered no evidence or compelling argument to cause the Commission to change its views on the question of balance of convenience as it applied between competitors or between customers of competitors and customers generally.
61. The CCTA submitted that Aliant Telecom had failed to provide the Commission an evidentiary basis upon which to justify granting the requested interim relief. The CCTA submitted that Aliant Telecom's success in the face of competition from EastLink continued largely unabated. The CCTA restated its view that Aliant Telecom's argument for a lessening or removal of the local winback rule and/or the local wireline promotions rules prior to forbearance was more properly dealt with in the Public Notice 2005-2 proceeding.
62. EastLink submitted that it supported the CCTA's comments and, for the reasons stated in the CCTA's submissions, Aliant Telecom's application did not fulfill the criteria for interim relief.

Aliant Telecom's reply comments

63. Aliant Telecom submitted that the parties who opposed its application had, in general, failed to address the market conditions in the territory specified in the application, and had relied instead on out-of-date national aggregate statistics.
64. Aliant Telecom submitted that its data showed the market share already achieved by EastLink and the accelerating pace at which EastLink was acquiring market share.
65. Aliant Telecom further submitted that it was clear that EastLink had the capacity to enter the market and, having done so, that capacity was not going away. In Aliant Telecom's view, the market had become irrevocably competitive.
66. Aliant Telecom argued that the real issue in its application was not the value of competitive constraints at a generic level, but instead, the need for those constraints at this time in this market.
67. Aliant Telecom submitted that its financial results for the first quarter of 2005 cited by the CCTA demonstrated that revenues from local telecommunications had declined 3.3 percent mainly due to competition, technology, substitution, and regulatory constraints.
68. With respect to the balance of convenience, Aliant Telecom submitted that the harm accruing to the company and to customers was clear while no offsetting harm to EastLink had been suggested. Aliant Telecom further submitted that the current situation was not in the public interest and that the public interest favoured the granting of the application.

69. In Aliant Telecom's view, the information that it had presented clearly demonstrated that the residential local services market in the area specified as the subject of its forbearance application had become an irrevocably mature competitive market.
70. Aliant Telecom submitted, with respect to the geographic scope of its requested relief, that the strong and aggressive competition which it faced in the larger part of its market in Nova Scotia and P.E.I. exerted more than sufficient discipline to protect the interests of consumers in those provinces, but that it was open to the Commission to limit the relief to those areas where competitors had chosen to deploy their services.
71. Aliant Telecom argued that, contrary to the CCTA's position, the Commission did not provide the company with the flexibility it needed to compete fairly in Decisions 2005-25 and 2005-27.
72. Aliant Telecom submitted that the Commission should not defer consideration of the Charter issue to the Bell Canada/SaskTel Part VII application proceeding. In Aliant Telecom's view, the assessment of whether the section 2(b) violation could be justified under section 1 of the Charter must be made in light of the facts of its market and the parties in that market.

Commission's analysis and determinations

73. The Commission notes that Aliant Telecom had based its request for interim relief on two grounds:
 - the alleged violation of section 2(b) of the Charter; and
 - competition from EastLink.
74. The Commission notes, as set out above, that an applicant seeking interim relief must demonstrate that it meets all three of the RJR-MacDonald criteria.
75. The Commission notes that in the RJR-MacDonald decision the Court had indicated that in light of the relatively low threshold of the first criterion, i.e., there is a serious issue to be determined, and the difficulties in applying the second criterion of irreparable harm to the party seeking relief in Charter cases, many interlocutory proceedings would be determined by consideration of the balance of convenience. In light of this, the Commission will first consider the balance of convenience.
76. The Commission notes the description of the test to be applied in determining the balance of convenience provided by Beetz J. in *Metropolitan Stores* at page 129 as: 'a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.'
77. The Commission further notes that the public interest and the question of irreparable harm to the public interest must also be considered under the balance of convenience criterion, particularly in cases involving the Charter. In the RJR-MacDonald case, the Court provided some guidance on how to determine whether the public interest would be irreparably harmed by the granting of interim relief in a Charter case. The Court stated at page 346:

In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting and protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

78. In this case, the Commission is charged with implementing the public interest as described in the Canadian telecommunications policy objectives set out in section 7 of the Act. Among those objectives are subsections 7(c) and 7(f) which set out the public interest in the increased competitiveness of Canadian telecommunications and greater reliance on market forces for the provision of telecommunications. The Commission has determined that these objectives are best fulfilled through sustainable facilities-based competition. The Commission has established the local winback rule in order to promote sustainable facilities-based competition, enforced that rule in the face of violations, and extended the time period during which the rule applies based on evidence that three months was not sufficiently long. These actions were taken to encourage the development of sustainable facilities-based competition.
79. In light of the above, the Commission considers that irreparable harm to the public interest could occur should the interim relief requested be granted. The Commission finds, therefore, that insofar as Aliant Telecom's arguments on the Charter are concerned the balance of convenience criterion has not been met. The Commission notes that the substantive issue of whether the local winback rule violates section 2(b) of the Charter will be considered by the Commission in the context of the Bell Canada/SaskTel Part VII application.
80. With respect to the remainder of Aliant Telecom's submissions regarding the balance of convenience, the Commission notes that such competition in the residential local exchange services market, as it exists, is only within a portion of Aliant Telecom's operating territory, and even within that portion of the territory where competition exists Aliant Telecom still retains a substantial majority of the customers. While the numbers provided to the Commission in Aliant Telecom's 2004 Annual Report and in its first quarter financial reports for 2005 indicate some loss of residential network access service, the Commission notes that those same reports indicate that the causes of those losses extend beyond just competition from EastLink and include Aliant Telecom's recent labour disruptions as well as issues related to technology and substitution. The Commission also notes that Aliant Telecom has not exhausted the possible avenues for mitigating the impact of competition from EastLink, such as reductions in the price for its residential service or the use of promotions as now permitted pursuant to Decision 2005-25.
81. With respect to the potential harm that might be caused by the granting of the requested interim relief, the Commission is concerned that the premature removal of the local winback rule and the rules on local wireline promotions, in the absence of an opportunity to consider

the evidence and detailed analysis, which will form part of the Public Notice 2005-2 proceeding, could result in a significant reduction of residential local competition in Aliant Telecom's operating territory.

82. The Commission considers that the degree of harm that could be caused directly to competitors and indirectly to sustainable facilities-based competition in Aliant Telecom's operating territory outweighs any economic harm that may be caused to Aliant Telecom during the Public Notice 2005-2 proceeding by the limitations imposed by the local winback rule and the rules on local wireline promotions.
83. In light of all of the above, the Commission considers that the balance of convenience favours not granting Aliant Telecom's request for interim relief.
84. Since Aliant Telecom has failed to meet the balance of convenience criterion, there is no need for the Commission to consider the other two of the RJR-MacDonald criteria.
85. The Commission **denies** Aliant Telecom's request for interim relief.

Secretary General

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