



Telecom Decision CRTC 2003-49

Ottawa, 21 July 2003

Call-Net Enterprises Inc. – Request to lift restrictions on the provision of retail digital subscriber line Internet services

Reference: 8622-C25-200300666

*In this decision, the Commission **directs** Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications and TELUS Communications Inc. (the incumbent local exchange carriers or the ILECs) to provide retail digital subscriber line (DSL) Internet services (IS) to competitive local exchange carriers' residential local telephone service customers, whose telephone service is provided via local loops leased from the ILECs. The ILECs are further directed to issue, forthwith, amended DSL access line tariffs removing the restriction that their DSL IS access services are only available to competitive service providers in association with an end-customer's ILEC-provided residential primary exchange service.*

*The Commission also **directs** MTS Communications Inc. to show cause why it should not also be subject to the Commission's determinations set out in this decision.*

Introduction

1. The Commission received an application filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, dated 17 January 2003, from Call-Net Enterprises Inc. (Call-Net) requesting that the Commission direct Bell Canada, Aliant Telecom Inc. (Aliant Telecom), Saskatchewan Telecommunications (SaskTel) (collectively, Bell Canada et al.) and TELUS Communications Inc. (TELUS), (collectively, the incumbent local exchange carriers or the ILECs) not to refuse to provide retail Digital Subscriber Line (DSL) Internet service (IS) to a residential customer who chooses a competitor for local exchange service (commonly referred to as primary exchange service (PES)) but is otherwise eligible for the ILECs' retail DSL IS. The requested relief would apply where the customer:
 - (a) received retail DSL IS and PES from the ILEC and subsequently switched PES to Call-Net; and/or
 - (b) received only PES from the ILEC but switched to Call-Net and subsequently decided to subscribe to the ILEC's retail DSL IS.
2. The Commission received comments from EastLink on 5 February 2003. Comments were received from Bell Canada et al., TELUS and the Public Interest Advocacy Centre on behalf of l'Union des consommateurs (PIAC) on 17 February 2003. Comments were also received from the Commissioner of Competition, Competition Bureau (Competition Bureau) on 26 February 2003. Reply comments were received from Call-Net on 27 February 2003. Additional comments were received from the Independent Members of the Canadian Association of Internet Providers (IMCAIP) on 28 February 2003.

The application

3. In its application, Call-Net indicated that each of the ILECs that provides retail residential DSL IS requires that the customer also subscribe to the ILEC's PES in order to receive the ILEC's retail DSL IS. Call-Net stated that when an existing ILEC residential customer switches PES to a competitive local exchange carrier (CLEC) like Call-Net, the ILEC unilaterally terminates the customer's existing retail DSL IS. Similarly, when Call-Net's residential PES customers order retail DSL IS from an ILEC, they are denied service on the grounds that they must subscribe to the ILEC's PES in order to receive retail DSL IS. Call-Net submitted that the ILECs' DSL access tariffs, used by independent Internet service providers (ISPs), require that the service can only be used if the end-user remains the ILEC's PES customer. Call-Net argued that the ILECs' current practice significantly impairs the development of competition in the residential local exchange market because a PES customer that also desires retail DSL IS has no choice but to subscribe to the ILECs' PES.
4. Call-Net stated that according to its own data that it tracked and collected during 2002,
 - 17% of customers who cancelled PES with Call-Net indicated that they did so because they could not receive retail DSL IS from Bell Canada,
 - 11% of potential customers cited the unavailability of Bell Canada's retail DSL IS as the primary reason they rejected Call-Net's PES, and
 - 13% of web-based sales rejections were attributable to the ILECs' refusal to provide retail DSL IS to customers who chose Call-Net as their PES provider.

Call-Net indicated that as a result, it had to include a statement in its local service marketing information that customers subscribing to Call-Net's PES would not be able to receive retail DSL IS from the ILECs. Call-Net submitted that the negative impact on CLECs would increase as the number of households subscribing to retail DSL IS grew over the next few years, as forecast by Bell Canada.

5. Call-Net also submitted that the ILECs' recent launch of "Lite" retail DSL IS would cause many dial-up IS customers to migrate to the ILECs' Lite DSL IS. Call-Net noted that Lite retail DSL IS is priced considerably lower than regular retail DSL IS and available only to customers who subscribe to the ILECs' PES. Call-Net stated that such a migration of dial-up IS customers to the ILECs' Lite retail DSL IS would exclude many potential PES customers from the reach of CLECs. In support of its argument, Call-Net cited an article in the November 2002 issue of the Network Letter, which indicated that 45,000, or almost half of the 93,000 retail DSL IS subscribers that Bell Canada added during the third quarter of 2002, chose the Lite DSL IS, and that 50% of Bell Canada's new Lite DSL IS customers had migrated from its own dial-up IS.
6. Call-Net submitted that the ILECs' current practice of refusing to provide retail DSL IS to a residential customer who chooses a competitor for PES is contrary to subsection 27(2) of the *Telecommunications Act* (the Act), since in its submission the ILECs are unjustly

discriminating against CLECs' PES customers, or persons desiring to switch to CLECs' PES, by not providing retail DSL IS to such customers. Call-Net further submitted that this practice grants an undue preference toward the ILECs by limiting the ability of CLECs to compete for the ILECs' PES customers.

7. In Call-Net's view, there are numerous Commission determinations involving undue preference and unjust discrimination, including determinations made under predecessor sections to subsection 27(2) of the Act, under the *Railway Act*, which support its application.
8. Call-Net cited *Challenge Communications Ltd. v. Bell Canada*, Telecom Decision CRTC 77-16, 23 December 1977 (Decision 77-16). Call-Net noted that, in that decision, the Commission directed Bell Canada to discontinue the prohibition on the use of customer-owned and customer-maintained terminal equipment in conjunction with its automatic mobile telephone service (AMTS), on the basis that it violated a predecessor section to subsection 27(2) of the Act. Call-Net submitted that the ILECs' current practice of making the provision of retail DSL IS conditional upon the customer taking ILEC-provided PES is similar to Bell Canada's impugned practice in that case of making the provision of AMTS conditional upon the customer using Bell Canada's equipment.
9. Call-Net referred also to Telecom Order CRTC 95-250, 3 March 1995 (Order 95-250), where the Commission determined that BC TEL's refusal to allow customers using a competitor's information system access lines, the alternative to BC TEL's business lines, to access the public switched telephone network (PSTN), in order to pre-subscribe to the competitor's long distance services, conferred an undue preference upon itself, contrary to subsection 27(2) of the Act.
10. Call-Net also cited *Bell Canada – Introduction of Megalink service*, Telecom Decision CRTC 92-5, 3 April 1992 (Decision 92-5), and *Bell Canada – Introduction of Microlink service*, Telecom Decision CRTC 92-14, 22 July 1992 (Decision 92-14), which denied approval to Bell Canada's proposed Megalink and Microlink tariffs. The proposed tariffs would have required customers to use only Bell Canada's network services with Megalink and Microlink, and for any competitors' customers either to acquire new local accesses from Bell Canada or to replace the competitors' services with Bell Canada's services. The Commission found that the proposed tariffs would have conferred an undue preference toward Bell Canada and would have unjustly discriminated against competing carriers who used Megalink or Microlink connections to their competitive services.
11. Call-Net referred also to *Unitel v. Bell Canada, AGT et al.*, Telecom Order CRTC 95-249, 3 March 1995 (Order 95-249), where the Commission determined that certain ILECs had conferred an undue preference upon themselves when they did not allow their customers, who desired to use alternative long distance service providers, to pre-subscribe their Remote Call Forward service to alternative long distance service providers.
12. In addition to their claims based on subsection 27(2) of the Act, Call-Net submitted that the requirement that customers must obtain PES from the ILECs in order to be eligible to subscribe to the ILECs' retail DSL IS constitutes bundling. Call-Net argued that the ILECs are in violation of section 24 of the Act, since no tariffs were filed, as required by

Local competition, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8). Call-Net noted that the Commission required in Decision 97-8 that when a forborne service is bundled with a tariffed service, the rates for the bundled service are to be filed for approval by the Commission.

13. Call-Net noted that, in *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission defined bundling as a situation where one rate covers a number of service elements. It also includes situations where there may be separate rate elements for each service element, but a number of service elements are aggregated for purposes of applying volume discounts, with the result that the discount available is greater than it would be were the service elements not aggregated.
14. Call-Net noted that the definition of the term "bundled services" or "bundling" was further expanded by the Commission in *Forbearance – Regulation of toll services provided by incumbent telephone companies*, Telecom Decision CRTC 97-19, 18 December 1997 (Decision 97-19); in *Stentor Resource Centre Inc. – Forbearance from regulation of interexchange private line services*, Telecom Decision CRTC 97-20, 18 December 1997 (Decision 97-20); and in *Joint marketing and bundling*, Telecom Decision CRTC 98-4, 24 March 1998 (Decision 98-4). Call-Net noted that in these decisions the Commission described bundling as the inclusion of different services or service elements under a rate structure. The Commission also noted in Decision 98-4 that this rate structure could be a single rate, a set of rates for various service elements and/or rates for one or more service elements which are dependent on the usage of other services.
15. Call-Net submitted that the relief requested in its application would be technically simple to implement. The network configuration would remain unchanged from the configuration that the ILECs currently use to provide DSL access service to competitive high-speed service providers. The only significant difference, according to Call-Net, would be that the ILEC would bill the customer only for retail DSL IS, while the CLEC would bill the customer for PES.
16. Call-Net submitted that, since the relief requested in its application would enable the ILECs to derive DSL IS revenue by using unbundled local loops leased and paid for by the CLEC, the ILEC should compensate the CLECs for a portion of the costs of such loops. Call-Net argued that this was a matter that could be easily and quickly resolved, considering that the ILECs had already developed a model for recovering line sharing costs from third parties that use their loops to provide retail DSL IS to end-customers. Call-Net indicated that it was willing to file a tariff similar to the ILECs' line sharing tariff in order to recover this cost. It would also be prepared to postpone recovery of such costs, or adopt any interim cost that the Commission might deem suitable, if such postponement or interim cost were necessary for immediate and expedited implementation of the relief sought in its application.

Positions of parties

17. In their comments, the ILECs opposed Call-Net's application. EastLink and PIAC supported the application, while the Competition Bureau expressed concerns with respect to the ILECs' practice.

18. The ILECs indicated that, since the retail IS market is competitive and has been forborne from regulation, the type of solution sought by Call-Net should properly be the subject of negotiations between the parties. Bell Canada et al. stated that Call-Net had, to date, not initiated any discussions with the companies to resell their retail DSL IS.
19. The ILECs submitted that they were not provided with an opportunity to test the data filed by Call-Net. In their view, the Commission was being asked to mandate a number of measures on the basis of conclusions drawn from incomplete information.
20. EastLink and PIAC supported Call-Net's position that providing retail DSL IS solely to customers who subscribe to the ILECs' PES subjects the CLECs to significant competitive disadvantage and gives the ILECs an undue competitive advantage. EastLink and PIAC also supported Call-Net's position that the ILECs' practice unjustly discriminates against customers of the CLECs and limits customer choice in the local exchange market.
21. The Competition Bureau stated that the effect of the ILECs' practice is to make it more difficult for the CLECs to gain residential market share. The Competition Bureau proposed that the Commission determine whether the ILECs' practice of tying DSL IS to local exchange service represents a barrier to entry for CLECs and, if so, that the Commission address the cost issues raised in this proceeding, and determine how these costs should be allocated among CLECs and ILECs.
22. Bell Canada et al. submitted that Call-Net's references to the Commission's determinations regarding violations of subsection 27(2) of the Act and the similar provisions of predecessor legislation were misleading, and not particularly relevant, since the circumstances in Call-Net's application were very different. Bell Canada et al. stated that Call-Net omitted to note that Decision 77-16 and the other terminal attachment cases it cited were instances in which the Commission determined that there were no technical or operational reasons to justify maintaining the then existing terminal attachment requirements. Bell Canada et al. also argued that the other decisions cited by Call-Net raised substantially different issues, in that in all those instances the principal issue was the right of competitors to interconnect their services to those provided by Bell Canada. Bell Canada et al. stated that there were no interconnection issues raised by Call-Net's application. Call-Net had already been provided with all the services it required to offer its own retail DSL IS using the ILECs' local loops and, indeed, it was currently offering high-speed IS to its business customers.
23. TELUS submitted that the cases cited by Call-Net all referred to access services for which there were no other market alternatives and which were, accordingly, not forborne from regulation at the time the decisions were rendered. Unlike retail DSL IS, customer-maintained terminal equipment was not forborne until 1994, 17 years after the release of Decision 77-16. Remote Call Forwarding remains a tariffed service. Similarly, toll and private line services used to access the PSTN were fully regulated at the time of Order 95-249, as were Megalink and Microlink at the time Decisions 92-5 and 92-14 were released.
24. PIAC submitted that the ILECs should in general be required to offer each of their services, including IS, on an unbundled basis whenever technically possible.

25. EastLink concurred with Call-Net's position that the tying of retail DSL IS to the ILECs' local exchange service constitutes a bundle, and therefore argued that a tariff should have been filed for Commission approval. EastLink submitted that such bundles, when combined with promotional price discounts for retail DSL IS, could be used by the ILECs to retain or win back PES customers.
26. The ILECs argued that PES and retail DSL IS do not constitute a bundle since the pricing of retail DSL IS is not dependent or conditional upon the pricing of PES, and there is no umbrella price, discount or rebate.
27. TELUS submitted that Call-Net's allegations with respect to bundling failed to make an important distinction between "horizontal" bundles, that are, in its view, subject to the Commission's bundling rules, and "vertical" bundles that are not. Vertical bundles, according to TELUS, consist of services partially made up of, or delivered through, bottleneck or essential facilities. These types of bundles could in TELUS's view be conceptualised as vertical bundles since the underlying facilities are part of what make up the service. In TELUS's view, residential PES and retail DSL IS are separate vertical bundles, each consisting of the local loop, local switching, local transport and various administrative services. The local loop is simply split into a high-speed DSL channel and a voice channel, so that DSL IS and voice telephony can be provided simultaneously over the local loop.
28. TELUS submitted that, unlike retail DSL IS and PES, a horizontal bundle involves the combined offering of two services, neither of which relies on the other for its production or delivery, and either of which can be offered without the other being provided at the same time. TELUS submitted that, based on the language and intent of the Commission's bundling rules, only horizontal bundles, characterized by service packages and prices that confer a benefit on the customer beyond the benefits available to the customer when the services are bought independently, should be of concern to the Commission.
29. The ILECs submitted that Call-Net is able to offer its own retail DSL IS to its local PES customers. Bell Canada et al. noted that Call-Net already offers DSL-based services to its business customers. Bell Canada et al. argued that, since Call-Net had already established extensive co-location arrangements in Bell Canada's central offices, it should be able to offer its own retail DSL IS where it leases Bell Canada's local loops. Furthermore, Call-Net had offered a range of dial-up IS for many years, and thus had presumably established the internal systems and processes it needed to operate as an ISP. The ILECs submitted, moreover, that CLEC customers have numerous alternatives, including high-speed IS from the cable and fixed wireless companies. The ILECs submitted that there was therefore nothing anti-competitive or unjustly discriminatory in their decision to offer retail DSL IS solely to their own customers.
30. Bell Canada et al. stated that DSL service providers could provide DSL IS to CLEC customers, as DSL service providers had been granted the ability to co-locate their equipment in the ILECs' central offices and to establish direct connections to other co-located Canadian carriers' sites to enable such carriers to offer retail DSL IS to their end-customers. Bell Canada et al. also submitted that sub-licensing of co-location space provided yet another way for a Canadian carrier co-locating within the ILECs' central offices to offer retail DSL IS.

31. Bell Canada et al. stated that their decision not to offer retail DSL IS to customers who obtained their PES from CLECs by means of local loops leased from Bell Canada et al. was based on a number of operational and technical concerns, including the following:
- a) Some of the Bell Canada et al. companies employed the end-customer's telephone number as the basic reference in the service provisioning systems used to support retail DSL IS. However, since these companies did not retain records of the telephone numbers assigned by CLECs to their PES customers, their systems would need to be modified so that something other than the telephone number could be used as a basic reference in order to respond to service calls from retail DSL IS customers whose PES was provided by a CLEC.
 - b) Information regarding the equipment and features being used by the CLEC, in conjunction with the local loop, would have to be exchanged and kept up to date in order to determine whether the local loop was capable of DSL IS provisioning, to address service incompatibility issues on an ongoing basis, and to respond to service calls from the retail DSL IS customer.
 - c) The level of customer service provided to retail DSL IS customers once they migrated to a CLEC might be reduced since, for example, Bell Canada et al.'s processes for isolating DSL IS-related service troubles had been developed under the assumption that each of these customers would obtain PES from Bell Canada et al. It was unclear if these processes would operate effectively in the event that the Commission granted the relief sought by Call-Net.
 - d) There would likely be increased costs and deterioration in quality of providing user support for retail DSL IS customers. Bell Canada et al. submitted that, since there were no mechanisms in place to enable its call centres to respond adequately to queries experienced by CLECs' customers concerning service outages, anticipated service restoration times, or other network problems, Bell Canada et al.'s retail DSL IS customers would experience increased hold times at its call centres and increased levels of customer frustration.
 - e) Development work on billing systems would likely be needed if Bell Canada et al. were to offer retail DSL IS independently from their PES, since the systems associated with billing retail DSL IS were integrated with those for billing PES.
32. TELUS submitted that it did not provide retail DSL IS to CLECs' PES customers since it was uncertain whether the market would justify the additional investment that would be required. It submitted that there would be costs associated with modifications to back office systems in order to bill retail DSL IS customers who were not TELUS PES customers, and to verify which customers were not TELUS PES customers in order to perform repairs and maintenance. Also, splitters would need to be installed in all central offices where TELUS

provided DSL-based service. The installation of splitters, either on the distribution frame or the digital subscriber line access multiplexers (DSLAM), would enable TELUS to split the data from the voice functionality on the loop in order to cross-connect the voice line to the CLEC's co-location equipment. TELUS submitted that there would be a need for inter-carrier agreements and processes for handling trouble with, and repair of, the DSL-based service, and corresponding changes would have to be made to TELUS's contractual liability limitations.

33. TELUS argued that, while any additional costs associated with providing retail DSL IS to a non-TELUS PES customer should ideally be recovered from such customers, it was not feasible to establish a higher rate for non-TELUS PES customers than the rate paid by TELUS's PES customers for retail DSL IS.
34. Bell Canada et al. objected to reimbursing Call-Net for a portion of the rates charged for unbundled loops which, according to Bell Canada et al., were already priced below the companies' costs. They stated that the costs which the Commission used as a foundation for the current unbundled loop rates did not include costs for any of the resources required to provide DSL-based services.
35. Bell Canada et al. stated that they were prepared to pursue arrangements to provide retail DSL IS to Call-Net's PES customers, provided that the following principles were agreed to at the outset:
 - a) any costs that Bell Canada et al. incurred to modify or convert existing systems to accommodate Call-Net's request would need to be recovered from Call-Net;
 - b) Call-Net would not be compensated for the use of leased loops;
 - c) Call-Net and Bell Canada et al. would establish the means of providing Bell Canada et al. timely information regarding Call-Net's or Call-Net's customer's equipment on leased local loops which might impact the operation of Bell Canada et al.'s DSL IS;
 - d) the confidentiality of any information held by Call-Net regarding Bell Canada et al.'s IS customers would have to be protected and not made available within Call-Net for the purpose of marketing competing IS; and
 - e) win-back restrictions would have to be established to ensure that once a Call-Net customer subscribed to a company's retail DSL IS, Call-Net was prohibited from winning back that customer to competing IS for a specified period of time, consistent with the win-back restrictions established by the Commission for Bell Canada et al.

Reply comments

36. Call-Net submitted that the ILECs had failed to justify denying retail DSL IS to CLEC PES customers that were otherwise eligible to receive the service.

37. Call-Net argued that the potential ability, if any, of competitors to build their own DSL network was irrelevant to the issue of whether or not the current ILEC practice violates subsection 27(2) of the Act and the Commission's bundling rules. With regard to the ILECs' submission that Call-Net is able to offer its own retail DSL IS to its PES customers, Call-Net went on to suggest that a number of factors had undermined the development of a competitive DSL market in Canada. In this respect, Call-Net argued that the ILECs' DSL access service available to competitive ISPs is priced higher than the ILECs' retail DSL IS rate, making it impossible for competitors to use the access service to compete in the retail DSL IS market. Call-Net also submitted that the ILECs had greatly oversimplified the challenges that new entrants faced in building a competitive DSL network. According to Call-Net, the ILECs' deployment of fibre electronics beyond the wire centres, at remotes, had a potentially devastating effect on competitive DSL service providers. Since it is uneconomical to co-locate DSLAMs at remotes, millions of potential retail DSL customers are beyond the reach of competitors. Also, where the competitor is co-located in the ILECs' wire centres, these investments are potentially stranded as the ILECs extend their networks through remotes. In addition, Call-Net argued that history showed that facilities-based DSL competition in Canada had been unsuccessful, littered as it was with competitors who had failed. Call-Net submitted that, contrary to the ILECs' suggestions, it takes far more than installing DSLAMs in co-location spaces to roll out a viable competitive DSL network and product. According to Call-Net, not only are co-location capital costs and expenses exorbitant, but other critical components remain under the exclusive control of the ILECs, including the local loop, local transport and back-haul services.
38. Call-Net disagreed with the ILECs' position that the Commission's past determinations regarding unjust discrimination and undue preference are irrelevant because they did not concern forborne services. In this regard, Call-Net stated that if the Commission had found that there was sufficient competition to discipline unjust discrimination in relation to the ILECs' retail DSL IS, the Commission would have completely and unconditionally forborne from subsection 27(2) of the Act.
39. Call-Net submitted that Bell Canada et al. were incorrect in arguing that the Commission decisions it cited were irrelevant to the consideration of its application. Call-Net stated that the principal issue in those decisions, as well as in its application, is not only the right of competitors to interconnect with the ILECs' services, but also the right of customers, regardless of whether they are end-customers or wholesale customers, not to be denied a service by the ILEC. Call-Net stated that it cited those cases as authority for the principle that refusing to provide an ILEC service to an otherwise eligible customer, unless that customer subscribes to another ILEC service, constitutes unjust discrimination and undue preference. Call-Net submitted that, pursuant to past Commission determinations, the ILECs are obliged under subsection 27(2) of the Act not to deny services to eligible customers.
40. Call-Net reiterated its position that in light of the ILECs' current practice, retail DSL IS and PES constitutes a bundle. It stated that TELUS's distinction between vertical and horizontal bundles is irrelevant since none of the Commission's bundling decisions contained this distinction. Call-Net argued that the ILECs' practice meets the criteria for bundling since it created an incentive for a customer to subscribe to the ILEC's PES rather than a CLEC's PES.

41. Call-Net argued that the ILECs had failed to justify that technical and operational reasons warranted denying retail DSL IS to a CLEC's PES customers.
42. Call-Net questioned Bell Canada et al.'s concerns about not having a record of the CLEC's PES customers' telephone numbers, as a basic reference for provisioning retail DSL IS service. Call-Net stated that since CLECs currently provide the ILECs with each CLEC PES customer's telephone number as part of a local service request, the ILECs are in possession of this information even before the service request is processed. In the case of customers who switch PES to a CLEC, but are unable to port their existing ILEC telephone number, any new number assigned by the CLEC would also be included in the local service request. Furthermore, Call-Net added that the simplest solution would be that the customer provide the ILEC with its telephone number when ordering the ILEC's retail DSL IS.
43. Call-Net submitted that there is no vital information about its telephone equipment and features that would impede the ability of the ILECs to provide retail DSL IS over the same local loop used by a CLEC to provide PES. In support of its position, Call-Net stated that the equipment used by the CLECs is "plain old telephone service" (POTS) equipment, no different than the POTS equipment used by the ILECs. Call-Net noted that all the DSL-related equipment would be provided by the ILEC, and the ILEC would be the repository of all relevant records and information on loop conditions. In Call-Net's view, this situation is no different from third party ISPs providing retail DSL IS over the same loop as one used for POTS by the ILECs.
44. Call-Net also disputed the ILECs' claim that there would be additional costs as a result of modifications to verify DSL capability of unbundled local loops. It submitted that where the customer already had ILEC-provisioned DSL IS before switching its PES to a CLEC, such loops would already be known to be DSL-capable. In situations where retail DSL IS had not yet been provisioned on a particular loop, the ILEC would need only to use the same processes it would use to pre-qualify the loop for its own PES customer.
45. Call-Net submitted that Bell Canada et al.'s concerns over the potential for reduced quality and increased costs of customer support provided to retail DSL IS customers once they migrated to a CLEC were misplaced. Call-Net argued that the provision of retail DSL IS to a CLEC's PES customer would not impair the ILECs' ability to troubleshoot DSL-related problems. Call-Net submitted, moreover, that the digital loop carrier equipment used by the CLECs to provide PES were designed and wired such that network outages or equipment failure did not result in loop disruptions or degradation of retail DSL IS. Furthermore, Call-Net argued that if DSL troubleshooting was not a problem in the ILECs' existing line sharing arrangements, then it should not be a problem with respect to retail DSL IS provisioned by the ILECs.
46. Call-Net questioned the ILECs concerns that developmental work might be necessary on their billing systems to enable billing for the provision of retail DSL IS to PES customers. It stated that the ILECs already bill separately for their DSL IS offerings. For example, pursuant to their current DSL access tariffs, the ILECs issue two separate bills when an ISP resells the ILEC's DSL service: a wholesale DSL bill to the ISP and a PES bill to the

end-customer. Call-Net also stated that the ILECs currently bill several consumer services on a non integrated basis. For example, long distance, local exchange services and dial-up IS are billed separately to customers who subscribe to them on a stand-alone basis.

47. Call-Net disagreed that the ILECs would be required to install splitters in all central offices since the ILECs already have splitters installed in wire centres where they currently provide retail DSL IS to their own PES customers. Call-Net submitted that, otherwise, the ILECs would be unable to provide DSL IS on the same loop as local voice service. Furthermore, the ILECs' tariffs stated that they had splitters installed in their wire centres to support the provisioning of retail DSL and POTS over the same loop by two different service providers.
48. Call-Net stated that the recovery of the costs of making the ILECs' retail DSL IS available to a CLEC's PES customers should be treated like any other business expense where the ILECs would recover such expenses from across their entire business. Call-Net noted that the ILECs had not suggested that these expenses were huge. It also noted that the ILECs would continue to derive revenue from the customer for DSL IS.
49. Call-Net submitted that the ILECs' proposal to recover from Call-Net any costs incurred to modify existing systems, plus a reasonable mark-up, was either based on confusion or was a misrepresentation of its application. Call-Net stated that the issue was the ILECs' obligation to comply with subsection 27(2) of the Act. Call-Net submitted that if it was found that the ILECs were not in compliance with the Act, any costs associated with bringing themselves into compliance were strictly to be borne by themselves, and not by competitors, such as Call-Net.
50. Call-Net reiterated its position that the ILECs should compensate the CLECs for providing retail DSL IS to the CLECs' PES customer. Call-Net argued that since CLECs lease these loops from the ILECs, the ILECs should compensate the CLECs when the ILEC uses the DSL portion of these loops.
51. In regard to Bell Canada et al.'s offer to negotiate arrangements with Call-Net, Call-Net indicated that it had little hope that any workable serving arrangements would be agreed to by Bell Canada et al. that would enable CLECs to compete effectively against Bell Canada et al. in the PES market.

Additional comments

52. IMCAIP stated that it was generally supportive of any regulatory action that would promote competition in the delivery of telecommunications services and increase opportunities for its members to both provide and access high-speed IS at competitive rates. IMCAIP considered that Call-Net's application was consistent with these objectives.
53. IMCAIP submitted that the ILECs' current practice that restricts the ability of ISPs to provide services to CLECs' PES customers has a negative impact on competition and is anti-competitive.

54. IMCAIP indicated that it foresaw a time when its members would wish to offer voice over Internet Protocol services together with resold DSL services, and was concerned that the current ILEC restrictions might hinder their ability to do so.

Commission's analysis and determinations

55. Call-Net's first argument was that the ILECs' current practice of providing retail DSL IS to residential customers who take PES from the ILECs, but not to residential customers who take PES from a CLEC, discriminates against CLECs and confers an undue preference upon themselves, contrary to subsection 27(2) to the Act.
56. The ILECs argued that since retail IS is a forborne service, they are not subject to subsection 27(2) in respect of how the service is provided. They argued that since the cases cited by Call-Net pertained to regulated services they were, for this and other reasons, irrelevant.
57. The Commission agrees with Call-Net that, although the services considered in the decisions cited were tariff-regulated services, whereas retail IS has been forborne from tariff regulation, the ILECs remain subject to subsection 27(2) of the Act in respect of retail IS.
58. The Commission also considers that the decisions cited by Call-Net are relevant. As in the present case, those decisions involved ILECs requiring customers, as a condition of obtaining an ILEC service, to obtain another service from the ILEC, rather than from a competitive service provider.
59. Subsections 27(2) and 27(4) of the Act read as follows:
- (2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.
- (4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.
60. The Commission's analysis of an allegation concerning a contravention of subsection 27(2) of the Act is conducted in two phases. The Commission first determines whether the conduct in question is discriminatory or preferential, and where it so determines, it then decides whether the discrimination is unjust or the preference is undue or unreasonable.
61. In this case, the Commission considers that the ILECs' refusal to provide retail DSL IS to existing or potential CLEC PES customers who would otherwise qualify for the service, and who would receive the service if they were ILEC PES customers, is discriminatory and preferential.

62. Subsection 27(4) of the Act provides that the onus of establishing that any discrimination is not unjust or that any preference is not undue or unreasonable is on the Canadian carrier that discriminates or gives the preference. In this connection, the Commission notes the submission of Bell Canada et al. and TELUS regarding operational and technical issues that would need to be addressed in making retail DSL IS available to CLECs' PES customers.
63. At the same time, the Commission notes Call-Net's submission that the CLECs currently provide the ILECs with each CLEC PES customer's telephone number as part of a local service request. The Commission also notes that in the case of a customer who switches PES to a CLEC, but is unable to port its existing ILEC telephone number, any new number assigned by the CLEC is also included in the local service request. Since the CLEC customer's telephone number is included in the local service request, or can be requested by the ILEC when the customer orders the ILEC's retail DSL IS, the Commission does not consider that significant modifications would be required to the ILECs' systems used to support retail DSL IS of a CLEC's PES customers.
64. The Commission notes that the ILEC is the repository of loop conditioning information and related records. Where the customer obtained retail DSL IS from the ILEC before switching to CLEC PES, the loop would already be DSL-capable. In cases where the customer applied to the ILEC for retail DSL IS after subscribing to a CLEC's PES, the ILEC would use the same processes to pre-qualify the loop as it would use if the customer were its own PES customer. The Commission does not consider that modifications to systems for verifying whether unbundled loops are DSL-capable would be required.
65. The Commission notes Call-Net's argument that digital loop carrier equipment used by the CLECs to provide PES were designed and wired such that network outages or equipment failures with respect to local voice services did not result in disruptions or degradations of retail DSL IS. The Commission is of the view that if DSL troubleshooting is not a problem in the ILECs' existing line sharing arrangements where competitive ISPs use the ILECs' DSL access service, then it should not be a problem with respect to the provisioning of retail DSL IS to CLEC customers. The Commission considers that the provision of retail DSL IS to CLEC PES customers should not impair the ILECs' ability to troubleshoot DSL-related problems or significantly increase costs associated with customer support. Furthermore, in the event that some additional processes may be required, the Commission considers that such processes can be readily worked out between the carriers.
66. The Commission notes that Bell Canada et al. did not identify particular concerns with respect to the types of modifications that may be required to their billing systems. They simply stated that issues could arise in relation to billing and that developmental work would likely be needed if Bell Canada et al. were to offer DSL IS independently from their PES. The Commission considers that modifications to the billing procedures to provide retail DSL IS to a CLEC's PES customer should not present a unique problem to the ILECs since the ILECs already bill separately for numerous services such as PES, toll and IS.

67. The Commission notes that the ILECs already have splitters installed in central offices where they currently provide retail DSL IS to their own PES customers or competitive ISPs. Otherwise they would not be able to provide DSL IS on the same loop as PES. The Commission considers that, therefore, the ILECs will not be required to install additional splitters in all central offices where DSL services are offered.
68. In light of the above, the Commission considers that the operational and technical reasons submitted by the ILECs do not justify the ILECs' refusal to supply retail DSL IS to the CLECs' residential PES customers, served by local loops leased from the ILECs, who would otherwise qualify for the service.
69. The Commission notes the ILECs' position that competition in the PES market is not being unduly impaired since Call-Net can pursue a number of options to provide its PES customers with retail DSL IS. The ILECs submitted that such options include co-locating DSL equipment at the ILECs' central offices and using the ILECs' DSL access tariffs. The Commission considers, however, that competitive DSL IS providers, such as Call-Net, face barriers to enter the DSL IS market as a result of co-location costs, transport costs, and the margins available when providing retail residential DSL IS. In addition, the ILECs' increasing deployment of fiber electronics at remotes makes it more difficult for competitors to expand their networks.
70. The Commission is mindful of the fact that as at the end of 2001, the incumbent local telephone companies held over 96% of total local lines and over 97% of total local revenues.¹ The Commission notes also that the incumbent local telephone companies were successful in attracting 924,000 DSL IS customers by year-end 2001.² Furthermore, the Commission notes that the marketing data filed by Call-Net demonstrates that a significant percentage of Call-Net's customers who cancelled the company's PES or who declined to switch to Call-Net's PES cited the unavailability of Bell Canada's retail DSL IS as a reason. In light of the above, and the barriers to the competitive provision of DSL IS, the Commission considers that the ILECs' refusal to supply retail DSL IS to a CLEC's PES customers makes it more difficult for CLECs to obtain and retain PES customers, thereby, impairing competitive entry into the PES market during this critical period in the transition to competition.
71. In light of the above, the Commission finds that the ILECs' refusal to provide retail DSL IS and retail DSL Lite IS to a CLEC's PES customers served by local loops leased from the ILECs, who would otherwise qualify for the service, constitutes unjust discrimination against CLECs and undue preference toward the ILECs, contrary to subsection 27(2) of the Act.
72. The Commission also finds that the ILEC tariff provisions that specify that their DSL access services are only available to competitive service providers in association with an end-customer's ILEC-provided residential PES, constitute unjust discrimination against CLECs and undue preference toward the ILECs, contrary to subsection 27(2) of the Act.

¹ *Report to the Governor in Council : Status of Competition in Canadian Telecommunications Markets*, December 2002 (the second GIC Report), page i.

² The second GIC Report, page 50.

73. Call-Net's second claim is that the ILECs' practice of limiting retail DSL IS only to their respective PES customers, constitutes a bundle since the tied provision of retail DSL IS and PES creates an incentive for a customer to subscribe to the ILECs' PES. The Commission also notes the ILECs' position that their provisioning of PES and retail DSL IS does not constitute a bundle. In the ILECs' view, they do not offer retail DSL IS and PES under a rate structure. According to the ILECs, the price of retail DSL IS is not dependent or conditional upon the price of PES, and they do not offer any discount, rebate or other inducement to persuade the customer to purchase both services.
74. The bundling rules currently applicable to the ILECs were established in a number of decisions, including Decision 94-19, Decision 97-8, Decision 98-4, Decision 97-20, and *Bundling framework developed for customer-specific arrangements*, Order CRTC 2000-425, 19 May 2000 (Order 2000-425). The Commission summarized the bundling rules in Decision 98-4 as follows:
- ... the Commission in Decision 94-19 stated that "the term bundling generally refers to a situation where one rate covers a number of service elements", and that bundling includes "situations where there may be separate rate elements for each service element, but a number of service elements are aggregated for purposes of applying volume discounts, with the result that the discount available is greater than it would be were the service elements not aggregated". In Decision 97-19 and Decision 97-20, the Commission also described bundling as the inclusion of different services or service elements under a rate structure. The Commission noted that this rate structure may be a single rate, a set of rates for various service elements, and/or rates for one or more service elements which are dependent on the usage of other services.
75. The Commission generally considers that bundling exists where a customer derives a financial benefit from acquiring more than one service from an ILEC that is greater than the benefit that would be available to the customer if the services were bought separately from the ILEC. The Commission does not consider that the ILECs' current practice with respect to the provision of retail DSL IS and PES constitutes a bundle. Although DSL IS is provided only to ILEC PES customers, retail DSL IS and PES are not being offered under a single rate structure, and no financial benefits are available to customers for subscribing to both services. The Commission, therefore, finds that the provision of retail DSL IS and PES by the ILECs did not require tariff approval.

Conclusion

76. In light of the above determinations, the Commission **directs** Bell Canada, Aliant Telecom, SaskTel and TELUS, upon request, to provide their respective retail DSL IS to any residential CLEC PES customer, who is served by a local loop leased from any of them and who would otherwise qualify for those services. The Commission further **directs** Bell Canada, Aliant Telecom, SaskTel and TELUS to issue, forthwith, amended DSL

access line tariffs removing the restriction that their DSL access services are only available to competitive service providers in association with an end-customer's ILEC-provided residential PES.

77. In regard to Bell Canada et al.'s request to recover from Call-Net the costs involved in modifying the ILECs' existing operational and technical processes and systems to implement the relief requested by Call-Net, the Commission notes that the ILECs did not submit any estimates of the magnitude of such costs. The Commission considers that in light of the relatively minor modifications required to the ILECs' operational and technical processes and systems to provide retail DSL IS to a CLEC's PES customers, the costs to do so would not be substantial. The Commission also notes that the ILECs will be deriving revenue from the provision of retail DSL IS over local loops, which would be leased and paid for by the CLECs. The Commission considers, moreover, that it is appropriate for the ILECs to bear the costs associated with bringing themselves into compliance with subsection 27(2) of the Act.
78. In light of the above, the Commission **denies** Bell Canada et al.'s request that Call-Net compensate the ILECs for any costs that would be incurred as a result of modifications to administrative processes and systems that would be required to implement the relief requested by Call-Net.
79. In regard to Call-Net's request that the ILECs compensate the CLECs for the portion of the local loop that they would use to provision retail DSL IS, the Commission notes that the rates CLECs pay ILECs for unbundled local loops are based on the costs of providing only voice telephony services, and not retail DSL IS. The costs which the Commission used as a foundation for the current unbundled loop rates did not include costs for any of the resources required to provide retail DSL IS. Accordingly, the full cost of the local loop is allocated to local telephony services, and competitors that lease the loop are in effect able to use the portion of the loop on which DSL is provisioned for free. Accordingly, the Commission does not consider it appropriate that the ILECs be required to compensate the CLECs for a portion of the local loop that would be used to provision retail DSL IS to the CLECs' PES customers.
80. In light of the above, the Commission **denies** Call-Net's request that Bell Canada et al. and TELUS compensate the CLECs for the portion of the local loop that the ILECs would use to provision retail DSL IS to a CLEC's PES customers served by local loops leased from Bell Canada et al. and TELUS.
81. The Commission notes that MTS Communications Inc. (MTS) was not a party to this proceeding. The Commission considers, on a preliminary basis, that the determinations set out in this decision should apply to MTS. Accordingly, MTS may show cause within 30 days of the date of this decision as to why it should not also be subject to the determinations set out in this decision.

Secretary General

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