



Telecom Decision CRTC 2004-57

Ottawa, 31 August 2004

NorthernTel, Limited Partnership and O.N.Telcom – Forbearance from regulation of wide area networking services

Reference: 8640-N51-200403452

In this Decision, the Commission forbears, with some conditions, from the exercise of its powers and the performance of its duties pursuant to sections 24 (in part), 25, 29 and 31 and subsections 27(1), 27(5) and 27(6) of the Telecommunications Act in relation to the provision of current and future wide area networking (WAN) services provided by NorthernTel, Limited Partnership (NorthernTel) and O.N.Telcom. The Commission directs NorthernTel and O.N.Telcom to each file tariffs for the underlying access and transport components required to provide Ethernet-based WAN services, to the extent that they are currently providing Ethernet-based WAN services, within 45 days of the date of this Decision, or, if they are not currently providing Ethernet-based WAN services, to file such tariffs prior to providing Ethernet-based WAN services.

Introduction

1. The Commission received an application from NorthernTel, Limited Partnership (NorthernTel), dated 8 April 2004, filed under Part VII of the *CRTC Telecommunications Rules of Procedure* and pursuant to section 34 of the *Telecommunications Act* (the Act). NorthernTel requested that the Commission refrain from exercising any power or performing any duty under sections 24, 25, 27, 29 and 31 of the Act in relation to NorthernTel's current and future wide area networking (WAN) services in its operating territory.

Process

2. On 28 April 2004, O.N.Telcom submitted its comments on NorthernTel's application. NorthernTel responded to O.N.Telcom's (now known as Ontera) comments on 7 May 2004.
3. On 10 May 2004, Allstream Corp. (Allstream), now known as MTS Allstream Inc., submitted its comments. Allstream also noted that NorthernTel apparently had not served copies of its application on any other party. As part of its comments, Allstream further requested that certain information, which NorthernTel filed under a claim of confidence, be disclosed.
4. On 19 May 2004, in a letter to NorthernTel, Commission staff requested that NorthernTel serve copies of its application, along with the 19 May 2004 Commission staff letter, to WAN service providers in the company's operating territory. In the same letter, Commission staff asked interested parties to submit their comments by 9 June 2004, and NorthernTel to submit reply comments by 16 June 2004. NorthernTel served copies on interested parties, along with the Commission's 19 May 2004 letter, on 26 May 2004.

5. On 9 June 2004, Allstream and O.N.Telcom submitted further comments on the application. On 15 June 2004, NorthernTel submitted its final reply comments. As part of its comments, NorthernTel responded to Allstream's request for disclosure.
6. On 29 June 2004, Commission staff issued a letter disposing of Allstream's disclosure request.

Background

7. The Commission's power to forbear from regulating a telecommunications service or class of services provided by a Canadian carrier originates from section 34 of the Act, which reads as follows:

34. (1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

(2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services.

(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services.

(4) The Commission shall declare that sections 24, 25, 27, 29 and 31 do not apply to a Canadian carrier to the extent that those sections are inconsistent with a determination of the Commission under this section.

8. The Canadian telecommunications policy objectives set out in section 7 of the Act include the following:

...

c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

h) to respond to the economic and social requirements of users of telecommunications services.

9. The Commission established a framework for considering whether or not to forbear in *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19). In that Decision, the Commission noted that the first step in assessing whether it is appropriate to forbear involves defining the relevant market. The relevant market is essentially the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase. The Commission also established a number of criteria to be examined when determining whether a market was competitive. These criteria include the market shares of the dominant and competing firms, demand and supply conditions, the likelihood of entry into the market, barriers to entry into the market and evidence of rivalrous behaviour.
10. In *Forbearance granted for telcos' wide area network services*, Order CRTC 2000-553, 16 June 2000 (Order 2000-553), the Commission granted forbearance from regulation of current and future WAN services provided by BC TEL, TELUS Communications (Edmonton) Inc. (both companies are now part of TELUS Communications Inc. (TCI)), Bell Canada, MTS Communications Inc., Island Telecom Inc., Maritime Tel & Tel Limited, NBTel Inc. and NewTel Communications Inc. (the last four companies are now Aliant Telecom Inc.) and TCI (collectively the former Stentor members).
11. In that Order, the Commission described WAN services and further stated that forborne WAN services did not include Asynchronous Transfer Mode (ATM)-based carrier interconnection services, or ATM services which provide public switched telephone network (PSTN) interconnection or call control capabilities equivalent to interconnection with the PSTN. Further, the Commission indicated that the WAN access is a value-added enhanced service (either ATM, Ethernet or Token Ring protocols) available to WAN customers, and is part of WAN services.
12. Further, the Commission, in Order 2000-553, found that, in the operating territory of the former Stentor members, the WAN services market was sufficiently competitive to protect the interests of users, in that there were numerous competitive suppliers, low barriers to entry, aggressive pricing and knowledgeable customers that could readily switch WAN service providers. Further, competitive WAN service providers could obtain the essential underlying access and transport services from alternate facilities-based service providers or from the incumbent telephone companies at tariffed rates and non-discriminatory terms where there was no alternative source of supply. The Commission also considered, in Order 2000-553, that the former Stentor members had no incentives to engage in anti-competitive below-cost pricing, because they would lose market share if they tried to raise prices.
13. Accordingly, in Order 2000-553, the Commission forbore from the exercise of its powers under sections 24 (in part) and 25, subsections 27(1), 27(5) and 27(6), and sections 29 and 31 of the Act with respect to the provision of WAN services by the former Stentor members. The Commission retained its powers under section 24 of the Act to ensure that the conditions regarding the disclosure of confidential customer information to third parties continued to apply, and to impose conditions as needed in the future. The Commission also retained its

powers under subsections 27(2), 27(3) and 27(4) of the Act to ensure that the former Stentor members do not unjustly discriminate against other service providers or customers, or confer an undue or unreasonable preference with respect to the provision of WAN services.

14. In *Northern Telephone Limited*¹ and *O.N. Tel*²: *forbearance from IXPL and ATM services*, Order CRTC 2000-631, 7 July 2000 (Order 2000-631), the Commission, in granting forbearance for interexchange private line (IXPL) services for NorthernTel and O.N.Telcom, noted that if forbearance from regulating the provision of IXPL services was only granted to NorthernTel on certain routes, it would be unreasonable to regulate O.N.Telcom on those same routes. The Commission further considered that in light of the unique circumstances in the operating territories of these companies, that on any given route where two suppliers were providing DS-3 or greater bandwidth IXPL services, both companies should be forborne. The Commission noted that this approach was consistent with sections 34(1) and 34(2) of the Act.
15. In *Forbearance granted to wide area networking services provided by SaskTel*, Order CRTC 2001-118, 6 February 2001, the Commission forbore from regulating the WAN services provided by Saskatchewan Telecommunications (SaskTel) to the same extent as it did in Order 2000-553.
16. In *Provision of Ethernet access service and OC-3 digital network access service*, Telecom Order CRTC 2002-456, 10 December 2002, for TCI, the Commission approved, on an interim basis, the introduction of Ethernet access service.
17. In *Ethernet services*, Telecom Decision CRTC 2004-5, 27 January 2004 (Decision 2004-5), the Commission required TCI to provide, on an interim basis, an Ethernet central office (CO) connecting link service and an Ethernet interface service for competitor use. Also in Decision 2004-5, the Commission approved, on an interim basis, the introduction by Bell Canada of Ethernet access service and Ethernet CO connecting link service that would be available to competitors. In Decision 2004-5, the Commission also directed Bell Canada to provide an Ethernet interface service for competitor use.
18. In *Application by TELUS Québec for forbearance from regulation of wide area networking services*, Telecom Decision CRTC 2004-7, 5 February 2004 (Decision 2004-7), the Commission forbore from regulating the WAN services provided by TELUS Communications (Québec) Inc.³ (TELUS Québec) to the same extent as it did in Order 2000-553.

¹ In *NorthernTel Limited Partnership*, Telecom Order CRTC 2003-73, 13 February 2003, the Commission approved an application from Northern Telephone Limited Partnership to change its name to NorthernTel Limited Partnership.

² In *Corporate name change*, Telecom Order CRTC 2004-291, 27 August 2004, the Commission approved O.N.Telcom's request to change its corporate name to Ontera.

³ The Commission has been advised that, effective 1 July 2004, pursuant to an asset purchase agreement, deed of transfer and ancillary assignments and agreements, TELUS Québec transferred or assigned to TCI all or substantially all of TELUS Québec's assets and liabilities.

NorthernTel's application

19. NorthernTel argued, with supporting documentation,⁴ that there was evidence of sufficient competition in the WAN services market for the Commission to forbear from the exercise of its powers and the performance of its duties under sections 24, 25, 27, 29 and 31 of the Act in respect to the company's current and future provision of WAN services, in its operating territory. NorthernTel noted that Sprint Canada Inc., O.N.Telcom, Allstream, TCI, Persona Communications Inc. (Persona), and Greater Sudbury Hydro Plus Inc. were offering or capable of offering WAN services throughout NorthernTel's region. NorthernTel further alleged that a portion of the potential market for WAN services had chosen to self-supply utilizing wireless technologies or their own fibre facilities as an alternative to purchasing WAN services from NorthernTel or its competitors. NorthernTel cited numerous equipment vendors who supplied WAN equipment directly to customers who chose to create their own private WAN networks.
20. NorthernTel, in its submission, noted that WAN services competition had resulted in market share losses broadly across NorthernTel territory and not just in the larger exchanges. NorthernTel specified that, among other places, it had lost customers in Timmins, New Liskeard, Kirkland Lake and Kapuskasing.
21. NorthernTel submitted that although it was difficult to compare prices for WAN services offered by various competitors directly and conveniently, its experience indicated that competitors offered at least as wide a range of WAN services, features and capabilities as NorthernTel itself, on very competitive terms and that the price of WAN services had been falling.
22. NorthernTel further submitted that there were no significant barriers to entry for competitors as the underlying digital services and support structures necessary to offer WAN services, were available at non-discriminatory terms through its Carrier Services Group. NorthernTel also noted that alternate service providers such as 360networks, Persona, Hydro One and O.N.Telcom were a source of leased facilities and that entrants also built their own facilities.
23. NorthernTel stated that it did not believe there were any significant barriers that prevented customers from switching WAN service providers, as all WAN services use industry standard network interfaces. Further, NorthernTel stated that the only significant cost associated with changing WAN service providers was the installation charge associated with service set-up. NorthernTel stated that it did not believe that the cancellation penalties for contracted customers were severe enough to provide a deterrent to competition.

O.N.Telcom's comments

24. O.N.Telcom agreed with NorthernTel's characterization of the WAN services market within NorthernTel's territory as competitive and was in support of NorthernTel's request to extend the forbearance regime, which was in place throughout the rest of the country, to the territory O.N.Telcom shares with NorthernTel.

⁴ Exhibit 1 of NorthernTel's submission was filed in confidence. It included the name of five WAN service customers which NorthernTel had lost to other competitive WAN service providers.

25. O.N.Telcom took issue with the fact that NorthernTel's application requested that the Commission grant forbearance to NorthernTel alone. O.N.Telcom noted the Commission's consideration, in Order 2000-631, of the unique circumstances that existed in the operating territories of NorthernTel and O.N.Telcom, in granting IXPL forbearance to both NorthernTel and O.N.Telcom. As a consequence, O.N.Telcom was of the view that the Commission should grant forbearance from regulation of WAN services to O.N.Telcom and NorthernTel on the same terms and conditions, and at the same time.
26. O.N.Telcom submitted that the conditions applicable to granting forbearance from regulation for WAN services, in NorthernTel's territory, should not be limited to the terms and conditions of Decision 2000-553, but should only be granted upon the premise of all other Commission determinations, including but not limited to those contained in Decision 2004-5 that have an impact on the WAN services market elsewhere in the country.
27. O.N.Telcom acknowledged that while itself and NorthernTel were both incumbents, they also compete directly with each other, and that NorthernTel was in control of facilities required to provide the access and link services required by competitors throughout the majority of NorthernTel's territory. Accordingly, O.N.Telcom requested that the Commission require both NorthernTel and O.N.Telcom to make the Ethernet services approved in Decision 2004-5 available, and to file interim tariffs for these services expeditiously.

Allstream's comments

28. Allstream submitted that NorthernTel's application did not provide detailed information regarding the services that were the subject of its forbearance request, nor did the application provide a list and description of the specific tariffs that NorthernTel proposed to withdraw if its request for forbearance was granted. Allstream argued that the failure by NorthernTel in its application and O.N.Telcom in its comments requesting similar forbearance for itself, to provide detailed information on their WAN services, made it impossible for interested parties to determine what underlying network components and services were being used by these companies to provision their WAN services. Allstream further alleged that there was considerable confusion as to how Order 2000-553 should be interpreted and what actually constituted a forborne WAN service.
29. Allstream expressed concern about NorthernTel's failure to provide information regarding competitive WAN service supply in its territory. Allstream challenged NorthernTel's statement, in its application, that Allstream provided competitive WAN services in NorthernTel's serving area. Allstream submitted that it did not offer Ethernet-based WAN services in the territories served by NorthernTel or O.N.Telcom. Further, Allstream alleged that NorthernTel did not furnish any evidence that competitors were actually offering WAN services in its specific operating territory. Allstream also argued that customers provisioning their own private WAN services should not constitute a loss of revenue or market share for NorthernTel, as these customers continued to rely on NorthernTel for underlying network facilities and services that are required for the provisioning of such WAN services.

30. Allstream further noted that neither NorthernTel nor O.N.Telcom had filed general tariffs for the underlying network components and services that were required by competitors to provision their own WAN services. Allstream cited (1) Ethernet access facilities, (2) Ethernet CO connecting links, (3) Ethernet Interface Service, (4) permanent virtual circuit transport, and (5) carrier-to-carrier interface as examples of such underlying services.
31. Allstream further noted that for legacy WAN services which were based on Digital Network Access (DNA) technology, neither NorthernTel nor O.N.Telcom offer Competitor Digital Network Access (CDNA) service, thereby requiring competitors to use the higher priced DNA services, which were the only services that have been tariffed by NorthernTel and O.N.Telcom.
32. Allstream asserted that the Commission should deny NorthernTel's and O.N.Telcom's request for WAN forbearance in the absence of sufficient information and approved tariffs for underlying Ethernet and CDNA access services.

O.N.Telcom's reply comments

33. In response to the allegation made by Allstream, that neither NorthernTel nor O.N.Telcom had provided sufficient evidence regarding the existence of competition in the WAN services market in their territories, O.N.Telcom noted, that NorthernTel's territory was a non-vertically integrated territory within which NorthernTel and O.N.Telcom competed in several market segments. O.N.Telcom further noted that both NorthernTel and O.N.Telcom readily acknowledged that they regularly competed for the limited opportunities to provide WAN services to customers.
34. In response to the allegation in Allstream's comments, that it would be discriminatory to allow forbearance prior to the approval of CDNA tariffs for NorthernTel and O.N.Telcom, O.N.Telcom noted that Order 2000-553 granted WAN forbearance to Canada's largest regulated telephone companies prior to the introduction of CDNA tariffs, which were only introduced pursuant to *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002.

NorthernTel's reply comments

35. NorthernTel stated that it did not understand why it was necessary for Allstream to know the exact list of the WAN services provided to NorthernTel's clients, and noted that NorthernTel had simply asked for the same WAN forbearance already extended to most Canadian carriers.
36. In response to Allstream's statement that it was impossible to determine from NorthernTel's application which network components and services are available from NorthernTel, NorthernTel provided a table with details of the facilities and services available from NorthernTel. NorthernTel noted that these facilities were available to any competitor at the approved General Tariff rates or through forborne services and were provided without prejudice or any undue preference.

37. In response to Allstream's allegation that NorthernTel had not furnished evidence that service providers actually offer competitive WAN services within NorthernTel's operating territory, NorthernTel clarified that in its application, it was demonstrating that major carriers have large capacity fibre routes across Canada, and that they could easily extend WAN services into NorthernTel territory. NorthernTel further noted that O.N.Telcom, who had partnerships with some of the major carriers, did not deny the potential or the existence of WAN services being provided to customers in northeastern Ontario.
38. In response to O.N.Telcom's comment that Decision 2004-5 should be imposed on O.N.Telcom and NorthernTel, NorthernTel noted that the Commission did not extend Decision 2004-5 to TELUS Québec, which was granted WAN forbearance in Decision 2004-7. NorthernTel also noted that in Decision 2004-7, the Commission did not require TELUS Québec to provide CDNA tariffs prior to granting forbearance.

Commission analysis and determination

39. In Order 2000-553, the Commission provided the following service definition:

WAN services are purchased mainly by medium- and large-sized businesses, governments and associations. WAN customers typically possess large internal information processing infrastructures, based on Ethernet, token ring or asynchronous transfer mode (ATM) protocols, usually at several locations. WAN services link the customer's local area networks (LANs) at the various locations. Often WAN services are used as replacements for older dedicated interexchange and intra-exchange private lines, such as Megaplan, and traditional frame relay services, such as Hyperstream.

WAN services consist of interfaces to customer-provided equipment at the customer's various locations, along with the ability to exchange information among locations. WAN services include the following elements:

- any of the service provider's network hardware and software which may be located on the customer's premises in order to provide Ethernet, token ring or ATM protocols at the interface to the customer's network;
- access transport (i.e. transport of packets and/or cells between the interface at the customer's premises and the service provider's network); and
- transport and routing or switching of packets or cells within the service provider's network for the purposes of transmitting data among the access points of a single customer.

40. As noted earlier in this Decision, the Commission further clarified in Order 2000-553 that forborne WAN services did not include ATM-based carrier interconnection services, or ATM services which provided PSTN interconnection or call control capabilities equivalent to interconnection with the PSTN.
41. Contrary to Allstream's assertion that there is considerable confusion as to how Order 2000-553 should be interpreted and what actually constituted a forborne WAN service, the Commission considers that the definition of services included in Order 2000-553 is sufficiently precise and is applicable for this forbearance application. The Commission notes that the services for which NorthernTel is seeking forbearance for are the same WAN services described in Order 2000-553.
42. In Order 2000-553, the Commission determined that the market for WAN services was national or regional in scope (rather than route-specific as in the case of private line services). In that Order, the Commission observed that, although in certain situations WAN services may be an alternative to private lines, WAN services were considerably different than private line services. Unlike private lines, WAN services were neither priced nor offered on a route-specific basis. There were also technological differences in that private line services involve dedicated lines on specific routes for the physical transport of voice and data traffic between sites, whereas WAN services involve networking amongst interconnected sites on lines that were not dedicated.
43. In Decision 94-19, the Commission established a number of criteria to be examined when determining whether a market was competitive. These criteria included the market shares of the dominant and competing firms, demand and supply conditions, the likelihood of entry into the market, barriers to entry into the market and evidence of rivalrous behaviour.
44. In Order 2000-553, the Commission found that the WAN service market was competitive, that entry was relatively easy and that the applicants have no incentives to engage in anti-competitive below-cost pricing, because they would lose market share if they tried to raise prices.
45. The Commission notes that both national and regional competitive WAN service providers compete in NorthernTel's territory. With respect to demand and supply conditions in NorthernTel territory, the Commission notes O.N.Telcom's submission that it readily competes with NorthernTel for the limited opportunities, within NorthernTel's territory, to provide WAN services to customers. The Commission further notes that, as in the case of Order 2000-553, competitive WAN service providers may obtain essential access and transport services from alternate facilities-based access service providers, or from NorthernTel, at tariffed rates and non-discriminatory terms where there is no alternate source of supply. Accordingly, the Commission is of the view that the conditions for forbearance, as noted in Decision 94-19, exist in NorthernTel's territory with respect to WAN services.
46. The Commission notes that while subsection 34(1) of the Act provides that the Commission may refrain from regulating a service or class of services when it finds that such forbearance is consistent with the Canadian telecommunications policy objectives, subsection 34(2) of the Act requires it to forbear where it finds that the market for the service in question is, or will be,

subject to sufficient competition to protect the interests of users. The Commission also notes, however, that subsection 34(3) of the Act provides that the Commission shall not forbear if it finds that to do so would be likely to impair unduly the establishment or continuance of a competitive market for that service.

47. Accordingly, the Commission finds, pursuant to subsection 34(2) of the Act, as a question of fact, that the provision, in NorthernTel's territory, of WAN services is sufficiently competitive to protect the interests of users so as to warrant forbearance to the extent set out in this Decision.
48. The Commission finds, pursuant to subsection 34(1) of the Act, as a question of fact, that refraining from the exercise of its powers and the performance of its duties, to the extent set out in this Decision, with respect to WAN services in NorthernTel's territory, is consistent with the Canadian telecommunications policy objectives of the Act.
49. The Commission also finds, pursuant to subsection 34(3) of the Act, as a question of fact, that refraining from regulating WAN services to the extent set out in this Decision is unlikely to impair unduly the continuance of a competitive market for that class of services.
50. In Order 2000-553, the Commission noted that it would retain sufficient powers to ensure that the telephone companies' competitors could obtain – at non-discriminatory rates, terms and conditions – access and transport facilities they require to compete in the provision of WAN services. Accordingly, in Decision 2004-5, the Commission noted that the access components of DNA and interim CDNA services did not represent appropriate substitutes for Ethernet access.
51. The Commission notes Allstream's position that the failure by NorthernTel and O.N.Telcom to provide detailed information on their WAN services made it impossible for interested parties to determine what underlying network components and services were being used by these companies to provision their WAN services. The Commission is of the view that it is not necessary for competitors to know provisioning details of NorthernTel's WAN services in order to compete. The Commission, however, notes Allstream's statement that it does not provide Ethernet-based WAN services in the territory served by NorthernTel, and Allstream's assertion that NorthernTel was offering WAN services that made use of underlying Ethernet access and transport facilities for which NorthernTel had not filed general tariffs.
52. The Commission notes O.N.Telcom's comments that the conditions applicable to forbearance of the WAN services market should not be limited to the terms and conditions of Decision 2000-553. The Commission further notes O.N.Telcom's concern that NorthernTel is in control of the facilities required to provide the access and link services required by competitors throughout the majority of NorthernTel's territory. Therefore, as directed in Decision 2004-5 for TCI and Bell Canada, the Commission considers that there is a requirement for NorthernTel to make available to competitors, essential access and transport elements it uses for the provisioning of its own Ethernet-based WAN services.
53. Accordingly, the Commission considers that NorthernTel should file tariffs for the underlying access and transport components used in the provision of Ethernet-based WAN services.

54. The Commission notes Allstream's argument that NorthernTel's failure to provide CDNA service is discriminatory. The Commission considers that the DNA tariffs available from NorthernTel fully meet the requirement, described in Order 2000-553, that underlying access and transport facilities are available at tariffed rates and under non-discriminatory terms and conditions to competitors where no other alternate source of supply exists.
55. The Commission notes O.N.Telcom's submission that in Order 2000-631, the Commission acknowledged the unique circumstances that existed in the operating territories of NorthernTel and O.N.Telcom in granting IXPL forbearance to both NorthernTel and O.N.Telcom. As a consequence, O.N.Telcom was of the view that the Commission should grant WAN services forbearance to O.N.Telcom and NorthernTel on the same terms and conditions and at the same time.
56. The Commission considers that the unique circumstances that the Commission referenced in Order 2000-631 continue to exist in NorthernTel's territory. The Commission notes that, with respect to WAN services, none of the parties commented on O.N.Telcom's request that the Commission provide it with the same regulatory treatment as NorthernTel. Therefore, the Commission is of the view that O.N.Telcom should be granted WAN service forbearance at the same time as NorthernTel, with the same conditions.
57. Accordingly, the Commission considers that O.N.Telcom should file tariffs for the underlying access and transport components used in the provision of Ethernet-based WAN services.
58. In light of these findings, the Commission must determine the extent to which it is appropriate to refrain, in whole or in part, and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 of the Act.

Section 24

59. Section 24 of the Act provides:
 24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.
60. The Commission considers that it is appropriate to retain its powers pursuant to section 24 of the Act to ensure that the confidentiality of customer information continues to be protected. As NorthernTel's Terms of Service, which ensure the confidentiality of customer information for regulated services, do not apply to forborne services, the Commission directs NorthernTel and O.N.Telcom, as a condition of providing WAN services, to abide by the existing conditions regarding disclosure of confidential customer information to third parties with respect to the services forborne from regulation in this Decision. The Commission also directs NorthernTel and O.N.Telcom, on a going forward basis, as a condition of providing WAN services, to incorporate, where appropriate, the existing conditions regarding disclosure of confidential customer information to third parties into all contracts and any other arrangements for services forborne from regulation in this Decision.

61. Finally, the Commission considers that it is also appropriate to retain sufficient powers under section 24 of the Act to specify possible future conditions relating to the provision of WAN services.

Section 25

62. Section 25 of the Act provides:

25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

(2) A joint tariff agreed on by two or more Canadian carriers may be filed by any of the carriers with an attestation of the agreement of the other carriers.

(3) A tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by the Commission and shall include any information required by the Commission to be included.

(4) Notwithstanding subsection (1), the Commission may ratify the charging of a rate by a Canadian carrier otherwise than in accordance with a tariff approved by the Commission if the Commission is satisfied that the rate

(a) was charged because of an error or other circumstance that warrants the ratification; or

(b) was imposed in conformity with the laws of a province before the operations of the carrier were regulated under any Act of Parliament.

63. Based on the record of this proceeding, the Commission considers it appropriate that NorthernTel and O.N.Telcom no longer be required to file tariffs and obtain the Commission's approval in respect of the services forborne from in this Decision. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 25 of the Act with respect to WAN services provided by either NorthernTel or O.N.Telcom.

Section 27

64. Section 27 of the Act provides:

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

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

(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.

(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.

(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

(6) Notwithstanding subsections (1) and (2), a Canadian carrier may provide telecommunications services at no charge or at a reduced rate

(a) to the carrier's directors, officers, employees or former employees; or

(b) with the approval of the Commission, to any charitable organization or disadvantaged person or other person.

65. The Commission considers that there is no need to apply the regulatory standards for "just and reasonable" rates to rates that are set in a competitive market. Accordingly, the Commission will refrain from the exercise of its powers and the performance of its duties under subsection 27(1) of the Act in respect to the services forborne from in this Decision. The Commission also forbears from the exercise of its powers under subsection 27(5) of the Act since it relates to subsection 27(1) of the Act with respect to which forbearance is granted. In addition, the Commission forbears from the exercise of its powers and the exercise of its duties under subsection 27(6) of the Act in respect to WAN services since it does not wish to limit the pricing of the services forborne from regulation.
66. However, in view of the dominant position of NorthernTel and O.N.Telcom for access and transport services and facilities in the operating territory of NorthernTel, the Commission considers it necessary to retain its powers under subsections 27(2) and 27(4) of the Act in order to ensure that NorthernTel or O.N.Telcom do not unjustly discriminate against other service providers or customers, or confer an undue or unreasonable preference with respect to the provision of WAN services forborne from regulation in this Decision.
67. The Commission also considers it necessary to retain its powers under subsection 27(3) of the Act with respect to compliance with powers and duties not forborne from in this Decision.

Section 29

68. Section 29 of the Act provides:

29. No Canadian carrier shall, without the prior approval of the Commission, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting

- (a) the interchange of telecommunications by means of their telecommunications facilities;
- (b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or
- (c) the apportionment of rates or revenues between the carriers.

69. The Commission considers it appropriate that neither NorthernTel nor O.N.Telcom be required to obtain the Commission's approval to enter into agreements with other telecommunications common carriers regarding WAN services forborne from regulation in this Decision. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 29 of the Act with respect to services forborne from regulation in this Decision.

70. The Commission notes that the services forborne in this Decision do not include ATM-based carrier interconnection services, or ATM services which provide PSTN interconnection or call control capabilities equivalent to interconnection with the PSTN, therefore NorthernTel and O.N.Telcom are still required to obtain the Commission's approval pursuant to section 29 of the Act with respect to these services.

Section 31

71. Section 31 of the Act provides:

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

72. The Commission considers it appropriate that NorthernTel and O.N.Telcom be able to limit their liability in respect of WAN services in the same way as may an unregulated service provider. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 31 of the Act with respect to services the Commission forbore from regulating in this Decision.

Declaration pursuant to subsection 34(4) of the Act

73. In light of the above, the Commission declares, pursuant to subsection 34(4) of the Act, that effective two weeks from the date of this Decision, sections 24, 25, 27, 29 and 31 of the Act do not apply to NorthernTel or O.N.Telcom current and future WAN services, except with respect to:

- conditions pursuant to section 24 of the Act set out in this Decision with respect to the confidentiality of customer information;
- any future condition that the Commission may impose, pursuant to section 24 of the Act, with respect to WAN services;
- the Commission's powers under subsections 27(2) and (4) of the Act with respect to unjust discrimination and undue preference in respect to the provision of WAN services; and
- the Commission's powers under subsection 27(3) of the Act with respect to compliance with powers and duties not forborne from in this Decision.

Tariff filings

74. The Commission directs NorthernTel and O.N.Telcom to issue forthwith revised tariff pages, effective two weeks from the date of this Decision, deleting the existing tariff provisions relating to WAN services.
75. In addition, NorthernTel and O.N.Telcom are directed to file, for the Commission's approval, tariffs for the underlying access and transport components used in the provision of Ethernet-based WAN services as follows:
 - i) to the extent that the company is offering Ethernet-based WAN services, tariffs are to be filed within 45 days of the date of this Decision; or
 - ii) to the extent that the company is not currently offering Ethernet-based WAN services, tariffs are to be filed prior to providing such services.

Secretary General

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