



## Telecom Decision CRTC 2004-84

Ottawa, 21 December 2004

### Prince Rupert City Telephones – Cellular service forbearance

Reference: Tariff Notice 80

*In this Decision, the Commission forbears, with some conditions, from regulating cellular services provided by Prince Rupert City Telephones.*

1. The Commission received an application by Prince Rupert City Telephones (CityTel), dated 9 July 2004, to revise General Tariff, items 1 to 13 of section 12, CityTel Mobility Cellular Service.
2. Specifically, CityTel applied to the Commission for forbearance from regulation of its cellular service based on information in *Forbearance from Regulation of Mobile Wireless Services Provided by Municipally Owned Telephone Companies*, Telecom Decision CRTC 98-19, 9 October 1998 (Decision 98-19) and *CRTC refrains from regulating O.N.Telcom's<sup>1</sup> delivery of mobile wireless services*, Order CRTC 2001-501, 29 June 2001 (Order 2001-501).

#### Background

3. 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 *Telecommunications Act* (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.

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<sup>1</sup> O.N.Telcom is now known as Ontera – see *Corporate name change*, Telecom Order CRTC 2004-291, 27 August 2004.

(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.

4. The Canadian telecommunications policy objectives set out at 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.

5. 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.

6. In Decision 94-19, the Commission 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.

7. In *Regulation of wireless services*, Telecom Decision CRTC 94-15, 12 August 1994 (Decision 94-15) and *Regulation of mobile wireless telecommunications services*, Telecom Decision CRTC 96-14, 23 December 1996 (Decision 96-14), the Commission found that the market for mobile wireless services in various geographic territories was sufficiently competitive to protect user interests and, accordingly, forbore from the regulation of mobile wireless services that were not provided directly by a regulated telephone company. In Decision 94-15, the Commission stated that it would be appropriate to forbear from the regulation of mobile wireless services provided directly by the regulated telephone companies once the companies had developed and implemented appropriate marketing safeguards and cost separations between their wireless and regulated services.

8. Subsequently, in the following decisions, the Commission extended forbearance to certain mobile wireless services provided directly by regulated telephone companies that had implemented cost separations between mobile wireless and regulated services:
- paging services provided by Bell Canada in *Application by Bell Canada to review and vary Telecom Decision CRTC 96-14*, Telecom Decision CRTC 98-15, 2 September 1998;
  - cellular and PCS services provided by NBTel Inc., now a part of Aliant Telecom Inc., in *NBTel Inc. – Forbearance from regulating cellular and personal communications services*, Telecom Decision CRTC 98-18, 2 October 1998;
  - mobile wireless services provided by the municipally owned telephone companies (MOTCs) in Decision 98-19;
  - all mobile wireless services provided by the former Stentor member companies in Telecom Order CRTC 99-991, 13 October 1999;
  - cellular services provided by O.N.Telcom in Order 2001-501; and
  - mobile wireless services provided by Société en commandite Télébec (Télébec) and NorthernTel, Limited Partnership in *Application by Société en commandite Télébec and NorthernTel Limited Partnership for forbearance from regulation of mobile wireless services*, Telecom Decision CRTC 2003-81, 2 December 2003.

### **CityTel's application**

9. CityTel noted that in Decision 98-19 the Commission had stated that:
- it had acknowledged in *Regulatory framework for the independent telephone companies in Quebec and Ontario (except Ontario Northland Transportation Commission, Québec-Téléphone and Télébec ltée)*, Telecom Decision CRTC 96-6, 7 August 1996, that MOTCs might not be in a position to establish structurally separate affiliates to supply cellular services, but had noted that they were monopoly providers of local service, and competitive safeguards were needed;
  - MOTCs served limited geographic markets, while Rogers Cantel Inc. (now Rogers Wireless Inc.) and other wireless carriers served much larger areas and had larger customer bases;
  - this fact, together with the Commission's direction on costing separations, made it very unlikely that the MOTCs would engage in predatory pricing; and

- the threat of potential entry by other carriers would protect subscribers against unnecessary rate increases for mobile wireless services.
10. CityTel also noted that, in reference to Order 2001-501, the Commission had refrained from the regulation of cellular service providers where a competitive environment either existed or was likely to exist. CityTel indicated that it was the sole provider of cellular service in its territory, but that its cellular market was open to competition.
  11. CityTel submitted that in prior forbearance decisions, the Commission had refrained, with some conditions, from regulating markets where mobile voice wireless telecommunications services were connected to the public switched telephone network.
  12. CityTel stated that approval of forbearance on cellular service would allow it to be more competitive and would increase reliance on market forces, which in turn would benefit its customers.
  13. The Commission received no comments with respect to the application.

### **Commission's analysis and determinations**

#### **Application of subsections 34(1), (2), and (3) of the Act**

14. 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.
15. In Decision 98-19, the Commission stated that forbearance from regulation of mobile wireless services provided by an MOTC was conditional upon the MOTC meeting the following four conditions:
  - (i) Filing Phase III results based on approved Phase III procedures (Phase III results), with annual filings of Phase III results thereafter;
  - (ii) Filing a Statement of Revenue Surplus/Shortfall applicable to mobile wireless services, with annual filings thereafter;
  - (iii) Excluding mobile wireless services from revenue requirement and contribution calculations; and
  - (iv) Having a separate division for provision of mobile wireless services, or provision of mobile wireless services by an independent third party (an MOTC could demonstrate the latter, for example, by providing the Commission with a copy of its agreement with the independent third party).

16. The Commission notes that prior to 2002, the small incumbent local exchange carriers' (ILECs) subsidy requirements had been based on Phase III costs. However, in *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000, the Commission determined that as of 1 January 2002, the small ILECs would be included under the new revenue-based contribution mechanism,<sup>2</sup> and were to use a Phase II costing methodology to determine their subsidy requirements. As a result, the Commission is of the view that conditions (i) to (iii) above no longer apply.
17. The Commission notes that the provision of mobile wireless services through structurally separate affiliates was forborne from regulation pursuant to Decisions 94-15 and 96-14. Further, CityTel's forbearance request for its cellular service is entirely consistent with previous Commission decisions forbearing from regulation of mobile wireless services.
18. Although CityTel does not provide wireless services through an affiliate, the Commission notes that the company maintains a separate division for its cellular service.
19. The Commission further notes that in *Joint marketing and bundling*, Telecom Decision CRTC 98-4, 24 March 1998 (Decision 98-4), the Commission removed the explicit prohibitions against cross-subsidies to mobile wireless services for nearly all Canadian carriers.
20. In Decision 98-4, the Commission also removed the joint marketing prohibitions and implemented the bundling rules. The bundling rules require CityTel to file a tariff if it wishes to bundle mobile wireless and regulated services. As part of that tariff filing, CityTel would have to demonstrate that the proposed rate or rates for the bundled service or services complies with the Commission's bundling rules, i.e., that the rate or rates recover the appropriate costs incurred in providing the bundled service or services.
21. Furthermore, in *Regulatory framework for the small incumbent telephone companies*, Decision CRTC 2001-756, 14 December 2001, the Commission established a regime of price regulation for the small ILECs including CityTel. Like the price cap regulation implemented by the Commission for Télébec in *Implementation of price regulation for Télébec and TELUS Québec*, Telecom Decision CRTC 2002-43, 31 July 2002, and renewed for the large ILECs in *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, this regime sets limits on the maximum price increases for an ILEC's regulated services.
22. The Commission recognizes that the termination of the requirement to file accounting information for CityTel as a result of the implementation of Decision 2001-756 raises the issue of whether there remain sufficient safeguards against cross-subsidies from regulated to competitive services.
23. In this respect, the Commission notes that price regulation does not prevent a regulated company from using profits or cash-flow earned in providing regulated services to subsidize competitive services. However, the Commission stated in *Quebecor Média inc. – Alleged anti-competitive cross-subsidization of Bell ExpressVu*, Telecom Decision CRTC 2002-61,

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<sup>2</sup> The new revenue-based contribution mechanism for the larger ILECs came into effect 1 January 2001.

8 October 2002, that price regulation ensures that rates for regulated services are just and reasonable, and thus the company's profits and cash-flow from regulated services are earned on the basis of just and reasonable rates.

24. In addition, a cross-subsidy to competitive services offered by the telephone company may be an undue preference to the telephone company, and unjust discrimination against competitors. The Commission notes that in previous decisions forbearing from regulation of public switched mobile voice services (i.e. mobile wireless services), the Commission retained its powers under subsections 27(2), 27(3) (in part) and 27(4) of the Act, in order to be able to deal with allegations of undue preference or unjust discrimination.
25. In view of the preceding, the Commission is of the view that the requirements outlined in Decision 98-19 are not necessary for forbearance. Further, the Commission is of the view that there are no significant barriers to entry for competitors in CityTel's cellular market.
26. 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 specified in this Decision, with respect to cellular services in CityTel's territory, is consistent with the Canadian telecommunications policy objectives of the Act.
27. The Commission also finds, pursuant to subsection 34(3) of the Act, as a question of fact, that refraining from regulating cellular services, to the extent specified in this Decision, is unlikely to impair unduly the emergence of a competitive market for these services.
28. 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.

**Scope of forbearance: cellular services**

***Section 24***

29. 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.
30. 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. Because CityTel's Terms of Service, which ensure the confidentiality of customer information for regulated services, do not apply to forborne services, the Commission directs CityTel, as a condition of providing cellular services, to abide by the existing conditions regarding disclosure of confidential customer information to third parties with respect to cellular services. The Commission also directs CityTel, on a going-forward basis, as a condition of providing cellular 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.

31. Finally, the Commission considers that it is also appropriate to retain sufficient powers under section 24 of the Act to specify possible future conditions for offering and providing cellular services.

***Section 25***

32. 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.

33. Based on the above, the Commission considers it appropriate that CityTel no longer be required to file and obtain the Commission's approval of tariffs for cellular services. 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 cellular services.

***Section 27***

34. 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.

35. 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 all of its powers and the performance of all of its duties under subsection 27(1) of the Act with respect to cellular services.
36. The Commission notes that CityTel has not requested forbearance from subsection 27(2) of the Act. Consistent with previous decisions in which the Commission forbore from the regulation of cellular services, the Commission will retain sufficient power under subsection 27(2) to ensure that CityTel does not give an undue preference or unjustly discriminate with respect to cellular services.
37. The Commission 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.



38. The Commission notes that CityTel has also not requested forbearance from subsection 27(4) of the Act. Consistent with previous decisions, the Commission considers it necessary to retain its powers under subsection 27(4) in relation to CityTel's provision of cellular services, to ensure that the onus continues to rest on the regulated carrier to demonstrate that a preference is not undue, or that discrimination is not unjust.
39. The Commission will forbear from all of its powers under subsection 27(5) of the Act, since subsection 27(5) relates to subsection 27(1), from which the Commission is forbearing in this Decision. The Commission will also forbear from all of its powers under subsection 27(6) of the Act, since the Commission does not wish to limit the pricing of the forborne services.

***Section 29***

40. 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.

41. The Commission considers it appropriate that CityTel no longer be required to obtain the Commission's approval to enter into agreements with other telecommunications common carriers regarding cellular services. 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 cellular services.

***Section 31***

42. 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.

43. The Commission considers it appropriate that CityTel be able to limit its liability in respect of cellular 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 CityTel's cellular services.

**Declaration pursuant to subsection 34(4) of the Act**

44. In light of the above, the Commission declares, pursuant to subsection 34(4) of the Act, that, effective 4 January 2005, sections 24, 25, 27, 29 and 31 of the Act will not apply to CityTel's cellular services, except with respect to:
- the conditions pursuant to section 24 of the Act with respect to the confidentiality of customer information;
  - any future condition that the Commission may impose, pursuant to section 24 of the Act;
  - subsection 27(2) of the Act, which requires that carriers do not give an undue preference, or discriminate unjustly;
  - 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; and
  - subsection 27(4) of the Act, with respect to the burden of establishing that a carrier does not confer an undue preference or discriminate unjustly.

**Tariff filings**

45. The Commission directs CityTel to issue revised tariff pages forthwith, deleting the existing tariff provisions relating to cellular services. The revised tariff pages will take effect as of 4 January 2005.

Secretary General

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