CASE COMMENT

CHRONIQUE DE JURISPRUDENCE

The Competitive Provision of Public Long Distance Voice Telephone Services in Canada

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In Telecom Decision 92-12, the C.R.T.C. approved an application by Unitel Communications Inc. and B.C. Rail Telecommunications/Lightel Inc. asking that the provision of long distance telephone services be opened up to competition. The author provides a detailed analysis of the decision and its implications, including those surrounding the entry of competitors, resale and sharing, and regulatory safeguards. He concludes that the decision is an important turning point in Canadian telecommunications, but that it should not be viewed as the end of the struggle for more open competition; on the contrary, he tells us, the struggle has just begun.

Dans la décision Télécom 92-12, le C.R.T.C. a approuvé une requête déposée par Unitel Communications Inc. et B.C. Rail Telecommunications/Lightel Inc. visant à permettre la concurrence dans le domaine de l'interurbain. L'auteur fait une analyse détaillée de la décision et de ses répercussions possibles, notamment celles qui vont influer sur l'entrée sur le marché de nouveaux concurrents, la revente et le partage, et la réglementation. Il conclut que la décision marque un tournant décisif dans les télécommunications canadiennes, mais qu'il ne faut pas la considérer comme la fin de la lutte pour la libéralisation de la concurrence, lutte qui ne fait que commencer.

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Revue de droit de McGill
To be cited as: (1993) 38 McGill L.J. 416
Mode de référence: (1993) 38 R.D. McGill 416

Synopsis

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Introduction

Following a lengthy and complex process,[1] in a landmark decision, *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*,[2] the Canadian Radio-television and Telecommunications Commission ("the Commission") extensively liberalized com-

[1]See *Unitel Communications Inc. and B.C. Rail Telecommunications/Lightel Inc. — Applications to Provide Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues: Scope and Procedure* (3 August 1990), Telecom Public Notice 90-73 (C.R.T.C.).

[2](12 June 1992), Telecom Decision 92-12 (C.R.T.C) [hereinafter Decision 92-12 or the Decision].

petition in the provision of public long distance voice telephone services (also called switched interexchange voice services, with competition in the provision of such services also described as interexchange competition).

In so doing, the Commission approved the request of Unitel Communications Inc. ("Unitel") for an order requiring Bell Canada ("Bell"), British Columbia Telephone Company ("B.C. Tel"), the Island Telephone Company Limited ("Island Tel"), Maritime Telegraph and Telephone Company, Limited ("MT&T"), The New Brunswick Telephone Company, Limited ("NBTel"), and Newfoundland Telephone Company Limited ("Nfld. Tel") (collectively called "the respondents") to connect Unitel's telecommunications network to their public switched telephone networks (PSTNs) for the purpose of providing public long distance telephone services, and to afford all reasonable and proper facilities for the interchange of public long distance telephone traffic between Unitel's network and those of the respondent telephone companies.[3]

The Commission also approved, in principle, an application by B.C. Rail Telecommunications ("B.C. Rail") and Lightel Inc. ("Lightel") (collectively called "BCRL") for an order requiring Bell, B.C. Tel and Unitel ("the BCRL respondents") to connect BCRL's telecommunications network to the PSTNs of Bell and B.C. Tel and to Unitel's telecommunications network for the purpose of providing public switched and dedicated voice and data telephone service, and Wide Area Telephone Service (WATS).[4] The Commission indicated that once B.C. Rail, Lightel and Call-Net Telecommunications Ltd. ("Call-Net," which is an affiliate of Lightel), who together initiated the BCRL joint venture, file documentation with the Commission which demonstrates that certain joint venture agreements have been implemented, the Commission will order the BCRL respondents to issue tariff pages providing for the interconnection of the BCRL respondents' systems with those of the companies which result from the implementation of the agreements.[5]

Most significantly, however, the Commission embraced a competitive model for the provision of interexchange voice services and indicated a willingness to approve other future applications for interconnection by facilities-based interexchange carriers or IXCs (*i.e.* new competitors employing their own transmission facilities) who are willing to abide by the terms and conditions established in the Decision.[6] Accordingly, the Decision creates potential new business opportunities for telecommunications carriers in Canada, will offer users of telecommunications services a greater choice of telecommunications suppliers and services, and represents a marked departure from the Commission's previous refusal in *Interexchange Competition and Related Issues*,[7] to permit the predecessor of Unitel, CNCP Telecommunications, to engage in full-scale interexchange competition using its own facilities interconnected to telephone company PSTNs.

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[3]See Decision 92-12, *ibid.* at 1, 13.
[4]*Ibid.* at 1, 13-14.
[5]*Ibid.* at 117.
[6]*Ibid.*
[7](29 August 1985), Telecom Decision 85-19 (C.R.T.C.) [hereinafter Decision 85-19].

The Decision has also significantly liberalized the regime applicable to the resale and sharing of telecommunications services provided by federally regulated telecommunications carriers. Resellers and sharing groups buy large quantities of telephone services (which normally only large users of such services can afford to purchase) from telecommunications carriers and sell these services to or share them among a number of smaller users. Resellers are motivated by profits, whereas true sharing groups are motivated by a desire to share savings. For simplicity, the two are often called resellers in this article. Resale and sharing of telecommunications services have been liberalized over a number of years by the Commission and this has resulted in gradually increasing competition in the provision of various types of telecommunications services.

In *Resale and Sharing of Private Line Services*,[8] the Commission consolidated and extended the rules which it had developed over a number of years governing the resale and sharing of telecommunications services offered by carriers under its jurisdiction. Prior to Decision 90-3 these rules permitted resale and sharing to provide: (1) local voice services (*i.e.* voice services to which long distance charges do not apply) other than pay telephone services; (2) data services; and (3) long distance voice services which are not interconnected to telephone company PSTNs. In addition, the rules also permitted the sharing of private line voice services which are interconnected to telephone company PSTNs, and the resale of such services when individual circuits are dedicated to a user. However, the Commission went much further in Decision 90-3 and, subject to certain special terms and conditions, also permitted the resale and sharing of private lines for joint use (*i.e.* private lines leased from certain federally regulated telecommunications providers could be interconnected with telephone company PSTNs and shared and resold to provide voice services without a requirement that a circuit be dedicated to a user).[9] This effectively enabled resellers to provide long distance voice services in competition with Bell and B.C. Tel. Since the time when the proceeding leading up to Decision 90-3 commenced, Island Tel, MT&T, NBTel, and Nfld. Tel (collectively "the Atlantic telephone companies"), which had previously been subject to provincial regulation, have come under the Commission's jurisdiction as a result of the decision of the Supreme Court of Canada in *Alberta Government Telephones* v. *Canada (Canadian Radio-television and Telecommunications Commission)*.[10]

In Decision 92-12, the Commission, subject to certain revised terms, approved an application filed by Call-Net in April of 1990, in which permission was sought for the resale and sharing for joint use of the private line services of the Atlantic telephone companies.[11] The Commission also decided that the

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[8](1 March 1990), Telecom Decision 90-3 (C.R.T.C.) [hereinafter Decision 90-3].

[9]*Ibid.* at 37.

[10][1989] 2 S.C.R. 225, [1989] 5 W.W.R. 385 [hereinafter *AGT* cited to S.C.R.].

[11]Decision 92-12, *supra* note 2 at 121. In *Applications by Unitel Communications Inc. — Resale and Sharing in the Maritimes and in the Operating Territory of AGT Limited* (18 March 1991), Telecom Letter Decision 91-2 (C.R.T.C.), the Commission had denied previous requests to permit resale and sharing pursuant to the rules set out in Decision 90-3 in the Maritime Provinces and in the operating territory of Alberta Government Telephones ("AGT"), prior to making a determination in Decision 92-12.

resale of the services of the Atlantic telephone companies should include the other forms of resale permitted by Decision 90-3, under the same terms.[12]

The Decision also fully liberalized the resale of WATS and other volume or targeted discount services, or TDSs (such as Advantage[13] and Teleplus) offered by the respondents.[14] Use of these services will be permitted to terminate calls in the operating territories of those telephone companies which were not respondents ("non-respondent telephone companies") in the proceeding (known as "IC2") leading up to the Decision, but use of 800 Service to originate competing long distance traffic in the operating territories of non-respondent telephone companies is prohibited.[15]

The newly expanded resale and sharing rules and their extension to the Atlantic Provinces will also create new business opportunities for resellers and give consumers an even greater choice of telecommunications suppliers and services.

I. Reasons for the Decision

Based on a thorough assessment of all of the information presented, the Commission concluded "that increased [long distance] competition, subject to ... appropriate terms and conditions, would be in the public interest."[16] In addition, "[i]n arriving at its conclusions, the Commission determined that toll [*i.e.* long distance] rates should be reduced to increase affordability of toll services, in general, and the competitiveness of Canadian business, in particular, and to maximize the use of Canadian telecommunications facilities."[17]

The Commission found that not only would competition increase pressure on the respondents to reduce rates, but also stated:

> More importantly, competition ... can [also] be expected to increase choice and supplier responsiveness, particularly in terms of the number of price and service packages tailored to address the specific needs and applications of a greater variety of user groups. This increase in responsiveness and choice would reduce initiatives by business and resellers to bypass the Canadian network and would increase the use of telecommunications as a strategic input to increase the efficiency and effectiveness of Canadian business. In the opinion of the Commission, such choice

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[12]Decision 92-12, *ibid.* at 122.

[13]Resellers had previously argued that they should be allowed to resell volume discount services such as Advantage Canada given that tbeir profitability is closely linked to the tariff structures of the carriers from whom they procure services to be resold. See *Application by Call-Net Telecommunications Ltd. to Review and Vary Telecom. Orders C.R.T.C. 90-1000 and 90-1001 and Decisions dated 30 November 1990 and 24 December 1990* (27 February 1991), Telecom Decision 91-3 (C.R.T.C.); *Bell Canada and British Columbia Telephone Company — Revisions to Monopoly Toll Services and Voicecom Rates and Introduction of Advantage Canada* (6 August 1991), Telecom Decision 91-11 (C.R.T.C.); and *Competitive Telecommunications Association et al. — Application to Review and Vary Final Approval of Advantage Canada* (3 April 1992), Telecom Decision 92-4 (C.R.T.C.).

[14]Decision 92-12, *supra* note 2 at 127.

[15]*Ibid.*

[16]*Ibid.* at 11.

[17]*Ibid.*

> and responsiveness [could not] be met in the longer term in a single supplier environment, nor [would it be] reasonable to assume that a single supplier can differentiate in terms of product and price sufficiently to meet the specific needs and multiple demands of different user groups.[18]

The Commission rejected proposals (called Reference Plans) put forward by various respondent and non-respondent telephone companies for reducing toll rates through targeted discounts financed by surplus revenues (*i.e.* revenues which are greater than those which such a telephone company is permitted by the Commission to earn and retain) as an alternative to liberalized competition.[19]

The Commission also rejected a number of arguments raised against increased competition, including those based on contentions that facilities-based interexchange competition would: (1) increase the long-run costs of supplying telecommunications services due to the presence of economies of scale, economies of scope, or because costs are subadditive[20] or increase the respondents' costs;[21] (2) be uneconomic because the applicants (Unitel and BCRL) would have higher cost structures;[22] (3) lead to local rate increases which would cause a diminution of universally affordable telephone service;[23] (4) cause non-respondent telephone companies to experience significant revenue reductions;[24] (5) harm subscribers in rural regions and in areas having low population densities;[25] (6) lead to reductions in the quality of service associated with the provision of telephone services;[26] and (7) lead to inefficient network planning and design.[27]

The Commission also expressed the concern that if it did not further liberalize competition

> it would not only diminish the threat of future entry but also diminish the degree of competition currently in place under the Decision 90-3 Resale rules, since the Reference Plan rate reductions [*i.e.* the rate reductions planned by the respondents during the coming years] are aimed at some of the same market segments served by resellers.[28]

The Commission has, for a number of years, accepted the premise that long distance services are priced significantly above cost, in order to provide a source of funds (called contribution) which cross-subsidizes the cost of providing telephone company subscribers access to the PSTNs, while maintaining rates for basic service (*i.e.* local rates) at modest levels.[29] In the U.S., for example, where

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[18]*Ibid.* at 12.
[19]*Ibid.*
[20]*Ibid.* at 18 and 21.
[21]*Ibid.* at 44.
[22]*Ibid.* at 20.
[23]*Ibid.* at 48.
[24]*Ibid.* at 52 and 55.
[25]*Ibid.* at 64.
[26]*Ibid.* at 65-66.
[27]*Ibid.* at 67.
[28]*Ibid.* at 36-37.
[29]This issue appears to have been first raised in a more modern context by Bell Canada in the proceeding leading to *CNCP Telecommunications: Interconnection with Bell Canada* (17 May 1979), Telecom Decision 79-11 (C.R.T.C.).

long distance competition has been in place for a number of years, and rates have also been restructured so that the bulk of access costs are levied from subscribers directly instead of through cross-subsidies, long distance rates are much lower.[30]

Accordingly, there is an incentive for those routing long distance traffic to Canadian destinations to bypass Canadian telephone company telecommunications facilities. This may be done in a variety of ways, including routing such traffic through the U.S. To the extent this occurs, it could be said to be a form of long distance competition. However, competition in the form of U.S. bypass may be economically disadvantageous to Canada for a number of reasons.

In the first place, when long distance traffic is removed from Canadian facilities, the contribution associated with that traffic is also lost, but since the identities of those participating in bypass and the extent of bypass are hard to ascertain, and since U.S. carriers are not under the Commission's jurisdiction, the lost contribution cannot be recovered. In a regulatory regime in which it is assumed that Canadian telephone companies operate in a monopoly environment, each company is regulated in a manner which results in the earning of a return on equity (ROE) within a specified range. Therefore, to the extent that contribution is eroded as a result of bypass, there will be severe pressure on regulators to allow local telephone rates to increase to make up the difference. This is a significant concern for a regulator such as the Commission, which wishes to ensure that local rates remain affordable and that local rate increases are not so sharp as to cause a public outcry, particularly among residential subscribers.

Bypass through the U.S. may also be wasteful, to the extent that it leads to an underutilization of Canadian resources which would otherwise be involved in the carriage of the traffic. Finally, to the extent that Canadian long distance prices are too high in an economic sense (*i.e.* priced significantly above cost) for public policy reasons, while telecommunications costs are a significant cost for many businesses, the international competitiveness of the Canadian economy is adversely affected.[31]

Accordingly, it is not surprising that the importance of reducing Canadian interexchange rates towards levels in the U.S. was clear in the Commission's view. In the Commission's words:

> Such rate reductions would assist in achieving the two important and related objectives of enhanced international competitiveness and reduced incentive to bypass Canadian network facilities. Since competition would not only result in lower interexchange rates in the long run, but also in greater choice in terms of price and service packages, the dual objectives of increased competitiveness and reduced bypass would be more readily achieved in a competitive environment.[32]

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[30]A description of past regulatory and competitive developments in telecommunications in the U.S. may be found in R.W. Crandall, "Has the AT&T Break-Up Raised Telephone Rates?" (Winter 1987) *The Brookings Review* 37.

[31]Decision 92-12, *supra* note 2 at 56-57.

[32]*Ibid.* at 61.

In addition, liberalizing competition, while not deregulating the industry, affords the Commission the opportunity to ensure that the portion of contribution lost by telephone companies due to a loss of market share to competitors which the Commission deems appropriate is recovered from the new entrants, thereby avoiding, or at least partially deferring or smoothing the rate restructuring which would otherwise eventually be brought about as a result of the continued bypass of Canadian telecommunications facilities, resulting in significant local rate increases. Therefore, the Commission's decision to liberalize interexchange competition can be seen as the exercise of a rational policy choice, in which the Commission has preferred to establish a regime involving regulated competition which it can control, and which allows it to have greater control over the timing and rate of local rate increases, as opposed to fostering an environment in which it is merely reacting to the consequences of unregulated competition in the form of bypass, which has survived previous regulatory attempts to control it,[33] due to the continued presence of economic incentives.

II. The Terms of Entry

A. Multiple Entry

As indicated, the Commission decided that increased competition should not be based on a regulated duopoly market structure. Rather, it found that multiple entry would bring greater discipline to the marketplace in terms of pricing and supplier responsiveness, and would be more likely to result in the provision of specialized services to market niches that may otherwise not be fully served by more ubiquitous service providers.[34] In order to exploit fully the benefits of competition, the Commission provided a framework (including charges for contribution and interconnection costs) which would allow other applications for interconnection by IXCs that would be subject to federal regulation, if the shareholders of such applicants are prepared to assume the risks and obligations associated with the terms and conditions set out in the Decision.[35]

The Commission was also convinced that the Reference Plan, or the broad elements of it, will likely be implemented with competitive entry. The Commission expects that, in the early years of competition, surplus revenues predicted by the respondents would be used to offset any negative effects (due to items such as the contribution discount specified in this Decision and any start-up costs that will not be recovered from Unitel or other IXCs) that the respondents may experience as a result of entry. As competition unfolds and the respondents begin to experience the positive impact of competition-induced productivity improvements and market expansion, the Commission expects that toll reductions by some respondents may be larger than estimated in the Reference Plan. These benefits could then be passed on to the respondents' customers through long distance rate reductions.[36]

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[33]*Ibid.* at 60.
[34]*Ibid.* at 116.
[35]*Ibid.* at 116-17.
[36]*Ibid.* at 99.

In its Decision, the Commission assumed that an IXC has the opportunity available to it to achieve cost reductions similar to those which the respondents will attain. The ability of an IXC to reach this objective ultimately rests on the managerial efficiency and strategic decisions of the firm. Since the achievement of lower costs is critical in achieving profitability, the Commission indicated "that the risks of entry have to be assumed by shareholders [of IXCs]."[37]

B. General Terms of Entry

The Commission indicated that it expects IXCs to abstain from originating traffic from within the territories of nearly fifty independent telephone companies, which the Commission presently considers to be under provincial regulatory jurisdiction. In the Commission's view, any potential impacts on the independents attributable to traffic arrangements should be resolved through negotiations between the IXCs, independents and their existing connecting carriers, subject to whatever regulatory approvals are required, rather than through limitations imposed by the Commission.[38] Similarly, IXCs will not be allowed to use 800 Service to originate competing interexchange voice traffic in the operating territories of the independents or non-respondents which are members of Stentor Canadian Network Management (Stentor, formerly called Telecom. Canada), the consortium comprised of Canada's major telephone companies.[39]

At the same time, the Commission refused to impose a requirement for IXCs to provide universal service (*i.e.* service in the entire operating territory of a telephone company) as a condition of entry.[40] This will permit carriers to address niche markets.

While the Commission considered it reasonable that IXCs serving more than one respondent territory may apply different rates in each territory, the Commission determined that current general policies regarding route-averaging should be maintained within the boundaries of each territory.[41] The principle of route-averaging requires that long distance calls of the same duration that are carried over the same distance, during the same time period, under similar circumstances, be priced at the same level regardless of their geographic location.[42] Accordingly, IXCs will be expected to adhere to this policy for basic MTS (*i.e.* Message Toll Service or regular long distance service) and volume discount services, in order to ensure that pressure to increase rates on low volume routes does not develop (due to efforts by all competitors in a market to utilize the higher revenues from these low volume routes not subject to extensive competition to cross-subsidize competitive rate reductions on the high volume, low cost routes), but the Commission also acknowledged that some services resulting from competition (such as those based on new technologies) may only be rolled out on high volume routes.[43] Furthermore, to the extent that certain tariff

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[37] *Ibid.* at 108-09.
[38] *Ibid.* at 53.
[39] *Ibid.* at 127.
[40] *Ibid.* at 63.
[41] *Ibid.* at 142.
[42] *Ibid.*
[43] *Ibid.* at 63.

offerings of the respondents which serve as MTS substitutes may not be currently adhering to the policy of route-averaging (such as, for example, WATS, 800 Service, Selectel, Extended Area Service and Econopak), the onus on IXCs will be no higher. Finally, the Commission also indicated that it does not currently impose route-averaging on resellers, and does not intend to do so after facilities-based entry, since "[s]uch a policy would unduly limit the benefits associated with resale, particularly the servicing of pent-up demand in niche markets."[44]

C. Contribution

In Canada, with certain minor exceptions, there are no recurring charges for recovering the entire cost of providing telephone company subscribers with access to the telephone network.[45] Rather, the cost of access is recovered by means of contribution,[46] primarily from the revenues earned by telephone companies from the provision of local and, to a much greater extent, long distance services.

In the words of the Commission:

> When respondents lose market share to competitors, the contribution associated with the lost traffic is also lost. Accordingly, to the extent that the access cost subsidy is to be maintained, competitors in the long distance market must also pay some level of contribution. Therefore, the contribution requirement of competitors, and the manner in which it is to be collected, are important considerations.[47]

The Commission was of the view that the contribution scheme in Canada operates as a subsidy independent of access cost causality. Therefore, the Commission refused to base contribution payments on the use of the respondents' access facilities in providing long distance services.[48]

The Commission also stated that it "has traditionally determined the contribution payments required from service providers in light of the particular circumstances of their business and service offerings and their potential impact on local rates."[49] Accordingly, the Commission did not agree that an equal payment should be required from all providers.[50]

The Commission adopted Unitel's proposal to pay contribution based on the amount of foregone contribution that arises as a result of its entry since, under this proposal, "IXCs would pay sufficient contribution to ensure that the principle of maintaining local rates at affordable prices is not jeopardized in any of the respondents' territories."[51]

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[44]*Ibid.* at 63-64.
[45]*Ibid.* at 69.
[46]*Ibid.*
[47]*Ibid.* at 69.
[48]*Ibid.* at 70-71.
[49]*Ibid.*
[50]*Ibid.*
[51]*Ibid.*

The Commission decided to use costing information regularly produced and filed by some respondents, in accordance with a costing methodology developed during the *Inquiry into Telecommunications Carriers' Costing and Accounting Procedures: Phase III — Costing of Existing Services*[52] as the basis for determining an appropriate contribution level.[53]

The objectives of Phase III are:

> (1) to assess whether rates for competitive services are compensatory in the sense that revenues resulting from the provision of such services cover the costs of providing them; and (2) to determine the extent to which the *contributions* made to the overall revenue requirement of carriers by monopoly services as a whole, and by certain categories [Broad Service Categories or BSCs] of competitive services are above or below cost. [emphasis added][54]

In fact, results prepared in accordance with the Phase III methodology can also indicate the contribution surplus or shortfall associated with the provision of certain BSCs of monopoly services, such as Monopoly Toll, Monopoly Local and Access, which makes it possible to use Phase III as a basis for calculating the contribution surpluses associated with the provision of toll and local services on the one hand, and shortfall associated with access on the other. The Phase III costing methodology originally applicable to terrestrial telephone companies which are members of Stentor was based on the method (known as the Revenue Settlement Plan or the RSP) which Stentor employs to allocate jointly earned revenues among its members.[55] The respondents are all members of Stentor. Since the Atlantic telephone companies are not yet capable of producing information in the Phase III format, those respondents will, for the time being, be required to produce contribution calculations based on RSP proxy results and RSP-to-Phase III conversion formulæ which attempt to approximate equivalent Phase III results.[56]

After making a number of technical adjustments[57] to the contribution levels payable to the respondents, the Commission granted IXCs the following discounts regardless of the date of their entry:[58]

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[52](25 June 1985), Telecom Decision 85-10 (C.R.T.C.) [hereinafter Decision 85-10].

[53]Decision 92-12, *supra* note 2 at 72.

[54]*Report of the Inquiry Officer with Respect to the Inquiry into Telecommunications Carriers' Costing and Accounting Procedures: Phase III — Costing of Existing Services* (Ottawa: Canadian Radio-television and Telecommunieations Commission, 30 April 1984) at 3.

[55]Decision 85-10, *supra* note 52 at 39.

[56]Decision 92-12, *supra* note 2 at 73-74.

[57]See the adjustment which excludes Plant Under Construction and Common costs allocated on the basis of BSC deficits from the competitors' contribution obligation discussed *ibid.* at 74-75, the 6% reduction in contribution payable to Bell associated with Gross Receipts Tax discussed *ibid.* at 76, the 2% surcharge associated with Direct Access Line usage discussed *ibid.* at 78-79, and the 1.7% reduction associated with WATS and 800 Services discussed *ibid.* at 79-80.

[58]*Ibid.* at 83-84. In *Unitel Communications Inc. — Application for Extension of the Contribution Discount Period and Other Matters* ((19 April 1993), Telecom Decision 93-5 (C.R.T.C.)), the Commission extended the contribution discount period established in Decision 92-12 by six months with respect to Bell, B.C. Tel, Island Tel and MT&T, since those telephone companies had requested and obtained a stay of Decision 92-12 from the Federal Court of Appeal pending an appeal of the Decision to that Court.

Table 1

Contribution Discount	
1993	25%
1994	25%
1995	25%
1996	15%
1997	10%
1998	0%

The Commission granted the contribution discount of limited duration on the basis that "the respondents currently hold a market advantage over all competitors in the long distance voice market, both as a result of their control of the local networks and as a result of their historically dominant positions."[59]

Competitors will be limited in the initial years in their market coverage and in their ability to obtain equal ease of access (EEA) "so their subscribers can access their networks as easily as most customers now access long distance service provided by the respondents, *i.e.*, dialing either 0 or 1 plus a seven-digit or ten-digit telephone number" (0+ or 1+ calling).[60] Thus, the contribution discount schedule shown in Table 1 was also approved on the grounds that competitors will be limited in the initial years in their market coverage and in their ability to obtain EEA.[61]

After taking into account all of the adjustments described, the Commission calculated the appropriate level of contribution to be paid by IXCs obtaining

[59]Decision 92-12, *ibid.* at 84.

[60]*Ibid.* at 154. In order to facilitate this approach, interexchange subscribers would have to preselect a primary long distance carrier in advance (pre-subscription). Then, whenever a 0+ or 1+ call is made, the telephone company switches would have to recognize the pre-subscribed carrier associated with the line from which the call is made and route the call to the appropriate interexchange carrier. In order to permit customers pre-subscribed to a particular carrier to use another carrier's services (casual calling), the subscriber would dial 10XXX plus a seven-digit or ten-digit telephone number (10XXX calling) where XXX is a unique Carrier Identification Code (CIC) of the desired carrier. Not all telephone company switches can be converted to EEA (such switches are called "non-conforming" while the others are "conforming"). In order to provide access from all non-conforming switches and, pending conversion to EEA, from conforming switches, a two-stage dialing arrangement could be employed: first the subscriber would dial 1+950-0XXX (where XXX is CIC of the carrier to be used), and, after a second dial tone, the subscriber would dial the ten-digit number of the called party (1+950 calling). 1+950, 1+ or 10XXX access (collectively trunk side access) are provided by technically superior trunk side connections which also enable the carrier obtaining such access to offer certain advanced services. Following Decision 90-3, *supra* note 8, resellers were provided with an inferior type of access known as line side access, which cannot serve as a platform for certain advanced services, and which requires a reseller's subscriber to dial a long stream of digits in order to: (1) access the reseller's network; (2) identify the subscriber as a legitimate user of the reseller's network; and (3) identify the number being called. Resellers have partially overcome this disadvantage by installing automatic dialers on customer premises which dial all of the digits required to access a reseller network and identify the caller as a valid subscriber. See also Decision 92-12, *ibid.* at 154-59, for a more detailed discussion of EEA.

[61]*Ibid.* at 84.

equal access interconnection for 1993. The per-minute levels for each of the respondents are shown below:[62]

Table 2

Estimate IXC Contribution Charge 1993

Respondent	#/min./end
B.C. Tel	0.05400
Bell	0.04852
Island Tel	0.04782
MT&T	0.07596
NBTel	0.06354
Nfld. Tel	0.05559

A number of mechanisms for allocating and collecting contribution were proposed during IC2, including: "(1) per minute approaches put forward by the respondents; (2) per trunk approaches put forward by the applicants; and (3) a market share allocation approach put forward by ETI [Economics and Technology, Inc.], external consultants to the Commission."[63]

In assessing the various contribution recovery proposals, the Commission considered several basic criteria, including:

(1) efficiency of administration;
(2) sustainability;
(3) the achievement of universal service objectives; and
(4) pricing flexibility for all market participants.[64]

The Commission found that a variable per access trunk contribution charge that increases with the number of interconnecting circuits (*i.e.* the circuits that connect a facility of an IXC or leased facility of a reseller to a facility of a respondent to provide access to the respondent's PSTN) in a trunk group, to reflect the greater efficiencies available in larger trunk groups, would be superior in assessing contribution.[65]

Where an interconnecting circuit is associated with 1+950, 1+ or 10XXX access (trunk side access) the Commission set the following contribution charges for each interconnecting circuit within a circuit group:[66]

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[62]*Ibid.* at 86, as amended by p. 86-R contained in an *errata* issued by the Commission on 28 August 1992.

[63]Decision 92-12, *ibid.* at 81.

[64]*Ibid.* at 80-81.

[65]*Ibid.* at 81, 177.

[66]*Ibid.* at 181-82, as amended by p. 182-R contained in an *errata* issued by the Commission on 28 August 1992.

Table 3

Per Circuit Contribution Charges (IXCs)

# of circuits in the circuit group	Bell	B.C. Tel	Island Tel	MT&T	NBTel	Nfld. Tel
1 – 3	$ 35	$ 40	$ 35	$ 55	$ 45	$ 40
4 – 6	115	125	115	180	150	130
7 – 9	165	185	165	260	215	190
10 – 14	205	230	205	325	270	235
15 – 19	240	270	240	375	315	275
20 – 29	270	300	270	425	355	310
30 – 39	300	330	295	465	390	340
40 – 49	315	350	310	495	410	360
50 – 74	335	370	330	520	435	380
75 – 99	350	390	345	550	460	400
100 plus	370	415	365	580	485	425

Where the interconnecting circuit is not associated with trunk side access (*i.e.* it is associated with the inferior form of access known as line side access), only 85% of the applicable contribution charges are payable.[67]

For each overseas access circuit (*i.e.* a circuit that connects to a service or facility of Teleglobe Canada (Teleglobe), which is Canada's international telecommunications carrier) located in a respondent's operating territory, used by an IXC, Teleglobe will be required to collect the monthly contribution charges specified in Table 3 from the IXC and remit the payment to the respondent.[68] In the case of IXC Canada-U.S.A. circuits which use a border crossing point in a respondent's operating territory, a monthly contribution charge approximately equal to that applicable to the particular respondent for trunk groups of fifty to seventy-four circuits will apply to each circuit.[69] This essentially assumes an average per trunk usage of 7,000 minutes per month in the case of such cross-border circuits.[70] The collection of contribution will involve the respondents, IXCs, Teleglobe and Telesat Canada ("Telesat"), Canada's national satellite carrier.

No contribution is payable in connection with test facilities provided to an IXC by a respondent,[71] where an interconnecting circuit is used solely to access a respondent's MTS/WATS services,[72] or where an IXC gathers traffic from its

[67]Decision 92-12, *ibid.* at 182.

[68]*Ibid.* at 182-83.

[69]*Ibid.* at 183, as amended by p. 183-R, contained in an *errata* issued by the Commission on 28 August 1992. The actual monthly per circuit amount applicable in respect of the operating territory of each respondent is: $340 (Bell), $380 (B.C. Tel), $335 (Island Tel), $530 (MT&T), $445 (N.B. Tel) and $390 (Nfld. Tel).

[70]Decision 92-12, *ibid.* at 85.

[71]*Ibid.* at 179.

[72]*Ibid.* at 183.

customers by itself with the aid of Direct Access Lines (DALs) instead of relying on a telephone company to deliver the customer's traffic to the IXC.[73]

Where an interconnecting circuit associated with line side access, a Canada-U.S.A. circuit or an overseas access circuit is used by an IXC for the purpose of providing a data service or a telecommunications service which is dedicated to the private communications needs of a user where one end of the facility used to provide the service is terminated at equipment dedicated to the user, the contribution charges specified in the Decision will not apply.[74] However, at least in the case of the provision of dedicated services under these circumstances, the Commission will require evidence that "by reasons [*sic*] of the technical, economic or operational characteristics of the service, it is unlikely that the connections [supplied for the purpose of providing data services] will be used significantly for voice service."[75]

Based on these determinations, the Commission directed that, with their annual filings of Phase III forecasts in December of each year, the respondents provide estimates of the appropriate contribution charges for the following year, to come into effect on 1 April of the following year, along with the underlying calculations, in a format approved by the Commission, as well as the forecast information on which their estimates and calculations are based. Respondents who do not yet produce Phase III results are to provide, each December, their best estimates in accordance with the RSP-based methodology already discussed. The Commission will use this to determine whether changes to the contribution tariff are required.[76]

Since competitors will be required to pay contribution relative to the level of contribution generated by the respondents, to the extent that toll reductions are included in a company's annual Phase III/RSP forecasts, contribution payments can be established that reflect the anticipated toll reductions. However, for toll reductions that are not included in the annual Phase III/RSP filing, the respondents will also be required to file an estimate of any change in the contribution charge which would arise, using the methodology established by the Commission in the Decision, so that appropriate adjustments to the contribution charges established in the annual process may be made when required.[77]

Finally, the Commission has attempted to mitigate the impact of competition on non-respondent members of Stentor by establishing a contribution mechanism that is based on amounts associated with revenues settled between members of Stentor through the RSP, as opposed to the originating toll revenues of the member companies, "and [which] therefore better reflects the manner in which member companies settle revenues among themselves."[78]

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[73]*Ibid.* at 78-79. The Commission decided that directly applying a contribution charge to DAL traffic would be administratively difficult. Accordingly, it incorporated estimates of DAL usage in its calculation of overall contribution requirements.

[74]*Ibid.* at 183.

[75]*Ibid.* at 183-84.

[76]*Ibid.* at 85.

[77]*Ibid.* at 141.

[78]*Ibid.* at 55.

It is interesting to note that the respondents are not being compensated for 100% of the contribution which will be lost to them as a result of increased competition. If a truly competitive environment in the provision of interexchange voice services is to flourish, this may be seen as positive to the extent that it motivates respondents to increase their efficiency and find new sources of revenue associated with the provision of access and local services. There should be some ongoing motivation for respondents to eliminate their contribution requirement over time, and only permitting recovery of a portion of the contribution lost due to competition is a proper first step in this direction.

In recent years, the respondents have started earning significant revenues from new optional local services, such as Custom Calling Features (*e.g.* Call Forwarding, Call Waiting, Speed-Call, Ident-A-Call and Three-Way Calling) and Call Management Services (*e.g.* Call Display, Call Screen, Call Return and Call Trace). Bell has also recently introduced another series of such services, called Tele-Messaging Services, and has recently launched Call Answer as the first service in this new category. The full potential of these services in generating revenues is still being developed. Other similar services, such as remote call forwarding and telephone company provided voice mail, have yet to be marketed to any significant degree in Canada.[79]

Encouraging telephone companies to develop revenues from these types of services is positive, since it stimulates the more rapid diffusion of technology to the local networks, and the more rapid and broader introduction of new and innovative local services. This, in turn, could lead to the gradual elimination of contribution payments by competitors to telephone companies, as rates for interexchange services (tolls) are allowed to fall more rapidly towards costs, without the fear of triggering substantial rate increases for basic telephone services (rate restructuring or rebalancing). The Commission has in fact hinted that it may study such an alternate approach in stating: "[g]iven the variety of factors influencing local service prices ... there may be alternative ways to generate increased revenues from local/access service other than across-the-board rebalancing."[80] The Commission has also indicated that it intends, "within its existing resource constraints, to initiate a process to study the most efficient and equitable way of pricing local and access services."[81]

D. Costs of Interconnection

Providing interconnection to IXCs will require changes to the respondents' networks, systems and procedures which will cause additional costs to be incurred. Some of the costs, such as the cost of modifying the respondents' switches, will occur once, generally near the outset of competitive entry, and are

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[79]For example, in *The New Brunswick Telephone Company Limited—Market Trial of Universal Voice Mail Service* (22 June 1992), Telecom Public Notice 92-38 (C.R.T.C.), the Commission indicated that NBTel had only recently asked for Commission approval to offer universal voice mail service, under the name PhoneMail, in the Sussex, New Brunswick exchange area, for a four-month market trial.

[80]Decision 92-12, *supra* note 2 at 143.

[81]*Ibid.*

collectively called start-up costs. Ongoing costs are primarily those associated with aggregating and terminating competitors' traffic for delivery to and from the IXCs' networks (switching and aggregation costs) as well as cost components associated with customer and operator services and carrier billing functions. The Commission found that "the magnitude of these costs is largely a function of the nature of the interconnection arrangements requested and the traffic generated."[82]

The Commission decided that rates for services that respondents provide to IXCs should be based on the incremental, economic, causal costs of providing the services,[83] and that start-up costs should be amortized over a ten-year period, so that IXCs would not be handicapped by an excessive assignment of start-up costs in the early years of competition.[84]

The Commission determined "$240 million to be a reasonable estimate of the respondents' start-up costs and $1.2 billion a reasonable estimate of the ten-year ongoing costs,"[85] and decided to allocate the start-up costs on the basis "of an approximation of the long-run market share of all competitors, including the respondents."[86] The Commission indicated that it expected the market share lost by respondents to be approximately 30% by the year 2002.[87] Accordingly, it decided that "the IXCs will pay 30% of the start-up costs through tariffed charges and that the remaining 70% will be allocated to the respondents."[88]

The Commission adopted the use of a per minute recovery mechanism for these costs so as to reflect the proportion of market share captured by competitors. Based on its estimates of the start-up costs and traffic volumes associated with each respondent, the Commission established the following per minute charges applicable to all *trunk side access* minutes that originate or terminate on the respondents' networks:[89]

Table 4

Charges for Recovery of One-Time Costs of Entry

Bell	$0.0011
B.C. Tel	$0.0017
MT&T	$0.0020
NBTel	$0.0010
Island Tel	$0.0020
Nfld. Tel	$0.0013

[82] *Ibid.* at 86-87.
[83] *Ibid.* at 88.
[84] *Ibid.* at 92.
[85] *Ibid.* at 89.
[86] *Ibid.* at 91.
[87] *Ibid.* at 103.
[88] *Ibid.* at 91.
[89] *Ibid.* at 92, as amended by p. 3 of an *errata* issued by the Commission on 28 August 1992.

The Commission noted that tariffs already exist for the circuits that would be used for the connection of the respondents' switches to those of the applicants. Therefore, the Commission concluded that, pending the development of appropriate rates during the introductory stages of competition, charges for switching, aggregation and related ongoing network sources and arrangements, will be rolled into one aggregate network charge of $0.011 per minute per end for the respondents to recover the ongoing costs of entry (excluding connection costs). The Commission also indicated that it expects the respondents to propose unbundled rates for the specific functions relating to interconnection that may better reflect their particular circumstances.[90]

The Commission also determined that the respondents should be required to carry overflow traffic where requested, but expressed concern that IXCs could exploit the availability of overflow traffic carriage in an attempt to minimize the total number of trunks in use, so as to avoid the associated charges (including contribution). Since IXCs have the ability to minimize overflow traffic by ordering additional trunks, the Commission stated that a tariffed rate for carriage of overflow traffic should be developed separate from the network charge which would reflect any additional costs, so as to encourage IXCs to use appropriate engineering criteria in the design of their networks.[91]

III. Resale and Sharing

A. The Scope of Resale and Sharing

In Decision 90-3,[92] the Commission took a rather limited view of the potential scope and viability of resale in stating that "resale for joint use would increase the number of suppliers in the market and would stimulate the development of integrated voice/data and value-added services." The Commission went on to state that "to the extent that margins between MTS and private line rates are sufficiently limited, resellers would be unable to compete solely on the basis of price and would have to add value to their services to compete effectively, thus ... differentiating [their] services from MTS/WATS."[93] The Commission further found that resellers would likely operate primarily in high traffic corridors[94] and would be technically disadvantaged by the poor quality of (line side) connections obtained from Bell and B.C. Tel, the necessity of reseller customers to dial extra digits, and the absence of lower-priced termination available through WATS.[95]

In Decision 92-12, the Commission, in extending resale and sharing to the Atlantic provinces, determined that "resale of the facilities of the Atlantic telephone companies would provide benefits similar to those anticipated in Decision 90-3."[96] The Commission also determined that permitting the resale of

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[90]Decision 92-12, *ibid.* at 95.
[91]*Ibid.* at 96.
[92]*Supra* note 8 at 19.
[93]*Ibid.* at 20.
[94]*Ibid.* at 35.
[95]*Ibid.* at 20.
[96]Decision 92-12, *supra* note 2 at 121.

WATS/TDS would "enable resellers to increase their geographic coverage at reduced costs"[97] and lower the cost of carrying long distance traffic which travels, in part, outside a reseller's network (off-net).

The Commission expanded on its reasons for liberalizing resale and sharing as follows:

> It has been the Commission's finding in past decisions that resellers can provide certain benefits and that resale is in the public interest where it does not result in substantial contribution erosion. Such benefits include greater supplier responsiveness, both in terms of service innovation and service and pricing flexibility. The Commission is of the view that resellers could deliver benefits to subscribers in certain niche markets that may not be served by facilities-based competitors. Moreover, in the absence of WATS resale, the Commission considers that resellers would be limited in their ability to offer alternatives to facilities-based competitors.
>
> In the opinion of the Commission, resale can increase the price responsiveness of the marketplace. Whenever there are significant differences in rates charged to end users, resellers have the opportunity to take advantage of available margins to respond to portions of the market that would not otherwise be able to benefit from various rate discounts. The respondents have the opportunity to respond to the reseller by reducing margins or beginning to serve such pent-up demand as identified by the reseller. The need for the reseller to continually respond to underserved market segments creates a dynamic marketplace. Such dynamic pricing can be considerably reduced if carriers can restrict access to volume discounted services. In such circumstances, not only can the reseller be limited in targeting pent-up demand, but respondents could use restrictions on access to target the resellers' customer bases with lower rates than the resellers can obtain. For instance, if the reseller is limited to off-net traffic at MTS rates, while the respondents can offer the resellers' customers a discount using Advantage, then the respondents would obtain a significant advantage and, as a consequence, the benefits of lower prices might not be as broadly based.[98]

Nevertheless, the Commission also cautioned that while "resale can provide many benefits ... it is not a substitute for facilities-based entry."[99] The Commission went on to discuss the more limited scope of resale in the following terms:

> Facilities-based entry permits sustainable and more broadly-based competition, thereby increasing the benefits to be derived from competition. A facilities-based carrier has more control over its facilities costs. Since a reseller leases its underlying facilities and operates at the margin provided for in the price of leased facilities and services, a reseller is at risk wherever carriers can reduce these margins. Since resellers have less control over their costs, a resale market that operates solely on arbitrage opportunities, without providing value-added services, may not be sustainable over the long run. However, resellers can complement facilities-based competition by providing price discipline, ensuring greater responsiveness and serving niche markets.[100]

Accordingly, while the Commission decided to extend resale and sharing to the Atlantic provinces and permit the resale of WATS and other targeted discount services, it was not satisfied that resale alone is a viable form of compe-

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[97] *Ibid.* at 125.
[98] *Ibid.* at 126.
[99] *Ibid.* at 118.
[100] *Ibid.*

tition in the provision of interexchange voice services in the long-run. Therefore, since the Commission, in permitting resale and sharing for joint use in Decision 90-3, created a competitive alternative which, in the Commission's own view, is inherently unstable, it is not surprising that the Commission is now permitting facilities-based competition and providing both IXCs and resellers with expanded resale capabilities. Or, alternatively stated, resellers will also now be able to employ their own facilities in their operations, thereby reducing their dependence on the price structures of the facilities-based carriers from which they lease facilities. The net effect of the new regime on resellers will likely be to encourage the development of two types of resellers, namely: (1) specialized resellers who compete primarily on the basis of value-added services rather than price (thereby enabling them to price their services at a premium over telephone company basic long distance voice services) and (2) mixed mode (*i.e.* resale and facilities-based) carriers who compete heavily on the basis of price and need to become less dependent on the margins between telephone company private line and MTS rates, thereby increasingly motivating such resellers to employ their own facilities or those provided by entities other than telephone companies (*e.g.* hydro utilities, etc.).

In fact, the Commission found that the BCRL application was premised on the use of "existing regional facilities and a resale customer base, and assume[d] a mix of owned and leased facilities."[101]

B. Contribution Payable by Resellers

In Decision 90-3, the Commission, in addition to requiring resellers to pay the regular tariffed rates for services and facilities obtained from telecommunications carriers, also established a contribution rate of $200 per month on private lines resold for joint use in order to relieve pressure to increase local rates resulting from the contribution erosion associated with that form of resale.[102] In Decision 92-12, the Commission decided that this amount should be increased as a result of the geographic extension of resale to the Atlantic provinces and the adoption of WATS/TDS resale.[103]

In establishing the contribution for resellers in a competitive environment that includes facilities-based entry, the Commission was mindful of the following two considerations:

> The first consideration is to establish a contribution for resellers that is appropriate given the nature of their operations and Commission objectives. The nature of resellers' operations has been to obtain end office non-equal access interconnection. The Commission considers it appropriate to charge resellers less for such access than for trunk-side access to the toll office switch on an equal access basis. However, the Commission considers that resellers should not be provided with an uneconomic price advantage over facilities-based competitors.
> The second consideration is whether the difference in the contribution charged to resellers and to IXCs would introduce a substantial opportunity for contribution avoidance.

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[101]*Ibid.* at 111.
[102]*Supra* note 8 at 52.
[103]See Decision 92-12, *supra* note 2 at 121, 125.

> The Commission notes that a contribution charge for resellers that would protect against significant contribution erosion may be less than that which is appropriate for IXCs. However, if resellers were to be charged a substantially lower amount, the difference would provide a strong incentive for IXCs to take advantage of the lower reseller contribution, even though the quality of access would be inferior. In the Commission's view, any difference greater than 15% could provide sufficient incentive to offset the lower quality. However, a differential of only 15% would mean a substantial change in the economic circumstances under which resellers operate. The Commission is of the opinion that the benefits of competition would be maximized if service providers could choose the mix of leased and owned facilities best suited to their market strategies. However, this would require that differences in contribution should reflect the type of access obtained rather than the type of service provider. Therefore, the Commission considers it reasonable to establish a transitional period during which the contribution charge required from resellers would increase from the minimum level necessary to protect against significant contribution erosion to within 15% of the contribution charges to facilities-based carriers.[104]

In light of the foregoing, the Commission established a five-year transitional period during which the contribution paid for a line side connection will increase, at the rate of 5 percentage points per year, from 65% of the contribution charged to facilities-based carriers in 1993 to 85% of the contribution charge applicable for toll office equal access interconnection in 1997.[105] Since these amounts are relative to IXC contribution, they also include the contribution discounts granted to IXCs which are reflected in Table 1.

Based on these discounts, the Commission set the following 1993 contribution charges for each interconnecting circuit within a circuit group:[106]

Table 5

Per Circuit Contribution Charges (Resellers)

# of circuits in the circuit group	Bell	B.C. Tel	Island Tel	MT&T	NBTel	Nfld. Tel
1 – 3	$ 20	$ 25	$ 20	$ 35	$ 30	$ 25
4 – 6	75	85	75	115	95	85
7 – 9	110	120	105	170	140	125
10 – 14	135	150	135	210	175	155
15 – 19	155	175	155	245	205	180
20 – 29	175	195	175	275	230	200
30 – 39	195	215	190	305	255	220
40 – 49	205	230	200	320	270	235
50 – 74	215	240	215	340	285	250
75 – 99	230	255	225	355	300	260
100 plus	240	270	240	380	315	275

[104] *Ibid.* at 128-29.

[105] *Ibid.* at 129-30.

[106] *Ibid.* at 188, as amended by p. 188-R contained in an *errata* issued by the Commission on 28 August 1992.

In order to liberalize resale and sharing in 1992, the Commission decided to apply the 1993 contribution rates in 1992.[107] Accordingly, subject only to the different discounted transitional rate schedule (shown in Table 5) applicable to resellers (who were only given the option of obtaining line side interconnection in Decision 92-12),[108] the contribution rules applicable to overseas access and Canada-U.S.A. circuits acquired by resellers are the same as those which have been described herein for IXCs.[109] Where a reseller obtains access circuits from Unitel (or presumably from any other IXC), the contribution charges specified in the general tariffs for resale and sharing of the telephone companies within whose territory the said circuits are located apply.[110]

No contribution is payable where an interconnecting circuit is used solely to access a respondent's MTS/WATS services,[111] or where a reseller gathers traffic from its customers by itself with the aid of Direct Access Lines (DALs) instead of relying on a telephone company to deliver the customer's traffic to the reseller.[112]

Where an interconnecting circuit, a Canada-U.S.A. circuit or an overseas access circuit is used by a reseller for the purpose of providing a local service, a joint use interexchange data service, or a voice or data service which is dedicated to the private communications needs of a user where one end of the facility used to provide the service is terminated at equipment dedicated to the user, the contribution charges specified in the Decision will not apply, but the Commission will require evidence that "by reasons [*sic*] of the technical, economic or operational characteristics of the service, it is unlikely that the connections [supplied for the purpose of providing any one of these services] will be used significantly for joint-use interexchange voice."[113]

The Decision does not contemplate the use of line side access by Unitel in conjunction with its owned facilities so as to result in contribution being payable at the discounted transitional rates. Accordingly, in order to prevent Unitel from having contribution on its traffic assessed at the lower contribution rate applicable to resellers, the Commission has prohibited Unitel from using resellers

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[107]Decision 92-12, *ibid.* at 130.

[108]See *ibid.* at 185-90, 194-97. On 19 June 1992 ITN Corporation filed an application with the Commission which seeks the availability of trunk side access for resellers. See *Trunk-Side Access by Resellers to the Public Switched Networks* (23 September 1992), Telecom Public Notice 92-55 (C.R.T.C.) [hereinafter Public Notice 92-55].

[109]See Decision 92-12, *ibid.* at 189, as amended by p. 189-R, contained in an *errata* issued by the Commission on 28 August 1992. The actual monthly amount applicable in respect of each Canada-U.S.A. circuit leased by a reseller in the operating territory of each respondent is: $220 (Bell), $245 (B.C. Tel), $220 (Island Tel), $345 (MT&T), $290 (N.B. Tel) and $255 (Nfld. Tel).

[110]Decision 92-12, *ibid.* at 196-97.

[111]*Ibid.* at 189.

[112]*Ibid.* at 78-79.

[113]*Ibid.* at 189-90. Following Decision 92-12, the Commission stated its intention to prescribe a method for determining and verifying which circuits will qualify for a contribution exemption pursuant to this rule. See letter addressed to various parties by the Commission concerning this matter (29 October 1992). In *Applications for Contribution Exemptions* ((1 April 1993), Telecom Decision 93-2 (C.R.T.C.)), the Commission actually prescribed the methodology for determining and verifying which circuits qualify for a contribution exemption.

> to aggregate or terminate traffic on its behalf using a discounted line-side connection. Further, during the transitional period, Unitel will be required to pay a contribution rate equal to 85% of the rate for equal access for any line-side connections obtained. The appropriate rate to be charged to other potential IXCs will depend on the network of the future applicant.[114]

Mixed mode carriers (*i.e.* carriers who have both the attributes of IXCs and resellers) who commence operating in the next few years may be subjected to different treatment for the purpose of making contribution payments depending on which of the two operating aspects is more dominant.[115] Those new carriers who are predominantly IXCs but wish to add some resale operations or are tempted to employ resellers to aggregate or terminate their traffic will not likely be allowed to benefit from the lower transitional contribution rates payable by resellers. Rather, they may be treated like Unitel and required to pay full IXC contribution on any trunk side interconnecting circuits and eighty-five per cent of full IXC contribution on any line side interconnecting circuits. On the other hand, mixed mode carriers who start out predominantly as resellers and gradually add owned facilities to their operations may be permitted, in the early years of interexchange competition, to pay the lower transitional reseller contribution rates on line side interconnecting circuits connected to facilities leased by them from other carriers. However, it is unclear whether or not such a carrier would be allowed to pay the lower reseller transitional contribution rates on line side interconnecting circuits connected to facilities owned by the carrier, or whether contribution would be charged at eighty-five per cent of full IXC contribution in such instances. In any event, such carriers would likely be expected to pay full IXC contribution on any trunk side interconnecting circuits. The Commission has allowed itself some measure of flexibility in determining what contribution rates will be payable by future IXCs (including mixed mode carriers) by stating that such determinations will depend on the network characteristics of the future IXCs.[116]

Since most of the facilities initially employed by BCRL would be primarily leased, the Commission in Decision 92-12 was not concerned about BCRL obtaining line side connections at the transitional rates. Furthermore, over time, as the facilities base of BCRL increases, BCRL will be required to pay contribution applicable to trunk side circuits on any equal access connections.[117]

In Decision 90-3, the Commission determined that "no facilities-based carrier will be permitted to lease interexchange services directly or indirectly to an affiliated company for resale for joint use or sharing, except where those services would be used only to provide data services or portable communications services such as mobile satellite and cellular services."[118] This affiliate rule was put into place to prevent a facilities-based carrier (such as Unitel) from entering the long distance market through an affiliated reseller, since this could amount

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[114]*Ibid.* at 130.

[115]These assessments are based on the discussion, *ibid.* at 130-31, relating to the contribution treatment to be afforded by the Commission to Unitel, BCRL and mixed mode carriers.

[116]*Ibid.* at 130.

[117]*Ibid.* at 130-31.

[118]Decision 90-3, *supra* note 8 at 39.

to facilities-based interexchange competition.[119] One practical effect of this rule has also been to prevent a telephone company from competing through an affiliated reseller. In Decision 92-12, the Commission stated its intention to review the need for the affiliate rule as a result of the Decision.[120] In the interim, since the Commission determined that applying the transitional period contribution charge for line side connections to BCRL would not result in substantial revenue erosion, BCRL was granted an exemption from the affiliate rule and from the prohibition placed on Unitel concerning the use of a reseller to aggregate or terminate traffic using discounted line side connections.[121]

C. General Treatment of Resellers

Insofar as implementation of Decision 92-12 is concerned, the respondents and Unitel were required to issue tariff pages reflecting the new resale and sharing rules within 60 days of the date of the Decision.[122] However, this implementation date was extended to 18 August 1992 by the Commission.[123]

As in the case of IXCs, resellers will initially be prohibited from: (1) originating competitive public switched long distance voice services in the operating territories of any telephone carrier other than a respondent; or (2) providing pay telephone services.[124] While the Commission did state that it would only prohibit IXCs from offering pay telephone service until it has approved a detailed operator services tariff that incorporates adequate consumer protection in respect of rates, access and confidentiality of consumer information,[125] it is less clear whether or not the Commission will eventually also allow resellers to provide pay telephone services as well.

Both IXCs and resellers offering shared tenant services must provide the respondent in whose operating territory the shared tenant services are offered with access to tenants who choose to obtain any telecommunications service from the respondent.[126] Unlike future IXCs, who will have to apply formally to the Commission to provide competitive public long distance voice services (although they will only have to demonstrate a willingness to abide by the terms and conditions of the Decision and will not be required to demonstrate financial viability),[127] a reseller will merely have to register with the Commission and with any other federally regulated telecommunications carrier from which it intends to obtain service.[128]

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[119]*Ibid.* at 37-39.

[120]Decision 92-12, *supra* note 2 at 131. In *Review of the Affiliate Rule* (25 November 1992), Telecom Public Notice 92-70 (C.R.T.C.), the Commission initiated a proceeding to review the affiliate rule.

[121]*Ibid.*

[122]*Ibid.* at 176.

[123]See letters from the Commission addressed to the Competitive Telecommunications Association and Cam-Net Communications Network Inc. (7 August 1992; 14 August 1992).

[124]See Decision 92-12, *supra* note 2 at 179, 187.

[125]*Ibid.* at 161.

[126]*Ibid.* at 179, 187.

[127]*Ibid.* at 117.

[128]*Ibid.* at 187.

D. *Regulatory Status of Resellers*

Presently, the *Railway Act*[129] provides for the regulation of telecommunications carriers which meet the definition of "company" set out in section 334 of that legislation. That definition includes "every company or person within the legislative authority of Parliament having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls."

In *Enhanced Services*,[130] the Commission concluded that its jurisdiction extended "only to those companies within federal jurisdiction that may be considered to be *operating* a telephone or telegraph system" (and no reference was made to the term "line" as opposed to "system," although the former is also employed in the definition of "company"). Accordingly, the Commission concluded "that its statutory mandate did not require it to regulate a potentially wide range of enhanced service providers who make use of underlying basic telecommunications services for the provision of their service offerings."[131]

In Decision 85-19, the Commission, while refusing to regulate resellers, concluded that "the resale and sharing market is similar in many respects to the enhanced services market and that the conclusions reached in Decision 84-18 are also appropriate here."[132] In addition, the language employed in both Decisions 84-18 and 85-19 suggests that the Commission's finding was driven by a belief that competition rather than regulation was appropriate for the enhanced services and resale and sharing markets.

The Commission's position concerning the regulation of resellers did not change when it further liberalized resale and sharing in Decision 90-3.

In *Application by TWU — Status of Resellers under the Railway Act*, the Commission reversed its prior position and held that "where a reseller offers end-to-end basic telecommunications service by means of interprovincial services or facilities that it configures, and where it exercises control over the carriage and routing of its traffic, it falls within federal jurisdiction and is operating a telephone system or line."[133] Accordingly, such a reseller is a "company" within the meaning of section 334 of the *Railway Act*,[134] and therefore subject to the Commission's jurisdiction. Furthermore, in accordance with the ruling of the Federal Court of Appeal in *T.W.U.* v. *Canada (Canadian Radio-television and Telecommunications Commission)*,[135] any carrier (including a reseller) which falls within the definition of a "company" must obtain Commission approval of tariffs for any amounts to be charged in connection with the provision of its telecommunications services. Accordingly, all resellers who came

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[129]R.S.C. 1985, c. R-3.

[130](12 July 1984), Telecom Decision 84-18 at 31 (C.R.T.C.) [hereinafter Decision 84-18].

[131]*Ibid.*

[132]Decision 85-19, *supra* note 7 at 89.

[133](11 June 1992), Telecom Decision 92-11 at 10 (C.R.T.C.) [hereinafter Decision 92-11].

[134]*Supra* note 129.

[135][1989] 2 F.C. 280, 98 N.R. 93 (F.C.A.), leave to appeal denied by the Supreme Court of Canada (*sub nom. CNCP Telecommunications* v. *Telecommunications Workers' Union*) [1989] 1 S.C.R. vi.

within the Commission's ruling in Decision 92-11 were required to file proposed tariffs by 9 October 1992. All resellers who had previously registered with the Commission as such, but who did not believe that they were required to file tariffs, were required to show cause by the same date as to why they should not have been required to do so.

The requirement to file tariffs may be onerous for many resellers of limited resources. However, to the extent that the Commission is satisfied that the resale market is sufficiently competitive, the Commission may expedite approval of reseller tariffs, much as it currently does for cellular telephone companies.

Furthermore, the requirement imposed on certain resellers by Decision 92-11 to file tariffs may disappear in the near future in any event, since the federal Minister of Communications has indicated that new telecommunications legislation[136] is not intended to apply to resellers and sharing groups.[137] Thus, the temporary regulation of resellers pursuant to Decision 92-11 seems particularly wasteful given the stated policy objectives of the government to promote a fully competitive (and essentially deregulated) market for resellers. This may have motivated the Competitive Telecommunications Association ("CTA"), which represents the resale industry, and ACC Long Distance Ltd., a reseller, to seek leave to appeal Decision 92-11 to the Federal Court of Appeal. However, the Court denied leave.[138] CTA subsequently filed a petition pursuant to section 67 of the *National Telecommunications Powers and Procedures Act*,[139] requesting the Federal Cabinet to postpone the filing of tariffs by resellers pursuant to Decision 92-11 until 28 February 1993 (by which time it was thought that the fate of the *Telecommunications Act* would become clear). The petition was denied,[140] perhaps because of a concern that Cabinet has no legal jurisdiction to postpone a tariff filing requirement in respect of a carrier (including a reseller) which must be regulated pursuant to the *Railway Act*.

In any event, it is interesting to note that the Commission's description of the type of reseller which is a "company" pursuant to Decision 92-11 only extends to a reseller offering basic services. This may resurrect the debate about what constitutes basic vs. enhanced services, as some resellers attempt to characterize themselves as providers of enhanced services in order to avoid regulation. It is unclear whether or not the distinction is supported by a plain reading of the *Railway Act*. However, the distinction made by the Commission may be necessary upon implementation of the North American Free Trade Agreement, which prohibits requiring enhanced service providers to file tariffs relating to

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[136]*Telecommunications Act*, S.C. 1993, c. 38 (coming into force 25 October 1993).

[137]See Communications Canada, *Telecommunications: New Legislation for Canada* (Ottawa: Communications Canada, February 1992) at 14. The structure of the definitions in s. 2 of the *Telecommunications Act*, which will replace the provisions of the *Railway Act* governing telecommunications, is aimed at excluding resellers from the legislation. It is unclear whether this legislative objective has been achieved.

[138]See orders of Mahoney J.A. in *Competitive Telecommunications Association* v. *Telecommunications Workers' Union* (4 September 1992), No. 92-A-4265 (F.C.A.); *ACC Long Distance Ltd.* v. *Telecommunications Workers' Union* (4 September 1992), No. 92-A-4280 (F.C.A.).

[139]R.S.C. 1985, c. N-20.

[140]See Order in Council P.C. 1992-2206 dated 8 October 1992.

such services, unless it becomes clear before then that the *Telecommunications Act* does not require resellers to file tariffs.[141]

An interesting side effect of the Commission's ruling in Decision 92-11 is that resellers who come under the Commission's jurisdiction will also come under federal jurisdiction with respect to other related matters, such as employment and human rights (irrespective of any tariff filing requirement). Accordingly, it is arguable that as early as 11 June 1992, federal legislation such as the *Canada Labour Code*,[142] *Canadian Human Rights Act*,[143] *Employment Equity Act*,[144] and *Pension Benefits Standards Act*[145] became applicable to such resellers, thereby displacing any provincial legislation covering the same subject matter which may have previously applied.

IV. Regulatory Safeguards

A. The Issues

The Commission determined that in a mixed monopoly and competitive environment, regulatory safeguards needed to be established with respect to: (1) access to bottleneck facilities; (2) anti-competitive pricing practices; and (3) the disclosure or use of competitively sensitive information.[146] At the same time, the Commission was concerned that imposition of regulatory constraints on incumbent firms not be so burdensome as to mitigate the beneficial effects of competition.[147]

B. Prineiples Applieable to Regulatory Safeguards

. In order to provide a level playing field for all competitors, the Commission determined that "safeguards should focus on equivalent access to the type of services and facilities that the telephone companies require in order to provide their own long distance services."[148] Thus, since IXCs will be "explicitly contributing substantial amounts to the recovery of Access and Common category costs, new tariffs for facilities and services required for equivalent access shall not include a mark-up."[149]

Similarly, the respondents will be required to provide information as to the existence of alternative suppliers if in the provision of access service (*e.g.* new subscribers, moves, changes) they actively promote their own long distance services, and will also be required to handle questions and referrals at respondents' business offices on an impartial basis. Moreover, the respondents will have to

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[141]*North American Free Trade Agreement* (Ottawa: Minister of Supply and Services Canada, 1992), art. 1303(2)(c).

[142]R.S.C. 1985, c. L-2.

[143]R.S.C. 1985, c. H-6.

[144]R.S.C. 1985 (2d Supp.), c. 23.

[145]R.S.C. 1985 (2d Supp.), c. 32.

[146]Decision 92-12, *supra* note 2 at 132-33.

[147]*Ibid.* at 132.

[148]*Ibid.* at 134.

[149]*Ibid.* at 136.

provide, on a tariffed basis, weekly reports of the names and addresses of all new subscribers and those changing their addresses.[150]

Furthermore, the Commission required each respondent to establish an Interexchange Carrier Group (ICG) in order to separate the monopoly and competitive activities of the respondents and to coordinate the delivery of facilities and services to competitors.[151]

Finally, the Commission, in approving the BCRL application in principle, stated: "The Commission finds it appropriate that all carriers under its jurisdiction allow access to their facilities and services on a non-discriminatory basis."[152] This implies that IXCs, upon bringing appropriate applications, will have access not only to respondents' facilities and services (and by extension of Decision 92-12 to those of Teleglobe and Telesat) for the purpose of providing competitive telecommunications services, but may also be granted access to the facilities and services of Alberta Government Telephones ("AGT"), and possibly to those of Northwestel Inc. ("Northwestel"),[153] as well as perhaps even to those of Rogers Cable T.V. Limited ("Rogers"), which has recently been held by the Commission[154] to be a "company" within the definition contained in section 334 of the *Railway Act*,[155] since Rogers "offers and provides end-to-end data, video, and voice telecommunications services using its local distribution systems located in several provinces, in combination, in some cases, with resold interexchange circuits."[156] The rule may, by logical extension, also be applied to access sought by a competitor (whether it be an IXC or a reseller) to the facilities and services offered by other IXCs and perhaps also to those offered by other resellers.

Presently, the Commission cannot exercise its jurisdiction over Saskatchewan Telecommunications (SaskTel) or the Manitoba Telephone System (M.T.S.), the Stentor members operating in the Provinces of Saskatchewan and Manitoba, respectively, due to the status of those companies as provincial crown agents.[157] Once federal legislation governing telecommunications is made bind-

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[150]*Ibid.* at 135.

[151]*Ibid.* at 137.

[152]*Ibid.* at 141-42.

[153]In Decision 90-3, *supra* note 8 at 39, and in *Bell Canada and Northwestel Inc. — Sale of Facilities in the Northwest Territories* (1 May 1992), Telecom Decision 92-6 at 26 (C.R.T.C.), the Commission refused to extend resale and sharing of private lines for joint use to the operating territory of Northwestel, due in part to "differences between Northwestel's circumstances and those of other carriers." It is, therefore, less clear whether the Commission is predisposed to liberalize competition in the provision of telecommunications services in the operating territory of Northwestel, notwithstanding the Commission's pronouncements concerning non-discriminatory access to the facilities and services of carriers under its jurisdiction. On the other hand, due to the difficulties inherent in providing telecommunications services to the sparsely populated and remote North, it may be some time before IXCs or resellers develop an interest in competing with Northwestel.

[154]In *Bell Canada* v. *Rogers Cable T.V. Ltd. Carrying on Business as Rogers Network Services — Application to Require the Filing of Tariffs of Tolls by Rogers Cable TV Ltd.* (11 June 1992), Telecom Decision 92-10 (C.R.T.C.) [hereinafter Decision 92-10].

[155]*Supra* note 129.

[156]Decision 92-10, *supra* note 154 at 25.

[157]This result derives from the ruling of the Supreme Court of Canada in the *AGT* case, *supra* note 10, that AGT, which at the time the decision was rendered, was an agent of the provincial