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15 January 2007

**By E-mail**

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Dear Mr. St-Aubin:

**Subject: Proposed Order Varying Forbearance from the regulation of retail local exchange services, Telecom Decision CRTC 2006-15, Canada Gazette, Part I, Volume 140, No. 50, 16 December 2006**

1. MTS Allstream Inc. (MTS Allstream) is pleased to submit the attached comments on the Governor-in-Council's proposed Order Varying Telecom Decision CRTC 2006-15, as set out in the *Canada Gazette*, Part I, Volume 140, No. 50, 16 December 2006.
2. Should you have any questions regarding the attached comments, please do not hesitate to contact the undersigned.

Yours truly,

*Original signed by Teresa Griffin-Muir*

c.c: Interested parties to Telecom Decision CRTC 2006-15

**In the Matter of**

**A Proposed Order Varying  
*Forbearance from the regulation of retail local exchange  
services, Telecom Decision CRTC 2006-15,  
Canada Gazette, Part I, Volume 140,  
No. 50, 16 December 2006***

**Comments of  
MTS Allstream Inc.**

**15 January 2007**

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## I. EXECUTIVE SUMMARY

- i. The Government's proposed order for the deregulation of the retail telephone services offered by the former monopoly telephone companies (the Proposed Order)<sup>1</sup> unfortunately will not create the conditions that are needed for the Minister to achieve his goal of "stimulat[ing] competition and innovation among local telephone service providers so that Canadian consumers and businesses will benefit from even more choice, improved products and services and lower prices."<sup>2</sup>
- ii. The Government explains that the proposed changes to the CRTC's existing test for local forbearance<sup>3</sup> are intended to "accelerate deregulation of retail telephone services pricing for traditional telephone companies".<sup>4</sup> According to the Government, as a result, "[c]onsumers will benefit from more choices and improved products and services. For the telecommunications industry, innovation will be encouraged as a result of more intense competition between traditional telephone companies and their competitors. The proposal reduces unnecessary regulation as well as increases reliance on market forces and encourages competition in telecommunications."<sup>5</sup>
- iii. MTS Allstream fully endorses these objectives and believes that every effort should be made to stimulate competition and innovation among local telephone service providers so that customers can benefit from increased choice, greater and faster innovation, as well as competitive pricing. However, in its haste to proceed with the Proposed Order, the Government of Canada may well jeopardise these very objectives.
- iv. While the Minister's goals are consistent with the objectives articulated in the recommendations contained in the Report of the Telecommunications Policy Review

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<sup>1</sup> *Canada Gazette*, Part I, Volume 140, No. 50, 16 December 2006, pp. 4312- 4321.

<sup>2</sup> Industry Canada, Press Release, "Canada's New Government Proposes to Accelerate Deregulation of local Telephone Service in the Interest of Canadian Consumers", 11 December 2006.

<sup>3</sup> As set out in *Forbearance from the regulation of retail local exchange services*, Telecom Decision CRTC 2006-15 (Decision 2006-15).

<sup>4</sup> Industry Canada, Backgrounder, "Government's proposed changes to the CRTC's local forbearance decision", 11 December 2006.

<sup>5</sup> Industry Canada, Backgrounder, "Government's proposed changes to the CRTC's local forbearance decision", 11 December 2006.

Panel (TPRP REPORT), which the Minister has endorsed, the Proposed Order fails to address the legislative framework and market conditions that underlie the approach taken in the TPRP REPORT Report, including:

- a careful assessment of the former monopolies' significant market power (SMP) on a market-by-market basis;
  - rationalization of the regime for wholesale access;
  - the establishment of clear and effective means to improve competitor access to municipal rights-of-way, building access, support structure access, as well as procedures, all of which represent significant barriers to entry; and
  - the introduction of more effective means to address cases of anti-competitive conduct.<sup>6</sup>
- v. To deregulate the former monopolies' local telephone services without regard to these conditions is to put the proverbial cart before the horse and to put both the sustainability of competition and the resulting customer benefits at risk. Moreover, this haste is unnecessary given that there is nothing precluding the former monopolies from continuing to apply to the CRTC for forbearance under the existing rules for local forbearance, in the event that the Government chooses not to vary the rules for local forbearance at this time. It is also open to Governor-in-Council to vary or amend each resulting decision on a case-by-case basis.
- vi. Close on the heels of the Proposed Order, the Government of Canada itself highlighted the fundamental role that the proper safeguards and underlying regulatory framework play in any move to deregulate and rely on market forces to the maximum extent feasible. On 18 December 2006, the Government issued a policy direction to the CRTC (the *Direction to the CRTC*), in which the Government directed the CRTC to review its regulatory framework relating to mandated access to wholesale services, taking into account the principles of "technological and competitive neutrality, the potential for incumbents to exercise market power in the wholesale and retail markets for the service

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<sup>6</sup> Telecommunications Policy Review Panel, *Final Report*, March 2006.

in the absence of mandated access to wholesale services, and the impediments faced by new and existing carriers seeking to develop competing network facilities.”<sup>7</sup>

- vii. The Proposed Order, while paying heed to the importance of Competitor Quality of Service (CQoS), runs contrary to the TPRP REPORT Report and the *Direction to the CRTC*, as well as undermining the achievement of vigorous competition in markets for local exchange service in Canada, the very thing that will ensure the transfer of social and economic benefits to Canadian customers.
- viii. In contrast to the clear direction given by the Government in the *Direction to the CRTC*, the Proposed Order casts aside any substantive consideration of market power and seeks to deregulate the local telephone services of the former monopolies before a revised approach to reliable wholesale access is in place.
- ix. In particular, the Proposed Order would eliminate two very common tests that are used to assess market power (*i.e.*, market share loss and evidence of rivalry in the market), and replace those tests with a rudimentary "competitor presence" test that is susceptible to legal challenge. In effect, the Proposed Order would repeal subsections 34(1) and 34(3) of the *Telecommunications Act*. This inconsistency with the *Telecommunications Act* would make the Proposed Order susceptible to being found *ultra vires* of its enabling legislation by a reviewing Court.
- x. The "competitor presence" test also runs contrary to the recommendations of the TPRP REPORT, as well as competition law principles applied by regulatory authorities and competition law authorities throughout the world. As discussed in the attached report prepared by Lemay-Yates Associates Inc.,<sup>8</sup> any attempt to deregulate without giving consideration to the market power of the former monopoly telephone companies runs completely against the tide and approach taken by regulatory authorities in comparable international jurisdictions. In most cases, deregulation has been accompanied by

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<sup>7</sup> *Canada Gazette*, Part II, Volume 140, No. 26, SOR/2006-355, December 14, 2006, page 2348 (the *Direction to the CRTC*).

<sup>8</sup> Lemay-Yates Associates Inc., *Comparative Discussion of Local Phone Service Forbearance*, 15 January 2007.

market share loss that is far greater than the CRTC's 25 per cent market share loss criterion.

- xi. Furthermore, in practice, as discussed in the report prepared by Economics and Technology Inc., the experience with the Federal Communications Commission's version of a "competitor presence" test in the U.S. has led to re-monopolization and higher prices, reduced rivalry and resulted in a reduction in the delivery of the other benefits of true competition to customers in affected U.S. telecommunications markets.<sup>9</sup>
- xii. On top of these concerns, the "competitor presence" test contemplated in the Proposed Order would lead to confusion and administrative complexity and, ultimately, delay the implementation of local forbearance. The Proposed Order would allow the "competitor presence" test to be used as an alternative to the Competition Bureau's Structured Rule of Reason (SROR) test; however, the "competitor presence" test is actually only one element of the Bureau's full-blown SROR test. Thus, the Proposed Order dilutes, and even rejects the Competition Bureau's SROR test even as it purports to adopt the SROR test.
- xiii. In addition, the Proposed Order's "competitor presence" test is framed in terms of the offer of services by a telecommunications service provider throughout the relevant geographic market. Apart from the fact that neither a "facilities-based telecommunications service provider" nor "offer" is defined, the notion of mere presence throughout the relevant market is, especially in the case of retail business markets, impossibly vague. Since the mere presence of competitor facilities does not necessarily mean that competitors have gained any customers in the market, the "competitor presence" test could be interpreted as permitting forbearance in absurd situations where the former monopoly continues to overwhelmingly dominate the market, to the point even of re-monopolization. At the other extreme, since no competitor in the business market will have facilities "throughout" the entire geographic market, the "competitor presence" test could equally be interpreted as being impossible to satisfy.

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<sup>9</sup> Lee L. Selwyn and Helen E. Golding, *Preventing Abuse of Dominance in Canadian Telecom Markets*, December 2006, prepared in response to the Competition Bureau's "Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry".

- xiv. The Proposed Order is also framed in terms that offer a choice between two alternative definitions of the relevant geographic market, the first being a relatively broad “Local Interconnection Region” that loosely overlaps with Canadian municipal and county structures and the second being the relatively miniscule local exchange. Local exchanges are too small to represent a community of interest, and reliance on the local exchange as the relevant geographic market would only lead to customer confusion and would be subject to gaming by the former monopolies.
  
- xv. In summary, MTS Allstream is in full agreement with the Minister’s desire to stimulate competition and innovation among local telephone service providers so that Canadian consumers and businesses will benefit from even more choice, improved products and services and competitive prices. However, as drafted, the Proposed Order is at risk of jeopardizing the establishment of the very competitive market that would achieve these goals.

## II. INTRODUCTION

1. The Government of Canada has embarked on an ambitious project to develop and implement a new telecommunications policy agenda for the 21<sup>st</sup> Century. The Government's new policy is designed to promote competition and thereby secure the ensuing social and economic benefits for Canadians and the ability to place increased reliance on market forces – two objectives that MTS Allstream fully supports.
  
2. In its public pronouncements, the Government has stated that it has relied heavily on the work of the Telecommunications Policy Review Panel (TPRP REPORT) and the recommendations contained in the TPRP REPORT Report,<sup>6</sup> of which there are 127. The principle of placing greater reliance on market forces comes from the TPRP REPORT Report, but so too the principle that in markets that have been found to remain prey to the former monopolies' significant market power or "SMP" pursuant to a case by case analysis, there will be a continued need for regulation. An equally important and related TPRP REPORT principle is that, the regulatory framework should continue to require incumbents to make essential facilities available to competitors, on a mandatory basis if necessary since by definition, retail market entry is not possible without competitor access to essential facilities.<sup>7</sup> Like the principle of placing increased reliance on market forces, MTS Allstream fully supports the need for careful assessment of the market power of the former monopolies and for a robust regime for competitor access to the critical monopoly infrastructure.
  
3. The Minister of Industry has responded to certain elements of the TPRP REPORT Report and has signalled that the Canadian public can expect more comprehensive steps to be taken in the future. Thus far, certain of the TPRP REPORT Report's recommendations have been translated into policies. The Government has tabled proposed amendments to the *Competition Act*, which, if passed and when they come into force, would establish financial penalties that could be imposed on the former monopolies should they engage in anti-competitive conduct in any deregulated markets.

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<sup>6</sup> The Telecommunications Policy Review Panel Final Report 2006 (the TPRP REPORT Report), available at: [http://www.telecomreview.ca/epic/internet/inTPRP Report-gecrt.nsf/en/Home](http://www.telecomreview.ca/epic/internet/inTPRP%20Report-gecrt.nsf/en/Home).

<sup>7</sup> The Telecommunications Policy Review Panel Final Report 2006 (the TPRP REPORT Report), available at: [http://www.telecomreview.ca/epic/internet/inTPRP Report-gecrt.nsf/en/Home](http://www.telecomreview.ca/epic/internet/inTPRP%20Report-gecrt.nsf/en/Home) page 3-33.

The Government has also issued a *Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*<sup>10</sup> (the *Direction to the CRTC*), that specifies the policy objectives and criteria that should be applied by the Commission in its decisions. Here again, the Government borrowed a page from the TPRP REPORT Report, directing the CRTC to complete a review of the existing regulatory framework relating to mandated access to wholesale services that are provided to competitors by the former monopolies. The Government directed this exercise should specifically take into account the potential for the former monopolies to exercise market power in both the (upstream) wholesale market as well as the (downstream) retail market, as well as the barriers faced by competitors in constructing and developing their own competing network facilities.

4. In the proposed order to the CRTC varying *Forbearance from the regulation of local exchange services*, Telecom Decision CRTC 2006-15, 6 April 2006 (Decision 2006-15) (Proposed Order),<sup>11</sup> the Government attempts to respond to petitions to Cabinet that were filed by certain of the former monopolies as part of a multi-pronged attack on Decision 2006-15.<sup>12</sup>
5. The Proposed Order, while paying heed to the importance of Competitor Quality of Service (CQoS), runs contrary to the TPRP REPORT Report and the *Direction to the CRTC* by undermining the achievement of vigorous competition in markets for local exchange services in Canada. Such vigorous competition is the very thing that will ensure the transfer of social and economic benefits to Canadian customers.
6. It cannot be consistent with the TPRP REPORT Report and the *Direction to the CRTC* for the government to have devised a test for forbearance that supplants a case-by-case consideration of the state of competition in a given market for telecommunications

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<sup>10</sup> Canada Gazette, Part II, Volume 140, No. 26, SOR/2006-355, December 14, 2006, page 2348 (the *Direction to the CRTC*)

<sup>11</sup> Canada Gazette, Part I, Volume 140, No. 50, 16 December 2006, page 4312 - 4321.

<sup>12</sup> There are four separate but related judicial appeals from Decision 2006-15 that have been launched by the former monopolies, at least two currently outstanding applications to the CRTC to review and vary Decision 2006-15 as well a proceeding initiated by the CRTC itself to reconsider certain aspects of Decision 2006-15, namely the inclusion of wireless services in the same relevant product market as local wireline services and the winback rules.

services with a "competitor presence" test that completely eliminates consideration of the former monopoly's market share, market share loss, rivalrous behaviour or any other measure of the extent of market power retained by the former monopoly. As well as being fundamentally at odds with the approach recommended by the TPRP REPORT Report and the *Direction to the CRTC*, this aspect of the Government's proposal, which by executive fiat, purports to remove the exercise of discretion on a case by case basis that is mandated by the *Telecommunications Act*, is susceptible to being impugned by a reviewing Court.

7. Nor is it consistent with the TPRP REPORT Report and the *Direction to the CRTC* for the Government to de-link prior implementation of competitor access to the former monopoly's operational support systems (OSS) and to tariffs for certain Asymmetrical Digital Service Line (ADSL) and Ethernet services (collectively, the wholesale criteria), from the forbearance regime or to lessen the former monopolies' incentive to satisfy CQoS standards.
8. The changes contemplated in the Proposed Order are far-reaching and strike at the very core of the conditions under which forbearance may or must not be granted under section 34 of the *Act*. The proposed changes could notionally render forbearance far more accessible to the former monopolies in all regions of the country and across both residential and business markets, even in instances where they hold a 99.9% share of the market. Most significantly, the former monopolies could be forborne under the Proposed Order well before the implementation of the Government's proposed amendments to the *Competition Act*, the rationalisation of the regulatory regime for wholesale access, and presumably, the fulfilment of the Government's promise of "more substantial regulatory change,"<sup>13</sup> the details of which are as yet unknown.
9. MTS Allstream fully supports the objective of maximising the social and economic well-being of Canadians and is firmly of the view that any changes to the existing framework should meet no less of a standard. The long-range benefits of increased

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<sup>13</sup> *Direction to the CRTC*, Regulatory Impact Statement, page 2346.

customer choice, competitive prices and higher levels of product and service innovation are only achievable where vigorous and sustainable competition takes hold.

10. However, in its haste to deliver these benefits to Canadians through the Proposed Order, the Government could very well jeopardise the only thing that will guarantee these social and economic benefits to Canadians – vigorous and sustainable competition. Indeed, deregulating a former monopoly telephone company without reference to market share, market share loss, rivalrous behaviour or, indeed, any assessment of market power, will have a deleterious effect on the establishment and continuance of competition in the market – something that the Government is seeking to promote. Moreover, deregulating the former monopoly telephone companies without the assurance that there is a robust wholesale regime and diluting the former monopolies' incentive to provide good CQoS to their competitors will have a deleterious effect on the establishment and continuance of a dynamic and robustly competitive market.
11. The Government's Proposed Order is not the proper means to achieve what are otherwise the right objectives, namely to promote competition and streamline the regulatory process. In fact, the Order is contrary to the Government's own *Direction to the CRTC* and the principles and recommendations of the TPRP REPORT Report.
12. In the submissions that follow, MTS Allstream addresses the proposed elimination of both the market share/market power criteria, the proposed redefinition of the geographic scope of the relevant market, the proposed elimination of trailing indicators from the list of CQoS indicators and the proposed elimination of the wholesale criteria.

## II. PROPOSED "competitor presence" TEST

13. Under clause 2 the Proposed Order, a former monopoly could be granted forbearance without being subject to and kind of market power assessment. In particular, the Proposed Order states that the Commission shall consider

242...that if an ILEC can satisfy the following criteria, then the requirements of section 34 of the Act for a forbearance determination will

have been met and the Commission will therefore grant forbearance in accordance with that section:

- a) the ILEC demonstrates that one of the following circumstances exist in the relevant market:
  - (i) that the ILEC does not have market power, based on the criteria set out in paragraph 213,
  - (ii) if the ILEC offers residential local exchange services, that there are, including the ILEC, at least three facilities-based telecommunications services providers, including providers of mobile wireless services, each of which is separately owned and is not an affiliate of any of the others, each of which offers residential local exchange services throughout that market, and at least one of which is, in addition to the ILEC, a fixed-line telecommunications service provider, or
  - (iii) if the ILEC offers business local exchange services, that there are, including the ILEC, at least two facilities-based, fixed-line telecommunications service providers, each of which is separately owned and is not an affiliate of any of the others and each of which offers business local exchange services throughout that market.

14. Paragraphs 242(a) (ii) and (iii) of Decision 2006-15 as set out in the Proposed Order include a "competitor presence" test for the retail residential and retail business markets, respectively. This "competitor presence" test is apparently offered as a stand-alone alternative to the Competition Bureau's SROR test to the assessment of market power, summarised at paragraph 213 of Decision 2006-15.
15. The Bureau's SROR test incorporates a criterion that looks to the number of competitors in a given market; however, the Bureau's test includes five additional criteria that are intended to assess the degree of competition that exists within a given market.
16. There are important reasons why the use of a "competitor presence" test that dispenses with the requirement to make an assessment of market power and the degree of competition in the relevant market is misguided:

- a. The proposed "competitor presence" test is susceptible to legal challenge as being *ultra vires* of section 34 the *Telecommunications Act*;
  - b. The proposed "competitor presence" test is inconsistent with competition law principles; as understood and applied both in Canada and abroad; and
  - c. The standalone "competitor presence" alternative to the Competition Bureau's SROR test is actually a less onerous subset of the Bureau's full-blown SROR test. There is an inherent contradiction here that will lead to confusion in its implementation;
  - d. The "competitor presence" test is framed in terms of the offer of services by a telecommunications service provider throughout the relevant geographic market. Neither "facilities-based TSP" nor "offer" is defined. Further, the notion of presence throughout a relevant market could variously be interpreted, especially in the case of retail business markets, either so broadly as to render forbearance an impossibility or so narrowly as to permit forbearance in absurd situations where competitors have gained an infinitesimal market share of 0.001 per cent. There is no rational way to resolve this conundrum; and
  - e. The former monopolies are apparently given the discretion when applying for forbearance to choose between two alternative definitions of the relevant geographic market, the first being a relatively broad "Local Interconnection Region" that loosely overlaps with Canadian municipal and county structures and the second being a relatively miniscule local exchange. Local exchanges are too small to represent a community of interest, will lead customer confusion and will be subject to gaming by the former monopolies. No guidance is offered as to when each of these alternatives would be most appropriate.
17. In the comments that follow, MTS Allstream explains why in the context of deregulating the former monopoly telephone companies, a framework that eliminates any assessment of a former monopoly's market power defies logic and common sense. MTS Allstream will first elaborate on the susceptibility of the proposed "competitor presence" test to legal challenge, and then discuss the incompatibility of this test with both competition law principles and the *Direction to the CRTC*. Also discussed is the lack of clarity within its terms.

**A. Principles Governing the Application of Section 34**

18. Paragraphs 242 to 281 of Decision 2006-15 describe and discuss a framework of five criteria that must be considered as a whole before a former monopoly will generally be able to demonstrate that it can no longer exercise market power in a relevant market. In very broad strokes, two of these criteria, the 25 per cent market share loss and rivalrous

behaviour criteria, are directly relevant to the assessment of a former monopoly's market power in a given market. The remaining three criteria refer to certain minimal wholesale criteria and CQoS obligations, all of which were established by the Commission pursuant to lengthy *ex post* findings of service delivery failures and anti-competitive conduct on the part of the former monopolies.

19. Clause 2 of the Proposed Order replaces all of paragraphs 242 to 281 of Decision 2006-15 with a single paragraph that describes two basic non-discretionary criteria, which if present, will require that the Commission make a finding that "the requirements of section 34 of the *Act* for a forbearance determination will have been met and the Commission will therefore grant forbearance in accordance with that section."
20. Section 34 of the *Act* provides that the Commission may forbear, either conditionally or unconditionally, from the regulation of certain telecommunications services otherwise regulated pursuant to sections 24, 25, 27, 29 and 31:

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

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

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

21. Pursuant to section 34(1) of the *Act*, the Commission may forbear, in whole or in part, where it determines as a question of fact that forbearance is consistent with the Canadian telecommunications policy objectives.
22. Pursuant to section 34(2) of the *Act*, the Commission must forbear, to the extent it considers appropriate, where it determines as a question of fact that a telecommunications service or class of services is subject to sufficient competition to protect the interests of users.
23. Subsection 34(3) provides, however, that 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.
24. While the Governor-in-Council has the statutory power to vary a particular decision of the Commission, it cannot unilaterally amend the *Act*. Like the Commission itself, Cabinet's directions to the Commission in relation to forbearance cannot be inconsistent with section 34 of the *Act*, which sets out the statutory preconditions and criteria for forbearance. In other words, whatever framework is put in place, it must respect the will of Parliament.
25. In the version of paragraph 242 that currently exists in Decision 2006-15, the Commission set out the circumstances in which a former monopoly will generally be able to demonstrate that it no longer exercises market power in a relevant market. Significantly, the Commission's version of paragraph 242, with its rivalrous behaviour criterion, recognized that regardless of whether the other four criteria for forbearance were met, the Commission still had to turn its mind to the question of whether forbearance in a particular case would inhibit the establishment or continuance of competition for a telecommunications service as required by section 34 of the *Act*.

26. As noted above, Clause 2 of the Proposed Order replaces all of paragraphs 242 to 281 of Decision 2006-15 with a single paragraph that purports to describe two criteria, namely the counting of facilities-based telecommunications service providers in a given relevant market and the satisfaction of a watered-down CQoS criterion. If present, these two criteria will dictate that the Commission find, in every case, that "the requirements of section 34 of the *Act* for a forbearance determination will have been met and the Commission will therefore grant forbearance in accordance with that section." In other words, the Proposed Order fetters or removes the Commission's discretion to consider whether forbearance would be consistent with the Canadian telecommunications policy objectives (subsection 34(1)) and eliminates the statutory prerequisite to forbearance that the Commission satisfy itself that forbearance would not impair unduly the establishment or continuance of a competitive market for a given service (subsection 34(3)). Conceivably, the Proposed Order would direct the Commission to forbear even in the face of a specific finding of fact in a particular case that to forbear would be inconsistent with the Canadian telecommunications policy objectives or would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services. In so doing, the Proposed Order supplants the Commission's statutorily mandated fact-finding jurisdiction, only to replace it with an essentially binary "competitor presence" criterion.
27. The Commission's primary duty is to enforce and implement the *Act* and yet the Proposed Order sets it on a collision course with section 34 of the *Act*. In effect, the Proposed Order repeals subsections 34(1) and 34(3). It is inconsistent with the *Act* and is therefore susceptible to being considered *ultra vires* of its enabling legislation by a reviewing Court.

**B. Inconsistency with Competition Law Principles**

28. In rewriting Decision 2006-15 to remove paragraphs 242 to 281 thereof, the Governor-in-Council is removing those portions of Decision 2006-15 that dealt with the assessment of the market power of the former monopoly telephone companies.

29. Under Decision 2006-15, the 25 per cent market share loss criterion was by no means the end of the analysis of an assessment of market power. It was merely a starting point, serving "an important measure, at a fixed point in time, of the degree of success that competitors have had in a particular relevant market in competing with the applicant former monopoly." Indeed, the notion that the market share loss criterion could by itself constitute a bright-line test justifying forbearance in a particular relevant market was rejected in Decision 2006-15.<sup>14</sup> The retention of the long-standing "rivalrous behaviour" criterion, established in the seminal Telecom Decision CRTC 94-19,<sup>15</sup> preserves the important principle that the discretion to grant forbearance under the *Act* must be exercised on a on a case-by-case basis based, as the legislation requires on findings of fact specific to the telecommunications market and service in question.
30. Since all of the former monopolies depart by definition, from a 100 per cent market share position, it is necessary, logical and only makes sense to apply some form of market share loss criterion. The use of a market share or market share loss criterion is perfectly in line with the practices adopted by competition law authorities around the world. In fact, as noted below, the 25 per cent market share loss threshold established in Decision 2006-15 is less stringent in most cases by far than the threshold typically used to test dominance by such authorities.
31. MTS Allstream submits that deregulation of telecommunications markets and, in particular, the markets for local exchange services, without regard to an assessment of the market power of the former monopoly that is seeking forbearance, contravenes competition law principles as well as Canadian precedents and precedents from around the world.
- (i) Use of Market Share and Market Share Loss Thresholds by Domestic Authorities**
32. When Canada's competition authority, the Competition Bureau, analyses cases of abuse of dominance, its guidelines specify that a firm with a market share below 35% (or a group with a collective market share below 60%) is unlikely to possess sufficient market

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<sup>14</sup> Telecom Decision CRTC 2006-15, paragraph 245.

<sup>15</sup> *Review of Regulatory Framework*, Telecom Decision CRTC 94-19, 16 September 1994.

power to warrant investigation. The corollary to this is that any firm with market share of greater than 35% is on a *prima facie* basis susceptible to being investigated as being dominant under the applicable provisions of the *Competition Act*.

33. The TPRP REPORT Report observed that in markets where the former monopoly incumbent local exchange carriers continued to wield significant market power or "SMP", there was a continued need for regulation. In keeping with this finding the TPRP REPORT Report recommended continued regulation in markets characterized by a former monopoly's SMP.<sup>16</sup> In addition to restrictions on pricing and other terms and conditions of retail services, the panel recognized the need for interconnection and access to wholesale facilities and services at regulated rates and on specified terms and conditions, and it stated that retail local exchange services should continue to be subject to a tariffing requirement where SMP is found to exist.<sup>17</sup> The Proposed Order is in clear conflict with these recommendations.
34. The TPRP REPORT also specifically deferred to the Commission to determine what criteria should be used before concluding that the former monopolies' SMP in a relevant market for local telecommunications services had declined sufficiently in order to permit forbearance from regulation. The Panel stated that, "In deciding whether or not to regulate, account should be taken of the CRTC's telecommunications sector experience to date, including its experience in establishing criteria for forbearance in the local exchange markets".<sup>18</sup> The test for SMP under competition law principles proceeds in two stages. First, the relevant market must be defined in terms of both product and geography. Second, the extent to which rivals can limit any market power otherwise held by the dominant firm(s) must be assessed. Market power is defined by reference to a number of indicators: market share (including share stability and distribution), barriers to entry (including any restrictive conduct allegedly engaged in by the dominant firm(s)), and other market characteristics (including the extent of technological change, the

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<sup>16</sup> See for example, Recommendation 3-6, Canada: Report on Competition Law and Institutions (2004) (OECD: January 18, 2005), page 3-14.

<sup>17</sup> Canada: Report on Competition Law and Institutions (2004) (OECD: January 18, 2005), pages 3-18 and 3-28.

<sup>18</sup> TPRP REPORT Report, page 3-14.

amount of excess capacity and whether customers or suppliers have degree of countervailing power).<sup>19</sup>

35. Overall, the former monopolies continue to exert significant market power in the provision of local exchange services. As of 31 August 2006, the former monopolies held an 89% share of local telephone service revenues in Canada and 87% of local lines.<sup>20</sup> In the residential market, competitors held only 10% of the revenue share and competition was confined to a limited number of local forbearance regions (LFRs).<sup>21</sup> In its 2006 CRTC Telecommunications Monitoring Report, the CRTC commented that local residential revenues and lines provided by competitors remained negligible in 2005 as they continued to focus on the business and wholesale market segments".<sup>22</sup> Yet despite the competitors' focus on the business and wholesale markets, the competitor share of business revenue has actually decreased to 12%<sup>23</sup> from the 14%<sup>24</sup> reported in the 2006 CRTC Telecommunications Monitoring Report. And for the most part this share would have been garnered utilizing some elements of the former monopoly infrastructure.
36. Given the historical monopoly status enjoyed by all of the former incumbent telephone companies and the current data on the level of competition in markets for local exchange services, it is completely unreasonable to assume without making any inquiry into the matter that competition is the prevailing condition in these markets. There may well be individual regions or pockets of the country where this is the case and, in such cases, the former monopolies are in no way precluded from applying for forbearance. However, the TPRP REPORT Report acknowledged that an assessment of market power remaining in the hands of the former monopolies was required on a case-by-case basis. It also recognized that market share was the starting point of any such analysis.

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<sup>19</sup> TPRP REPORT Report, footnote 23 of Chapter 3.

<sup>20</sup> Commission staff letters, 20 October 2006 and 1 November 2006 regarding Telecom Public Notice 2006-12 – *Proceeding to reassess certain aspects of the local forbearance framework established in Decision 2006-15: Placement of certain aggregate information on the public record.*

<sup>21</sup> Commission staff letter, 20 October 2006 regarding Telecom Public Notice 2006-12 – *Proceeding to reassess certain aspects of the local forbearance framework established in Decision 2006-15: Placement of certain aggregate information on the public record.*

<sup>22</sup> CRTC Telecommunications Monitoring Report, 2006, page 36.

<sup>23</sup> Commission staff letter, 1 November 2006 regarding Telecom Public Notice 2006-12 – *Proceeding to reassess certain aspects of the local forbearance framework established in Decision 2006-15: Placement of certain aggregate information on the public record.*

<sup>24</sup> CRTC Telecommunications Monitoring Report, 2006, page 36 - 37.

37. To do away with an assessment of market power by eliminating the market share loss and rivalrous behaviour criteria established in Decision 2006-15 runs contrary to the practices of Canada's Competition Bureau as well as the recommendations of the TPRP REPORT.

**(ii) International Precedents**

38. The minimum market share threshold at which a supplier is presumed to be dominant by competition authorities in other countries is triggered at a much lower level than the 75% criterion established in Decision 2006-15. These thresholds, which are in keeping with the Competition Bureau's 35% criterion, are summarized in the table below:

Country/Union	Firm's Market Share Threshold for Applying a Rebuttable Presumption of Market Dominance
Canada	35 %
European Union <sup>25</sup>	50 %
Korea <sup>26</sup>	50 %
South Africa <sup>27</sup>	35 %
Singapore <sup>28</sup>	60 %
United States <sup>29</sup>	35 %

<sup>25</sup> Competition Law and Policy in the European Union (OECD: January 6, 2006) – "Dominance is often presumed at market shares over 50% and it may be found at lower levels depending on other factors", page 26.

<sup>26</sup> Korea: Competition Law and Policy in 1997-1998 (OECD: January 1, 1997) – "According to the criteria set forth in the relevant provisions of the *Fair Trade Act*, a market-dominant enterprise is an enterprise which supplies its goods or services in a market where the goods or services which are the same as or similar to the goods or services the gross domestic supply amount of which during the most recent one-year period is one hundred (100) billion Won or provided that the market share of one enterprise is 50% or more or the combines market share of three or less companies is 75% or more" (page 5) See also 2004 Report, at page 3.

<sup>27</sup> Competition Law and Policy in South Africa (OECD: May 15, 2003) "A firm with a market share between 35% and 45% is presumed to be dominant, but the firm may rebut the presumption by showing it does not have market power", at page 24.

<sup>28</sup> CSS Draft Guideline on the Section 47 Prohibition (Singapore Competition Commission) – "In general, dominance may be presumed if an undertaking has a market share above 60%" (page5) See also Competition Commission of Singapore Guidelines, at page 4, paragraph. 14.

<sup>29</sup> In the United States, the use of market share and market share analysis plays a very significant role in the evaluation of SMP in a number of circumstances, including the following: 1) Merger Analysis: where a merger results in a firm holding an Herfindahl-Hirschman Index (HHI) rating of 1800, the Anti-Trust Division of the Department of Justice considers this to be a "highly concentrated" market. (An HHI of 1800 is roughly equivalent to a market share of 43 per cent); 2) Lessening of Competition

39. Given these international precedents or benchmarks, it is trite to point out that the 25% market share loss threshold established in Decision 2006-15 is somewhat lenient by comparison. In effect, what the Decision 2006-15 criterion means is that even with as high as a 75% share of the relevant market, the Commission is prepared to conclude, subsequent to a case-by-case fact-finding exercise, that there is competition sufficient to protect the interests of customers in local telephone markets in Canada.
40. As can be seen from the attached study commissioned by MTS Allstream from Lemay-Yates, entitled *Comparative Discussion of the Implementation of Local Phone Forbearance with Other Jurisdictions* (Lemay-Yates Report), marked as Appendix A, in none of the jurisdictions studied can it be said that the telecommunications regulator has been prepared to forbear without any assessment of market power whatsoever. Indeed, the Lemay-Yates Report demonstrates that, in many other jurisdictions, regulatory authorities have not forbore until the former monopoly has lost significantly more market share than 25 per cent.
41. These examples clearly demonstrate that, where the starting point of the analysis is the former monopolies' historical monopoly over the local exchange market and their ubiquitous networks and market reach, virtually all competition authorities and all comparable telecommunications authorities apply a market share loss test in assessing SMP. In the view of MTS Allstream, it would violate competition law principles and regulatory best practices from around the world to institute a forbearance test that does not require, in one form or another, some assessment of market power.

**C. Difficulties in the Application of the "competitor presence" Test**

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through Unilateral Effects: this market behaviour includes "elevating price" and "suppressing output". The starting point for analysis in these instances begins with firms that hold 35 per cent or more of the relevant market.

42. Apart from concerns with respect to its susceptibility to legal challenge and its inconsistency with competition law principles, the application of the "competitor presence" test set out in the Proposed Order is fraught with other difficulties.
43. First, although the standalone "competitor presence" test at paragraphs 242(a) (ii) and (iii) of the Proposed Order is purportedly proposed as an alternative to the Competition Bureau's full-blown SROR test, as noted above, the "competitor presence" test is in fact a much less onerous subset of the Bureau's test. These two tests cannot honestly stand as alternatives to each other as no reasonable former monopoly would adopt the Bureau's SROR test if given the choice.
44. Furthermore, within each of the retail and business versions of the "competitor presence" test found at paragraphs 242(a)(ii) and (iii) of the Proposed Order, the Government's use of undefined and vague terms is likely to lead to confusion and difficulties in the implementation of this test, especially in relation to the retail business market. In particular:
  - a. The test refers to "facilities-based telecommunications service providers", which is not defined; and
  - b. The test refers to "competitor presence" in a given market in terms of "offers ... local exchange services ... throughout that market", which is so broad as to render forbearance a near impossibility or so narrow as to permit forbearance in absurd situations where competitors may own facilities but not have a single customer.

**(a) *Overlap with the Bureau's SROR Test***

45. The Proposed Order incorporates by reference the structured rule of reason (SROR) test proposed by the Competition Bureau and the Commissioner of Competition in the proceeding that led to Decision 2006-15. The SROR test has several elements:
  - a. Are there at least two independent facilities-based service providers, the former monopoly and a facilities-based entrant, capable of offering local service that has been determined to fall within the relevant product market for the former monopoly's local service?
  - b. Is the competitor able to obtain and retain a customer base?

- c. Is the competitor's variable costs of providing local service similar to or lower than the former monopoly's variable costs of providing local service?
  - d. Is either the former monopoly or the competitor capacity-constrained?
  - e. Is there evidence of vigorous rivalry between the former monopoly and the competitor in the provision of local service?; and
  - f. Are industry characteristics such that the former monopoly is unlikely to engage in anti-competitive behaviour?
46. Without detracting from comments made by MTS Allstream on the Bureau's SROR test in the proceeding leading to Decision 2006-15, it would be fair to state that although the Bureau does not explicitly use market share as part of its test, criteria (b) through (f) of its test do attempt to address the fundamental issue of the assessment of market power prior to forbearing. Indeed, this is the only interpretation of criteria (b) through (f) that would be consistent with the *Act* and, equally, the Government's *Direction to the CRTC*.
47. On the other hand, the Proposed Order proposes the mere presence of two or more competitors, as the case may be, as an alternative to the SROR test (see paragraphs 242a) (ii) and (iii) of the Proposed Order). In other words, the "competitor presence" test is offered as a standalone alternative to the SROR test at paragraph 242a) (i), when in actual fact, it only represents one element of that test.
48. This highlights an inherent contradiction in the framework contemplated by the Government in the Proposed Order. Since the SROR test and the "competitor presence" tests are alternatives, but in actual fact the latter test is really only a very small subset of the former, it begs the question of whether the SROR test and the "competitor presence" tests are honest alternatives to each other. If they are truly meant to be alternatives, then it is not at all clear why the assessment of market power in accordance with the five other criteria of the SROR test would not be relevant in all cases.

**(b) "Facilities-based telecommunications service providers" and presence throughout a market**

49. The "competitor presence" test contemplated in the Proposed Order refers to "facilities-based telecommunications service providers". Neither this term, nor its most significant component part, "facilities-based", is defined in the *Act*.
50. The *Act* defines a "telecommunications common carrier" as "a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation." It also includes a definition of the term "telecommunications service providers" (TSPs). And yet, the apparently crucial trigger of forbearance, namely the presence of facilities-based TSPs, brings on the term, "facilities-based", which is not defined.
51. Even more confusion will surround the application of the proposed "competitor presence" test when it is used to determine whether a given facilities-based telecommunications service provider, whatever that may be, offers services "throughout" a given market.
52. First, there will be confusion as to the meaning of the word "offer" in the proposed "competitor presence" test. This term could extend to mere advertising, marketing and offering for sale, or it could be restricted to situations in which competitors provide services to real customers. Equally unclear in the latter instance is how many customers a competitor would have to have in order to qualify as offering services, or whether such customers would have to be served using the competitor's owned and operated facilities. There could be other meanings as well that could arise in various different contexts, but in each case, there is no rational way to resolve the vagueness of the term. The term could be interpreted so broadly as to encompass TSPs that lease or own a single strand of fibre, not necessarily in a given geographical market and that is not even necessarily used to provide services in the relevant product market in question. On the other hand, it could be interpreted so narrowly as to encompass only those TSPs that own and operate facilities in the relevant geographic market that are the only facilities used by the TSP in question to provide services in the relevant product market. Faced with these

widely divergent possibilities, there is no rational way to determine which interpretation, or whether some undefined middle ground is what is intended by the proposed Order.

53. Second, there will be confusion as to the meaning of the term "throughout". This term could be interpreted, especially in the case of retail business markets, either so broadly as to render forbearance an impossibility, or so narrowly as to permit forbearance in absurd situations where competitors have gained an infinitesimal market share of 0.001 per cent. Once again, there is no rational way to resolve this conundrum.
54. It is arguable that in retail residential markets, at least in markets where the cable companies have developed footprints, this term may be workable. However, in retail business markets, determining the meaning and applying the term "throughout" will be fraught with difficulty. Unlike the residential market, there has been no footprint-like growth of competitor facilities in retail business markets. This is not unique to Canadian telecommunications markets – this phenomenon was reviewed and studied as recently as November 2006 by the Government Accountability Office (GAO) of the U.S. House of Representatives in the case of the dedicated access services market.<sup>30</sup> The high barriers to entry that characterise local exchange markets in the U.S. (which in this regard are comparable to Canadian local exchange markets) are described in the attached study (marked as Appendix B), prepared by Economics and Technology, Inc. for MTS Allstream, entitled "Preventing Abuse of Dominance in Canadian Telecom Markets". As explained by Mr. Selwyn and Ms. Golding, the "economic conditions that affect the (competitor)'s decision to deploy fibre optic facilities are *building specific* and include such factors as (1) the cost of providing a lateral connection between the building and the (competitor)'s fibre ring. (2) the potential level of revenue available to the (competitor) if it deploys facilities at that location, and (3) institutional barriers, such as the ability to negotiate for access rights with the building owner. Geographic proximity (i.e. having the same serving wire center) does not cancel out these key

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<sup>30</sup> United States Government Accountability Office (GAO), *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, House of Representatives, November 2006, page 12, and 19-22 (GAO Report).

economic considerations."<sup>31</sup> Mr. Selwyn and Ms. Golding go on to state that the presence-based trigger tests used of late in the United States, which are philosophically similar to the "competitor presence" test by the Government, ignore the fundamental facts that drive the construction of competing networks. A forbearance test that ignores economic reality is flawed.

55. To put it differently, if the term "throughout" is to be taken literally such that facilities-based telecommunications service providers must have ubiquitous owned and operated facilities comparable to the former monopolies throughout a relevant geographic market, then forbearance will never be achievable.
56. At the other extreme, if the term "throughout" is to be taken as having minimal content, such that if a facilities-based telecommunications service provider owns and operates small amounts of fibre in a given geographic area, it will be deemed to be offering services throughout that market, then forbearance will likely to be granted too liberally and indeed in absurd situations. For example, under this interpretation of the Proposed Order, if a competitor was merely co-located in the former monopoly's central office or owned one foot or a single strand of fibre in a given geographic market and yet, did not have access to a single customer, it still might be deemed to be offering services throughout that market. This would clearly be absurd and would not protect the interests of customers in that market. Indeed, it would impede the establishment of competition in the market, which would only be to the detriment of customers.
57. This definitional problem is necessarily linked to the proper definition of the geographic market, which the Proposed Order also seeks to amend. The Proposed Order seeks to amend Decision 2006-15 in order to allow the former monopolies to apply for forbearance for either a local exchange or a "local interconnection region" (LIR)<sup>32</sup>, which loosely overlap with Canadian municipal and county structures.

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<sup>31</sup> Economics and Technology Inc., "*Preventing Abuse of Dominance in Canadian Telecom Markets*", prepared for MTS Allstream Inc., December 2006, page 7.

<sup>32</sup> LIR is defined in the Annex to Trunking Arrangements for the interchange of traffic and the point of intersection between local exchange carriers, Telecom Decision CRTC 2004-46 (Decision 2004-46).

58. The Proposed Order states that LIRs are appropriate geographic markets because "they utilize established provincial administrative boundaries, such as those of municipalities, counties and districts, and they are competitively neutral, they are clearly delineated, they often reflect a social and economic community of interest and they are administratively practical."
59. The Proposed Order goes on to state that the use of local exchanges is also apparently desirable because these "often reflect a social and economic community of interest and are less likely than LFRs to contain pockets of uncontested customers."
60. LIRs are relatively expansive geographic areas comprised of municipalities, regional municipalities and counties. Indeed, it would appear that some of the Commission-defined LFRs, especially in urban areas, overlap with LIRs. MTS Allstream is unclear as to what advantages are presented by the use of LIRs over the LFRs, especially given that the Commission indicated its willingness in Decision 2006-15 to consider forbearance applications based on alternative definitions of the geographic component of a relevant market on a case-by-case basis.
61. That LIRs and local exchanges, which are so fundamentally different in size, are being proposed as acceptable alternative definitions to the geographic component of the relevant market definition points to a certain lack of clarity with respect to the objectives of the exercise. It is equally unclear when it would be appropriate for the former monopoly to apply for forbearance on the basis of a LIR as opposed to a local exchange and what factors the Commission should consider in determining whether an LIR or a local exchange is the more appropriate geographic component of the market definition. No guidance is offered as to when one or the other of these alternatives would be most appropriate and yet, any assessment of market power is necessarily linked to the proper definition of the geographic market.<sup>33</sup>

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<sup>33</sup> In the Competition Bureau's Final and Reply Comments in the proceeding leading to Decision 2006-15, the Bureau repeatedly signalled that its SROR test and its submissions as a whole were predicated on the assumption that both the relevant product and geographic market were properly defined. See, for example, the Argument of the Commissioner of Competition (September 15, 2005), paragraph 38 and Reply Argument of the Commissioner of Competition (October 7, 2005), page 2.

62. In the proceeding that led to Decision 2006-15, the Competition Bureau warned of the potentially dangerous consequence of arriving at an incorrect market definition, namely that the assessment of market power would be skewed. The Competition Bureau noted that:

If markets are defined too narrowly, market shares will be over-stated. Conversely, if markets are defined too broadly, market shares will be under-stated. Proper market definition is therefore essential in the calculation of market shares if they are to provide a reliable indicator of possible market power. Proper market definition is also essential to determining the conditions of entry, since it defines the market for which the analysis of entry is required. Similarly, market definition establishes the market in which the potential for a firm to engage in anti-competitive conduct that entrenches, maintains or enhances its market power must be assessed.<sup>34</sup>

63. MTS Allstream's primary concern is with the use of "local exchanges" as contemplated in the Proposed Order. In particular, there are approximately 2,700 local exchanges across the country. As a result, when one considers both the residential and business markets, there are potentially over 5,400 relevant markets. On the face of the matter, it would appear that this staggering number of relevant markets, which would be both administratively unworkable and impose a huge regulatory burden, contravenes the policy objective of a streamlined and administratively efficient regulatory regime, as set out in the *Direction to the CRTC*.
64. Apart from the administrative complexity and burden of a framework that is based on local exchanges as the geographic component of the relevant market, there is a concern that with the adoption of local exchanges, forbearing in a market as small as a local exchange may stifle and, indeed, stamp out the embers of competition on an exchange-by-exchange basis. This gives rise to a situation where one customer benefits at the expense of another. Customers in non-forborne regions should not be subsidizing competition in forborne regions, particularly when such areas are right next door to each other and, in fact, represent a single community of interest.

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<sup>34</sup> Evidence of the Commissioner of Competition (22 June 2005), paragraph 167.

65. Furthermore, and from the perspective of ordinary Canadians, unlike LFRs (or even LIRs), local exchanges are relatively speaking much smaller geographic areas. It is highly unlikely that local exchanges reflect a community of interest. A community of interest is in almost all cases likely to be represented by some conglomeration of local exchanges. Without delving into the details of the community of interest test outlined in Decision 2006-15, ordinary Canadians simply do not identify with local exchanges, but rather, as members of a town, city, or other administrative structure. There is likely to be customer confusion and dissatisfaction when a customer in one local exchange receives forborne services but a customer in a neighbouring local exchange, which is part of the same community of interest, does not.<sup>35</sup>
66. To conclude on the issue of the elimination of any assessment of market power and the elimination of the market share analysis in the Proposed Order, MTS Allstream notes that the ETI Report warns against the economically unsound assumptions that underpin "presence" – based tests and the unattractive consequences that the adoption of such tests have had on customers south of the border.<sup>36</sup>
67. Quite apart from the legal competition law and difficulties will flow from the elimination of the market share criterion, the Government must ensure that its policies do not act at counter purposes to the ultimate goal of achieving vigorously competitive markets and the ensuing benefits that will flow to customers.

#### **WHOLESALE CRITERIA AND CQoS**

68. The Proposed Order confirms that the provision of competitor services by former monopolies in accordance with the Commission's CQoS standards is a necessary precondition to forbearance.<sup>37</sup> In doing so, Governor-in-Council recognized that the provision of competitor services by the former monopolies supports sustainable competition and the long-term interests of customers.

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<sup>35</sup> MTS Allstream notes in this regard that, recently, both Bell and TELUS have filed applications with the CRTC to expand local calling areas to reflect a community of interest.

<sup>36</sup> Economics and Technology Inc., "*Preventing Abuse of Dominance in Canadian Telecom Markets*", prepared for MTS Allstream inc., December 2006, page 8.

<sup>37</sup> Proposed Order, page 4320, clause 2.

69. Unfortunately, the Proposed Order eliminates the linkage between the wholesale regime and the CQoS criteria and retail forbearance. In so doing, it eliminates the incentives necessary to ensure that the former monopolies will provide competitors with the essential access to underlying facilities and services at a minimum level of service quality.
70. MTS Allstream submits that the removal of these criteria would be inconsistent with the *Direction to the CRTC*, which recognizes that conditions in underlying wholesale market are extremely important to ensuring viable and sustainable competition in retail markets. Both the wholesale criteria and the fulfilment of CQoS indicators, including the trailing indicators, are key components of a robust wholesale access regime. The existence of such a regime provides the underpinnings for efficiency, which is a goal of competitive markets, and it allows the regulator to place greater reliance on market forces in retail markets, thereby hastening the speed with which these markets can be deregulated.
71. It is important to bear in mind that competitor access to the services that are required to be tariffed and made available to competitors as a precondition to forbearance (i.e. the wholesale criteria) was obtained by competitors only after extremely long and drawn out processes, spanning six and even seven years, and only after it had become abundantly clear that the former monopolies were using their dominance and significant market power in upstream wholesale markets to lessen and prevent competition in downstream retail markets. MTS Allstream and other competitors have been at the forefront of proceedings to gain access to ADSL, Ethernet and OSS systems and networks, processes which have taken years to resolve.
72. Similarly, the Commission's CQoS regime also only came into existence after competitors filed complaints and countless applications with the Commission concerning the former monopolies' failure to provide essential underlying key facilities and services in a timely fashion. Like the wholesale criteria, the CQoS indicators, including the trailing indicators are the result of several *ex post* processes in which the former monopolies had every opportunity to address the record of their service delivery failures. Even after the implementation of such plans the former monopolies' repeated failures demonstrated

the need to more directly link the wholesale and CQoS criteria to retail forbearance, as found in the CRTC's forbearance criteria. The former monopolies have argued every which way possible, including in a self-contradictory manner,<sup>38</sup> in order to avoid the establishment of CQoS standards, and subsequently, the imposition of incentive programs such as the retail rate adjustment plan and the competitor rate rebate plan. These were only imposed on an *ex post* basis once the CRTC and competitors had amassed overwhelming evidence of repeated and significant service delivery failures.<sup>39</sup> Indeed, the trailing indicators were only put in place in 2005, after the Commission found that the former monopolies were providing consistently poor quality of service to their competitors.<sup>40</sup>

73. Each of the Competitor Services underlying the wholesale criteria (ADSL and Ethernet access and transport) and access to OSS are essential to the ability of competitors to enter into and compete in the market for local exchange services, in particular VoIP-based services, as well as in markets for broadband services. The TPRP REPORT observed that deployment of broadband is lagging in Canada, as compared to other countries around the world. Forbearing without having in place a regime for wholesale access by competitors to these various wholesale services will certainly not further the degree of competition and, therefore, will not promote innovation or benefit customers of retail voice and data services.
74. Similarly, competitors depend significantly on the use of incumbent local exchange carrier services.<sup>41</sup> Many of the services reflected in the CQoS regime are only provided

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<sup>38</sup> For example, on LNP Loop Orders, the former monopolies argued at the beginning that so-called high-volume orders (more than 4 orders) should not be subject to the business rule, and then later, flip-flopped to state that orders with volumes of less than 20 should not be measured at all.

<sup>39</sup> Between July 2002 and the end of Q3/06, Bell, Bell Aliant and TELUS missed a total of 1664 times out of 4216 indicators with results, which in percentage terms, effectively translates to a 40 per cent failure rate. This figure in and of itself is astonishingly bad. However, the anti-competitive and discriminatory intent behind these results is brought into perspective when one compares the CQoS results with retail Q of S results over the same period. In the case of retail QoS, the ILECs had per cent.

<sup>40</sup> Regulatory framework for second price cap period, Decision 2002-34, paragraph 781.

<sup>41</sup> In Decision 2002-34, paragraph 775, the Commission stated as follows: "In the Commission's view, the record of this proceeding demonstrates clearly that competitors depend significantly on the use of ILEC services. For competition to succeed, competitors must be able to provide service to their customers of a quality that is comparable to that which the ILECs provide to their own customers. If a CLEC cannot provide comparable quality of service, it will not be able to compete effectively. Further,

to competitors because the Commission has mandated their provision. Competitors depend significantly on the use of the services and facilities of the former monopolies<sup>42</sup> in order to provide services to their own customers and the achievement of this minimum standard of service by a former monopoly is an important factor in limiting the former monopoly's market power and helping to ensure that competition within a relevant market will be sustainable.

75. Absent mandated access and plans to provide adequate incentives to the former monopolies to meet the CQoS standards (such as the Rate Rebate Plan or the explicit linkage between forbearance and CQoS performance), the former monopolies have little incentive to provide these services in a manner that facilitates the successful operation of their competitors' businesses.<sup>43</sup> Having fought against the establishment of the CQoS indicators and the mandating of the services underlying the wholesale criteria at every step of the way and on an *ex post* basis, the former monopolies now appear intent on eliminating these indicators through judicial and political avenues of appeal.
76. And yet, for competition to succeed, "competitors must be able to provide service to their customers of a quality that is comparable to that which the former monopolies provide to their own customers. If a [competitor] cannot provide comparable service quality, it will not be able to compete effectively."<sup>44</sup> Without the imposition of minimal incentives and controls, such as the wholesale and CQoS criteria, the former monopolies can dictate the pace and extent of competition through their control over services and facilities in the wholesale market.
77. Instituting compliance with the wholesale and CQoS criteria as pre-conditions for forbearance is entirely consistent with section 34 of the *Act* and, indeed, the telecommunications policy objectives set out in section 7 of the *Act*. That these criteria remain pre-conditions to forbearance is also consistent with the TPRP REPORT Report

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CLECs must be able to quickly correct substandard service to their customers if they are to be able to retain customers and minimize any possible customer rebates."

<sup>42</sup> *Finalization of quality of service rate rebate plan for competitors*, Telecom Decision CRTC 2005-20, March 31, 2005, paragraph 31.

<sup>43</sup> Telecom Decision CRTC 2005-20, paragraph 72.

<sup>44</sup> Telecom Decision CRTC 2006-59, paragraph 4.

and the *Direction to the CRTC*, which recognizes at clause 1(c) (ii) that conditions in the upstream wholesale market have a direct impact on competition and rivalry in the downstream market.

78. The TPRP REPORT Report states that since "by definition retail market entry is not possible without competitor access to essential facilities, the regulatory framework should continue to require incumbents to make these available, on a mandatory basis if necessary."<sup>45</sup> The corollary to the foregoing would be that sustained competition in retail markets is not possible without competitor access to essential facilities.
79. The *Direction to the CRTC* also acknowledges that the wholesale market is characterized by unique conditions and challenges, including the potential for the incumbents to exercise market power in both wholesale and retail markets "in the absence of mandated access to wholesale services".<sup>46</sup>
80. The recent experience in the wholesale market in the United States illustrates the dangers of deregulating without an eye to conditions in the underlying market. The Federal Communication Commission's (FCC) "proxy for competition" as being the mere presence of competitors in wire-centres resulted in pricing flexibility and deregulation with respect to last mile digital access services ("Special Access"). As a result of this regime, the former monopolies' Special Access rates increased more rapidly than rates in "non-competitive" markets subject to the FCC's price cap rules. Under the FCC's "pricing flexibility" regime, the former monopolies' wholesale last mile digital services rates in markets deemed to be "competitive" have risen (not fallen) and have actually increased more rapidly than rates in "non-competitive" markets still subject to the FCC's price cap rules.<sup>47</sup>
81. De-linking the wholesale and CQoS criteria would be inconsistent with the Government's acknowledgement of the importance of the wholesale market, the potential for the former monopolies to exert market power in both wholesale and retail markets, and the

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<sup>45</sup> TPRP REPORT Report, page 3-33.

<sup>46</sup> TPRP REPORT Report, paragraph 1(c) (ii).

<sup>47</sup> Economics and Technology Inc., "Preventing Abuse of Dominance in Canadian Telecom Markets", prepared for MTS Allstream Inc., December 2006, page 5.

importance of safeguarding competitor access to essential facilities to assume the establishment and continuance of dynamic competition in retail markets. For example, if the Governor-in-Council were to de-link the trailing indicators from the Commission's local forbearance framework, the former monopolies would undoubtedly continue with their current practice of consistently missing the key CQoS trailing indicators, or even reducing their already very poor service levels. Without assured access to competitor services on a timely basis, competitors would be unable to make commitments to their own customers on the timing of a new service installation or repair. This would have irreparable negative consequences on competitors' customer relationships, reputation, revenues and costs. Ultimately, the ability of a former monopoly to delay and otherwise hinder their competitors' ability to provide service to their customers will stifle the establishment of competition and drive competitors from the market.

82. If forbearance is granted in the absence of the wholesale criteria and CQoS, which are indisputably linked to maintaining the health and robustness of the upstream wholesale market, then competition and the interests of customers in downstream retail markets will suffer. The Government's haste to deregulate in the retail local exchange markets would in this way actually undermine the fulfilment of the ultimate objective, which is to flow the benefits of true competition to customers.
83. Given the nature of these Competitor Services and the importance which the Governor in Council itself has placed in its *Direction to the CRTC* on getting the wholesale regime right, not to mention the history of delay and abuse demonstrated by the former monopolies in making these services available, MTS Allstream submits that these criteria should not be removed from Decision 2006-15.

#### **ESSENTIAL PRECONDITIONS TO A FORBEARANCE REGIME IN RETAIL MARKETS**

84. The Direction to the CRTC states that it drew heavily from the TPRP REPORT Report. The TPRP REPORT Report never condoned lifting all forms of regulation applicable to

the few remaining markets subject to regulation absent an assessment of the degree of significant market power wielded by the former monopolies.<sup>48</sup>

85. Related to the foregoing recommendation were a series of recommendations to augment the powers of the Commission to safeguard against re-monopolization of telecommunications markets and to ensure that competitors would be able to compete on an equal footing with the former monopolies in any future de-regulated environment. Indeed, the TPRP REPORT Report and its recommendations must be seen as a whole. Included in the TPRP REPORT Report's recommendations are the following:

- a. That the *Telecommunications Act* be amended to provide for the creation of a category of essential facilities, including ancillary services, that should be subject to a regime of mandated supply at regulated rates and to establish a process whereby this category of services can be kept up-to-date;<sup>49</sup>
- b. That the *Telecommunications Act* be amended to give the CRTC clear authority to mandate interconnection arrangements and interoperability between all public networks in the public interest and where market forces are unlikely to result in interconnection on reasonable terms and in a timely manner;<sup>50</sup>
- c. That the respective roles of the Competition Bureau and the CRTC be clarified in the interests of efficient and streamlined regulation;<sup>51</sup>
- d. That the *Telecommunications Act* be amended to ensure that the CRTC has a clear power to resolve disputes and order access to support structures of all kinds and access to public property of all descriptions;<sup>52</sup> and
- e. That legislation be enacted to establish authority to resolve individual customer and small business complaints.<sup>53</sup>

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<sup>48</sup> TPRP REPORT Report, Recommendation 3-4: "The approach to forbearance established in section 34 of the *Telecommunications Act* should be replaced. New provisions should state that, upon application by any party, telecommunications market subject to economic regulation should be reviewed. There the review concludes that there is no longer any significant market power in a market, restrictions on price increases should be discontinued" and Recommendation 3-5: "There should be a transition period of 12 to 18 months, during which time services that are currently subject to economic regulation shall continue to be subject to such regulation until there has been an opportunity to examine whether there is significant market power in markets for these services."

<sup>49</sup> TPRP REPORT Report 2006, Recommendation 3.20 – see also Recommendations 3-21 to 3-30.

<sup>50</sup> TPRP REPORT Report 2006, Recommendation 3-26.

<sup>51</sup> TPRP REPORT Report 2006, Recommendations 4-1 to 4-17.

<sup>52</sup> TPRP REPORT Report 2006, Recommendations 5-1 to 5-8

<sup>53</sup> TPRP REPORT Report 2006, Recommendations 6-1 to 6-5.

86. None of the foregoing safeguard measures are currently in place. The only front on which there has been any movement is the initiation of a major and significant proceeding in Public Notice CRTC 2006-14, which will establish important principles with respect to the nature and terms of access of all competitors to the former monopolies' services and facilities.
87. Even though the Government may not implement each of the foregoing recommendations of the TPRP REPORT in exactly the form that is recommended by the TPRP REPORT, all of the foregoing can be characterised as safeguard measures necessary to protect the interests of users and to ensure that competitors are able to compete on an equal footing with the former monopolies.
88. The TPRP REPORT Report predicated its recommendation that the CRTC wield a lighter regulatory approach on a careful assessment of the former monopolies' SMP on a market-by-market basis, rationalization of the regime for wholesale access and the augmentation of the Commission's powers with respect to the municipal access, building access, support structure access and procedures and means to address cases of anti-competitive conduct.
89. It makes little sense to deregulate the former monopolies in the market for local exchange services prior to the implementation of the foregoing recommendations in one form or another. The potential harm to end users in pursuing speedy de-regulation while barriers to competitive entry persist (e.g. building, municipal and support structure access and the lack of a coherent and efficient regime for wholesale access) or while processes to deal with consumer complaints are delayed, is too great to justify rushing head-long into de-regulation of retail markets for local telecommunications services.
90. On the other hand, there would be no harm to the former monopolies were the Commission allowed to assess whether their significant market power is truly subject to vigorous competition on a market-by-market basis in accordance with Decision 2006-15. The reality is that were Decision 2006-15 not varied by the Government at this time, there is nothing precluding the former monopolies from continuing to apply to the

Commission for forbearance. It is also open to the Governor-in-Council to vary or amend each resulting decision on a case-by-case basis.

91. Similarly, were Decision 2006-15 not varied at the present time, nothing would curtail the Governor-in-Council's power to vary or amend the decisions arising from the currently outstanding proceeding in which the Commission has gathered a record to reconsider its 25 per cent market share loss threshold<sup>54</sup> and other issues. In issuing Public Notice 2006-9 and Public Notice 2006-12, the Commission signalled that it had an open mind towards the issues therein and acknowledged the need to develop a record in light of which to reconsider its original decision. The former monopolies have initiated other proceedings before the Commission to reconsider other aspects of Decision 2006-15, such as the definition of the geographic component of the relevant market and the retention of the trailing indicators.<sup>55</sup> Were the Governor-in-Council to desist for the time being from amending Decision 2006-15, it would have the advantage of the record and the Commission's ultimate decision in the foregoing proceedings without being precluded from amending any resulting decisions.

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<sup>54</sup> *Proceeding to examine whether mobile wireless services should be considered to be in the same relevant market as wireline local exchange services with respect to forbearance, and related issues*, Telecom Public Notice CRTC 2006-9 as amended by paragraph 23 of *Proceeding to reassess certain aspects of the local forbearance framework established in Decision 2006 15*, Telecom Public Notice CRTC 2006-12 (Public Notice 2006-12).

<sup>55</sup> TELUS, Application to review and vary Telecom Decision CRTC 2006-15, *Forbearance from the regulation of retail local exchange services*, 5 October 2006.