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16 August 2006

VIA EMAIL AND COURIER

Mr. Leonard St. Aubin
Acting Director General
Telecommunications Policy Branch
Industry Canada
300 Slater Street
Ottawa, Ontario
K1A 0C8

Dear Mr. St. Aubin:

Subject: *Canada Gazette*, Part I, June 17, 2006
Order under Section 8 of the Telecommunications Act – Policy Direction to
the Canadian Radio-television and Telecommunications Commission

Introduction

1. Further to the above-noted Order, Primus Telecommunications Canada Inc. (“Primus Canada”) seeks to make representations with respect to the Order.
2. The draft Policy Direction announced by the Honourable Maxime Bernier, Minister of Industry on June 13, 2006, is the government’s first response to the over 120 recommendations of the Telecommunications Policy Review (“TPR”) Panel Final Report. The draft Policy Direction to the Canadian Radio-television and Telecommunications Commission (“CRTC”) aims to “direct the CRTC to rely on market forces to the maximum extent feasible under the Telecommunication Act and regulate – where there is still a need to do so – in a manner that interferes with market forces to the minimum extent necessary.”¹
3. The draft Direction, in the opinion of Primus Canada, is squarely aimed at the presumption of regulation contained in the *Telecommunications Act* (the “Act”) and the CRTC’s *ex ante* regulatory powers. Without proposing changes to the Act itself (neither the current section 7 Policy Objectives nor the Commission’s responsibilities regarding

¹ “Canada’s New Government Tables Proposed First-of-its-Kind Policy Direction on Telecommunications to CRTC Calling for Greater Reliance on Market Forces,” Ottawa, June 13, 2006.

just and reasonable rates and undue preference) the intent of the government is to direct the Commission to ease-up on its current degree of regulatory oversight of the incumbent telephone companies (“the ILECs”).

4. Primus Canada supports the Minister’s stated objective to ensure that Canadians benefit from a stronger competitive environment that will bring greater choice and even lower prices and better services – in fact this is a driving objective of our company. However, to sustain even the current levels of competition in the market, Primus Canada feels it is necessary to expand the wholesale regime via regulation, not limit it. We believe strongly that the access networks of the ILECs must be unbundled and available to competitors at wholesale rates. If the draft Policy Direction is implemented as currently drafted it will stifle competition rather than enhancing it, contrary to the stated objective of Minister Bernier and the government.

Primus Canada – a crucial competitor

5. Primus Canada is an independent, standalone Canadian corporation, with an all-Canadian management team and a majority Canadian Board of Directors. Wholly-owned by Primus Telecommunications International, Inc. based out of McLean, Virginia, Primus Canada has its head office in Toronto, and has offices in Vancouver, Toronto, Markham, Oakville, London, Windsor, Ottawa, Montreal and Edmundston. Primus Canada offers service in all regions of the country. Primus Canada has been operating in Canada since 1997 and has grown to be Canada’s largest alternative telecommunications provider. Since entering the Canadian telecommunications market, Primus Canada has provided Canadians with choice and competitive pricing, by offering a broad range of low cost, high quality innovative and competitive services to Canadian consumers. As such, Primus Canada is a crucial component of the Canadian telecommunications market.

6. As with all markets, increased competition in the telecommunications market will result in more choice, lower costs, improved features and innovation, all of which benefits the Canadian consumer. As a highly efficient and competitive entrant, Primus has contributed to the creation of the competitive telecommunications market by providing:

- (i) competitive choice for Canadian consumers;
- (ii) innovation and new service delivery; and
- (iii) investment in Canada.

7. **(i) Competitive Choice for Canadian Consumers:** Primus Canada provides choice in the telecommunications market. Consumers in every market segment want competitively priced and reliable alternatives to the incumbent service providers. Primus Canada provides just that. Over one million Canadian households and businesses rely on Primus Canada as their service provider and recent survey results show that our consumers are very pleased with our service. Surveys conducted of our business and residential customers indicate that 89% of our business customers and 88% of our residential customers stated that they would refer Primus Canada to a friend or colleague.

Furthermore, Primus Canada's Business Services division was been awarded the 2006 Consumers' Choice Award Gold Award for Business Excellence in Ottawa and Toronto. Primus was chosen by consumers for the quality of our product, our customer service and our value.

8. **(ii) Innovation and new service delivery:** Primus Canada has contributed significantly to innovation and new services and features through its service offerings. In January of 2004, Primus Canada was the first company in Canada to introduce and offer to consumers Voice-over-Internet Protocol, or VoIP, a phone service based on high speed Internet service. This product provides Canadians with a versatile alternative to traditional telephone service. Consumers can simply move their existing local telephone number to Primus Canada's VoIP service and use the service like they would their traditional telephone. A major benefit to consumers of VoIP is the cost savings – the service costs are over 25% less than traditional telephone service and since its launch, Primus Canada has lowered VoIP rates by over 40% from its introductory prices.

9. In the business market, Primus Canada provides Canadian business customers with a variety of high quality, multi-platform website and server hosting solutions, largely developed through its Ottawa-based division, Magma Communications. We have developed extensive Internet system and network management expertise, which has made Primus Canada Business Solutions the choice of thousands of Canadian businesses.

10. **(iii) Investment in Canada:** Over the past 10 years Primus Canada has invested significantly in Canada and is a key example of the net benefits of foreign investment for the country and ultimately for Canadian consumers.

11. Primus Canada has made considerable contribution to the Canadian economy. Since 1997, we have spent over one billion dollars in Canada. Moreover, since we commenced business in Canada in 1997, we have invested over \$300 million in network infrastructure in Canada, to the extent permitted by current government regulation. Due to current rules governing ownership, Primus Canada is restricted in the extent that we can invest in transmission facilities and wireless licenses, and as a result, it is required to operate as a reseller of telecommunications services rather than as a facilities-based carrier. Despite these restrictions, our management focus has been to attract customers, obtain scale and then invest in facilities wherever possible. This approach enables us to obtain economies, better control our destiny and differentiate our service offerings for customers.

12. We took this approach in the long distance market where we invested in a nationwide switching infrastructure and after growing to several hundred thousand customers we further invested in a nationwide network in the form of a backbone IRU. Similarly, in the high speed internet and local telephony markets where we have 30,000 DSL resale customers and 150,000 resold access lines, we are now constructing a substantial local co-location network with a partner facilities-based carrier to provide our own high speed access and local service via unbundled loops. By the end of this quarter we will have completed almost 70 co-locations and will be able to provide our own 20 Mbps high-speed Internet access and local telephony service to approximately 3 million

households. We have also purchased, with a Canadian investor, WiMax wireless microwave licenses in major cities across Canada and hope to construct a wireless network once technology and economics permit.

13. Our network allows Primus Canada to provide voice and data services to most major Canadian cities and also includes direct links into the United States through two gateways in New York and Washington. Through this network, coupled with strategic partnerships and alliances in Canada and abroad, Primus Canada is able to provide worldwide reach to Canadian consumers for voice and Internet services. This investment has clearly paid off as Primus Canada has had well over 25 consecutive EBITDA positive quarters, allowing us to employ Canadians and continue to invest in our network infrastructure, whenever possible.

14. Finally, Primus Canada has also contributed to job creation in Canada since 1997. We have offices in many major centres across Canada and are a key employer in some smaller Canadian communities. For example:

- we operate a 142-person call centre in Edmundston, New Brunswick, where we are one of the largest employers in the community;
- Primus Canada employs almost 1,000 Canadians across Canada in:
 - Vancouver, British Columbia;
 - Toronto, Markham, Oakville, London, Windsor and Ottawa, Ontario;
 - Montreal, Québec; and,
 - Edmundston, New Brunswick.

Required Amendments to the Policy Direction

15. While Primus Canada supports the Minister's goals of making Canada's telecommunication regulatory system more modern, flexible and efficient and the objective of the draft policy Direction to rely on market forces to the extent feasible when regulating the industry, we strongly support the notion contained within the Minister's release that the Commission "**regulate – where there is still a need to do so.**" Primus Canada suggests, however, that slight amendments to the Policy Direction (details below) will ensure that, while the industry moves to greater reliance on market forces, the regulatory measures that remain ensure that efficient competitive entrants such as Primus Canada are not deterred from entering or excluded from the industry.

(a) Critical Inputs Must be Available

16. The draft Policy Direction as it currently stands has the potential to further inhibit the degree of competition in the telecommunications industry by restricting the availability of wholesale services, once again in the face of the ILECs' continuing control of bottleneck/essential facilities and, Primus Canada would argue, the incumbent cable television companies.

17. The magnitude of the competitive industry's reliance on the wholesale services of the ILECs is underscored by the most recent CRTC telecommunications monitoring report, issued in July 2006. Table 4.1.5 entitled "Inter-carrier payments per revenue dollar by wireline market sector (2005)" demonstrates that on an unweighted average basis across all major wireline market sectors just over 41% of each dollar generated by resellers is paid to another service provider for wholesale services. Primus Canada would highlight the fact that in the local market segment this number rockets to almost 65% of every dollar generated. Any increase in the magnitude of intercarrier expense, a certain outcome of the deregulation of wholesale services given current market realities, would have a devastating impact on competitive service providers. Primus Canada would also point out, per the CRTC's report, that in the local market 63% of the competitor-provided retail lines were provisioned using leased or resold facilities. This fact further demonstrates competitors' continued reliance on the wholesale services of the incumbents.²

18. Generally speaking, Primus Canada has no objection to a regime that increases the incentives for investment and construction of competing telecommunications network facilities. In fact, Primus Canada has made significant investments in telecommunications network equipment. As noted earlier, since we commenced business in Canada in 1997, we have invested over \$300 million in network infrastructure in Canada, to the extent permitted by current government regulation. However, while Primus Canada currently is free to invest in and deploy many types of network equipment, the current foreign investment restrictions as applied to Canadian carriers means that in many cases, Primus Canada is simply not permitted to invest in certain types of transmission facilities. For example, Primus Canada is not permitted to build a long haul backbone telecommunications network. In order to offer its wide range of innovative and economically priced services to its customers, Primus Canada has no other alternative but to lease many different types of services from the ILECs, and to a much lesser extent, the cable television companies.

19. Primus Canada subscribes to various "near essential" tariffed wholesale services mandated by the CRTC that provide a wide reach to ILEC customers. Under the current regulatory rules these services are not considered essential and so they are subject to significant mark-ups above the ILECs' costs. Primus Canada is concerned that if these services are ultimately deregulated as a result of the wording of the Policy Direction, any margins that do exist for Primus Canada via these services will quickly disappear through rate increases by the ILECs.

20. For example, Primus Canada's ability to offer even thinly profitable retail high-speed Internet access is directly reliant on our access to key ILEC wholesale services. Bell Canada's standard residential high-speed Internet access service offering retails for \$46.95 per month while Primus Canada's retail price for the same service is \$44.95. Primus Canada is compelled to offer a discounted rate in order to encourage customers to try our

² *Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, CRTC Telecommunications Monitoring Report, July 2006, page 39.

service. The ILECs also offer steep introductory promotions on their services, which Primus Canada must at least match in order to acquire customers. Bell Canada's current wholesale tariff offering for the access circuit from the customer's premises to the serving central office including the host of other network element and backhaul charges result in extremely thin margins for Primus Canada. With its decision to offer a slightly discounted retail service, Primus Canada is not in the position to be able to absorb any increased wholesale costs. What is certain, however, is that if these types of wholesale services were to be deregulated, these wholesale costs would rise and the terms and conditions for use of the service imposed by the Bell Canada would become more restrictive, thereby limiting the usefulness of the service to service providers in competition with Bell Canada. Primus Canada has recently experienced this disturbing result in the wireless sector after its wireless wholesale service provider was purchased by one of the three current wireless service providers in Canada.

21. A very few wholesale services are classified as “essential” services. However, most wholesale services are not so classified, although they are all critical inputs used by competitive service providers such as Primus Canada to offer its services to end customers. It is important to highlight the fact that as far as the CRTC is concerned, the scope of essential services is very narrow. According to the CRTC’s local competition decision, CRTC Decision 97-8, essential facilities must meet all three of the following criteria:

- they are monopoly controlled;
- a CLEC requires them as an input to provide services; and,
- a CLEC cannot duplicate them economically or technically.

22. As a result of that determination the only facilities that the CRTC established as essential are: Central office codes (NXXs); subscriber listings; and, local loops in certain bands. It is a vast understatement to say that competitors need more than just these facilities on a wholesale basis.

23. A significant amount of the CRTC’s work in promoting competition over the past eight years has been focused on establishing a second group of wholesale services that the Commission has referred to as “near essential”³. A literal reading of the proposed wording in Paragraph 1(c)(ii) of the Direction would lead the CRTC to conclude that it should cease to regulate the large group of “near essential” facilities entirely and require competitors to negotiate with the ILECs for access to these services, once again in the presence of continued control of bottleneck facilities by the ILECs.

24. Primus Canada feels strongly that in order to meet the objective of a truly competitive market, the Direction must be very clear regarding the government’s intent with regard to the phrase “essential facilities.” Phasing out mandated access to wholesale services that are near essential would have immediate and drastic impacts on the service

³ See for example paragraph 5 of *Call-Net’s request for an order requiring incumbent local exchange carriers to file a tariff for four-hour mean time to repair on local loops*, Telecom Decision 2004-19, 22 March 2004.

that Primus Canada would be able to offer the Canadian public as the ILECs detariff their services and approach competitive service providers for contract negotiations on a wide range of services. Not only would the wholesale internet services described above be at issue but so would all the Competitor Digital Network (CDN) services currently relied on by the competitive industry, as well as access tandem and direct connect services which are critical for the provision of competitive long distance services to the Canadian public.

25. Accordingly, Primus Canada recommends that Paragraph 1(c)(ii) of the draft Policy Direction be changed as follows:

With a view to providing increased incentives for innovation and investment and to building a stronger competitive environment with greater choice, lower prices and better services for Canadians, conduct a review of its regulatory framework regarding mandated access to wholesale services to ensure that the availability of the critical inputs needed by competitors is technologically neutral and addresses the control of bottleneck facilities with respect to network infrastructure.

26. It is our understanding that MTS Allstream is also supportive of this approach to changing the wording of the Direction.

27. Primus Canada cannot stress enough the importance of a workable wholesale regime, not only for the competitive industry, but for the over 1 million Canadian customers currently served by Primus Canada and the many more we will attract over the coming years.

(b) *Ensure a Truly Competitive Market*

28. One of the objectives of regulation must be to ensure a level playing field for all competitive entrants, both new and existing. We recommend that the Direction be amended to ensure that wherever used, regulation ensures a level playing field for all participants by:

- ensuring increased reliance on market forces does not discourage efficient competitive entry;
- targeting economic regulation, if required, at those companies, or groups of companies, that control bottleneck/essential facilities; and,
- prohibiting anti-competitive behaviour.

29. In this regard, we suggest changes to Paragraph 1(i), and Paragraph 1(b)(ii) and (iii) as follows. Firstly, regarding Paragraph 1(a)(i), reliance on market forces must not result in the impairment of efficient competitive entrants. This is not to say that every entity who wishes to compete must be propped-up by regulation. Accordingly, we suggest that Paragraph 1(a)(i) be worded as follows:

1.(a) The CRTC should:

- (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objective, unless such forces would be likely to unduly impair the establishment or continuance of a competitive market such that efficient competitive entrants would be disadvantaged.

30. Secondly, regarding Paragraph 1(b)(ii), again, while we agree that regulatory interference must not prejudice an efficient competitive entrant nor promote an inefficient entrant, some level of regulation is required in the industry to ensure efficient, but small and non-facilities based competitive entrants are not deterred or disadvantaged due to the dominance of the incumbent service providers.

31. To this end, Primus Canada submits the following language for Paragraph 1(b)(ii):

- 1.(b)(ii) economic regulation of Canadian carriers, when required, should neither deter efficient competitive entry nor promote inefficient entry of any telecom service provider.

32. Thirdly, regulation is required to ensure that dominant players in the industry do not engage in anti-competitive behaviour targeted against smaller and/or non-facilities based players. Primus Canada has established itself as a key competitive alternative for Canadian consumers with a proven track record and as such, we agree with and support efforts to increase competition in the telecommunications industry, through reliance on competitive market forces and less regulation.

33. However, this formula will only work in a market that is truly competitive. In the Canadian telecommunications industry, it has been our experience that there still remain huge barriers inherent in the industry that prevent competition from fully developing. As the largest alternative competitor in the Canadian telecommunications market, Primus Canada is perfectly positioned to comment on the state of competition in the market and from our first hand knowledge, it is readily apparent that the Canadian competitive market has not yet evolved. For example, in 2005, the ILECs held a market share in local lines of 84% for business services and 92% for residential customers.⁴ The same lack of competition can be demonstrated in the wireless market in Canada. The final report of the TPR acknowledged that Canada's mobile wireless industry lags behind many OECD countries due to less competition, which has resulted in higher prices, less innovation, lower uptake and lower rates of usage than the U.S. market, by comparison.⁵

34. Primus Canada is however, concerned that by addressing only the *Act's* presumption and *ex ante* powers the government will neglect the balance of the TPR report's recommendations which focused on strengthening the *ex poste* competition law provisions. As noted by the Report, "the list of acts in section 78 of the *Competition Act* is not well suited to telecommunications markets." The Panel went on to state that "a somewhat modified set of rules and guidelines should be established to assist in distinguishing anti-competitive conduct from vigorous competitive rivalry."

⁴ NBI/Michael Sone Associates, "Canadian Local Telecommunications and VoIP Services Market Report – Overview – 2005 Edition."

⁵ 2006 Telecommunications Policy Review Panel, Final Report, page 1-21.

35. The Minister's public comments concerning the government's intention *not* to revisit the *Competition Act*⁶ to address these concerns means that competitors to the ILECs face a situation where the ILECs will enjoy additional flexibility while they continue to, as a group, enjoy over 92% market share in the residential telephony market alone.⁷ Objective market share figures such as these clearly demonstrate that much work needs to be done to promote competition. Granting these companies additional regulatory flexibility while they retain control of key bottleneck/essential facilities without strengthening the rules against anticompetitive conduct will do nothing to increase the levels of competitiveness in the telecommunications market, nor meet the needs of the Minister and his government as to increased benefits to Canadians.

36. Primus Canada is in the often-difficult position of relying on facilities-based competitors from which we purchase services essential to our business, while at the same time competing with these same players in the sale of services. In this type of situation, without effective anti-competitive regulation, anti-competitive behaviour on the part of incumbent carriers, such as refusal or delays in providing essential facilities to competitors, or the provision of services or facilities at excessive prices or on discriminatory terms could critically injure or be fatal to competitive entrants who must rely on these services. Therefore, the Direction must provide that where regulation is used, in order to ensure the level playing field for competitors, anti-competitive behaviour be prohibited. In this regard, we submit the following amendment for Paragraph 2(b)(iii):

2(b)(iii) regulatory measures designed to advance non-economic objectives of regulation should, to the greatest extent possible be implemented in a symmetrical and competitively neutral manner, and deter anti-competitive behaviour; and

(c) *Inclusion of Policy Objectives Regarding Increased Competitiveness*

37. Section 1 of the proposed Policy Direction draws particular attention to *the Act's* policy objectives (c) and (f). Primus Canada has no objection to the CRTC exercising its authority with due regard to these objectives. We are concerned, however, that in emphasizing these two objectives, the government may inadvertently pressure the CRTC to neglect other policy objectives that contribute directly to the increased competitiveness of the telecommunications markets. For example, Policy Objectives (g) and (h) state:

... to stimulate research and development in the field of telecommunications and to encourage innovation in the provision of telecommunications services.

and

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

⁶ Minutes from the 6 June 2006 meeting of the Standing Committee on Industry Science and Technology.

⁷ *Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Table 4.2.7, "Local residential lines", *op. cit.*, page 36.

38. As described above, Primus Canada has been a true innovative pioneer in the Canadian market from its early activity in the long distance market to its initiative to be first to market in Canada with Voice over Internet Protocol “VoIP” service. It is also beyond dispute that the services offered by Primus Canada respond to the economic requirements of Canadians. A comparison of Primus Canada’s retail rates for local and long distance telephony, high-speed internet and wireless services with those of the ILECs and major cable companies demonstrates that Primus Canada is a price leader in each of these areas and serves the economic needs of Canadians very well. One million Canadians cannot be wrong. The CRTC’s continued achievement of these two objectives should not be hindered by a premature emphasis on an ambitious plan to deregulate. Primus Canada submits that the phrase “and particularly in paragraph 7(c) and (f)” should be deleted from Paragraph 1 of the draft Direction.

Conclusion

39. As demonstrated by the lengthy and detailed report created by the Telecommunications Policy Review Panel and the swift action by Minister Bernier and the government in addressing the needs of this crucial Canadian industry, this is a critical time for the Canadian telecommunications market. Increased action, particularly in the areas of productivity and innovation are needed to ensure that Canadian telecommunications properly serves Canadians and keeps Canada competitive on the international stage. Primus Canada applauds the government for its interest in this industry as manifested by its proposal of the first ever Direction regarding telecommunication to the CRTC.

40. To conclude, Primus Canada has demonstrated its contribution to the Canadian economy and the public interest in Canada. Primus Canada is a key player in the market. The current foreign investment restrictions preclude Primus Canada from investing in certain network infrastructure. Accordingly, Primus Canada has no choice but to make extensive use of the regulated wholesale services available from the ILECs. Continued regulation of wholesale services is, therefore, key to the promotion of competition in the telecommunications market. Economic regulation of those companies that control bottleneck facilities is still required. In addition, specific measures are needed to prohibit anti-competitive behaviour. Finally, Primus Canada believes that the CRTC should make its decisions with due regard to the current policy objectives regarding the encouragement of innovation and the economic interests of both business and residential consumers.

41. In light of the important nature of this discussion and the impact on key players within the Canadian system such as Primus Canada we would support the process outlined in the Minister’s announcement that following the Canada Gazette, Part I, the draft Policy Direction would go to the appropriate House and Senate Committees for parliamentary debate.

42. It is imperative that the Direction address the needs and concerns of all competitive entrants in the telecommunications markets – not just those of the larger and dominant players – which ultimately, will only benefit all Canadians. We would like to thank you for the opportunity to participate in this very important process, and we look forward to

continuing the dialogue with you not only on this process, but as the government considers the further recommendations put forward by the TPR Panel.

Yours truly,

A handwritten signature in cursive script, reading "E. (Ted) Chislett". The signature is written in dark ink and is positioned to the left of a vertical line that extends downwards from the end of the signature.

E. (Ted) Chislett