

**IN THE MATTER OF 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**

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**REPRESENTATIONS OF  
COGECO CABLE INC., QUEBECOR MEDIA INC.,  
ROGERS COMMUNICATIONS INC. AND SHAW  
COMMUNICATIONS INC.**

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**Filed: August 16, 2006**

## **Introduction**

1. These representations are made jointly by Cogeco Cable Inc., Quebecor Media Inc., Rogers Communications Inc. and Shaw Communications Inc. in response to the notice in Part I of the Canada Gazette, dated June 17, 2006, in which the Governor in Council invited comments on the text of a proposed Policy Direction to the Canadian Radio-television and Telecommunications Commission (CRTC).

2. Cogeco, Quebecor, Rogers and Shaw own and operate Canada's four largest cable companies. In addition to providing cable television and other media services to approximately 6.8 million subscribers, these companies have entered the telecommunications market and compete with the incumbent local exchange carriers (ILECs) in the provision of local and long distance telephone services, fixed and mobile wireless services, Internet and other broadband services in most regions of Canada.

3. In light of their heavy involvement in the communications and telecommunications sectors, and because of the important role that the CRTC plays in the development and regulation of these markets, the companies have a significant interest in the proposed Policy Direction to the CRTC.

4. This is the first time the Governor in Council has proposed to issue a Policy Direction since the power to do so was established in section 8 of the *Telecommunications Act*. As indicated in the Canada Gazette notice, the proposed Policy Direction is the direct result of a recommendation made by the Telecommunications Policy Review Panel (TPRP) which provided the Government its report in March of this year.

5. We support much of the TPRP's report including its recommendation for a policy direction. However, as discussed below, we have reservations about the

wording of the Government's proposed Policy Direction and suggest that certain amendments be made in order to bring it into line with the TPRP's reform proposals and the requirements of the *Telecommunications Act*.

### **The TPRP's Report and Recommendations**

6. The TPRP's report included a comprehensive set of proposals for change in Canada's telecommunications policies and regulatory framework. The report was based on an extensive consultation process and included a careful analysis of Canada's telecommunications environment, as well as a balanced assessment of the reforms which would be appropriate to continue Canada's successful transition from monopoly to competition in all telecommunications markets.

7. It is important to emphasize that Canada has been and continues to be a world leader in telecommunications. As noted by the TPRP in its report:

... Canada's past policy and regulatory framework has been successful in supporting the modernization of the Canadian telecommunications industry. ... Canadian telecommunications industry performance ranks at or near the top in most traditional telecommunications service markets.<sup>1</sup>

8. The aim of the reforms recommended by the TPRP is to ensure that Canada remains a leader in telecommunications and, in particular, that Canada not fall behind other developed countries in this critical economic sector. In this regard, the TPRP singled out broadband and wireless as key areas of concern:

Over the course of its work, the Panel has become concerned that the Canadian telecommunications sector performance has not kept pace with its earlier achievements. In particular, Canada has not remained at the leading edge of development and deployment in two key growth areas of the telecommunications sector – broadband and wireless.<sup>2</sup>

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<sup>1</sup> TPRP Final Report at 1-10, 1-11.

<sup>2</sup> TPRP Final Report at 1-13.

9. In addition to its concerns about wireless and broadband – both of which the CRTC ceased to subject to economic regulation many years ago – the TPRP also addressed the question of the most suitable regulatory framework for a telecommunications environment which, in most segments, is well on the way to full competition. On this issue, the TPRP proposed a comprehensive set of inter-related recommendations. Central to all of these recommendations is the TPRP’s view that economic regulation should be required only where a service provider has significant market power (SMP):

Under the new regulatory framework proposed here, there should be a legislative presumption of no economic regulation of basic transmission services. Economic regulation should be maintained or imposed only where there is a finding that the service provider has SMP in the market for a service. Existing economic regulation of basic transmission services should be reviewed and eliminated where there is no SMP.<sup>3</sup>

10. The TPRP acknowledged in its report that many of its recommended reforms would require legislation to implement and suggested a number of measures that could be taken in advance of amendments to the *Telecommunications Act*. One of the interim measures proposed was the issuance of a policy direction to the CRTC pursuant to section 8 of the *Act*.

11. We agree with both the TPRP’s overall proposals for regulatory reform, as well as its suggestion for a policy direction. We also agree that the focus when deciding whether economic regulation is required should be an assessment of whether or not a service provider has SMP.

12. In our view, the TPRP was correct when it concluded “Canada’s past policy and regulatory framework has been successful”. The CRTC has guided the Canadian telecommunications industry from an era of monopoly to competition while avoiding the severe structural and economic problems experienced in many other countries. There are now only a handful of ILEC

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<sup>3</sup> TPRP Final Report at 3-13.

services which remain subject to economic regulation – primarily local exchange services - and in many areas across the country it is expected that within 12 to 18 months the ILECs will no longer have SMP in these services. If this proves to be the case, economic regulation of these services should also cease.

13. We believe that Canada is well on the way to achieving a completely revamped regulatory regime which fully suits the new competitive environment for telecommunications. However, we also believe it is critical to take the next steps in a deliberate manner which recognizes the full scope of the TPRP's recommendations. In particular, it is important to heed the TPRP's call for a transitional period in the move to a new regime:

The Panel recognizes that a transitional regime will be required. During the transition, services currently subject to economic regulation should remain regulated for a period of 12 to 18 months, during which all telecommunications markets should be examined to determine whether any service provider has SMP. If there is no SMP, the particular market should be deregulated. If there is SMP, economic regulation should continue.<sup>4</sup>

14. We also believe it is critical to recognize that a shift in regulatory approach from *ex ante* (prior approval) regulation to *ex post* (after the fact) regulation is only possible if the proper institutional framework and enforcement mechanisms are in place. This point was emphasized by the TPRP in its report:

As this shift in regulatory focus occurs, it is important to consider the most appropriate institutional framework to define markets, assess market power, determine whether there has been an abuse of such SMP when it is found to exist, and determine whether such conduct has resulted in a significant lessening or prevention of competition. It is equally important to ensure that the institution granted this authority has an in-depth understanding of the telecommunications sector as well as the requisite powers and procedures to make determinations in a timely manner, to impose effective remedies when justified and to monitor compliance with its orders.<sup>5</sup>

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<sup>4</sup> TPRP Final Report at 3-12.

<sup>5</sup> TPRP Final Report at 4-3.

15. We strongly believe that all of these conclusions by the TPRP must be kept in mind when moving forward with the proposals for regulatory reform suggested by the TPRP. We believe they are especially important in the context of the Government's proposed Policy Direction to the CRTC.

### **The Proposed Policy Direction**

16. As indicated above, recognizing that legislative and institutional change can take years, the TPRP suggested that the Government consider issuing a policy direction to the CRTC as an interim measure. We agree with the TPRP that this is a reasonable interim step.

17. That being said, we are concerned that the Government's proposed Policy Direction fails to adequately take into account the TPRP's carefully designed set of recommendations. We are especially concerned that the wording of the proposed Policy Direction fails to adequately take into consideration the fact that the CRTC is required by law to apply the *Telecommunications Act* in its present form and – equally importantly – fails to adequately reflect the fact that the CRTC has only those powers granted to it under that *Act*. These concerns are elaborated on in the detailed analysis of the proposed Policy Direction, which is attached as an appendix to this submission.

18. As indicated in our detailed analysis, there is a serious concern that the wording of the proposed Policy Direction could result in greater confusion, rather than increased clarity, in the interpretation and implementation by the CRTC of the telecommunication policy objectives set out in section 7 of the *Telecommunications Act*.

19. While the Governor in Council can use a policy direction to clarify the policy objectives in section 7 of the *Telecommunications Act*, it cannot use it to amend the substantive provisions of the *Act*. To the extent that the proposed

Policy Direction would appear to suggest that the CRTC should regulate as if the *Act* has been amended, this is likely to generate more confusion than clarity. It could also lead to serious legal issues which would unnecessarily divert attention from the central goal of promoting the transition from monopoly to competition in all telecommunications markets.

20. Based on our review, we are concerned that, in its current form, the wording of two of the provisions in the draft order (sections (a)(i) and (ii)) could be interpreted as conflicting with the requirements of the *Telecommunications Act*. We also believe that section (c)(i) is subject to the same criticism and, in our view, is unnecessary in light of the other provisions in the order.

#### Section (a)

21. Section (a) of the Policy Direction provides as follows:

- (a) the CRTC should:
  - (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives; and
  - (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

22. In our view, these two sections of the proposed Policy Direction are troubling as they appear to suggest that the CRTC should ignore the requirements of Part III of the *Telecommunications Act* which requires economic regulation, except when the statutory tests for forbearance in section 34 have been satisfied.

23. Under section 34 of the *Act*, the CRTC should forbear from economic regulation when it finds as a question of fact that the telecommunications services in question are or will be “subject to competition sufficient to protect the

interests of users.” In addition, subsection 34(3) prohibits the CRTC from forbearing from regulation when it determines, 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. These are statutory tests for forbearance that cannot be changed by a policy direction. Only Parliament can change these tests through legislation.

25. Our concern is that the wording of sections (a)(i) and (ii) of the proposed Policy Direction are not properly qualified to take account of the mandatory provisions of the *Act*. We note that the Minister of Industry used more appropriate wording in a speech announcing the Government’s intention to issue a policy direction. In that speech, the Minister stated that the proposed Policy Direction “...direct[s] the CRTC to rely on market forces **to the maximum extent feasible within the scope of the current *Telecommunications Act***.”<sup>6</sup>

26. In our view, the meaning imparted in the proposed Policy Direction is quite different from what the Minister described in his speech. While the qualification used in the proposed order, “to the maximum extent feasible”, implies that it is within the CRTC’s power or discretion to rely on market forces, the term used by the Minister, “to the maximum extent feasible **within the scope of the current *Telecommunications Act***” clearly recognizes the legal restrictions placed on the CRTC’s regulatory actions. We therefore believe that section a(i) should include the wording used by the Minister.

27. We also believe that section (a)(i) should expressly recognize that one can only rely on market forces when they exist and are sufficient to replace regulation as the means of safeguarding the interests of users. In fact, competition is developing in local markets on a very uneven basis, with some urban centres

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<sup>6</sup> The Honourable Maxime Bernier, Minister of Industry, Speaking Points, 2006 Canadian Telecom Summit, Toronto, June 13, 2005 emphasis added.

starting to experience real competitive alternatives while many smaller centres and rural areas enjoy little, if any, competition. Section 34 of the *Act* recognizes this possibility by focussing on the strength of market forces to protect the interests of users. Consequently, we believe it is important for the proposed order to qualify the direction to the CRTC to rely on market forces by reference to market conditions.

28. Similar criticisms can be levelled at section (a)(ii) which requires the CRTC, when relying on regulation, to use measures “...that interfere with market forces **to the minimum extent necessary to meet the policy objectives**”.

29. Again, while the CRTC has a certain amount of discretion in respect of the regulatory measures it implements, the current legislation places some serious limitations on such discretion. In particular, the CRTC cannot opt for *ex post* enforcement mechanisms over *ex ante* approval of tariffs and rates, as the TPRP would like it to be able to do under new legislation. The CRTC can approve a range of rates, as it has already done, it can implement a price cap regime, as it has already done – but it cannot do away with the requirement for tariff filings and advance approval of rates.

30. In light of these concerns, we recommend adding the Minister of Industry’s qualifying wording to both sections (a)(i) and (ii) and that section (a)(i) also expressly refer to the need to consider market conditions. Given these changes, section (a) of the proposed Policy Direction would read as follows:

- (a) the CRTC should:
  - (i) rely on market forces to the maximum extent feasible, given market conditions and the other requirements of the Act, as the means of achieving the telecommunications policy objectives; and
  - (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum

extent necessary to meet the policy objectives and the other requirements of the Act;

Section (c)

31. Section (c)(i) of the proposed Policy Direction addresses “operational practices” and reads as follows:

- (c) in order to promote efficient, informed and timely operations the Commission should adopt the following operational practices:
  - (i) provide for maximum efficiency in regulation by using only tariff approval measures that are as minimally intrusive and as minimally onerous as possible,

32. In our view, section (c)(i) goes beyond “operational practices” and infringes on the substance of regulation.

33. Section (c)(i) requires tariff approval measures to be “as minimally intrusive and as minimally onerous as possible”. This is not really an “operational practice” measure since it goes to the question of whether lighter or heavier regulation is required in a given instance. An assessment of this question should turn primarily on market conditions, the effectiveness of the measure proposed in implementing the policy objectives and the other considerations set forth in the proposed Policy Direction – not on administrative expediency.

34. We note that section (a)(ii) already states that when relying on regulation, the CRTC must “use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives”. In our view, section (a)(ii) renders section (c)(i) redundant to the extent that section (c)(i) is limited to “operational practices”. If section (c)(i) is viewed as going beyond “operational practices”, we believe that it is overbroad and should not be included in the proposed order. Overall, we recommend that section (c)(i) be deleted.

## **Conclusion**

35. In its March 2006 report, the TPRP recommended a range of policy and regulatory reforms, many of which would require legislation to implement. The TPRP also suggested that, as an interim measure, the Government consider issuing a policy direction to the CRTC pursuant to section 8 of the *Telecommunications Act*.

36. We believe the TPRP's recommendations are balanced and that the concept of a policy direction is a good one. However, in implementing the direction and the recommendations, the government must have regard to the successes that Canada has had in the telecommunications sector and the extent to which the current regime has already facilitated extensive deregulation. Furthermore, we have concerns with the wording of the Government's proposed Policy Direction on the grounds that it fails to adequately reflect both the requirements of the *Telecommunications Act* and the full scope and inter-related nature of the TPRP's proposals for reform.

37. We therefore recommend that sections (a)(i) and (ii) be amended as identified above and that section (c)(i) be deleted. Subject to these amendments, we support the wording of the proposed Policy Direction.

38. We thank the Governor in Council for giving us the opportunity to provide our input on this important issue.

**APPENDIX**

**IN THE MATTER OF 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**

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**DETAILED ANALYSIS OF THE PROPOSED POLICY  
DIRECTION TO THE CRTC**

**SUBMITTED BY:**

**COGECO CABLE INC., QUEBECOR MEDIA INC.,  
ROGERS COMMUNICATIONS INC. AND SHAW  
COMMUNICATIONS INC.**

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Filed: August 16, 2006

## **INTRODUCTION**

1. This detailed analysis of the Policy Direction to the Canadian Radio-television and Telecommunications Commission (CRTC) is submitted jointly by Cogeco Cable Inc., Quebecor Media Inc., Rogers Communications Inc. and Shaw Communications Inc. in support of their representations filed in response to the notice in Part I of the Canada Gazette, dated June 17, 2006.

2. The issuance of a Policy Direction by the Governor in Council is an historic event in the telecommunications sector since it marks the first time such an order has been proposed since the *Telecommunication Act* was enacted in 1993 and the power to issue such an order was first conferred in section 8 of the *Act*. It is therefore very important that the first such direction be very clear in its intent and well-understood by the regulator, the industry and the public at large.

3. As discussed in our representations, we agree with the overall thrust of the proposed Policy Direction. However, while the Governor in Council can use a policy direction to clarify the policy objectives in s. 7, it cannot use it to amend the substantive provisions of the *Telecommunications Act*. We are concerned that in its current form, the wording of two of the provisions in the draft order (sections (a)(i) and (ii)) could be interpreted as conflicting with the requirements of the *Telecommunications Act*. Section (c)(i) is subject to the same criticism and, in our view, is unnecessary in light of the other provisions in the order.

4. In short, the proposed Policy Direction ought not to short-circuit the legislative process for amending the *Telecommunications Act* and ought not to suggest that the Commission rely on market forces to any greater extent than is already permitted in Part III of the *Act*. In order to guard against this outcome, we have proposed some minor amendments to the wording of clauses (a)(i) and (ii) of the proposed Policy Direction, and the deletion of clause (c)(i).

### **The Requirements of Section 8**

5. Section 8 of the *Telecommunications Act* provides as follows:  
The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.
6. The “Canadian telecommunications policy objectives” are defined in subsection 2(1) of the *Act* as “the objectives set out in section 7.”
7. Section 47(b) of the *Act* requires the Commission to exercise its powers and perform its duties in accordance with any orders made by the Governor in Council under section 8.
8. In order to comply with section 8, a policy direction must meet the three criteria specified. It must be:
  - of general application;
  - on broad policy matters;
  - with respect to the Canadian telecommunications policy objectives.
9. Section 8 is an extraordinary measure since it enables the Governor in Council to bind the Commission, which ordinarily operates as an independent quasi-judicial regulatory tribunal, with respect to certain matters pertaining to the statutory policy objectives. It should therefore be strictly confined to this purpose and ought not to derogate from the other sections of the *Act*. In other words, the Governor in Council cannot bind the Commission to interpret any other section of the *Act* in a particular manner or to ignore any provision of the *Act* or to contravene any such provision.

10. Since an order under section 8 must be with respect to the Canadian telecommunications policy objectives (defined to be the objectives set out in section 7), the Governor in Council can neither add to, nor delete, any of the objectives listed in section 7. This proposition is supported by the wording of section 8. Had Parliament intended for the Governor in Council to be able to amend the policy objectives by subordinate legislation, it would have expressly granted this power.

### **The Intent of the Proposed Policy Direction**

11. The stated intention of the proposed Policy Direction, according to the Regulatory Impact Analysis Statement, is to "... enable timely change toward more market-oriented regulation in advance of any legislative change which would inevitably take longer."

12. In its Regulatory Impact Analysis Statement, the Government has made it clear that the TPRP's recommendations have heavily influenced the wording of the proposed order:

A fundamental finding of the Panel was that competition in telecommunications markets has evolved to the point where market forces can be relied upon to achieve many telecommunications policy objectives and the need for regulation should not longer be presumed. This concept of reliance on market forces to the maximum extent feasible fits with the Government's overall objective of improving the competitiveness and productivity of the Canadian economy. The Panel recommended specifically issuing a policy direction under section 8 of the *Telecommunications Act*, and the proposed policy direction draws heavily from the proposal recommended by the Panel.<sup>7</sup>

13. As discussed further in the Statement, the proposed Policy Direction is intended to provide policy guidance on how the Commission should exercise its regulatory mandate and to "direct it to take a more market-based approach to implementing the *Act*."

Section 8 of the *Telecommunications Act* provides the Governor in Council (GIC) with the authority to issue policy directions of general application to the CRTC on broad policy matters with respect to the telecommunications policy objectives set out in the Act. **The proposed policy direction to the CRTC will provide policy guidance on how the Commission should exercise its regulatory mandate and direct it to take a more market-based approach to implementing the Act.**<sup>8</sup>

14. It is also clear from the Statement that the proposed Policy Direction is intended to: "... enable timely change toward more market-oriented regulation in advance of any legislative change which would inevitably take longer":

More market-oriented regulation is one part of a comprehensive telecommunications strategy proposed by the Panel. It also made recommendations in a number of other areas, including amendments to the *Telecommunications Act*; development of an ICT adoption strategy; delivery of affordable and reliable broadband services in all regions of Canada; and reform of regulatory agencies, including the creation of new institutions. **These recommendations involve complex issues that will require in-depth analysis and consultations before the Government can proceed. Delaying the release of the policy direction until the Government is prepared to respond in full to the Panel's report would delay regulatory change, and mean that Canadians are delayed in seeing the benefits of a regulatory regime that relies more on market forces.** It is important to note as well, that the policy direction does not diminish legislated objectives in the Act, including the objectives to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada, and to contribute to the protection of privacy of persons. The power to issue policy directions was designed to be an instrument to provide timely policy guidance to the regulator. **Issuing a policy direction enables timely change toward more market-oriented regulation in advance of any legislative change which would inevitably take longer.**<sup>9</sup>

15. Given these stated objectives, we are concerned that the proposed Policy Direction, which is meant to be used to provide direction on broad policy matters in respect of the objectives in section 7 of the *Act*, might in fact be used to bypass the more cumbersome legislative process by purporting to affect other

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<sup>7</sup> Canada Gazette Part 1, June 17, 2006, page 1606, *Regulatory Impact Analysis Statement*.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, at page 1607.

substantive sections of the *Act* which govern the CRTC's application of economic regulation.

**Section (a)**

16. Section (a) of the Policy Direction provides as follows:

(a) the CRTC should:

- (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives; and
- (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

17. Regardless of the merits of a policy that reverses the “presumption of regulation” and calls on the CRTC to “rely on market forces to the maximum extent feasible”, this is not what the *Telecommunications Act* currently prescribes. This is because Part III of the *Act*, as it is currently constituted, in fact prescribes economic regulation, except when the statutory tests for forbearance in section 34 have been satisfied. These statutory tests include a requirement for the CRTC to forbear from economic regulation when it finds as a question of fact that the telecommunications services in question are or will be “subject to competition sufficient to protect the interests of users.” In addition, subsection 34(3) prohibits the CRTC from forbearing from regulation when it determines, 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.” These are statutory tests for forbearance that cannot be derogated from by the terms of a policy direction. Only Parliament can change these tests through legislation. In addition, the *Act* requires the CRTC to make these determinations “as a question of fact.” This is not a determination that the CRTC can be directed to make in a certain manner pursuant to section 8.

18. Moreover, it is inaccurate to state that the *Telecommunications Act* contains a “presumption of regulation”. That implies that there is a discretion in the Commission to regulate or not. In fact, absent market conditions that satisfy the statutory tests for forbearance in section 34, the *Act* compels the CRTC to apply economic regulation. Section 25 prohibits a carrier from offering a telecommunications service except in accordance with a tariff filed with, and approved by, the CRTC that contains the rate to be charged. Section 27 requires all such rates to be just and reasonable and non-discriminatory. These provisions are not discretionary - they are mandatory.

19. It would therefore be wrong to think that the prescription of regulation in the *Act* can be changed by issuing a policy direction to the CRTC – it cannot. No matter what the proposed Policy Direction says, the CRTC is bound to continue to apply the provisions of the *Act* that require economic regulation when the tests for forbearance in section 34 have not yet been satisfied.

20. This was clearly recognized by the TPRP in its Report. The TPRP acknowledged that legislation was required and, until such time as sections 25 and 34 were repealed, economic regulation must continue for as long as the carrier in question retains SMP in the relevant market.

Accordingly, the Panel believes the presumption in the current *Telecommunications Act* that telecommunications services provided by Canadian carriers must be regulated unless the Commission forbears should be replaced by a presumption of deregulation for all services. **Thus, s. 25 of the Act should be repealed and replaced with a new provision that economic regulation should apply to a service provider in a telecommunications market only if there is a finding that the service provider has SMP in that market.**

The Panel recognizes that a transitional period will be required. During the transition, services currently subject to economic regulation should remain regulated for a period of 12 to 18 months, during which all telecommunications markets should be examined to determine whether any service provider has SMP. If there is no SMP, the particular market

should be deregulated. **If there is SMP, economic regulation should continue.**<sup>10</sup>

21. Our concern is that the wording of sections (a)(i) and (ii) of the proposed order are not properly qualified to take account of the mandatory provisions of the Act. We note in this regard that the Minister of Industry, himself, more appropriately qualified the wording in his speech cited above, than has been done in the proposed order. The Minister stated that the proposed Policy Direction "...direct[s] the CRTC to rely on market forces **to the maximum extent feasible within the scope of the current *Telecommunications Act***."<sup>11</sup>

22. Rather than use the Minister's qualifying words, the draft Policy Direction uses the words "**to the maximum extent feasible as the means of achieving the telecommunications policy objectives**". (emphasis added)

23. In our view, the meaning imparted in the proposed Policy Direction is quite different from what the Minister described in his speech. While the qualification used in the proposed order, "to the maximum extent feasible", implies that it is within the CRTC's power or discretion to rely on market forces, the term used by the Minister, "to the maximum extent feasible **within the scope of the current *Telecommunications Act***" clearly recognizes the legal restrictions placed on the CRTC's ability to carry out the Direction and to rely on market forces.

24. In our view section (a)(i) should also expressly recognize that one can only rely on market forces when they exist and are sufficient to replace regulation as the means of safeguarding the interests of users. In fact, competition is developing in local markets on a very uneven basis, with some regions starting to experience real competitive alternatives and others still left with no alternatives. In this regard, there tends to be a big disparity between urban and rural areas.

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<sup>10</sup> TPRP Report, page 3-12, emphasis added.

<sup>11</sup> The Honourable Maxime Bernier, Minister of Industry, Speaking Points, 2006 Canadian Telecom Summit, Toronto, June 13, 2005 emphasis added.

Section 34 of the *Act* recognizes this by focussing on the strength of market forces to protect the interests of users. In our view, it is equally important for the proposed order to qualify the direction to the CRTC to rely on market forces by reference to market conditions.

25. This was expressly recognized by the TPRP in the text of the policy direction it proposed to the Government. Paragraph (e) of that text provided as follows:

Economic regulation shall apply only if there is a finding of significant market power in respect of a telecommunications service or class of services provided by a Canadian carrier. The Canadian Radio-television and Telecommunications Commission should continuously review telecommunications markets on a timely basis to ascertain the appropriate degree of regulation or forbearance under section 34 of the *Telecommunications Act*.<sup>12</sup>

26. While one might dismiss this concern as one which is irrelevant from a legal perspective, since the Courts will interpret the Policy Direction in a manner that is consistent with the primary legislation which gives birth to it,<sup>13</sup> it is in fact an important concern at this particular juncture when the CRTC is under fire from the ILECs for declining to deregulate their local telephone services at this juncture. Both the TPRP Report and the proposed Policy Direction are being used by the ILECs as tools to attack the CRTC's credibility and stature in a manner that is unfair given the requirements of the current legislation.<sup>14</sup> If the proposed Policy Direction is allowed to be implemented in its current form, it will exacerbate this problem, bringing the CRTC's judgment into question.

27. Since one of the objectives of the proposed order is to clarify the policy objectives in section 7, it is vitally important that it not add to the confusion or uncertainty. It is also in the public interest that our public institutions not be set up for unfair criticism by raising expectations that are beyond the requirements of

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<sup>12</sup> TPRP Report, page 10-7.

<sup>13</sup> *Belanger v. The King* (1916), 54 S.C.R. 265.

the law. It is for these reasons that we are proposing that very clear recognition be given in the order itself to the statutory limitations on the CRTC's ability to rely on market forces.<sup>15</sup>

28. The same criticisms can be levelled at section (a)(ii) that requires the CRTC, when relying on regulation, to use measures "...that interfere with market forces **to the minimum extent necessary to meet the policy objectives**".

29. Again, while the CRTC has a certain amount of discretion in respect of the regulatory measures it implements, the current legislation places some serious limitations on such discretion. In particular, as discussed above, the CRTC cannot opt for *ex post* enforcement mechanisms over *ex ante* approval of tariffs and rates, as the TPRP would like it to be able to do under new legislation. It can approve a range of rates, as it has already done, it can implement a price cap regime, as it has already done – but it cannot do away with the requirement for tariff filings and advance approval of rates. For this reason, we recommend adding the Minister's qualifying wording to (a)(ii) as well.

30. With our recommended amendments, section (a) of the proposed Policy Direction would read as follows:

- (a) the CRTC should:
  - (i) rely on market forces to the maximum extent feasible, given market conditions and the other requirements of the Act, as the means of achieving the telecommunications policy objectives; and
  - (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives and the other requirements of the Act;

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<sup>14</sup>Moreover with regard to the TPRP Report, the ILECs frequently quote selective passages without continuing on to provide associated qualifying passages or recommendations.

<sup>15</sup> Again we note that the current statute has enabled the CRTC to forbear from economic regulation in approximately 70% of the telecom market (as measured by revenue) today.

**Section (b)**

31. Section (b) of the Policy Direction provides further details on the manner in which the Governor in Council would like the CRTC to satisfy the requirements for efficient and effective regulatory measures, when they are required. It provides as follows:

- (c) when it is determined that regulatory measures are required, then that regulatory measure should satisfy the following criteria:
  - (i) each regulatory measure should specify the telecommunications policy objective that is advanced by the measure and demonstrate compliance with this policy direction,
  - (ii) economic regulation, when required, should neither deter efficient competitive entry nor promote inefficient entry,
  - (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
  - (iv) interconnection arrangements and access regimes, including access to buildings, in-building wiring and support structures, should, to the greatest extent possible, be technologically and competitively neutral, in order to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers;

32. In our view, these measures satisfy the requirements of section 8. They are of general application, on broad policy matters with respect to one or more of the objectives in section 7. Generally speaking, they add clarity to the requirement to ensure that regulation, when required, is efficient and effective: paragraph (i) is aimed at ensuring identification of the policy objective being furthered by the regulatory measure and paragraphs (ii) to (iv) contain a number of regulatory principles that are fairly widely accepted and already pursued by the

CRTC – efficient economic entry; and competitive and technological neutrality.

33. For these reasons, we do not consider that any amendments to section (b) are required.

**Section (c)**

34. The final section of the Policy Direction addresses “operational practices” designed to ensure that the CRTC’s own regulatory practices are efficient. It provides as follows:

- (d) in order to promote efficient, informed and timely operations the Commission should adopt the following operational practices:
  - (i) provide for maximum efficiency in regulation by using only tariff approval measures that are as minimally intrusive and as minimally onerous as possible,
  - (ii) with a view to providing increased incentives for innovation, investment in and construction of competing telecommunications network facilities, conduct a review of its regulatory framework regarding mandated access to wholesale services, in order to determine the extent to which mandated access to wholesale services that are not essential services should be phased out and the appropriate pricing of mandated services to encourage investment and innovation in network infrastructure,
  - (iii) maintain and publish service performance standards for the various forms of regulatory proceedings it undertakes to ensure that regulatory measures, when required, are efficient, and
  - (iv) continue to explore and implement new approaches for streamlining its regulatory process to enhance the efficiency and effectiveness of regulatory measures.

35. Sections (c)(ii) (iii) and (iv) would appear to be within the ambit of section 8 as they clearly pertain to the broad policy of encouraging efficiency in regulation. However, section (c)(i) appears to go beyond “operational practices” to get at the substance of regulation.

36. Section (c)(i) requires tariff approval measures to be “as minimally intrusive and as minimally onerous as possible”. This is not really an “operational practice” measure since it goes to the question of whether lighter or heavier regulation is required in a given instance. As discussed above, this should turn primarily on market conditions, the effectiveness of the measure proposed in implementing the policy objective and the other considerations set forth in the proposed Policy Direction – not on administrative expediency.

37. Section (c)(i) is cast in overly broad terms, since unlike sections (a)(i) and (ii), it does not qualify the direction by reference to the objectives of the Act. Nor does it qualify the requirement with regard to market conditions or the other requirements of the *Act*, as we have recommended in respect of (a)(i) and (ii).

38. Section (a)(ii) already states that when relying on regulation, the CRTC must “use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives”. Since section (b)(i) of the proposed order already requires the CRTC to specify the telecommunications policy objective being advanced and to demonstrate compliance with the policy direction, the CRTC will already have to demonstrate the proportionality of the regulating to the derived policy outcome, maximum reliance on market forces and minimal interference with the operation of market forces, as well as competitive and technological neutrality. These sections properly set out the parameters under which tariff approval mechanisms should operate.

39. It should again be noted that the TPRP did not go as far as the proposed order in the “Proposed Text of Policy Direction” in its report. As mentioned above, the TPRP recommended in paragraph (e) of its proposed text that “Economic regulation shall apply only if there is a finding of significant market power in respect of a telecommunications service or class of services provided by a Canadian carrier...” This provision properly tied economic (tariff) regulation to a finding of SMP, as required by section 34 of the Act. In addition, unlike section (c)(i), the TPRP did not propose that the CRTC use “only tariff approved mechanisms **that are as minimally intrusive and as minimally onerous as possible.**” Rather, it proposed that:

- (k) To ensure greater efficiency in regulation, *ex ante* tariff regulation shall be used only when less intrusive and less onerous tariff approval mechanisms, such as price cap mechanisms, are determined to be ineffective means **to satisfy the objectives of economic regulation.**<sup>16</sup>

40. The TPRP therefore anchored the remedy of *ex ante* tariff approvals to the presence or absence of SMP and to achievement of the objectives of economic regulation. It did not simply exhort the CRTC to use the least intrusive and least onerous form of tariff measure. The TPRP clearly recognized the relationship of economic regulation to the presence or absence of market power, as well as the fact that the goal of economic regulation is the advancement of the telecommunications policy objectives in section 7 of the Act.

41. In light of the forgoing, it is our recommendation that section (c)(i) be deleted for the following reasons:

- it overstates the principle advanced;
- it is not consistent with the TPRP’s recommendations;
- it is not consistent with the objectives of economic regulation; and,

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<sup>16</sup> TPRP Report, page 10-7, emphasis added.

- the requirements of sections (a) and (b) of the order properly address the general intent of the proposal in section (c)(i).

**Conclusion**

42. Subject to the amendments proposed in our representations, we support the wording of the proposed Policy Direction. We thank the Governor in Council for giving us the opportunity to provide our input on this important issue.