



April 8, 2019

**VIA EMAIL**

**Pamela Miller**

Director General

Telecommunications and Internet Policy Branch

Innovation, Science and Economic Development Canada

10<sup>th</sup> Floor, 235 Queen Street

Ottawa, ON K1A 0H5

Email: ic.telecomsubmission-soumissionstelecom.ic@canada.ca

Dear Pamela Miller,

**Re: Draft Order in Council Issuing a Direction to the CRTC on Promoting Competition, Affordability, Consumer Interest and Innovation  
Canada Gazette, Part I, Vol 153, Number 10, March 9, 2019**

We write you with respect to the above-referenced draft policy direction to the CRTC on the Implementation of the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation.<sup>1</sup>

The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) is a legal clinic based at the University of Ottawa, Faculty of Law. Our mandate is to advocate in the public interest on matters arising at the intersection of law and technology. This has included active participation in many formative telecommunications proceedings and policy-development processes. Our comments herein are informed by this institutional experience.

This draft policy direction represents an important step in the evolution of the CRTC's regulatory approach to telecommunications services by focusing these activities on competition, affordability, consumer rights and innovation. As the draft policy direction rightly notes, there remain significant issues in the Canadian telecommunications landscape. By formally confirming these factors as government priorities and directing the CRTC to emphasize their consideration in its regulatory actions, the government is

---

<sup>1</sup> Order in Council, Order Issuing a Direction to the CRTC on Promoting Competition, Affordability, Consumer Interest and Innovation, March 9, 2019, Part I, 153(10), <http://gazette.gc.ca/rp-pr/p1/2019/2019-03-09/html/reg5-eng.html>.

taking an important step in mitigating these ongoing challenges.

As such, we would at the outset encourage the government to resist any suggestions to weaken those elements of the draft policy direction currently designed to emphasize competition, affordability, consumer interest and downstream innovation in CRTC regulatory actions.

To fully realize the important objectives of this policy direction we would, however, suggest three changes. Each of these arises from the interaction between this draft policy direction and the pre-existing 2006 policy direction.<sup>2</sup>

The 2006 Policy Direction compelled the CRTC to rely on market forces to the maximum extent possible in achieving its regulatory objectives.<sup>3</sup> The 2006 Policy Direction also required a one-time review of all CRTC policies to ensure they are compliant with this general maxim, as well as to additionally ensure that all CRTC policies are structured in a manner that increases investment and innovation in telecommunications facilities.<sup>4</sup> In our view, the various ways in which this pre-existing policy direction interacts with the new draft direction must be expressly addressed.

First, the 2006 Policy Direction's focus on the pre-eminence of market-driven solutions directly undermines the current draft direction's efforts to emphasize competition, affordability, consumer rights and innovation. Many historical CRTC decisions have acknowledged this reality, and important gains along these priority areas have been achieved by the Commission in spite of the 2006 Policy Direction, not because of it.<sup>5</sup>

---

<sup>2</sup> Order in Council, *Order Issuing a Direction to the CRTC on the Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, December 14, 2006, PC 2006-1534, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/FullText.html>, "2006 Policy Direction"

<sup>3</sup> Order in Council, *Order Issuing a Direction to the CRTC on the Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, December 14, 2006, PC 2006-1534, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/FullText.html>, "2006 Policy Direction", paragraphs 1 (a) and (b).

<sup>4</sup> Order in Council, *Order Issuing a Direction to the CRTC on the Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, December 14, 2006, PC 2006-1534, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/FullText.html>, "2006 Policy Direction", sub-paragraph 1 (c).

<sup>5</sup> Examples include: promoting competition (Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies*, July 22, 2015, CRTC File No: 8663-C12-201313601, <https://crtc.gc.ca/eng/archive/2015/2015-326.htm>); Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, June 3, 2013, CRTC File No: 8665-C12-201212448, <https://crtc.gc.ca/eng/archive/2013/2013-271.htm>); affordability (Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy*, December 21, 2016, CRTC File No: 8663-C12-201503186, <https://crtc.gc.ca/eng/archive/2016/2016-496.htm>); consumer interests (Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, June 3, 2013, CRTC File No: 8665-C12-201212448, <https://crtc.gc.ca/eng/archive/2013/2013-271.htm>); Telecom Decision CRTC 2007-130, *Establishment of an independent telecommunications consumer agency*, December

Indeed, the CRTC has demonstrated over the years that it is possible to impose regulatory frameworks that are consistent with the 2006 Policy Direction and are not reliant on market forces.<sup>6</sup> However, these gains were only possible because the 2006 Policy Direction expressly acknowledges that the policy objectives encoded in section 7 of the *Telecommunications Act* remain the CRTC's primary objective, and that market forces need only be relied upon to the maximum extent possible in achieving those obligations.<sup>7</sup>

By contrast, no such latitude is granted by the 2006 Policy Direction to any future orders in council such as the draft direction currently under consideration. In carrying out its regulatory actions, the CRTC will be obligated to "consider" the new priorities established in sub-paragraphs 1(a)(i)-(vii) of the new draft direction. However, as a result of the 2006 Policy Direction, the Commission must continue to maximize its reliance on market forces in carrying out its duties under the *Telecommunications Act*, even if it must now consider the new priorities alongside the 2006 imperative. While parliament will be taken to have been aware of the 2006 Direction in issuing the new one, it remains unclear how the two will interact. Indeed, even a consistent interpretation of the two policy directions might lead to co-regulatory approaches that are continue to fall short in promoting competition, affordability, consumer interests and downstream innovation.<sup>8</sup>

In light of this potential for confusion and even conflict, we recommend that the current Draft order in council expressly rescind the 2006 Policy Direction. Indeed, CIPPIC would argue that, to the extent the 2006 Policy Direction has had substantial impact on telecommunications services in Canada, this impact has been largely negative in nature.

---

20, 2007, CRTC File No: 8665-C12-200711748, <https://crtc.gc.ca/eng/archive/2007/dt2007-130.htm>); and innovation in downstream services (Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers*, CRTC File No: 8648-C12-200815400, <https://crtc.gc.ca/eng/archive/2009/2009-657.htm>; Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet service providers*, CRTC File Nos: 8661-P8-201510199, 8622-V42-201510735 & 1011-NOC2016-0192, <https://crtc.gc.ca/eng/archive/2017/2017-104.htm>).

<sup>6</sup> Indeed, all current regulatory obligations are consistent with the 2006 Policy Direction. See Telecom Decision 2007-51, *Action Plan for the Review of Commission Regulatory Measures in Light of Order in Council PC 2006-1534*, CRTC Reference No: 8663-C12-200706575, July 11, 2007.

<sup>7</sup> For example, the instrument directs the CRTC to "rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives" [emphasis added]: Order in Council, *Order Issuing a Direction to the CRTC on the Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, December 14, 2006, PC 2006-1534, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/FullText.html>, "2006 Policy Direction", sub-paragraph 1(a)(i).

<sup>8</sup> See for example Telecom Decision CRTC 2018-475, *Lower-cost data-only plans for mobile wireless services*, December 17, 2018, CRTC File No: 1011-NOC2018-0098, <https://crtc.gc.ca/eng/archive/2018/2018-475.htm>, para 41: "The Commission recognizes that the national wireless carriers' revised proposals represent an improvement over their initial proposals. While none of the revised plans on their own would necessarily be enough to fill the gap identified by the Commission with respect to lower-cost data-only plans, their introduction would represent an important step forward in developing and supporting more affordable and innovative mobile wireless services for Canadians and, in particular, for Canadians with low household incomes."

Its rescission would therefore be welcome, and directly in line with the general impetus underlying the new policy direction.

Barring such an outcome, we would, at minimum, recommend that the current draft order be modified to add a supremacy clause in section 2, as follows:

2 Except otherwise expressly stated, section 1 of this Order supersedes any other directions issued to the Commission under section 8 of the *Telecommunications Act*.

OR

2 Section 1 of this Order supersedes *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355.

A second and related consideration arises from sub-paragraph 1(c)(ii) of the 2006 Policy Direction, which required the CRTC to review all regulatory frameworks “with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities”, among other considerations.<sup>9</sup> While the 2006 Policy Direction does not embed the ongoing pre-eminence of facilities-based investment and construction, it has engendered and reinforced a CRTC policy fidelity to facilities-based competition which may undermine the objectives of the new draft policy direction. This focus on one form of competition—facilities-based competition—to the exclusion of others has undermined important CRTC policy efforts designed to enhance competition, affordability, consumer protection and innovation in the past.<sup>10</sup>

In light of this dynamic, sub-paragraphs 1(a)(vi) and (vii) of the new policy direction, which recognize the need to enable innovation in telecommunications services and to stimulate investment in research and development supporting the offering and provision of telecommunications services might be read as reinforcing this pre-existing CRTC predilection towards reliance on facilities-based competition.

The requirement in sub-paragraph 1(a)(vi) to enable new innovative technologies and

---

<sup>9</sup> Order in Council, *Order Issuing a Direction to the CRTC on the Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, December 14, 2006, PC 2006-1534, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/FullText.html>, “2006 Policy Direction”, sub-paragraph 1 (c).

<sup>10</sup> Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services*, May 5, 2015, CRTC File Nos: 8620-C12-201401489, 8620-C12-201317230 & 8620-C12-201312082, <https://crtc.gc.ca/eng/archive/2015/2015-177.htm>, paras 88, 109 and 123-125.

differentiated service offerings might mitigate this concern if interpreted properly. However, given the historic momentum of facilities-based policy at the CRTC, this provision might be misinterpreted. We are further concerned that if sub-paragraph 1(a)(vi) is interpreted through a lens that emphasizes facilities based service differentiation, it may have the ultimate impact of undermining online innovation and existing CRTC net neutrality policies.<sup>11</sup>

We would therefore recommend clarifying these two paragraphs. Sub-paragraph (vii) in particular largely replicates paragraph 7(g) of the *Telecommunications Act*, and its emphasis in this draft policy direction does little to address long-standing and well-documented regulatory challenges. We would recommend striking sub-paragraph 1(a)(vii) of the new draft direction.

Consideration should also be given to amending sub-paragraph 1(a)(vi), so that it does not reinforce existing tensions between facilities-based innovation and downstream innovation. One way of doing so would be to amend sub-paragraph 1(a)(vi) so that it clearly and unambiguously encourages the CRTC to enable *downstream* innovation rather than innovation in the provision of telecommunications services:

---

<sup>11</sup> See in particular Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet service providers*, CRTC File Nos: 8661-P8-201510199, 8622-V42-201510735 & 1011-NOC2016-0192, <https://crtc.gc.ca/eng/archive/2017/2017-104.htm>, paras 44-46:

44 Differential pricing practices enable ISPs to differentiate their marketing offers from those of their competitors. They can be attractive for some consumers, as they provide discounted data for certain content and a measure of predictability with respect to data consumption and any corresponding charges.

45 While it has been argued that differential pricing practices promote competition, in the Commission's view, the impact of such practices on competition would generally be negative in both the retail Internet access services market and the various content markets, as well as for Canadian consumers. In the long term, this negative impact could extend or entrench the already favourable market positions of large, established ISPs and content providers, and could prevent or limit competitive activity by smaller players, which would be detrimental to consumers.

46 The Commission considers that competition in the retail Internet access services sector is best served, and the telecommunications policy objectives set out in the Act are best achieved, when ISPs compete and differentiate their services based on their networks and the attributes of the services on those networks, such as price, speed, volume, coverage, and the quality of their networks.

**1** In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission, when relying on regulation, should consider how the measures used can promote competition, affordability, consumer interests and innovation, namely the extent to which they

...

(vi) enable innovation in telecommunications services, including new technologies and differentiated service offerings, by minimizing any discriminatory treatment of content by telecommunications service providers, and ...

Alternatively, sub-paragraph 1(a)(vi) could be amended to clarify that this provision should enhance innovation in new technologies and differentiation of service offerings, but not at the cost of downstream innovation.

Finally, the comparative language of the 2006 Policy Direction and the current draft policy direction raises challenges. Specifically, the 2006 Direction mandated the Commission to maximize reliance on market forces in its regulatory actions, whereas the new draft policy direction only compels the Commission to “consider ... the extent to which” the Commission’s regulatory decisions achieve the specific policy priorities it sets out in paragraph 1(a). This relative disparity may lead to an interpretation of the new draft policy direction that de-emphasizes the specific policy priorities it sets out.

We would therefore recommend amending paragraph 1(a) to more closely match the language used in the 2006 Policy Direction. Some options might be:

**1** In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission, ~~when relying on regulation, should consider how the measures used can promote competition, affordability, consumer interests and innovation, namely the extent to which they~~

OR

1 In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) the Commission, ~~when relying on regulation,~~ should consider how the measures used ~~can~~ promote competition, affordability, consumer interests and innovation to the maximum extent feasible, namely and when exercising its powers and performing its duties, should consider the extent to which they

In closing, we would once again like to congratulate the government on its decision to direct telecommunications regulations in a manner that is more directly focused on the promotion of competition, affordability, consumer interests and innovation. We hope that our recommended amendments will lead to a regulatory instrument that is better able to realize the important objectives at which it is directed.

Yours Truly,

A handwritten signature in black ink that reads "Tamir Israel". The signature is written in a cursive, flowing style.

Tamir Israel

\*\*\* END OF DOCUMENT \*\*\*