

**8 April 2019**  
**Via Email**

Pamela Miller  
Director General  
Telecommunications and Internet Policy Branch  
Innovation, Science and Economic Development Canada  
235 Queen Street, 10<sup>th</sup> Floor  
Ottawa, ON  
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Dear Ms. Miller,

**Re: Canada Gazette, Part I, Volume 153, Number 10: *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation* – Comments of Distributel Communications Limited**

1. Distributel Communications Limited (“Distributel”) is pleased to file its comments on the proposed *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*<sup>1</sup> (the “Proposed Direction”). Distributel welcomes this initiative as a necessary and important step towards achieving more competitive telecommunications markets, which will ultimately support the Government’s policy objectives of increased affordability, consumer protection, and innovation.

***Distributel and our interest in the Proposed Direction.***

2. Distributel, along with and through the companies in the Distributel group<sup>2</sup>, is a competitive provider of telecommunications and IP-based television services (“IPTV”). Distributel began operating in 1988 as a long-distance provider and has since grown to become a full-service telecommunications and IPTV provider with offices across the country and a national network. We offer high-speed Internet, home phone, and long-distance services to residential subscribers in Ontario, Quebec, Alberta, and British Columbia, as well as IPTV service in Ontario and Quebec serving areas. Via Navigata Communications and ThinkTel (the business services division of Distributel), we provide advanced voice and data services for the SMB, Enterprise and Wholesale markets throughout Canada. As a top Microsoft Solutions Partner and a Cisco PMP, our business operations are a driving force for innovation in the industry.
3. We serve our residential, business, enterprise, and wholesale customers using a combination of regulated wholesale inputs from large incumbent telephone and cable carriers (“incumbent carriers”), other unregulated

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<sup>1</sup> *Canada Gazette*, Part 1, Vol. 153, No. 10, 9 March 2019, pg. 856, at pg. 860.

<sup>2</sup> These include Acanac Inc., Navigata Communications Limited, Yak Communications (Canada) Corp., and Zazeeen Inc.

wholesale inputs, and equipment and facilities that we own and operate. Over time, we have increased the size of our networks, including most recently through the acquisition of fibre and microwave networks in British Columbia. We intend to continue doing so as part of our commitment to always provide a connectivity solution that is best suited for each individual customer, at preferential pricing versus the incumbent carriers, for value that is best in class.

4. However, as both a user of wholesale products and a competitor in the highly vertically integrated telecommunications and broadcasting markets, we depend on functional telecommunications and broadcasting regulatory regimes. Unlike the former-monopoly incumbent carriers, we are not able to rely on size or market dominance to dictate terms to our suppliers, and in many cases would be unable to negotiate for the provision of wholesale services at reasonable rates, terms and conditions but for regulatory rules requiring the provision of those services.<sup>3</sup> While we strive to attract and retain customers based on better prices, offerings, and customer service, we do so in an environment characterized by companies with huge incumbency advantages and market power. A functional regulatory regime is therefore critical to curbing the excesses that inevitably arise in such an environment.

***Our position.***

5. In our comments, Distributel makes the following three principle submissions:
  - a) The Proposed Direction is an essential step to arriving at a more competitive, consumer focused telecommunications market which will better serve the needs of Canadians;
  - b) Certain changes to the wording of the Proposed Direction are warranted; and
  - c) The Proposed Direction should replace *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 (“Previous Policy Direction”).

***The Proposed Direction is necessary if its stated goals are to be achieved.***

6. For many telecommunications services, the approach taken to date has not resulted in the degree of competition, affordability, or consumer protection which Canadians can and should expect from their telecommunications services and service providers.
7. From the advent of competition in telecommunications services, the Canadian Radio-television and Telecommunications Commission (the “CRTC” or “Commission”) has prioritized the development of facilities-based competition over other forms of competition. For example, when introducing competition in the long

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<sup>3</sup> See for example BCE’s 2018 third quarter results conference call where CEO of BCE George Cope noted that “[w]holesale is a regulatory obligation, not a business strategy for us” (see BCE Q3 2018 Results Conference Call Transcript, 1 November 2018, at page 19 (<http://www.bce.ca/investors/financial-reporting/2018-Q3/2018-q3-transcript.pdf>)). This is indicative of the challenges Distributel faces when negotiating with many incumbent carriers – wholesale is regarded as an obligation rather than an opportunity, with the result that it is very difficult to have meaningful negotiations.

distance market in Telecom Decision CRTC 92-12, *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues* the CRTC stated that relative to resale, or more accurately, service-based competition, “facilities-based entry permits sustainable and more broadly-based competition, thereby increasing the benefits to be derived from competition.”<sup>4</sup> Likewise, in Telecom Decision CRTC 97-8, *Local Competition*, after acknowledging that service-based competition can, “help promote the development of a competitive market”, the Commission went on to state that, “the full benefits of competition can only be realized with facilities-based competition.”<sup>5</sup>

8. This view continues to persevere and has resulted in numerous regulatory decisions that give preference to facilities-based competition, and, in turn, the large facilities-based incumbent carriers. Most recently, in Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services* (“TRP 2015-177”), the Commission decided not to mandate the provision of wholesale wireless access services (referred to as Mobile Virtual Network Operator services, or “MVNO”) because of its view that mandating wholesale MVNO access would undermine investments by the large national wireless carriers in their facilities-based wireless networks.<sup>6</sup> Importantly, this decision was made despite the Commission’s findings in the same decision that mandating wholesale MVNO access would, “play a role in increasing consumer choice and value in the retail market” and that to not do so, “would likely result in a substantial lessening or prevention of competition in the downstream retail market.”<sup>7</sup>
9. In some respects this is understandable as the CRTC’s regulatory powers under the *Telecommunications Act*, S.C. 1993, c. 38 (the “Act”) were largely premised on the regulated entity being a “Canadian Carrier” which is defined as a person “who owns or operates a transmission **facility**” [emphasis added]. The Broadcasting and Telecommunications Legislative Review Panel is considering whether provisions like this should be changed and Distributel has argued before that body that the current focus on facilities-based networks in the Act is outdated and no longer appropriate.
10. As time and circumstances have moved on, it has become clear that this approach is not sustainable. More recent changes to the Act have acknowledged that significant elements of the telecommunications ecosystem are provided by non-facilities-based service providers,<sup>8</sup> and the Commission has had to conclude that its traditional approaches to regulating the large, incumbent providers have not achieved its desired results. In Telecom Notice of Consultation CRTC 2019-57, *Review of mobile wireless services* (“TNC 2019-57”) the Commission itself notes that it has had to intervene “on several occasions to address competitive issues, settle disputes, address issues of choice and affordability, and fill market gaps” because the existing regulatory framework has not been sufficient to do this.<sup>9</sup> Reversing its position in TRP 2015-177, the Commission has now

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<sup>4</sup> At section C.1.

<sup>5</sup> At paragraph 237.

<sup>6</sup> At paragraphs 121 to 122.

<sup>7</sup> At paragraphs 120 and 106.

<sup>8</sup> See for example, section 24.1 which was added to the Act in 2014 and which gives the Commission the power to impose conditions on the offering of telecommunications services by any “person other than a Canadian carrier”.

<sup>9</sup> At paragraph 17.

come to the preliminary view that, “it would be appropriate to mandate that the national wireless carriers provide wholesale MVNO access as an outcome of this proceeding” and has requested comments on that view.<sup>10</sup>

11. While this most recent statement seems promising, it is much too early to say whether the benefits of service-based competition have been or will be accepted by the Commission. The facilities-based focus has become a mantra, repeated over and over since competition was first introduced in a meaningful way in 1992, despite the evidence that this approach has not been entirely successful. There is little evidence to show that, without an external stimulus like the Proposed Direction, other forms of competition will be considered on an equal footing with facilities-based competition. Indeed, immediately after concluding on a preliminary basis in TNC 2019-57 that mandated wholesale MVNO access services are needed, in the very next paragraph the Commission concludes that such services should be in place for a “limited amount of time and subject to a phase-out period”<sup>11</sup>. Even when acknowledging that its traditional approach to regulation has failed and acknowledging the value of MVNOs, the Commission appears to be unable to accept that regulation to encourage this new, service-based form of competition should be in place for more than a “limited amount of time”.
12. The current focus on facilities-based competition, while perhaps appropriate at one time, needs to be supplanted by a wider focus on competition generally as required by the Proposed Direction. As consistently recognized by the Commission itself, duplication of the networks of the incumbent carriers is simply not feasible. It requires too much capital, is logistically too complex, and would take too long to offer the relief consumers need now. If the regulatory regime continues to prioritize facilities-based competition relative to other forms of competition, it will continue to accrue to the benefit the incumbent carriers who have those networks, and who have not responded properly to the needs of Canadian consumers to date. There are other providers who can offer competitive options in other ways, and the CRTC should be directed to ensure that those forms of competition are also promoted.
13. If one accepts that there is insufficient competition today, but duplication of existing facilities-based networks is not feasible, the logical alternative is service-based competition using wholesale inputs sold at compensatory rates. This is the easiest lever to manipulate to encourage more competition. It is for this reason that the Proposed Direction’s requirement to “encourage all forms of competition” is so important to achieving the goals of increased affordability, consumer protection and innovation. While competition is just one of the results Government has asked the CRTC to promote, we believe that the creation of robust competition is a central pillar to achieving the other desired outcomes, and accordingly, the Proposed Direction’s requirement to encourage all forms of competition must be maintained.

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<sup>10</sup> At paragraph 39.

<sup>11</sup> At paragraph 40.

**Changes to the wording of the Proposed Direction are required.**

14. As currently worded, clause 1(a)(i) of the Proposed Direction directs the Commission to, when implementing the telecom policy objectives and relying on regulation, “**consider**” [emphasis added] how regulatory measures can promote competition, affordability, consumer interests and innovation.
15. Distributel is concerned that the use of the word “consider” significantly diminishes the forcefulness of the Proposed Direction and is likely to make it less effective than intended. We believe the wording should be changed as follows:

Current wording:

*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 . . . “ [emphasis added]*

Proposed wording:

*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, **shall ensure** that the measures used ~~can~~ promote competition, affordability, consumer interests and innovation, namely ~~the extent to which~~ **that** they . . . “*

16. Merely having to “consider” how measures will promote competition, affordability, consumer interests, and innovation does not mean that those measures will be directed to achieving those results. With the current wording, the Commission could engage in an academic exercise of thinking about whether those results would be promoted, without taking positive steps to achieve them. While we are not suggesting this would be the case, there is nonetheless a stark difference between a permissive requirement that a matter be considered versus a direction that measures taken should achieve specific outcomes.
17. It is also difficult to think of a regulatory measure implemented by the Commission which **should not** promote competition, affordability, consumer interests, and innovation. As a result, there is no risk in directing the Commission to **ensure that** the measures chosen will at least promote those results, as opposed to considering how they would do so. Specifying more definitive language does not result in this being a direction which is not “of general application” on “broad policy matters” if that is a concern. It is not necessary to hedge the Government’s direction to promote competition, affordability, consumer interests, and innovation with the word “consider”, and there are good reasons why the Governor in Council should not do so.

***The Proposed Direction should replace the previous policy direction, not operate in conjunction with it.***

18. The text accompanying the Proposed Direction states that it will “exist in complementary fashion to the previous policy direction”.
19. Distributel urges the Governor in Council to reconsider this approach. The Previous Direction was used to promote the current, unsuccessful focus on facilities-based competition to the primary benefit of the facilities-based incumbent carriers. The incumbent carriers leveraged the Previous Direction at every opportunity to bolster their arguments that their incentives to invest in new technologies would be destroyed by any mandated provision of wholesale services. Although the Commission has more recently viewed these statements with the skepticism they deserve, it has nonetheless repeatedly chosen to shy away from other forms of competition in favour of the facilities-based competition advocated by the large incumbent carriers. As long as the Previous Direction remains in place, it may continue to be relied upon to encourage this approach despite that it has not resulted in the degree of competition, affordability, or consumer protection that Canadians deserve.
20. The Previous Direction’s requirement to “rely on market forces to the maximum extent feasible” has also led the Commission to take a hands-off approach to mandated wholesale services when it should clearly have been regulating. While Distributel believes that regulation should be applied only when necessary, directing the regulator to prioritize the reliance on market forces over regulation created an environment where the CRTC minimized or withdrew more regulatory measures than was appropriate. Time and time again, market forces have not been proven sufficient to discipline market power enjoyed by the incumbent carriers. In these circumstances, anything which causes the regulator to question whether it should intervene with regulation can only lead to less competition and, in turn, to the detriment of Canadian consumers. To avoid this situation continuing, Distributel believes that the Previous Direction should be repealed.
21. The Governor in Council could choose to instead specify that the “reliance on market forces” provision and other problematic provisions of the Previous Direction are no longer in effect. However, leaving any portion of the Previous Direction in place would only serve to water down this Policy Direction, or lead to problems of interpretation which could result in Government in Council’s policy objectives not being effectively implemented by the Commission.
22. For example, there is reference in the Previous Direction to “increasing incentives for innovation and investment in and construction of competing telecommunications **network facilities**”. If this language is left in place, the Commission would have to weigh the Proposed Direction’s requirement to encourage all forms of competition (including non-facilities service-based competition) against the Previous Direction’s focus on investment in facilities. This gives too much room to pick and choose an approach which may result in the status quo rather than the Government’s stated policy objectives.
23. The paragraph in the Regulatory Analysis section of the Proposed Direction which states that it will exist in complementary fashion to the Previous Direction goes on to note that the Previous Direction directed the CRTC to use streamlined and efficient practices in order to reduce regulatory burden and costs for the Government,

the CRTC and the telecommunications industry, and noted the efforts the Commission has made in this regard. The implication here appears to be that efficiency and reducing regulatory burden continue to be goals that Government wants to promote. If this is the case, it would be preferable, in our view, to incorporate this language into the Proposed Direction rather than keep the Previous Direction in place. Incorporating the language into the Proposed Direction would achieve the Governor in Council's goals, while not introducing the ambiguity associated with two directions coexisting at the same time.

***Conclusion.***

24. As stated at the outset of this submission, Distributel welcomes the Proposed Direction and is strongly of the view that it is a necessary and important step towards achieving more competitive telecommunications markets. At the same time, Distributel believes that the suggestions made herein will ensure that the regulatory measures that follow this initiative will achieve the Government's stated goal of increased competition, affordability, consumer protection, and innovation.

All of which is respectfully submitted,

Original signed by

Christopher Hickey  
Director, Regulatory Affairs

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