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Re: Proposed Order of Direction to the CRTC

The Internet Society Canada Chapter (ISCC) is writing to provide our representations respecting the proposed *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interest and Innovation*, published in the Canada Gazette, Part I, on 9 March 2019.

ISCC strongly supports the thrust of the proposed Direction to the CRTC, and believes it to be an important signal to the CRTC as to the Government's priorities with respect to telecommunications policy. We particularly welcome the mention, for the first time in a legislative text, of consumer interests as being central to Canadian telecommunications policy. Merely correcting this long neglected objective of telecommunications policy is sufficient in itself to justify the proposed Direction.

We have three concerns respecting the proposed Direction. First, the proposed Direction does not clearly set out its relation to the existing Direction of 2006. Second, we believe the proposed direction should use wording of legal as opposed to moral obligation. Third, the proposed Direction does not sufficiently prioritize between the objectives of promotion of competition, affordability, consumer interests, and innovation. We shall address these issues in the following paragraphs.

By leaving in force the existing Direction of 2006, it will stand equally with the proposed Direction. The proposed Direction will supersede the existing Direction only to extent there is an actual conflict between the proposed Direction and the existing Direction. In our view the proposed Direction should clearly take priority to the existing Direction. In fact, we believe the existing Direction should be explicitly repealed. Its continuing existence can lead only to ambiguity and misunderstanding, and permit parties to proceedings before the CRTC to create mischief and misdirection that would frustrate adherence to the proposed Direction. If the

Government considers that portions of the existing Direction are of continuing value, ISCC recommends that those portions of the existing Direction be incorporated into the language of the proposed Direction.

Policy directives are subject to interpretation. Keeping previous directives in operation leaves too much room for the Commission to pick and choose which directive or part of a directive it favours. Ambiguous and incompatible language will frustrate the achievement of the government's purpose in devising a new directive. Dare to be clear.

ISCC is also of the opinion that the use of the word "should" in the header of paragraph 1(a) should be replaced with "must". The CRTC should not merely be nudged to give priority to the enumerated factors, but be required to give those factors priority.

We likewise take exception to the use of the phrase "when relying on regulation" in the same header. In our opinion, the CRTC should be required to consider the priorities set out in the proposed Direction more generally "in exercising its powers and performing its duties under the *Telecommunications Act*". The phrase "when relying on regulation" appears too restrictive. It brings forward language from the existing Direction that is, in our view ambiguous and potentially very narrow. We strongly believe the broader formulation would better meet the objectives of the proposed Direction.

Finally, we believe the proposed Direction could be strengthened by setting priorities within the factors requiring consideration by the CRTC. While not without controversy, ISCC believes that of the factors, consumer interests should be given clear primacy. We would like to suggest a reformulation to the header to paragraph 1(a) as follows:

- (a) the Commission, in exercising its powers and performing its duties under the *Telecommunications Act*, **must consider how it can promote consumer interests by encouraging competition, affordability and innovation, and in particular:**

We believe that the above changes, if adopted, will greatly enhance the effectiveness of the proposed Direction, give real and unambiguous direction to the CRTC, and cut off myriad legal and regulatory subterfuges that would otherwise frustrate the implementation of the proposed Direction.

Finally, the declared goal of the government is to constrain the market power of certain actors. Yet this market power has arisen over the course of time from conscious policy decisions made under then prevailing technological assumptions about how competition could take place, many of which have been made obsolete by modern software. Market power is further augmented and even justified by the doctrine that all legitimate, effective competition proceeds from the possession of "facilities", which is code for large accumulations of capital equipment which are not obliged to be leased to third parties. 'Facilities-based competition' has been a conscious policy pursued by the CRTC in wireless to this day, and actively promoted by the incumbents. The proposed policy direction provides an opportunity to the government to state explicitly that "all forms of competition" includes the use of mandated resale and sharing of facilities.

In closing, we wish to express again our support for the proposed Direction. It goes a long way to meeting the real needs of Canadians. We propose the above changes only in the spirit of improving the chances that the proposed Direction will succeed in changing the manner in which the CRTC implements the *Telecommunications Act*.

Respectfully submitted,

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

Timothy Denton, Chairman

On behalf of the Internet Society, Canada Chapter