IN THE MATTER OF CANADA GAZETTE NOTICE NO. DGTP-007-2006 PERTAINING TO PETITIONS TO THE GOVERNOR IN COUNCIL IN RESPECT OF TELECOM DECISION CRTC 2006-15 *FORBEARANCE FROM THE REGULATION OF RETAIL LOCAL EXCHANGE SERVICES*

Comments of Shaw Communications Inc.

August 2, 2006

Executive Summary

1. On May 12, 2006, Bell Canada, TELUS Communications Company, Saskatchewan Telecommunications and Aliant Inc. (collectively "Bell *et al*" or the "petitioners") filed a petition with the Governor in Council, pursuant to section 12 of the *Telecommunications Act*, requesting that Government refer back to the CRTC for reconsideration a recent decision establishing the rules for deregulating the local telephone services market in Canada. The petitioners recommended that the Government direct the CRTC to vary Telecom Decision CRTC 2006-15 (Decision 2006-15)[1] to "conform" with the conclusions and recommendations set out in the Telecommunications Policy Review Panel report (the "TPRP Report").

2. For the reasons summarized below and described in greater detail throughout this submission, Shaw Communications Inc. (Shaw) strongly recommends that the Governor in Council reject this petition.

3. Local telephone competition is still in its early days and the petitioners, whose collective annual revenues exceed **$22 Billion,** continue to hold on average **92% market share nationally** and as high as **100% market share** in some parts of the country. In spite of the petitioners' current dominance, the CRTC nonetheless established a pro-competitive and clear forbearance framework that allows for rapid deregulation in the event competition and market forces develop to a point that allows consumer interests and the objectives of the *Telecommunications Act* to be met. The CRTC's framework is consistent with both the intent of the TPRP report and with the federal Government's recently proposed policy directive [2] and will in fact lead to faster and a more comprehensive deregulation of the local telecom sector than that proposed in the TPRP.

4. The petitioners argue in their submissions that the CRTC's Decision 2006-15 is inconsistent with the recommendations contained in the TPRP Report and that this situation should be remedied by referring the decision back to the Commission for reconsideration so that it can be made to conform with the recommendations therein. On its face, this might appear as a reasonable position, however a closer review of their

[1] *Forbearance from the regulation of retail local exchange* services, Telecom Decision CRTC 2006-15.
[2] "Order under Section 8 of the Telecommunications Act – Policy Direction the Canadian Radio-television and Telecommunications Commission"*, Canada Gazette, Part I,* Vol. 140, No. 24, p. 1607.

submission reveals that the petitioners have adopted a selective and self serving interpretation of the Report. In Shaw's view, the petitioner's are not really interested in what the TPRP report actually recommends but rather have as their objective a self-interested agenda skewed in favour of maintaining their significant market power. Consider for example that as the TPRP recommended that economic regulation be retained "if there is a finding that a service provider has significant market power in the market for such services" - a finding that clearly applies in the local telephone market – a direction that the CRTC modify its decision to conform with the TPRP should result in maintaining the current level of regulation over the dominant local telephone companies. In any event, as the federal Government has indicated that it has not yet had an opportunity review the detailed recommendations contained in the Report or, for that matter, to even formulate a complete response to the Report[3], it is impossible for the Commission to amend its forbearance decision consistent with a telecommunications policy framework that is still on the drawing board. Looking past the pretense, the petitioners' true intent is clearly exposed: quite simply, the petitioners seek immediate deregulation of their local exchange services through pressuring government into actions that undermine the credibility of the CRTC before local competition can establish a strong foothold in the sector.

5. The petitioners make these arguments at a time when there are two separate processes currently underway, one in Parliament and one initiated via the *Canada Gazette,* both of which deal with the TPRP Report and the steps that the Government is taking in relation to the Report. Therefore, it would be inappropriate and, indeed, it would undermine the integrity the Parliamentary process if the Governor in Council were to take any action on the Petitions in advance of the disposition of these proceedings.

6. The *Telecommunications Act* allows parties who are not satisfied with Commission decisions to petition the federal Cabinet. However it is not the function of the government, Cabinet or the Governor in Council to micro-manage the CRTC by constantly reviewing and overturning Commission decisions. Traditionally, the role of the federal government has been to monitor the telecommunications industry and to

[3] See the statements of the federal Government's statements in "Order under Section 8 of the Telecommunications Act – Policy Direction the Canadian Radio-television and Telecommunications Commission"*, Canada Gazette, Part I,* Vol. 140, No. 24, p. 1607.

provide guidance and direction to the CRTC on broad issues of telecommunications policy. Through its current efforts, namely reviewing the TPRP recommendations and issuing a proposed policy directive, this Government is actively carrying out the mandate contemplated for it by the Act.

7. Finally, the petitions are not substantiated by any new evidence or quantifiable data to justify the relief requested. The petitioners submissions are silent to the fact that the incumbent local telephone companies hold a **92%** share of the local telephone services market in Canada or that in some areas of the country they control **100%** of the market, such as in the province of Saskatchewan or that there is no country in the industrialized world that would seriously consider deregulating the local telephone services of an incumbent phone company where that company holds market shares of this magnitude.

8. In reality, there is very little for the petitioners to complain about. The CRTC has created a framework for forbearance that establishes a rapid path to deregulation, even in markets where the ILECs hold market shares that are well in excess of what even the Competition Bureau presumes to be a dominant market share. Furthermore, the decision is based on a sound economic analysis, is fully in synch with the recommendations of the TPRP Report and the federal Government's proposed Policy Direction to the CRTC, and creates the quickest path to full deregulation of local telephony services in Canada.

9. For all of these reasons, as well as those set out below, Shaw urges the Governor in Council to dismiss the petitions that have been filed by Bell Canada *et al*, so that the local forbearance framework contemplated in Decision 2006-15 can be implemented without delay.

Comments of Shaw Communications Inc. on the petitions of Bell Canada *et al* seeking an order from the Governor in Council referring Telecom Decision CRTC 2006-15 back to the CRTC for reconsideration

I. Introduction

1. On May 12, 2006, Bell Canada, TELUS Communications Company, Saskatchewan Telecommunications and Aliant Inc. (collectively "Bell *et al*" or the "petitioners") filed a petition with the Governor in Council, pursuant to section 12 of the *Telecommunications Act*, requesting that Government refer back to the CRTC for reconsideration a recent decision establishing the rules for deregulating the local telephone services market in Canada. The petitioners would have the Government direct the CRTC to vary Telecom Decision CRTC 2006-15 (Decision 2006-15)[4] to "conform" with the conclusions and recommendations set out in the Telecommunications Policy Review Panel report (the "TPRP Report").

2. The petitioners argue that the CRTC's decision is inconsistent with the recommendations contained in the TPRP Report. The petitioners make these arguments even though the federal Government has indicated that it has not yet had an opportunity review the detailed recommendations contained in the Report or, for that matter, to even formulate a complete response to the Report.[5]

> *These recommendations involve complex issues that will require in-depth analysis and consultations before the Government can proceed.*

3. The petitioners also make these arguments at a time when there are two separate processes currently underway, one in Parliament and one initiated via the *Canada Gazette,* both of which deal with the TPRP Report and the steps that the Government is proposing to take in relation to the Report. Therefore, it would be inappropriate and, indeed, it would undermine the integrity the Parliamentary process if the Governor in Council were to take any action on the Petitions in advance of the disposition of these proceedings.

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[4] *Forbearance from the regulation of retail local exchange* services, Telecom Decision CRTC 2006-15.

[5] Regulatory Impact analysis Statement accompanying "Order under Section 8 of the Telecommunications Act – Policy Direction the Canadian Radio-television and Telecommunications Commission"*, Canada Gazette, Part I,* Vol. 140, No. 24, at p. 1607.

4. Furthermore, and in any event, the petitions are not substantiated by any evidence or quantifiable data to justify the relief requested. For example, the incumbent local telephone companies (or "ILECs") hold a **92%** share of the local telephone services market in Canada and in some areas of the country (such as in the province of Saskatchewan) they control virtually **100%** of the market. There is no country in the industrialized world that would seriously consider deregulating the local telephone services of an incumbent phone company where that company holds market shares of this magnitude, yet the petitioners remain silent on their market shares and associated market power.

5. The petitioners are not truly interested in what the TPRP Report actually says or recommends. Indeed, the petitioners studiously avoid quoting any of the actual recommendations contained in the Report. One is left to conclude, therefore, that the real agenda of these very large and dominant telephone companies is to seek complete deregulation or "forbearance" of their local telephone services at a time when their overall market share is still well above 90%.

6. In reality, there is very little for the petitioners to complain about. The CRTC has created a framework for forbearance that establishes a rapid path to deregulation, even in markets where the ILECs hold market shares that are well in excess of what even the Competition Bureau presumes to be a dominant market share. Furthermore, the decision is based on a sound economic analysis and it is fully in synch with the recommendations of the TPRP Report and the federal Government's proposed Policy Direction to the CRTC.

7. For all of these reasons, as well as those set out below, Shaw Communications Inc. ("Shaw") urges the Governor in Council to dismiss the petitions that have been filed by Bell Canada *et al*, so that the local forbearance framework contemplated in Decision 2006-15 can be implemented without fear of delay or political interference.

II. The petitions are rife with mischaracterizations and selective interpretations of the Telecommunications Policy Review Panel Report

8. As indicated above, the petitioners have asked that Decision 2006-15 be referred back to the Commission so that it can be made to conform more closely to the TPRP Report.

In support of this request, the petitioners refer extensively to the Report, extracting quotes from here and there and then, based on these quotes, the petitioners argue that the CRTC's decision is out of step with the TPRP's findings and recommendations.

9. On its face, this might seem like a reasonable approach for the petitioners to adopt in order to support their claims. However, a closer analysis of their submissions reveals that the petitioners have not only adopted a highly selective and distorted interpretation of the Report, they have actually mischaracterized several of the TPRP's findings.

10. For example, one of the cornerstones of the petitioners' arguments is that the TPRP made a finding that "very substantial competition exists" in Canada's various telecommunications markets and that this warrants the elimination of all forms of economic regulation of their local exchange services.[6]

11. This, in fact, is a gross misrepresentation of the Report's findings and recommendations. The TPRP did not make any findings or recommendations about the state of competition in the market for *retail local exchange services* because this issue was before the CRTC in the context of the local forbearance proceeding (which was underway at the same time as the TPRP proceeding). Although the Report does contain references to the state of competition in other Canadian telecommunications markets, it would have been inappropriate for the TPRP to make any findings in relation to the local exchange services markets because this matter was being openly debated and considered in the context of a technical regulatory proceeding before the CRTC.

12. Furthermore, there is absolutely no validity to the petitioners' insinuation that the TPRP recommended removal of economic regulation of their local exchange services.[7] In fact, the TPRP Report directly contradicts this argument. For example, the Report makes a clear distinction between "basic transmission services" on the one hand and "discretionary services" on the other. In the case of the former category of services (a category to which the petitioners' local telephone services belong), the TPRP

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6 Petition of Bell *et al*, para. 4. See also the Supplement to Petition of Bell *et al*, page 1 of 3.

7 The report recommends the elimination of economic regulation where no SMP exists. This is not the case in the local exchange services market where the ILECs' hold a market share of 92%. TPRP Report, Recommendation 3-3(b), page 3-12.

recommended that economic regulation should be retained "if there is a finding that a service provider has significant market power in the market for such services."[8]

13. The petitioners never mention this very basic, but highly relevant fact in their petitions, presumably because they know that the evidence is not on their side. Instead, they twist the Report's findings and recommendations in order to suggest that all of their services should be freed from economic regulation, regardless of the nature or type of service being provided, or whether they exercise SMP in the relevant product market.

14. The petitioners also complain in their submissions that, under Decision 2006-15, they will be forced to file tariffs with the CRTC for their local telephone services until these services are forborne from regulation and that they will have to comply with certain marketing restrictions in the interim.[9] According to the petitioners, this requirement is also out of step with the recommendations of the TPRP.[10]

15. Once again, this is a highly misleading characterization of the TPRP's findings and recommendations. It is abundantly clear from the TPRP Report that the Panel believes that economic regulation remains appropriate for service providers that exercise SMP. Indeed, Recommendation 3-3(b) of the Report states that it is only in markets where there is no SMP that retail telecommunications services should be offered "without the need for tariff filings or similar *ex ante* measures."[11]

16. Another recommendation contained in the TPRP Report that the petitioners fail to highlight or mention in their submissions is the process that is contemplated by the TPRP for the regulatory treatment of services that are currently subject to economic regulation, such as the petitioners' local exchange services. Specifically, the TPRP Report advocates a 12 to 18 month transition period, during which time services that are currently subject to economic regulation (which would include the petitioners' local exchange services) would continue to be subject to this form of regulation until there has been an opportunity to examine whether there is SMP in the market for these services.[12]

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8 TPRP Report, Recommendation 3-3(a), page 3-12.
9 Petition of Bell *et al*, para. 52.
10 Petition of Bell *et al*, para. 54.
11 *Ibid,* Recommendation 3-3(b), page 3-12.
12 *Ibid,* Recommendation 3-5, page 3-12.

17. This time frame is much longer than the time frame for forbearance that was contemplated by the Commission in Decision 2006-15 in instances where the ILECs have lost 25% or more of the relevant product market. In these instances, the Commission determined that it would be prepared to grant forbearance to an ILEC immediately provided that the ILEC has met the other pre-conditions to forbearance for a prior six month period of time.[13]

18. Thus, when the petitioners say that they want Decision 2006-15 referred back to the Commission so that it can be made to better "conform" with the TPRP Report, it must be borne in mind that this would mean abandoning the very short forbearance time frames contemplated in Decision 2006-15 in favour of the much longer "transition regime" timeframes that are contemplated in the TPRP Report for services that are currently subject to economic regulation.

19. While there are undoubtedly many consumers and others within the industry that would have no difficulty with this approach, it is hard to believe that this is what the petitioners actually want in the way of relief from the Governor in Council, which, in turn, means that there are two possible interpretations of the petitioners' submissions: 1) either the petitioners really do not understand the relief that they have requested in their applications; or 2) the petitioners are merely using the TPRP Report as a springboard to complain about a decision that is perfectly sound, but which they nonetheless dislike.

20. If the former interpretation is the correct one, then the petitioners would be well advised to read the actual recommendations contained in the TPRP Report (something which they assiduously avoid in their submissions), because several of these recommendations directly contradict the petitioners' submissions in this proceeding.

21. If, on the other hand, the latter interpretation of the petitioners' submissions is the correct one to adopt, then this is a little more troublesome because it suggest that the petitioners are pursuing a more disingenuous agenda. It means that the petitioners are using a distorted and manipulated interpretation of TPRP Report – in other words, false premises – to advance their cause and to prop up what is in reality a very weak and

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[13] Decision 2006-15, para. 242.

hollow case. Their agenda is to preserve their market share and their less than faithful description of the Report's recommendations serves this objective.

III. The CRTC's local forbearance decision is based on a sound economic analysis and does not set onerous, unprincipled or unrealistic targets for forbearance

22. The petitioners have argued in their submissions that the market share loss threshold of 25% that was established in Decision 2006-15 is "unprincipled". In particular, the petitioners claim that the CRTC "either lacks comprehension of the basic economic principles which determine when competitive conditions are such that market forces can be relied upon to protect the interest of customers – or is unwilling to employ such principles in its determinations."[14]

23. This is an astounding comment, and a highly disingenuous one at that, given that the economic "principles" applied by the Commission in Decision 2006-15 (which were first developed by the Commission in Telecom Decision CRTC 94-19[15]) are the very principles that were relied upon by the petitioners in the local forbearance proceeding. Bell Canada, for example, recommended during the PN 2005-2 proceeding that "the Commission should apply the forbearance principles outlined in Decision 94-19 through an objective and efficient process."[16]

24. This is precisely what the Commission did in Decision 2006-15, yet for some reason its forbearance test is now suspect and "unprincipled".

25. As Bell *et al* well know, the Commission's forbearance test is the same test that is applied by competition law authorities around the world, including Canada's own Competition Bureau. Indeed, as noted by Bell *et al* in the PN 2005-2 proceeding, the elements of the Commission's forbearance test "are consistent with those considered by the Competition Bureau in its assessment of whether a merger or a practice of anti-competitive acts by a company is likely to substantially lessen or prevent competition."[17]

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14 Petition of Bell *et al*, para. 18.

15 *Review of the Regulatory Framework,* Telecom Decision CRTC 94-19.

16 Comments of Bell Canada, as submitted in the proceeding initiated by Telecom Public Notice CRTC 2005-2, *Forbearance from regulation of local exchange services*, June 22, 2005, para. 106.

17 Ibid. at para 110.

26. The fact of the matter is that there is nothing wrong with the Commission's forbearance test or the principles that form a part of this test. As indicated above, this test is fully consistent with the economic tests that are applied by competition law authorities – something which both the petitioners and the TPRP repeatedly cite as a goal to which we should strive – and it has been used reliably by the Commission for over a decade to deregulate almost every single ILEC service available, including the ILECs' long distance services, private line services, WAN and packet data services and mobile wireless services, to name but a few. While it is true that the Commission has not forborne from regulating the ILECs' local exchange services, this is because the ILECs continue to exercise SMP in the market. It is not because the Commission has used the wrong test or a flawed analysis.

27. With respect to the Commission's selection of a market share loss threshold of 25%, it should be noted that in many countries around the world a 25% market share loss would not result in forbearance or a presumption that an ILEC no longer holds SMP. In fact, the European Union and the Competition Bureau use much higher market share loss thresholds to determine whether a firm exercises SMP. The same holds true for a number of other jurisdictions as demonstrated in the table below:

Country/Union	Threshold for Applying Presumption of Market Dominance[18]
Canada	35%
European Union	50%
Germany	33%
Korea	50%
South Africa[19]	35%
Singapore	60%
Brazil	20%

[18] A company is presumed to be dominant in a market if it holds a market share in excess of the amounts specified in the table. This presumption can be rebutted with other evidence. Source OECD and the Singapore Competition Commission.

[19] South Africa applies a non-rebuttable presumption of dominance where a firm holds 45% of the relevant market.

28. There is nothing unprincipled or punitive, therefore, about the Commission's choice of a 25% market share loss threshold. Most jurisdictions in developed economies require market share losses of 50% to 65% before they will remove the presumption of SMP. By comparison, the Commission was actually generous in setting the market share loss threshold at only 25%. Indeed, based on the experience in other jurisdictions, the Commission could have established a much higher market share loss threshold and it still would have remained below the thresholds that are used in other jurisdictions.

29. However, regardless of which threshold is used, the evidence clearly and unequivocally demonstrates that the ILECs come nowhere near either a 50% market share loss threshold (as used by the EU) or the 25% threshold that was established by the Commission in Decision 2005-16. For example, according to the Commission's most recent *Report to the Governor in Council on the Status of Competition in Canadian Telecommunications Markets* (the "Monitoring Report"), the ILECs accounted for 97% of residential access lines and 88% of business access lines (excluding out-of territory) as of year-end 2004.[20]

30. Furthermore, based on publicly available information, it would appear that this trend continued into the year 2005. For example, by the end of last year, Canada's four major cable companies had signed up only 309,000 local telephony subscribers *on a combined basis across the country*.[21] This represents only 2.4% of the roughly 12.9 million residential local access lines in Canada.[22] This is hardly the "threat" to the ILECs' incumbency that the petitioners make the cable companies out to be. In fact, based on the above-noted trends, it has been estimated that the ILECs' overall share of the local exchange services market in 2005 is likely still in excess of 92%.[23]

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20 CRTC Monitoring Report, October 2005, page 49 – 50.

21 Decima *Network Letter*, Volume 26, Issue 1, 18 January 2006.

22 As of the end of 2004, there were approximately 12.9 million residential local access lines in Canada (CRTC Monitoring Report, October 2005, page 49).

23 This estimate was prepared by MTS Allstream Inc. based on a weighted average calculation of the ILECs' estimated 2005 residential and business market segment shares where the weights are based on 2004 residential and business access line counts provided in the October 2005 Monitoring Report. See Comments of MTS Allstream, dated June 5, 2006, as submitted in the proceeding initiated by Telecom Public Notice CRTC 2006-6, *Reconsideration of Reconsideration of regulatory framework for voice communication services using Internet Protocol, Telecom Decision CRTC 2005-28*.

31. One would have thought, given the stridency with which they argue their case, that the petitioners have uncovered new market share information which demonstrates that they no longer exercise SMP in the relevant product market. However, this does not appear to be the case. In fact, with the exception of mobile wireless market share data, an issue which is discussed more fully in section 6 below, Bell *et al* diligently avoid any discussion of their local service market shares, other than to assert, of course, that their overwhelmingly dominant share of the market is not a problem. The same is true for the Coalition for Competitive Telecommunications ("CCT"), a coalition which purports to represent the interests of Canadian business users.[24] No new data or evidence has been filed by this group to suggest that the ILECs have lost additional market share in the local business market or that the Commission's findings with respect to the ILECs' dominance in this market segment are incorrect.[25]

32. The fact of the matter is that there have been no material changes in the state of competition over the last few years. The evidence clearly demonstrates that with the exception of some nominal declines of ILEC market shares in certain areas of the country, the ILECs still hold well in excess of 92% of the market in many areas of the country and, in the case of the province of Saskatchewan, the number remains at 100%.

33. Given this evidence, it is simply outlandish for the petitioners to suggest that the market is ripe for forbearance. The market is no way near to being competitive. The petitioners know this, yet they seem unable to accept that their best hope for early forbearance is not by delaying the implementation of Decision 2006-15 through wasteful and time-consuming cabinet petition proceedings. Rather, it is by readying themselves for forbearance in accordance with the fast-track forbearance framework established in Decision 2006-15.

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[24] Shaw notes that petitions to the Governor in Council concering Decision 2006-15 have been submitted, separately, by the CCT and by the Government of Saskatchewan. Notice of these petitions was published in the July 22, 2006 edition of Part 1 of the Canada Gazette, Vol. 140, No. 29, and registerd as Notice No. DGTP 009-2006. While Shaw's comments to DGTP 007-2006 herein respond fully to the the relief sought by the petitioners in the DGTP 009-2006 proceeding, Shaw may elect to provide supplementary comments in that context of the DGTP 009-2006 and reserves the right to do so.

[25] In fact, some of the available data suggests that there are real problems of SMP in the local business services market. For example, in the market for very large business customers who make up 53% of the revenues in the business customer market, the Commission's Monitoring Reports consistently show ILEC market shares of 98% See, for example, CRTC Monitoring Report, October 2005, pp. 117-118.

34. With respect to the petitioners' comments on the Commission's test for deregulation of basic cable service rates and their comparisons of this test to the test for forbearance in the local exchange services market, it should be noted that the petitioners have provided an incomplete and inaccurate description of this test in their submissions. The Commission did not, as the petitioners insinuate, establish a test for cable deregulation which provides for the deregulation of basic cable rates once the incumbent cable operator can demonstrate a market share loss of 5%. Rather, the Commission established a two-part test which requires the cable operator to demonstrate that: (1) it has lost 5% of its existing basic cable customer base in its licensed serving area (a customer base, incidentally, which is much smaller than the overall number of households with television sets); AND (2) the basic service of one or more other licensed broadcasting distribution undertakings ("BDUs") is available to 30% or more of the total customer base in the cable operator's licensed serving area.

35. Although it is patently obvious why the petitioners have chosen to only make reference to one portion of the Commission's BDU test, their representations of the test are inaccurate and misleading. It is clear that there is much more to the test than a simple 5% market share loss criterion.

36. More to the point, however, the Commission's BDU test is irrelevant and, indeed, completely useless when applied in the context of the local exchange services market. For example, as the petitioners well know, the Commission's BDU test was developed pursuant to its mandate under the *Broadcasting Act*, which is entirely different than the mandate and the powers that the Commission exercises pursuant to the *Telecommunications Act*, including the forbearance powers granted to the Commission under section 34 of the latter Act.

37. Furthermore, the conditions that existed in the market at the time that the Commission established its test for BDU rate deregulation were entirely different than those which prevail in the local exchange services market. For example, at the time that the BDU test was established, more than 23% of households that *could* subscribe to cable television service did not. This is not the case in the local exchange services market where virtually 100% of households subscribe to local telephone service because this service, unlike cable services, is considered to be an essential service. Thus, at the time

that the DTH companies entered the market, the cable companies held less than 75 percent of the overall market of households with television sets.

38. It is also important to bear in mind that when the DTH companies entered the BDU market, their service footprints completely blanketed the existing customer base and they could begin service on day one without the need to contact or interconnect with the incumbent cable company. This is not the case in the local exchange services market. Competitors in this latter market must roll out their services on a community-by-community basis, and as discussed more fully below, they must interconnect and negotiate with the incumbents to obtain various services at every step of the way – something which is causing significant delays to the roll-out and implementation of competitor services.

39. With respect to the CCT's suggestion that the Commission adopt the circuit-by-circuit forbearance test that was established by the Commission in Telecom Decision CRTC 97-19, *Stentor Resource Centre Inc. - Forbearance from Regulation of Interexchange Private Line Services*, this is a highly impractical test which is impossible to apply in the local exchange services context and would result in a tremendous regulatory burden on both the Commission and the incumbents alike. Indeed, almost every single party to the Commission's local forbearance proceeding, including Bell *et al*, rejected this test because it makes no sense in the local exchange services context, which simply underscores the point that each market is unique and a test that might work in one market (*e.g.*, the BDU test or the private line test), is not necessarily the correct test to use in another market (*e.g.*, the local exchange services market).

40. With respect to the petitioners concerns regarding the Commission's definition of the relevant geographic market for local exchange services, these concerns appear to be premised on a misunderstanding of how the Commission's geographic market definition works. For example, Bell *et al* and the province of Saskatchewan argue that SaskTel would have to lose 119% of consumer lines and 85% of business lines in the Yorkton exchange before SaskTel would be eligible for forbearance in this exchange.[26] Similar examples of market share losses are also given by the petitioners for other exchanges in Saskatchewan, such as the Prince Albert, Moose Jaw, the Saskatoon exchanges. Each

[26] See Petition of Bell *et al*, para. 46 and Petition of the Province of Saskatchewan, para. 19.

of these examples, however, is based on a flawed premise. The Commission did not define the relevant geographic market for local exchange services in Decision 2006-15 as the "local telephone exchange". Rather, it defined the relevant geographic market using Census Metropolitan Areas ("CMAs") and Economic Regions ("ERs") which are standard geographic measures that are used by Statistics Canada and countless other data collection agencies to describe geographic markets in Canada that share common characteristics. It is incorrect, therefore, for the petitioners to use the local telephone service exchange when calculating the market share loss that they would have to experience within a CMA or ER before they become eligible for forbearance. This is tantamount to comparing apples to oranges. The correct geographic measure is the CMA/ER and, as indicated above, the ILECs would have to demonstrate that they have lost a 25% share of the local exchange services within the CMA/ER in order to qualify for forbearance under the framework established in Decision 2006-15.

41. However, even if the petitioners' interpretation of the Commission's definition of the relevant geographic market is correct, there is no need to petition the Governor in Council in order to remedy the situation. Decision 2006-15 already contains a mechanism which allows interested parties to request a different definition of the relevant geographic market in a given area of the country. The Commission stated that it "is willing to entertain applications for local forbearance outside of a CMA, pursuant to the local forbearance framework, which identify a different LFR [local forbearance region] from those set out in Appendix A" of the Decision.[27]

42. It would appear therefore that the petitioners' complaints regarding the Commission's definition of the relevant geographic market are somewhat misguided and, indeed, unnecessary. If the petitioners are not satisfied with the way in which a particular geographic market within their respective operating territories has been defined, they do not need the Governor in Council to make a determination or micro-manage this issue. They merely need to ask the Commission to define the market differently.

IV. Barriers to Entry

43. Another one of the arguments that is made by the petitioners in support of their request to have Decision 2006-15 referred back to the Commission is that the decision fails to

[27] Decision 2006-15 at para. 168.

take account of the allegedly "low barriers to entry" in the market.[28] Although it is a little difficult to understand the petitioners' arguments on this issue because they only devote two paragraphs to it, essentially their position seems to be that even if the ILECs hold market shares of 95%, this is not necessarily indicative of SMP. It is also necessary to consider other factors such as the ease with which competitors can enter the market. According to the petitioners, there are very low barriers to entry in the market as evidenced by the 100 or so companies that have entered the market to provide VoIP services.[29]

44. Leaving aside the question as to whether or not this figure is correct, the petitioners fail to address why, despite the existence of all of these competitors, their overall market share continues to hover in the 92% range. In other words, there may be a number of competitors in the market, but they share among themselves only 8% of the market. The remaining 92% is held by the incumbent telephone companies.

45. Furthermore, and perhaps more importantly, the petitioners completely gloss over the fact that there remain several significant barriers to entry in the market, including, but not limited to: high sunk costs, long construction lead times, customer inertia, and the need to obtain access to municipal rights of way, hydro utility poles and multi-unit buildings. It should be noted that even among cable company competitors (whose networks have nowhere near the ubiquitous coverage of the ILECs' networks built over the course of a century), the cost of market entry includes investment in plant upgrades measured in the hundreds of millions. In the case of Shaw, for example, this investment represents $350 million over the next few years.[30]

46. Notably absent from Bell *et al's* petition is a discussion of the numerous obstacles that competitors face in obtaining network interconnection arrangements from the ILECs in a

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28 Petition of Bell *et al*, para. 23.

29 *Ibid,* footnote 20. The petitioners often include software and hardware manufacturers of VoIP and standard telephone equipment in their estimates of the number of competitors in the market. For example, at paragraph 8 of the Bell *et al* petition, references are made to the presence of Cisco, Avaya and Microsoft in the local services market. These companies do not provide local telephone services in Canada. If they did, they would be registered with the CRTC (which they are not).

30 Testimony of Mr. Michael D'Avella, Senior Vice President of Planning, Shaw Communications Inc., as presented in the proceeding initiated by Telecom Public Notice CRTC 2005-2, *Forbearance from Regulation of Local Exchange Services*, Transcript Vol 4, line 5896, September 29, 2005.

reasonable time frame and on rates, terms and conditions that reflect the essential or bottleneck nature of these services. It is important to note in this regard that the local exchange services market is not like other markets. In most retail markets, competitors are not obliged to rely on the incumbent for network access or facilities. In the local exchange services market, however, competitors must interconnect with each other – and ultimately with the ILEC - in order to ensure that their customers can call each other. Absent this interconnection, a customer on competitor network "A", for example, will not be able to call a customer of incumbent network "B" and vice versa.

47. Because the ILECs control access to 92% of local telephone customers in Canada, competitors are highly dependent on the interconnection services of the ILECs. Although this exercise might appear, on its face, to be relatively straightforward, in actual fact, the ILECs make it an extremely difficult, extremely costly and extremely time consuming exercise. Indeed, order to get a better sense of how costly and time consuming this exercise can be, we have set out below a brief description of the numerous obstacles that competitors face in simply trying to establish interconnection arrangements with the incumbent telephone companies.

- **Interconnecting to a Local Interconnection Region ("LIR")** - Interconnection to the public switched telephone network ("PSTN") in any given LIR in Canada takes a minimum of 6 months, and each telephone service exchange within that LIR takes an additional 2 weeks. To support Shaw's entry into the Vancouver market, for example, we are anticipating a minimum of 17 months to complete the interconnection process throughout the Vancouver LIR.
- **ILEC Control over the Selection of Interconnection Trunks** – When a new entrant interconnects with the incumbent's network, the entrant uses telecommunications trunks to carry out this interconnection. The type of interconnection of trunks that are chosen is a matter that is determined exclusively by the ILEC and it falls to the competitor to deal with any incompatibility of efficiency issues.
- **Outdated Technology** – The ILECs often use outdated technology and equipment to interconnect with a new entrant. This equipment can interfere with or even obstruct the services that are provided by the new entrant to its customers.
- **Control over 911 Facilities** -The ILECs control all of the 911 trunks within each exchange that terminate at the premises of a public safety answering point or "PSAP" (i.e., the agency that actually handles 911 calls). In order for a new entrant to provide 911 services to its customers it has no choice but to interconnect with the ILEC which maintains the trunks to the PSAP.
- **Telephone Number Portability** - The ILECs control the process that is associated with the transfer of customer telephone numbers from one service provider to

another. Because the ILECs start with 100% of the customers, most customers that switch service providers are customers of the ILECs. By slowing down the number porting process and/or capping the number of ports that the ILECs will process in a day, the ILECs can cause significant delays in the customer transfer process. Shaw has experienced significant ILEC delays in the porting of telephone numbers which has resulted in the loss of customers.

- **Delays in Updating Switching Software -** The ILECs control the updating of switches within an LIR. Routing information within these switches must be updated to ensure call completion between ILEC and competitor customers. When ILECs delay needed updates, calls between ILEC customers are unaffected. Only competitor customers suffer. So long as the ILECs serve virtually all the customers, they have little incentive to quickly update their switches to accommodate the migration of customers to competitors.
- **Delays in Negotiations/Lack of Resources** - The ILEC controls the entire timeline associated with the negotiations that are needed in order to establish interconnection arrangements. Lack of ILEC resources, such as not having the necessary personnel or equipment ready or available, can slow the process down considerably. Additionally, because the ILECs dictate the technological terms of interconnection, significant "testing" delays can result where the equipment used by the new entrant for proposed interconnection does not match the brand of equipment used by the ILEC (a common occurrence in light of new entrant desire to employ newer, more efficient and cost-effective technologies).

48. Although this is only a small sampling of the numerous problems that are encountered by new entrants when they try to interconnect with the incumbents, it provides some insight into how tremendously time consuming and costly the interconnection exercise can be. It puts the lie to the petitioners claim that there are low barriers to entry. And it also demonstrates why the Commission has required the ILECs, as a precondition to forbearance, to make certain services and facilities available to competitors at service level standards established by the Commission.

49. As indicated above, new entrants must interconnect with the ILECs in order to ensure that customers of the ILECs can make and receive calls from customers of new entrants. This interconnection is a *sine qua non* of local competition, yet as demonstrated above, it is a process that is controlled entirely by the incumbent telephone companies. Indeed, as demonstrated above, it is a barrier to entry that is consistently manipulated by the ILECs in order to prevent competitors from gaining a foothold in the market.

V. The decision does not create market "uncertainties" as alleged by the petitioners

50. One of the more curious accusations leveled by the petitioners against the Commission's local forbearance decision is that it allegedly creates "uncertainty" because the mechanism is "not a bright line test".[31]

51. This is a ridiculous and nonsensical assertion. The Commission's framework for considering local forbearance applications, as established in Decision 2006-15, uses a very simple test in order to determine when a particular market should be forborne from regulation. This test uses very clearly defined criteria which are well-understood by the ILECs and easily measured. This, in turn, means that it is a very simple matter to determine whether forbearance can be granted in a given market.

52. The Commission's local forbearance test is set out in paragraph 242 of Decision 2006-15. Essentially, the test requires that the following pre-conditions to forbearance be met:

- The ILEC has experienced a 25 percent market share loss in the relevant market for which forbearance is sought (the "market share loss" criterion);
- The ILEC has met certain specified competitor Quality of Service indicators, for the six month period prior to the forbearance application, when the results are averaged across the six-month period (the "competitor Q of S" criterion);
- For forbearance applications relating to the residential market, the ILEC has an approved Competitor Services tariff for bundled ADSL service, and for forbearance applications relating to the business market, the ILEC has an approved Competitor Service tariff for bundled ADSL as well as approved competitor Ethernet access and transport service tariffs (the "Competitor Services tariffs" criterion);
- Where the Commission has required it, the ILEC has implemented competitor access to its operational support systems (the "Competitor OSS" criterion);
- The ILEC has demonstrated that rivalrous behaviour exists within the relevant market (the "rivalrous behaviour" criterion)

53. The first thing to be noted about this list of forbearance criteria is that it is extremely short. Indeed, despite the petitioners' assertions to the contrary, the list is composed of

[31] Petition of Bell *et al*, para. 26.

a total of five items – something which can hardly be described as "complicated" or "cumbersome".[32]

54. Second, there are three items on the list that are entirely within the power of the ILECs to control. Specifically, those items which are referred to as "Competitor Services tariffs", "Competitor Q of S" and "Competitor OSS" all depend on the ILECs' willingness to make these essential services and facilities available to competitors. If the ILECs choose not to meet these requirements, then the risk of delaying their forbearance requests is one which they bear entirely on their own.

55. Finally, there is no "uncertainty" about the items on the Commission's list. The ILECs know exactly what is involved in meeting each of the Commission's forbearance criteria because the Commission has already established the tests that must be met for meeting these requirements.[33] These tests are clear and unambiguous, and they are well known to the ILECs. It is not a question, therefore, of whether standards exist for meeting the tests. It is simply a question of whether the standards have been met.

VI. Timing Concerns

56. It should be clear from the foregoing that the petitions that have been filed by Bell *et al* are fundamentally flawed. Rather than rely on concrete evidence or even cogent arguments to support their claims that the Commission's local forbearance decision should be sent back for reconsideration, the petitioners have chosen to predicate their arguments instead on sensational claims and nonsensical rhetoric.

57. Although these flaws would represent grounds alone to dismiss the petitions in their entirety, even if they were temporarily overlooked or set aside, there still remains the issue of timing and whether it truly makes sense for the Governor in Council to consider these petitions at this time.

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32 Petition of Bell *et al*, paras. 38.

33 See, for example, *Competitive local exchange carrier access to incumbent local exchange carrier operational support systems,* Telecom Decision CRTC 2005-14, *Quality of service indicators for use in telephone company regulation*, Telecom Decision CRTC 97-16, and *Finalization of quality of service rate rebate plan for competitors*, Telecom Decision CRTC 2005-20. The test for meeting the 25% market share loss is set out in Decision 2006-15 and the test for demonstrating rivalrous behaviour is set out in Decision 94-19, referenced above.

58. As many parties are aware, the Commission recently initiated a proceeding to consider one of the very issues that has been raised as a concern by the petitioners in their submissions, namely the issue of whether mobile wireless services should be included in the same relevant product market as wireline local exchange services for certain purposes, including forbearance. Specifically, on June 16, 2006, the Commission issued Public Notice CRTC 2006-9, entitled *Proceeding to examine whether mobile wireless services should be considered to be in the same relevant market as wireline local exchange services with respect to forbearance, and related issues* ("PN 2006-9").

59. In this Public Notice, the Commission noted that Statistics Canada had recently released updated mobile wireless usage data that was not available to interested parties or the Commission during the proceeding which led to Decision 2006-15.[34] The Commission then stated in PN 2006-9 that, in light of this more recent information, it "considers that the issue of whether mobile wireless services are in the same relevant market as wireline local exchange services should be re-examined."[35]

60. Each of the petitioners has argued that the Commission should have included mobile wireless services within the definition of the relevant product market for local voice services, and each of the petitioners has pointed to this issue as a reason for the federal Cabinet to refer Decision 2006-15 back to the Commission for reconsideration. In the interim, however, the Commission has initiated a proceeding which squarely addresses this issue. For all intents and purposes, therefore, the issue as raised by the petitioners is now moot. The Commission has taken steps of its own accord to respond to this concern.

61. Furthermore, and in any event, there are other proceedings that are currently underway which raise serious questions about the appropriateness of granting the relief requested

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[34] The petition essentially argues that, notwithstanding or perhaps because this data was published the day before the Commission released Decision 2006-15, the Commission should have taken this information into account when it rendered Decision 2006-15. This argument conveniently overlooks the fact that the data in question was not available at the time of the local forbearance proceeding itself, and as the petitioners well know, the Commission cannot render a decision on the basis of evidence that only becomes available after the proceeding is over.

[35] PN 2006-9 at para. 3.

in the petitioners' submissions. As noted earlier, the petitioners have essentially asked the Governor in Council to refer Decision 2006-15 back to the Commission so that the Decision can be made to conform to the recommendations contained in the TPRP Report. However, subsequent to the petitioners' request, the Minister of Industry tabled in Parliament a proposed "Section 8" Policy Direction to the CRTC.[36] As with PN 2006-9, this new development engages Government and industry in a debate that goes to the heart of the petitioner's concerns.

62. Additionally, because the proposed policy direction contains language that, while clearly drawn from some of the proposals contained in the TPRP report, does not actually replicate the language of any of the *recommendations* that are set out in the report, it is evident the Government is not convinced that the recommendations of the TPRP should be adopted in the wholesale fashion advocated by the petitioners. A plain reading and comparison of the two documents leads naturally to this conclusion. Supporting evidence can be found in the Regulatory Impact Analysis Statement which accompanied the draft Direction, as published in the *Canada Gazette,* wherein Government states that the "recommendations [contained in the Report] involve complex issues that will require in depth-analysis and consultations before the Government can proceed."[37]

63. Given these statements, it would be inappropriate for the Governor in Council to grant the relief requested in the petitioners' applications, because the petitioners have asked for something which the federal Government is not yet prepared to do, namely adopt the recommendations of the TPRP and to direct the CRTC to do the same.

64. It is also important to note that even if Bell *et al* modified the relief requested in their petitions so that the Commission's local forbearance decision was made to conform with the federal Government's proposed Policy Direction to the CRTC (as opposed to the recommendations of the TPRP), it would still be inappropriate for the Governor in Council to grant the relief requested by the petitioners because the proposed Policy Direction is currently a matter that is before Parliament and it is also being considered in

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[36] See "Order under Section 8 of the Telecommunications Act – Policy Direction the Canadian Radio-television and Telecommunications Commission"*, Canada Gazette, Part I, Vol*. 140, No. 24, pp. 1606-1610.

[37] *Ibid*, page 1607, emphasis added.

the context of a separate public consultation process that was initiated via the *Canada Gazette* on June 17, 2006.

65. It would be premature, and indeed a fundamental subversion of the Parliamentary process, if the Governor in Council were to grant this form of relief. It is first necessary to dispose of the public and Parliamentary proceedings that have been initiated in relation to the draft Policy Direction before any conclusions can be drawn about what steps should be taken by the Government in relation to the TPRP Report.

VII. Conclusion

66. As a final observation, Shaw notes that there is a pre-defined role that is played by each of the federal government, the Governor in Council and the CRTC in the overall regulatory framework for the telecommunications industry in Canada. Traditionally, the role of the federal government has been to monitor the telecommunications industry and to provide guidance to the CRTC on broad issues of telecommunications policy. The role of the CRTC, on the other hand, is to serve as an expert tribunal that is tasked with the technical, day-to-day responsibilities of regulating the Canadian telecommunications industry. Although the *Telecommunications Act* allows parties who are not satisfied with Commission decisions to petition the federal Cabinet, it is not the role of the federal government, the federal Cabinet or the Governor in Council to micro-manage the CRTC by continuously reviewing and overturning Commission decisions.

67. The petitioners have extremely deep pockets. They have invested heavily in a lobbying campaign to discredit the CRTC and to seek widespread "regime change" – all in an effort to achieve a competitive playing field which is tilted more heavily in their favour. While these activities are not unusual for dominant firms that exercise SMP in very large markets this does not mean that their positions are correct or that they need to be pandered to every time they announce their displeasure with a CRTC decision.

68. With their latest round of petitions and complaints regarding the Commission's local forbearance decision, there is a growing concern in several quarters that the federal Government is being "played" by Bell *et al* in a game that, clearly, has very high stakes and which could result in long term, negative impacts on consumers and the

competitiveness of Canada's telecommunications markets if the rules are not properly structured and calibrated. It is extremely important, therefore, that the federal government recognize this conduct for what it is, namely the regulatory gaming of a very small sub-set of companies that have a self-interested agenda that is skewed in favour of maintaining their significant market power. The government places independence and accountability high on its list of objectives. It should therefore demand that all industry stakeholders conduct themselves in a manner that respects these objectives.

69. More to the point, however, it is clear from the discussion above that nothing has changed in the local exchange services market that would warrant granting the relief requested in the petitioners' submissions. The ILECs continue to hold well over 90% of the relevant product market and there is no logical economic argument that could be made to justify a forbearance approach that is different than that set out in Decision 2006-15. There is no need, therefore, to feel pressured into overturning or referring back to the CRTC a perfectly sound and rational decision.

70. The Commission's local forbearance decision will guarantee a far more rapid path to forbearance than any of the recommendations contained in the TPRP Report. Shaw therefore respectfully urges the Governor in Council to dismiss the petitions that have been filed by Bell Canada *et al*, so that the local forbearance framework contemplated in Decision 2006-15 can be implemented without fear of delay or political interference.