

**Canada Gazette Notice No. DGTP-007-05**  
**Petitions to the Governor in Council**  
**Telecom Decision CRTC 2005-28**  
***Regulatory Framework for Voice Communication Services***  
***Using Internet Protocol***

**Reply Comments of:**

**Aliant Telecom Inc.;**  
**Bell Canada;**  
**Saskatchewan Telecommunications;**  
**Télébec, société en commandite; and**  
**TELUS Communications Company**

**13 April 2006**

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### ATTACHMENTS:

1. *International Comparison of Approaches to Economic Regulation of VoIP: A Response to Lemay-Yates Associates Inc. Report "A Discussion of the Evolution of VoIP Regulation Worldwide", dated November 2005, Gilbert and Tobin, International Telecommunications Legal Experts, 12 April 2006.*
2. *VoIP Competition Update, April 2006.*
3. *Predatory Pricing and Public Policy in Canadian Telecommunications: A Reply to the Canadian Cable Telecommunications Association (CCTA), Dennis L. Weisman, Professor of Economics, Kansas State University, 12 April 2006.*

## 1.0 INTRODUCTION

### 1.1 The Petition and relief requested

1. On 12 May 2005, the Canadian Radio-television and Telecommunications Commission<sup>1</sup> issued its decision<sup>2</sup> to regulate the marketing and pricing of the traditional telephone companies' VoIP services. The VoIP decision is the very antithesis of the recommendations of the federal government's Telecommunications Policy Review Panel that there should be a presumption of deregulation of new telecommunications services.<sup>3</sup> There is an urgent need for reform and the VoIP Petitions present the perfect opportunity to start off in the right direction.

2. On 28 July 2005, Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications, Télébec, société en commandite, and TELUS Communications Company<sup>4</sup> (collectively, the Companies) submitted a Petition<sup>5</sup> asking the Governor in Council to address the CRTC's VoIP decision.

3. Specifically, the Companies requested that the Governor in Council, pursuant to section 12(1) of the *Telecommunications Act*, vary Decision 2005-28 so as to eliminate economic regulation of VoIP services (including, without limitation, elimination of the winback rule in the context of VoIP, specifically winback restrictions should not apply to VoIP and there should be no restrictions on a party's ability to contact customers at any time for the purposes of marketing VoIP) by declaring that sections 25, 27, 29 and 31 of the *Act* do not apply to VoIP services. The Companies also requested that the Order refer the VoIP decision back to the Commission for reconsideration so as to make it conform in all respects to this variation within 90 days.<sup>6</sup>

4. Similar relief has been requested in Petitions from the Province of Saskatchewan (5 July 2005), the Communications, Energy and Paperworkers Union of Canada (26 July 2005), the Vancouver Board of Trade (28 July 2005), and the Coalition for Competitive Telecommunications (10 August 2005).

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<sup>1</sup> The CRTC, or the Commission.

<sup>2</sup> Telecom Decision CRTC 2005-28, *Regulatory Framework for Voice Communication Services Using Internet Protocol* (Decision 2005-28, or the VoIP decision).

<sup>3</sup> *Final Report*, Telecommunications Policy Review Panel, March 2006 (TPR Final Report), for example, Recommendations 3-3 to 3-7.

<sup>4</sup> Formerly, TELUS Communications Inc.

<sup>5</sup> Filed pursuant to section 12(1) of the *Telecommunications Act*.

5. Decision 2005-28 has created a situation where one class of service providers, the traditional telephone companies,<sup>7</sup> is hampered by regulation when trying to make its best VoIP offers to customers. The economic regulation imposed by the VoIP decision (which applies in both residential and business markets) includes the requirement for the traditional telephone companies to seek and obtain prior CRTC approval of VoIP prices, terms and conditions of service, restrictions on flexibility to adjust prices in specific markets based on competitive conditions in those markets, restrictions on flexibility to offer service bundles to customers (even where these bundles include non-regulated services), restrictions on the flexibility to offer attractive VoIP promotions to customers, and a prohibition on direct marketing to customers for a period of several months from the time a former local residential customer takes VoIP service from a competitor.

6. The Petitions demonstrated that the decision to apply these rules and restrictions to the traditional telephone companies' VoIP services is bad for customers, bad for competition and bad public policy.

7. Gazette Notice No. DGTP-007-05 was issued on 3 September 2005. Pursuant to this Notice, comments on the Petitions have, as of today's date, been submitted by the Canadian Cable Telecommunications Association (the CCTA) (7 November 2005), Quebecor Media Inc. (QMI) (14 November 2005) and MTS Allstream (12 December 2005), collectively the *cabletelcos et al.* These parties argue that the relief requested by the Companies and other Petitioners should be denied.

8. This submission constitutes the Companies' reply to the Petitions and comments of other parties. As will be demonstrated herein, the *cabletelcos et al.* have failed to bring forward any information or arguments that refute or in any way weaken the basis for the Companies' Petition for relief from economic regulation of VoIP services.

9. Some parties asked the Governor in Council to wait for the TPR Panel to issue its Final Report and for the CRTC to issue its decision on the framework for local forbearance. Both these events have now taken place. On the one hand the TPR Panel's landmark and visionary

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<sup>6</sup> The Companies' Petition, paragraph 3.

report recommends that the federal government act immediately to make the necessary changes to ensure a regulatory framework that relies on competition and market forces to the maximum extent feasible.<sup>8</sup> On the other hand, in stark and stunning contrast, the CRTC's profoundly disappointing decision on local forbearance<sup>9</sup> demonstrates that this Commission does not comprehend the essential characteristics and requirements of a competitive marketplace. Immediate change is necessary, and granting the relief requested would begin the process of turning a new leaf on telecommunications regulation to the benefit of Canada and Canadians.

10. Notably, the VoIP decision jeopardizes this government's ability to:

- free competitive forces to deliver to Canadians the best choices of telecommunications products and pricing;
- make policy decisions that have real meaning to the Canadian businesses which are helping to drive the economy;
- make crucial policy investments in Canada's infrastructure, economic productivity and quality of life; and
- remove unnecessary regulations.

## **1.2 The Companies are proven VoIP innovators**

11. MTS Allstream has suggested that the traditional telephone companies are not VoIP innovators:

"Typically, incumbents are not the first to innovate: they only respond after new products and services have been introduced by competitors and they perceive a threat to their market share. VoIP is a ready example of this phenomenon. Numerous new competitors have entered the market with truly innovative VoIP services."<sup>10</sup>

12. The reality is quite the opposite. The Companies have repeatedly proved they are VoIP innovators:

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<sup>7</sup> Although it is common to see the Companies and the other traditional telephone companies referred to as "incumbent local exchange carriers", or ILECs, these companies are not, in fact, incumbents in the provision of either VoIP itself or the high-speed Internet access over which some VoIP services can be offered.

<sup>8</sup> TPR Final Report, Chapter 3.

<sup>9</sup> Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services*.

- SaskTel, through its subsidiary Navigata, was one of the first telephone companies in Canada to introduce a consumer and small business VoIP service, WebCall, in April 2004. Initially, this service was only available outside Saskatchewan. Following recent CRTC approval of tariffs, WebCall is now available in Saskatchewan.<sup>11</sup>
  
- Bell Canada has introduced two consumer VoIP services. Bell Digital Voice Lite, introduced in March 2005, rides on any high speed interconnection, and Bell Digital Voice, introduced in autumn 2005, uses standardized IP methods to transport voice features as data packets over Bell Canada's network. The Company has also introduced Business IP Voice for Broadband service for the small and medium business market.<sup>12</sup>

Bell Digital Voice service has been widely praised as the most innovative consumer VoIP product on the market. Glen Campbell of Merrill Lynch stated: "Bell Digital Voice service, [is] an innovative hybrid offering that uses conventional line-powered phones with no adapters (requiring no truck roll) but IP switching".<sup>13</sup> NBI/Michael Sone Associates wrote: "To our knowledge, Bell is the first company in Canada and perhaps North America to integrate VoIP service into its residential telephony infrastructure in this manner."<sup>14</sup> Carrie MacGillivray of Yankee Group wrote: "This is a watershed event for the existing VoIP market in Canada. Bell Canada is the first carrier in North America to build VoIP into the network and offer customers a robust and feature-rich telephone service."<sup>15</sup> At the time Bell Digital Voice Lite service was introduced, telecommunications analysts Iain Grant and Brian Sharwood of SeaBoard Group had special praise for its unique on-line customization feature stating that "[t]his functionality still hasn't arrived on the primary competing [Videotron] VoIP service in Quebec".<sup>16</sup>

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<sup>10</sup> MTS Allstream's 12 December 2005 comments, paragraph 10.

<sup>11</sup> See further discussion in section 4.1 of these Reply Comments.

<sup>12</sup> Business IP Voice was introduced in August 2006.

<sup>13</sup> Glen D. Campbell, *Canadian Telecom & Cable Valuation Monitor 2006: The Year Ahead*, Merrill Lynch, 11 January 2006, page 5.

<sup>14</sup> NBI/Michael Sone Associates, *Canadian Local Telecom and VoIP Services Market Report*, 2005 Edition, page 69.

<sup>15</sup> Carrie MacGillivray, *Bell Canada Bets on Network-Based Residential VoIP*, Yankee Group DecisionNote<sup>SM</sup> Event Analysis, 9 September 2005.

<sup>16</sup> IGB Grant and Brian Sharwood, "Grand Kahunas" – Bell Fills the Regulatory Void, SeaBoard Comments, 28 March 2005.

- Bell Canada, SaskTel, TELUS and MTS Allstream itself have each introduced VoIP services for the Enterprise business market. TELUS was the first company in Canada to introduce a VoIP service for Enterprise customers (IP One).
- The development by the industry of innovative solutions to the provision of 9-1-1 for VoIP customers was led by the Companies.

13. One or more of the Companies have been at the forefront of virtually every VoIP innovation by the Canadian service providers. Given this performance, freeing the Companies to compete on an equal basis with the cabletelcos and other service providers can only be expected to sharpen competition and increase its benefits.

### **1.3 No justification for economic regulation**

14. The cabletelcos *et al.* argue<sup>17</sup> that since VoIP is in the same market as traditional local telephony – a segment where the CRTC continues to apply economic regulation<sup>18</sup> – the Commission had no choice but to apply economic regulation to VoIP services.<sup>19</sup> To clarify, the Companies have not taken the position that local VoIP services and traditional local telephone services are in different markets. It is evident that VoIP services and traditional wireline telephony are in the same market. It does not, however, follow, as the cabletelcos *et al.* claim, that because VoIP is in the same market as traditional local wireline telephone service that VoIP has to be regulated the same as traditional local telephony. This issue was discussed at length in the Companies' Petition.<sup>20</sup>

15. Burgeoning entry by VoIP providers and vigorous price competition for VoIP services belie any notion that competition will fail if the market restrictions in the VoIP decision are removed. On the contrary, there is a real danger that the VoIP decision's imposition of economic regulation on the Companies' VoIP services will inhibit innovation and harm customers. Removing such regulation would obviate that danger. Economist Margaret Sanderson stated in Attachment 2 to the Companies' Petition, that if economic regulation were

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<sup>17</sup> At paragraph 5 of its 7 November 2005 comments, the CCTA suggests that the Companies' Petition is based on a claim that VoIP services are not in the same product market as traditional local telephone service.

<sup>18</sup> The relief requested in the Companies' Petition relates to VoIP services. Relief from economic regulation for traditional local telephone services was outside the scope of Decision 2005-28.

<sup>19</sup> See, for example, the CCTA's 7 November 2005 comments, paragraph 28.

<sup>20</sup> The Companies' Petition, section 3.0.

removed from the traditional telephone companies' VoIP services, Canadians would have access to a wider selection of VoIP offerings faster.<sup>21</sup>

16. The CCTA submitted with its 7 November 2005 comments an overview of the economic literature on anti-competitive pricing by Gerald W. Brock entitled *The Economic Theory of Predatory Pricing*. Referring to this overview, the CCTA identifies certain fringe theories which appear to support its allegations that economic regulation of the traditional telephone companies is necessary to prevent anti-competitive pricing and the failure of competition. In Attachment 3 to these Reply Comments, prepared at the request of the Companies, Dennis L. Weisman, Professor of Economics at Kansas State University, finds that the CCTA's allegations are without merit for the following reasons:

"First, in evaluating the incentives for predation, it is necessary to understand the implications of technological/market convergence for the evolving nature of Canada's local telephone service markets. Second, while claims of predation are common in regulated industries, actual cases of successful predation are, in fact, so rare as to prompt reference to predatory pricing as the 'Loch Ness Monster' of competition and antitrust law. Third, policymakers must clearly distinguish between legitimate concerns about predatory pricing and what are merely attempts on the part of rivals to peg ILEC prices at *supra-competitive* levels. Fourth, merely recounting various theories of predation, as the CCTA's experts do, is not a substitute for actual evidence of predation in the marketplace. On this score, the CCTA continues to fail to establish the credibility of its claims. Fifth, contrary to the CCTA's claim that 'targeted' price reductions are anti-competitive, cutting prices in order to respond to competition and increase business is often the very essence of competition. Finally, sound competition policy places the burden of proof in making predation allegations on those market participants alleging predation—a burden that, by a consensus of expert opinion in recent regulatory proceedings, the CCTA has not met."<sup>22</sup>

17. The cabletelco *et al.*'s claims are addressed further in section 3.0 of these Reply Comments.

18. In support of their Petition on 28 July 2005 the Companies provided two reviews of global approaches to VoIP economic regulation by international telecommunications legal

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<sup>21</sup> The Companies' Petition, Attachment 2, paragraph 61.

<sup>22</sup> Dennis L. Weisman, *Predatory Pricing and Public Policy in Canadian Telecommunications*, 12 April 2006, Executive Summary.

experts Peter Waters of Gilbert & Tobin, and Joel Winnik of Hogan and Hartson.<sup>23</sup> Hogan and Hartson addressed approaches adopted in the United States and Gilbert and Tobin in other jurisdictions around the world. These reviews concluded that the CRTC's policy of price-regulating VoIP services is out of step with the policies of regulators around the world. The CCTA submitted with its 7 November 2005 comments, a report by Lemay-Yates Associates Inc. entitled *A Discussion of the Evolution of VOIP Regulation Worldwide* (LYA Report) which responded to Gilbert and Tobin's review. The Companies have asked Gilbert and Tobin to provide a critique of the LYA Report which is provided in Attachment 1 to these comments and summarized in section 5.2.<sup>24</sup>

19. Gilbert and Tobin conclude that "...nothing in the LYA Report causes us to change our assessment that the CRTC's decision to apply extensive economic *ex ante* obligations to ILECs' VoIP services is out of step with the policies of regulators around the world. While regulators around the world have approached the issue of VoIP regulation using different decision-making structures, the predominant trend worldwide is to arrive at a similar outcome of little or no *ex ante* regulation of ILEC VoIP." Gilbert and Tobin go on to note that "...the LYA Report obscures the single fundamental fact that LYA has not been able to identify any other country which requires *ex ante* approval of an ILEC's VoIP prices with the single exception of Singapore."<sup>25</sup>

20. These regulators have reached their decision not to regulate regardless of whether they have found VoIP to be in the same market as traditional wireline telephony, or in a different market. This is demonstrated in Figure 1 of Attachment 1. France, Ireland, the Netherlands, Norway and Switzerland have all, like the CRTC, found, or may find, that VoIP is in the same market as traditional wireline telephony, but the regulators in all these countries have already made the decision not to apply *ex ante* price regulation to VoIP. Denmark, Spain and the United Kingdom have concluded that VoIP and traditional wireline telephony are in different markets and have not applied *ex ante* price regulation to VoIP. Australia, Belgium, Finland, Germany, Hong Kong, Japan, New Zealand, South Korea and the United States have decided not to require *ex ante* price regulation of VoIP, regardless of whether VoIP and traditional wireline telephony are in the same market. Notably, even in the few countries where traditional

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<sup>23</sup> Attachment 3 to the Companies' Petition: *Comparative International Approaches to VoIP Regulation*, Peter Waters, Gilbert and Tobin Lawyers, 25 July 2005; and Attachment 4 to the Companies' Petition: *United States Federal and State Regulatory Treatment of Voice over Internet Protocol Service Offerings*, Joel S. Winnik, Hogan and Hartson L.L.P., 21 July 2005.

<sup>24</sup> *International Comparison of Approaches to Economic Regulation of VoIP: A Response to Lemay-Yates Associates Inc. Report "A Discussion of the Evolution of VoIP Regulation Worldwide"*, dated November 2005, Gilbert & Tobin, 12 April 2006.

telephone companies are still required to get prior approval for the prices of traditional telephone services (France, Ireland, Japan, South Korea and the United States), this requirement does not apply to VoIP.

21. In the United States (which, strikingly, and without explanation the LYA Report does not discuss), neither federal nor state regulatory authorities have imposed any price regulation on VoIP services, whether offered by traditional telephone companies or their affiliates.<sup>26</sup> Indeed, the FCC has specifically concluded that state public utility commissions are *precluded* from regulating VoIP – and several U.S. federal district courts have said the same. In particular, the FCC found that economic regulation of VoIP service would conflict with federal policy, since a tariff requirement and rate-related regulations and rules could "harm consumers by impeding the development of vigorous competition", and would "introduce ...substantial delay in time-to-market and ability to respond to changing consumer demands".<sup>27</sup>

22. This is not, as the CCTA would have it, a case where the CRTC is out in front and other regulators will follow. It is a case where the Commission is clinging to an outdated regulatory paradigm that others are progressively abandoning for traditional wireline telephony and have refused to impose on VoIP.<sup>28</sup> In the TPR Panel's words, Canadian telecommunications policy and regulation are falling behind the times: "looking backwards and congratulating ourselves on past performance is of diminishing value."<sup>29</sup>

#### **1.4 Time to turn over a new leaf**

23. In their comments, the cabletelcos *et al.* asked the Governor in Council to await the report of the TPR Panel as well as the CRTC's local forbearance decision before issuing a decision on the Petitions. These events have now taken place and drive home the urgency of addressing the unbridgeable chasm existing between the outdated, out-of-touch, economically-illiterate, excessively bureaucratic regulatory policies of this Commission, and the federal

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<sup>25</sup> Attachment 1, paragraphs 1.4 and 1.5.

<sup>26</sup> See the Companies' Petition, paragraphs 82 to 85.

<sup>27</sup> *Vonage Preemption Order*, paragraph 20. See also Attachment 4 to the Companies' Petition, pages 2 and 3.

<sup>28</sup> Significantly, two Commissioners, Commissioner Andrée Noël and then Commissioner and Vice-Chair, Broadcasting, Andrée Wylie, dissented from the opinion of the majority, and would not have applied price regulation to the traditional telephone companies. Commissioner Wylie observed that if the criteria applied in the VoIP decision to conclude that VoIP services should be regulated had been applied to wireless when the Companies first offered wireless services, their wireless services would have been subject to price regulation – which they were not.

<sup>29</sup> TPR Final Report, pages 1-11 and 1-22.

government's determination to "...promote a more competitive, more productive Canadian economy" and to "...seek to improve opportunity for all Canadians".<sup>30</sup>

24. On the one hand, the TPR Panel's landmark Final Report, issued on 22 March 2006, recommends that the federal government act immediately to make the necessary changes to ensure a regulatory framework that relies on competition and market forces to the maximum extent feasible.<sup>31</sup> If adopted, the TPR Panel's recommendations would ignite the telecommunications sector and more broadly the entire ICT industry,<sup>32</sup> ensuring that Canadian consumers and businesses receive the full benefits of competition and innovation. In the Panel's words:

"[T]he time has come to reform Canada's telecommunications policy and regulatory framework. In spite of the fact that Canada has one of the most competitive telecommunications markets in the world, we continue to have one of the most detailed, prescriptive and costly regulatory frameworks. This framework is particularly burdensome for Canada's major telecommunications service providers, who now face stronger competition in a number of market segments from well-established facilities-based rivals as well as from new entrants. The Panel believes the Canadian telecommunications industry has evolved to the point where market forces can largely be relied on to achieve economic and social benefits for Canadians, and where detailed, prescriptive regulation is no longer needed in many areas."<sup>33</sup>

25. Of significance with regard to VoIP are the TPR Panel's recommendations that "new basic transmission services [such as IP-based transmission services] should be subject to a presumption of no economic regulation" and that discretionary services (such as the CRTC has recently deemed Bell Digital Voice Lite to be<sup>34</sup>) should only be subject to the standard competition law controls on anti-competitive conduct.<sup>35</sup>

26. On the other hand, and in stark contrast, is the Commission's long awaited and profoundly disturbing decision on local forbearance, issued on 6 April 2006.<sup>36</sup> This decision holds out no hope for removal (or even relaxation) of economic regulation of VoIP in the foreseeable future. The CRTC's sacrifice of the interests of customers in favour of further

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<sup>30</sup> Speech from the Throne, 4 April 2006.

<sup>31</sup> TPR Final Report, Chapter 3.

<sup>32</sup> Information and Communications Technology industry.

<sup>33</sup> TPR Final Report, page 1-22.

<sup>34</sup> At paragraph 36 of Telecom Decision CRTC 2006-11, *Bell Digital Voice Service*, the CRTC determined that Bell Digital Voice Service is a "residential optional local service", in other words a "discretionary " service to use the TPR Panel's terminology.

<sup>35</sup> TPR Panel Final Report, Recommendations 3-7 and 3-8(b).

<sup>36</sup> Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services*.

efforts to protect competitors from healthy competition, and its complete lack of regard for economic principles dramatically illustrate the pressing need to turn a new leaf in the regulation of telecommunications.

27. The criteria and process for forbearance for local services (which include VoIP services) set out in the CRTC's so-called forbearance decision have been widely condemned by the industry and analysts. The National Post's Mark Evans and Paul Viera summarized analysts' views stating that the decision is "...more evidence that the regulator does not grasp the industry's competitive dynamics" and that, even after the CRTC's market share of 25% loss of lines is reached, it could take up to 2 years (in some cases more) for economic regulation to be lifted. They go on to note the view of analyst Iain Grant, managing director of SeaBoard Group that the decision demonstrates the CRTC's "penchant for insidious meddling has overcome any feeling for industry dynamics or any respect for the power of consumers to make their own decisions".<sup>37</sup>

28. When the Companies appealed the VoIP decision, the cabletelcos *et al.* urged the Governor in Council to wait for the recommendations of the TPR Panel and the CRTC's forbearance decision. When the TPR Final Report came out and said the issue is urgent, Rogers' representative, Ken Engelhart, said wait for forbearance which would make all the TPR proposals moot.<sup>38</sup> Now that the CRTC has issued its criteria for forbearance, Rogers characterizes the decision as "setting a very realistic standard for when the market becomes competitive".<sup>39</sup> This is not surprising, since, as noted above, the CRTC's decision has given the cabletelcos and other competitors the added protection of two years or more during which they will be largely shielded from legitimate competition from the traditional telephone companies. Even once forbearance is granted, because of the stringency of the test, it will be limited to certain areas only – for example, it excludes wireless-only customers,<sup>40</sup> uses a broad geographic definition of the relevant market, and requires a high market share loss threshold of 25% of lines (as compared to the threshold for forbearance set by the CRTC for the cable

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<sup>37</sup> Ken Englehart, Vice-president of Regulatory Law at Rogers quoted in Mark Evans and Paul Viera, *CRTC revamp draws flak*, National Post, 7 April 2006.

<sup>38</sup> Ken Engelhart quoted in Deirdre McMurdy, *Telecom review: Dial 'T' for toothless: Clout wielded by industry's players means little change for consumers*, Ottawa Citizen, 23 March 2006, stated "I'm not really sure we need to go through this, given how close we are to deregulation".

<sup>39</sup> Quoted in Catherine McLean and Simon Tuck, *CRTC sets tough guidelines*, Globe and Mail, 7 April 2006.

<sup>40</sup> Ironically on 5 April 2006, the day before the local forbearance decision was issued, Statistics Canada reported that "[t]he proportion of Canadian households relying only on cellphones ...has more than doubled [going from 1.9% to to 4.8%] in just over two years". In Vancouver, the percentage was 9.6% (Statistics Canada, *The Daily*, 5 April 2006, page 5).

industry of 5%). Moreover, once forbearance is granted there are several pages of obligations that are retained many of which will apply only to the traditional telephone companies. The CRTC has no plans to review these conditions before April 2009!<sup>41</sup>

29. Though the TPR Panel could not comment directly on the matters raised by the Petitions, its Final Report made it plain that Canada cannot afford to wait any longer to reform telecommunications regulation. The CRTC's deeply flawed decision on local forbearance is further evidence of this urgency.

30. The Companies will address the problems with the CRTC's local forbearance decision in the future. Suffice it to say that the Petitions to remove economic regulation of VoIP services present the Governor in Council with an important opportunity which, if seized, would put in place a keystone in building this government's record of promoting a more competitive, more productive Canadian economy.

## **2.0 BROAD SPECTRUM OF PARTIES REQUEST RELIEF**

31. The cabletelcos *et al.* stand alone in asking for economic regulation of the Companies' VoIP services to be retained. This is not surprising because these are the companies that have the most to gain from the tilted playing-field created by the VoIP decision. Against this self-interested group stands a broad spectrum of Petitioners requesting a level playing field: the Province of Saskatchewan, the Companies, major business customers, Canadian workers represented by the CEP, as well as consumers themselves who have spoken through their responses to surveys.

### **2.1 Customers**

32. The Coalition for Competitive Telecommunications (the Coalition) submitted a Petition on behalf of leading Canadian business trade and service associations that collectively represent more than 12,000 Canadian companies.<sup>42</sup> The Coalition calls on the Governor in Council to reverse the CRTC's decision not to forbear from economic regulation of VoIP

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<sup>41</sup> Decision 96-15, paragraph 472.

<sup>42</sup> Including The Association of Canadian Acquirers; The Association of Canadian Travel Agencies; The Canadian Depository for Securities Limited; Canadian Manufacturers & Exporters; Megatrade Communications Services Corp.; The Canadian Newspaper Association; Insurance Bureau of Canada; The Investment Dealers Association of Canada; The Investment Funds Institute of Canada; Retail Council of Canada; and Société de gestion du réseau informatique des commissions scolaires.

services. Failing to take such action would, in the view of the Coalition, "...jeopardize competition, innovation and investment in the VoIP services market specifically and the telecommunications industry generally". Further, it will obstruct achievement of "...potential benefits to the Canadian telecommunications industry and the Canadian economy generally from a free market in VoIP services". Finally, the decision "...places Canada seriously out of step with its major trading partners and jeopardizes our competitiveness internationally".<sup>43</sup>

33. The Vancouver Board of Trade's Petition also cites the negative implications of the VoIP decision for competition and the prospects of improving productivity in Canada:

"This decision has negative implications for competition in the provision of voice communications services in Canada, negative implications for the convergence of voice and other communications in this country, and could result in a slower decline in the prices of voice communications than would otherwise be the case. Given the difficulties Canada has experienced and is experiencing in terms of improving productivity relative to other countries, this is a retrograde step."

34. Acting to remove economic regulation of the Companies' VoIP services would be a decision which would have real meaning for these businesses.

35. Consumers overwhelmingly support a level playing field as the best way to protect their interests. In a 26 July 2005 release entitled *Canadians Offer Their Opinions on Voice Over Internet Protocol (VOIP) and the CRTC Ruling*, Ipsos-Reid summarized key findings from a national survey commissioned by the Companies.<sup>44</sup> It stated that: "...Canadians are not receptive to the idea of a regulatory environment that creates unfair advantages for some ... VOIP competitors. Ninety-four percent [94%] agree that all VOIP service providers, including established telephone companies like Bell Canada, Aliant, SaskTel, Télébec, and TELUS, should be subject to the same regulatory rules". Ipsos-Reid also found strong support for the lifting of specific CRTC restrictions which limit the Companies' ability to price VoIP services competitively and to offer bundles to customers.

36. In a July 2005 Decima Research report, prepared on behalf of the Public Interest Advocacy Centre (PIAC),<sup>45</sup> Decima set out the results of a national survey of Canadian consumers' attitudes to telecommunications regulation. 92% of respondents to this survey felt

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<sup>43</sup> The Coalition's Petition, paragraph 14.

<sup>44</sup> Attachment 5 to the Companies' Petition.

that policy and regulation of VoIP should treat all competitors equally.<sup>46</sup> Similarly, a Decima survey prepared for Vcom Inc. in Saskatchewan found that 92% of consumers felt that there should be a regulatory level playing field for all companies providing VoIP service.<sup>47</sup>

## 2.2 Province of Saskatchewan

37. Saskatchewan was the first to Petition the Governor in Council concerning the VoIP decision, requesting a level playing field for SaskTel and the other traditional telephone companies in the provision of VoIP services. Saskatchewan strongly objected to the VoIP decision's tilting of the regulatory rules in favour of international competitors and against Canadian companies, noting that other countries do not accord special advantages to foreign entrants. In Saskatchewan's view, the decision is antithetical to the development of a robust, innovative, competitive economy.<sup>48</sup> Saskatchewan concludes: "If Saskatchewan and Canada are to maintain a solid infrastructure, consideration must be given on how to maintain investment in that infrastructure. Weakening those companies which do invest in Canadian facilities does not seem to be an appropriate methodology to achieve that end."<sup>49</sup>

## 2.3 Canadian workers

38. The Communications, Energy and Paperworkers Union of Canada (CEP) represents about 160,000 members employed in telecommunications, broadcasting, journalism, natural resources, and a variety of other industries and occupations. The CEP's Petition requests a level regulatory playing field to ensure that its members are not unfairly disadvantaged by economic regulation "...imposed on the telephone companies (ILECs) where its members work, but not on other VoIP providers, such as the cable companies or foreign-based providers". The CEP goes on to state that, on a broader level, it strongly believes the regulatory regime imposed in the VoIP decision "...will harm Canadian consumers through resulting higher prices and reduced choices."

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<sup>45</sup> PIAC is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services such as telecommunications.

<sup>46</sup> Decima Research, *Telecom Policy Review - Consumer Attitudes on Telecommunications Regulation* (see Appendix D-12 to Bell Canada's Submission to the TPR Panel, 15 August 2005).

<sup>47</sup> *Saskatchewan Residents' Views on the State of Competition & Regulation in the Telecommunications Services Market*, Decima Research, June 2005 (attached to Saskatchewan's Petition).

<sup>48</sup> Saskatchewan's Petition, paragraph 6.

<sup>49</sup> Saskatchewan's Petition, paragraph 36.

### **3.0 WHAT THE CABLETELCOS *ET AL.* CLAIM THE PETITIONS ARE ABOUT**

39. The cabletelcos *et al.* claim that the Petitions are about giving the Companies the ability to drive their competitors out of the market through anti-competitive behaviour such as below-cost pricing. The CCTA states:

"This is what the ILECs' Petition is really about – the ability to drive their competitors out of the market and recapture the 3% market share that they have collectively lost. Economic experts appearing on behalf of CCTA before the CRTC in the proceeding on local forbearance explained that the ILECs could effectively engage in anti-competitive behaviour and would have the incentive to do so."<sup>50</sup>

MTS Allstream states:

"[T]he real purpose of the petition, ...is not to be allowed to compete on a level playing field, as they claim, but rather to be free to employ their market power in an unconstrained manner to undermine competition, and thereby to preserve their dominance."<sup>51</sup>

40. The cabletelcos *et al.* nowhere explain why it would be that, if their claims had any merit – which they do not – Petitioners with the stature of the Province of Saskatchewan, major business customers and a major Canadian union would be requesting similar relief to the Companies. The reality is that the opposition of the cabletelcos *et al.* to the relief requested in the Petitions is based on their perceived benefit from having regulation hobble the Companies, even though they clearly do not need such protections.

41. As discussed in section 3.3 and by Professor Weisman in Attachment 3 to these Reply Comments, the Companies' have neither the incentive nor the ability to behave in an anti-competitive manner.

### **3.1 Claims that competition is weak/re-monopolization will occur are not credible**

42. In order for the conditions for anti-competitive pricing or other behaviour to exist, it must be possible for the firm to behave in such a way as to force the exit of its competitors and prevent entry by others.

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<sup>50</sup> The CCTA's 7 November 2005 comments, paragraph 7.

43. In their comments, the cabletelcos *et al.* portray themselves as struggling and VoIP competition as fragile. This picture is false – and this is not just the Companies' opinion. The Competition Bureau itself has expressed the view that even if anti-competitive behaviour were to occur (despite lack of incentives, as will be discussed in section 3.3), it is unlikely to induce exit "...where the rival [for example, the cabletelcos] has invested in a sunk network that is ubiquitous and exists for other reasons, not only to supply telecommunications services"<sup>52</sup> As was further noted by the Competition Bureau, the possibility of this happening has been directly contradicted by the evidence of one of the largest of cabletelcos, Shaw, when it stated that it "won't ever go away".<sup>53</sup>

"[T]he evidence of one the largest cable companies contradicts the CCTA assertion that cablecos will be dissuaded from entering or expanding due to ILEC 'deep pockets' or a 'reputation' for predation. Mr. Shaw testified that not only will Shaw digital phone service be available to 95% of Shaw customers within two to three years, it is unlikely that Telus will drive Shaw out of the market. He stated that Telus won't kill Shaw and Shaw won't kill Telus, as there is lots of market for everybody here.<sup>54</sup> He later said that while certain tactics by the ILEC might slow down deployment, once deployed in a market, Shaw won't ever go away.<sup>55</sup>" (footnotes in original)<sup>56</sup>

44. As recently as March 2006, Jim Shaw is reported as stating, with reference to TELUS, that his company will try to "...kick those bunnies through the goal posts."<sup>57</sup>

45. In fact rather than the cable entrants struggling to stay in telephony, there is a developing consensus in the investment community that it is the traditional telephone companies that are under threat:

- In the days prior to the filing of the Companies' Petition, Glen Campbell of Merrill Lynch spoke of "...cable winning the first round in the battle with telcos" and predicted that

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<sup>51</sup> MTS Allstream's 12 December 2005 comments, paragraph 74.

<sup>52</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Evidence of the Commissioner of Competition*, 22 June 2005, paragraph 266.

<sup>53</sup> On 10 February 2006, the CCTA announced that it was winding up its operations. However, Shaw was a member at the time the CCTA filed its 7 November 2005 comments.

<sup>54</sup> Transcript of Proceedings before the Canadian Radio-television and Telecommunications Commission, *Forbearance from regulation of local exchanges services* (Transcript), paragraph 6070.

<sup>55</sup> Transcript, paragraphs 6186 to 6189.

<sup>56</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Reply Argument of the Commissioner of Competition*, 7 October 2005, pages 8 and 9.

<sup>57</sup> Jason Kirby, *Ciao Boys!*, Financial Post Business, March 2006.

- "[s]ubscriber losses to cable could be faster than investors expect" and that "[f]or telcos, pressure from cable will be a long-term issue for their wireline operations".<sup>58</sup>
- In August 2005, an article in the National Post commented on Videotron's success and quoted one analyst as stating that "[t]he No. 1 victim of this campaign is going to be Bell...They are going to lose customers to Videotron in a big way."<sup>59</sup>
  - Reporting on Q3 2005, Glen Campbell stated that "[c]able operators in Canada and the U.S. continued to make strong gains in the telephony market" while for the traditional telephone companies "[r]esidential access line losses accelerated in both the U.S. and Canada."<sup>60</sup>
  - In December 2005, Standard and Poors commented "[o]ur overall outlook for traditional fixed-line telecom services is negative reflecting our expectation of increased competitive local and long-distance pressures" and on the cable industry that "[t]he outlook for the Canadian cable industry is generally more positive than for wireline".<sup>61</sup>
  - In January 2006, Glen Campbell stated: "We expect line losses to cable telephony to accelerate through 2006, as cable telephony footprints expand from ~50% to ~75% of total homes."<sup>62</sup>
  - In March 2006, the OECD wrote "VoIP take-up likely will erode circuit-based voice traffic, thus leading to a decrease in the voice revenues of traditional telecommunications operators. In addition, VoIP take-up likely will put downward pressure on the price of traditional voice services, resulting in additional reductions in revenue from traditional voice markets."<sup>63</sup> For Canada, the OECD considers the impact in terms of loss of circuit-based accesses would be particularly acute because "...cable modems are the most commonly adopted form of broadband Internet access".<sup>64</sup>

### 3.2 Claims of high entry barriers simply ignore the fact of successful entry

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<sup>58</sup> Glen D. Campbell, *Cable Turns Up the Heat*, Canadian Telecom and Cable Valuation Monitor, Merrill Lynch, 20 July 2005.

<sup>59</sup> Kevin Restivo, *Videotron moves on Bell's turf: Battle starts on Bell's Montreal home with cable phone service at 40% discount*, National Post, 18 August 2005.

<sup>60</sup> Glen D. Campbell, *North American Cable and Telecom 3Q05 Scorecards*, Merrill Lynch, 16 November 2005.

<sup>61</sup> *Canadian Cable And Telecom: Broadband Proliferation Drives Industry Transition*, Standard and Poor's, 6 December 2005.

<sup>62</sup> Glen D. Campbell, *Canadian Telecom & Cable Valuation Monitor – 2006: The Year Ahead*, Merrill Lynch 11 January 2006, page 9.

<sup>63</sup> *Policy Considerations of VoIP*, Working Party on Telecommunication and Information Services Policies, OECD, 20 March 2006, page 7.

<sup>64</sup> *Policy Considerations of VoIP*, Working Party on Telecommunication and Information Services Policies, OECD, 20 March 2006, page 7.

46. The cabletelcos *et al.* cite 2004 market share information in the CRTC's 2005 GIC Monitoring Report<sup>65</sup> as evidence that the traditional telephone companies have market power and can therefore behave in an anti-competitive fashion. They infer that because in 2004 the traditional wireline telephone companies accounted for a combined share of 97% of traditional local residential wirelines,<sup>66</sup> and because local VoIP is a substitute for traditional local residential wireline service, economic regulation must be applied to the traditional telephone companies VoIP offerings. This market share information is, of course, outdated.<sup>67</sup> More importantly, however, as even the cabletelcos *et al.* concede,<sup>68</sup> high market share is not a sufficient condition for a finding of market power in VoIP. There must also be high barriers to entry.<sup>69</sup>

47. The CCTA suggests that local VoIP service providers are having difficulty entering the market due to technical and financial barriers, customer inertia, and the need to get access to support structures. This is clearly not the case. Entry is not mere speculation; the facts overwhelmingly speak for themselves. Given the evidence of effective and viable entry, there are not high barriers to entry for those offering VoIP services. This evidence is even more glaring today than at the time the Petitions were submitted. Barriers to entry are low for the cabletelcos (with their ubiquitous broadband networks), and almost non-existent for those VoIP providers who offer services which can ride over the existing broadband networks of any carrier.

48. Even though cabletelco VoIP was only launched in 2005, by December the four largest cabletelcos, Cogeco, Rogers, Shaw, and Videotron, had expanded their VoIP footprint to over 50% of Canadian homes<sup>70</sup> and reported having well over 300K VoIP customers between

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<sup>65</sup> CRTC Report to the Governor in Council, *Status of Competition in Canadian Telecommunications Markets – Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, October 2005.

<sup>66</sup> Even in 2004, the competitors' share of total business lines was over 12%.

<sup>67</sup> Though outdated, this information does indicate the share gains that cabletelcos achieve in a relatively short time period after entry. In 2004, the traditional wireline companies share in Nova Scotia was 85%, reflecting the impact of competition from cable company EastLink. Significantly, between 2003 and 2004, even before Videotron's entry into the residential local market with its VoIP offering, the number of retail lines provided by competitors increased by 25%. In 2005, according to NBI/Michael Sone Associates, the number of competitor-provided lines increased by 120%, or 560K lines, to over a million lines (*Canadian Local Telecom and VoIP Services Market Report*, 2005 Edition, page 18).

<sup>68</sup> The CCTA's 7 November 2005 comments, paragraph 28, and MTS Allstream's comments, paragraph 56.

<sup>69</sup> In an abuse of dominance case, *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 40 C. P. R. (4<sup>th</sup>) 453, at 502, which was decided in 2005, the Tribunal explicitly writes:

"[138] As stated in Laidlaw and Nielsen, a large market share leads to a prima facie conclusion that the firm likely has market power. In order to establish market power, this conclusion must be supported by other findings on issues such as the existence of barriers to entry, the number of other competitors, excess capacity and the state of the market. Where barriers to entry are non-existent, even a very large market share will not support a finding of market power." (emphasis added).

<sup>70</sup> Chris Li, *Cogeco Inc. – Cable is the Valuation Variable – Initiate at Neutral*, Merrill Lynch, 10 February 2006, Table 1, page 5.

them.<sup>71</sup> Other VoIP providers have also continued to grow. By September 2005, Vonage had surpassed its 2005 goal of attracting 800,000 North American customers, reaching one million customers.<sup>72</sup> In Canada, Vonage increased its footprint from 14 centres in May 2005<sup>73</sup> to over 60 centres by February 2006.<sup>74</sup>

49. Attachment 2, Table 1 compares current industry analysts' VoIP forecasts with those available in July 2005.<sup>75</sup> The forecasts of uptake of VoIP by Canadian households have increased significantly. The revised consensus view is that 8.4% of Canadian households will subscribe to VoIP service from the Companies' competitors in 2006, increasing to 13.5% in 2007 (see Attachment 2, Figure 1 and Table 1).<sup>76</sup> These forecasts exceed analysts' expectations at the end of July 2005 by 3.8 percentage points for 2006 and 5.3 percentage points for 2007.

50. For example, in July 2005, NBI/Michael Sone Associates was estimating that by 2007 competitors would gain 16.3% of wirelines, and that VoIP would represent more than 40% of the gain.<sup>77</sup> This estimate has since been increased to a competitor gain of 20.5% by 2007, with VoIP representing more than 60% of the gain.<sup>78</sup>

51. Overall the performance and outlook for the cabletelcos has continued to strengthen. Other VoIP competitors also remain confident about their prospects. On 16 February 2006, Stephen Dorsey, President and CEO of babyTEL spoke of having "...a lot of room to compete

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<sup>71</sup> Cogeco press release, *Growth in cable and radio fuels COGECO results*, 12 January 2006; Rogers press release, *Rogers Announces Wireless, Cable and Telecom Subscriber Results for Fourth Quarter 2005*, 9 January 2006; Shaw press release, *Shaw Communications Inc. announces first quarter results and continued subscriber growth*, 12 January 2006; and Videotron press release, *Videotron extended its lead in 2005*, 5 January 2006.

<sup>72</sup> *Canadian Local Telecom and VoIP Services Market Report*, 2005 Edition, NBI/Michael Sone Associates, November 2005, pages 145 and 146.

<sup>73</sup> *Vonage Canada expanding Internet telephone service to more than 50 additional cities and communities throughout Canada*, Canadian Newswire, 31 May 2005.

<sup>74</sup> [www.vonage.ca](http://www.vonage.ca).

<sup>75</sup> The sources for the forecasts available in July 2005 are: *An Exciting Year Ahead: SeaBoard's Views on the 2005 Communications Market*, SeaBoard Group, January 2005, page 4; *Canadian Telco and Cableco Quarterly Preview*, Merrill Lynch, 13 April 2005, page 8; *Canadian Local Telecom Services Market Report, 2004 Edition*, NBI/Michael Sone Associates, November 2004, page 18; and, *LYA Canadian Consumer Telecom & Cable TV Market Forecasts 2004*, Lemay-Yates Associates Inc., August 2004, page 33.

<sup>76</sup> The sources for the revised forecasts are: *Canadian Local Telecom and VoIP Services Market Report*, 2005 Edition, NBI/Michael Sone Associates, November 2005, page 20; *Canadian Telecom & Cable Valuation Monitor, 2006: The Year Ahead*, Merrill Lynch, 11 January 2006, page 15; *Top of the First - the VoIP Battle Begins*, SeaBoard, August 2005, page 6 and *Brace Yourself! 2006; the year in Preview*, SeaBoard, December 2005, page 4. An update to the Lemay-Yates forecast was not publicly available at the time of writing. The Merrill Lynch estimate excludes the Call-Net (now Rogers) forecast, which appears to include both traditional wireline telephony and VoIP.

<sup>77</sup> *Canadian Local Telecom and VoIP Services Market Report*, 2004 Edition, NBI/Michael Sone Associates, November 2004, pages 17 and 18.

against Bell, Telus, Rogers, Videotron, Shaw and others". Mr. Dorsey also described the business that babyTEL is developing as a "provider of providers", and sees "great potential in the business market". He concludes that, though not all players will survive there is no sign that competition will fail:

"Of course, despite the fact the VOIP industry is growing at a 100% clip this year and is expected to stay on that rate every year until 2010, not every VOIP competitor will succeed, just as many competitive long-distance companies in the mid 1990s failed. There will be mergers and fallout, but there is serious money to be made by truly opening up the benefits of VOIP to the entire marketplace."<sup>79</sup>

52. The CCTA alleges that there are high barriers to entry because "numerous companies have gone out of business trying to enter" and that few competitors remain in the market. First, the CCTA's claim that few competitors remain in the market is patently ridiculous. The Companies' Petition provided a list of about fifty consumer VoIP service providers operating in Canada.<sup>80</sup> Table 2 of Attachment 2 to these Reply Comments updates this list which now shows about 70 consumer VoIP providers. In addition there are about 70 business VoIP service providers. In all, when duplicates are eliminated, there are at least 100 VoIP service providers operating in Canada today.<sup>81</sup> Second, as Mr. Dorsey concludes in the above quote, "...not every VOIP competitor will succeed" and "[t]here will be mergers and fallout". This is how healthy competition is supposed to work. Competition is not about the survival of a given competitor but about the survival of vigorous, consumer-welfare enhancing competition. Not all those who try to enter will be successful. Not all those who enter survive.

53. In addition to ongoing entry and growth, vibrant price competition has continued since July 2005,<sup>82</sup> with the cabletelcos and other providers launching a number of new bundles, aggressively priced promotions and other price changes.<sup>83</sup> For example, in December, Rogers

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<sup>78</sup> *Canadian Local Telecom and VoIP Services Market Report*, 2005 Edition, NBI/Michael Sone Associates, November 2005, Exhibit 9, page 19 and Exhibit 11, page 20.

<sup>79</sup> [www.cartt.ca](http://www.cartt.ca), *How a Baby can compete with the big guys*, Stephen Dorsey, 16 February 2006.

<sup>80</sup> Attachment 1 to the Companies' Petition.

<sup>81</sup> An article in the Ottawa Citizen in November 2005 also stated that there are 100 firms in Canada offering VoIP (Peter Wilson, *VoIP in Overdrive*, Ottawa Citizen, 10 November 2005).

<sup>82</sup> For a fuller description of the intensity of competition for VoIP services, see Attachment 2 to the Companies' Petition – in particular sections 2.3 and 3.4.

<sup>83</sup> In addition to the Rogers examples referenced, since the Companies' Petition was submitted at the end of July other cabletelco and non-cabletelco VoIP providers have also launched new offers, for example:

**Cabletelcos:** In August 2005, Videotron launched three new triple-play bundles comprising VoIP, digital TV and Internet, including free installation ([www.videotron.com](http://www.videotron.com)). In November, Cogeco launched promotions of various bundles of TV, high-speed Internet and Digital Phone Service (VoIP) ([www.cogeco.ca](http://www.cogeco.ca)). In December, Cogeco launched an offer for new customers of Digital Phone Service which provides a discount of \$10 per month in Ontario and \$5 in Québec for the first year of service ([www.cogeco.ca](http://www.cogeco.ca)). Shaw has recently launched a new promotion whereby customers signing up for Shaw Digital Phone between February and the end of August 2006

introduced a bundle price of \$100 per month for customers subscribing to Rogers Home Phone, Rogers Personal TV, Rogers Yahoo Hi-Speed Internet Ultra-Lite and Rogers Wireless Megatime Plan. This price provides a 15% discount off the regular prices. During January 2006, Rogers promoted Rogers Home Phone with one feature for a price of \$24 per month, a 20% discount off the regular price of \$30. In February, Rogers added a promotion offering new Rogers Home Phone customers a \$30 credit over 3 months, or – for those signing up for a 1 year contract – either one month free unlimited long distance, or a free cordless phone. Customers who sign-up on-line receive an additional \$15 credit. In April, Rogers added a promotion of 1 month free Rogers Home Phone service plus one calling feature. Before one of the Companies could introduce similar offers in its traditional serving territory it would have to file tariffs for CRTC approval and wait, potentially several weeks, for the Commission to approve or deny its application. This situation deprives customers of choice and the potential for a deal which better suits their needs.

54. Clearly, the barriers to entry are low, if not non-existent.

### **3.3 Claims of anti-competitive incentives and conduct are without foundation**

55. To suggest, as the *cabletelcos et al.* do,<sup>84</sup> that the Companies will engage in anti-competitive behaviour if they are not compelled to obtain prior regulatory approval of the prices, terms and conditions of their service offerings is presumptuous, misguided and simply wrong. As Saskatchewan stated in its Petition "[r]egulation on the presumption of guilt is contrary to ... the principles of natural justice".<sup>85</sup> To build a regulatory regime under the apprehended fear and assumption that one group will act anti-competitively is neither effective nor efficient and will undoubtedly retard innovation. The TPR Panel stated that regulation is

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pay only \$30 per month for the first 3 months, rather than the standard price of \$65 in Calgary, Edmonton, Vancouver and Victoria and \$55 per month in Winnipeg (Shaw press release, *Shaw Celebrates One Year Anniversary of Shaw Digital Phone with Introductory Offer for New Customers*, 10 February, 2006). Among small cabletelcos, Askivision ([www.aski.ca](http://www.aski.ca)), Cayoosh Communications Inc ([www.cayooshcom.com](http://www.cayooshcom.com)), Chase Cable & Internet ([www.mascon.bc.ca](http://www.mascon.bc.ca)), Lumby Cable & Internet ([www.mascon.bc.ca/lumby](http://www.mascon.bc.ca/lumby)), Pender Island Cable & Internet ([www.mascon.bc.ca/penderisland](http://www.mascon.bc.ca/penderisland)) and Wood Lake Cable ([www.woodlakecable.bc.ca](http://www.woodlakecable.bc.ca)) each launched new pricing plans.

Other providers: babyTEL reduced per minute charges by up to 63% ([www.babytel.ca](http://www.babytel.ca)), Inter.net launched a plan that provides unlimited province-wide calling ([www.ca.inter.net](http://www.ca.inter.net)), NetFone launched a plan that provides unlimited North American calling ([www.netfone.ca](http://www.netfone.ca)), Nicer Canada added five new features to its Home Package with no change in monthly rate ([www.glopex.com](http://www.glopex.com)), Unitz increased the number of long distance minutes included in its existing plans and added a new plan (i-Line Global) with unlimited long distance calling to Canada, the U.S. and 36 other countries, for \$60 per month ([www.unitz.ca](http://www.unitz.ca)), Unitz also introduced a discount of \$5 per month for customers subscribing to a bundle of cable or DSL Internet, and telephone service from Unitz ([www.unitz.ca](http://www.unitz.ca)), and YAK reduced the price of its unlimited calling plan by up to 25% ([www.YAK.ca](http://www.YAK.ca)).

<sup>84</sup> See, for example, the CCTA's 7 November 2006 comments, paragraph 76.

counterproductive when "...normal business conduct, characteristic of competitive markets" is "unduly discouraged", and recommended that economic regulation in telecommunications services markets should be guided by competition law principles.<sup>86</sup>

56. The cabletelcos *et al.* do not offer any economic justification for preserving the economic regulation of VoIP. Instead, they – and the CRTC – justify the intrusive regulatory regime based on vague and unsubstantiated assertions that retail marketing restrictions were introduced in response to the anti-competitive activities by the traditional telephone companies. Although this is not the place to dispute specific allegations of abuse of dominance – suffice it to say that the facts do not support these allegations.<sup>87</sup>

57. This is also not the place to review the history of each of the current restrictions. But such a review would reveal that they were each imposed, generally at the behest of competitors, in an effort to "promote" competition by restricting otherwise normal and lawful marketing activities of the traditional telephone companies, rather than as a response to proven anti-competitive activity. As an example, the winback restrictions were first created in 1998 in order "...to facilitate CLEC entry into the local market."<sup>88</sup> The original three-month ban was extended in 2004 to a full year for residential customers not because of breaches of the winback rule, but because, in the CRTC's view, "...competition in the residential local market has not developed as expected in the five years since the winback restrictions were first imposed ...".<sup>89</sup> In other words, the winback rules were not, as implied by the cabletelcos *et al.*, created or augmented as a result of anti-competitive behaviour by the Companies, but rather were instituted in order to protect competitors. The TPR Panel has recommended that winback campaigns that benefit consumers should not be restricted by the regulator.<sup>90</sup>

58. Similarly, the CRTC's three-year outright ban on promotions by the Companies was recently lifted, but, in the same decision, replaced with onerous market restrictions designed to protect competitors. This was done not because of any anti-competitive activities or breaches

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<sup>85</sup> Saskatchewan's Petition, paragraph 12.

<sup>86</sup> TPR Final Report, page 3-21 and Recommendation 3-14.

<sup>87</sup> For example, after recently appointing inspectors to investigate alleged non-compliance with regulatory obligations by certain of the Companies, the Commission concluded that there was no evidence of anti-competitive conduct.

<sup>88</sup> CRTC Letter Decision dated 16 April 1998, *Commission Decision Regarding CISC Dispute on Competitive Winback Guidelines*, page 2.

<sup>89</sup> Telecom Decision CRTC 2004-4, *Call-Net Part VII Application – Promotion of local residential competition*, paragraph 117.

<sup>90</sup> TPR Final Report, page 3-23.

of existing rules by the Companies, but again for the specific purpose of assisting competitors.<sup>91</sup> The TPR Panel has recommended that promotions should not require prior CRTC approval.<sup>92</sup>

59. It must be remembered that the cabletelcos *et al.* are seeking to preserve competition-restricting regulations such as winback rules. Attempts to constrain otherwise lawful and appropriate activity are, by their nature, counter-productive, difficult to implement, and destined to be a constant source of friction and controversy. For example, while, on the one hand, the traditional telephone companies are being encouraged by the marketplace and their customers to be more innovative, consumer-oriented and market driven, they are, at the same time, faced with sanctions for engaging in the precise form of activity that markets encourage, customers expect, and their competitors undertake.<sup>93</sup> Second, the protection of competitors from market forces is a never-ending, self-perpetuating and futile process. Once protected from competitive forces, history proves that firms remain inefficient and less able to compete, thereby requiring continued regulation while failing to achieve the lowest prices and greater variety and quality of services for customers.

60. As noted earlier, in an overview submitted with the CCTA's 7 November 2005 comments, Gerald W. Brock reviewed developments in the economic theory of predatory pricing.<sup>94</sup> Presumably realizing that the mainstream theories find there is little if any incentive for predatory pricing – and that the facts bear this out – the CCTA relies on fringe models based on hypothetical assumptions of so-called "reputation effects" or "signalling". The CCTA made similar arguments in the CRTC's forbearance proceeding. Commenting, the Competition Bureau explained that the signalling and reputation models depend on asymmetries of information about demand and/or the incumbents' costs which do not appear credible, given actual entry by the cable companies and a long history of cost-based regulation of the traditional

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<sup>91</sup> See for example Telecom Public Notice CRTC 2003-1-1, *Review of promotions*, paragraphs 7 and 8.

<sup>92</sup> TPR Final Report, page 3-27.

<sup>93</sup> Henry Ergas and Leonard Waverman, *Would Canada Benefit from Australia-Style Regulation?*, paragraph 6 (See Appendix D-8 to Bell Canada's Submission to the TPR Panel, 15 August 2005).

<sup>94</sup> Dr. Brock also includes a discussion of the U.S. airlines and predatory pricing. The relevance of this is unclear. In its Reply Argument in the Commission's forbearance proceeding, the Competition Bureau referred to airline anti-trust cases in Canada, the United States, Australia and Europe where large airlines were accused of targeting smaller airlines on specific routes. The CCTA's witness suggested that there had been findings of anti-trust violations. To the contrary, the Bureau pointed out that in no case was there a finding that an airline had violated anti-trust laws in these jurisdictions. The Bureau stated that "[c]ontrary to the assertions of the expert witnesses put forward by the CCTA, the Bureau would submit that, if anything, experience with allegations of predatory pricing in the airline industry provides no justification for continued regulation in telecommunications". (*Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Reply Argument of the Commissioner of Competition*, 7 October 2005, pages 7 and 8).

telephone companies.<sup>95</sup> In Attachment 3 to these Reply Comments, Professor of Economics, Dennis Weisman also addresses why the theories relied on by the CCTA break down.

61. The CCTA pleads that the economic regulation in the VoIP decision is necessary to prevent the Companies from targeted pricing and other legitimate marketing strategies in an effort to win back the cabletelcos "hard-won" customers.<sup>96</sup> The CCTA made a similar plea for protection from targeted pricing in the CRTC's proceeding on local forbearance. The Competition Bureau dismissed this plea. Such protection would, in the Bureau's view frustrate the competitive process, and in turn harm consumers:

"In effect, the CCTA advocates a broad definition of anti-competitive pricing that would include not only predation, but also 'targeted' pricing, even where such pricing is above cost. This is a prescription that is worse than the disease. There is nothing inherently anti-competitive about targeted pricing. Indeed, one would expect firms to compete for customers more aggressively in markets where they face competition..<sup>97</sup>

62. The Competition Bureau is concerned that the rules against targeting dampen competitive vigour. It went on to comment that "[r]igid rules preventing targeting or constraining prices that are above cost would put a chill on price competition and serve to frustrate the competitive process, and in turn harm consumers".<sup>98</sup> It is interesting to note that at the time of opening-up long distance competition the CRTC itself concluded that targeted pricing by the traditional telephone companies is in the public interest.<sup>99</sup> None would seriously dispute that long-distance competition is now well-established in Canada. This was achieved without protections against price differentiation.

63. In addition, Professor Weisman comments that the CCTA's characterization of price differentiation (or targeted pricing as it often referred to) as "bad" is disingenuous and self-serving. Moreover, the cabletelcos themselves are engaged in targeted marketing:

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<sup>95</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Argument of the Commissioner of Competition*, 15 September 2005, paragraph 82.

<sup>96</sup> For example, see the CCTA's 7 November 2005 comments, paragraph 50.

<sup>97</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Reply Argument of the Commissioner of Competition*, 7 October 2005, page 8.

<sup>98</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Reply Argument of the Commissioner of Competition*, 7 October 2005, page 8.

<sup>99</sup> In Decision 92-12, *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, the CRTC found, at section I F paragraph 13, that "...plans by the respondent telephone companies to introduce targeted rate reductions are in the public interest, particularly in light of concerns about the competitiveness of Canadian business and bypass of Canadian network facilities".

"It is noteworthy that the CCTA portrays targeting as something 'bad'. And yet, whereas lower prices may be bad for the profit margins of the cable companies, they are obviously good for consumers. Targeting is in reality simply competition by a different name. In fact, it is the CCTA's members that are the market participants actually engaged in targeting: They can target their services to the most profitable customers, while leaving the less profitable customers for the ILECs to serve. But what the CCTA really wants is not only the ability to target the most profitable customers, but to use the regulatory process to constrain the ILECs from mounting an effective competitive response necessary to retain those customers."<sup>100</sup>

64. It is notable that in its recent, widely criticized, decision on the criteria for local forbearance, the CRTC specifically established the definition of the relevant market so as to prevent the traditional telephone companies from targeted marketing, which the CRTC characterized as "anti-competitive".<sup>101</sup> It is clear that this Commission does not comprehend that an essential characteristic of a competitive marketplace is the ability of competitors to engage in price differentiation. In contrast the TPR Panel stated that price differentiation "...is a normal business practice" and that CRTC prohibitions "...extend beyond anti-competitive concerns", potentially resulting in "...a significant loss of efficiency".<sup>102</sup>

65. If the market restrictions in the VoIP decision are allowed to stand, rather than competitive rivalry, regulation will be a primary force in determining which providers succeed in the market. Because of restrictions on the Companies' ability to compete, there will be fewer attractive investment opportunities available to them, resulting in less actual investment and hence lower competitive pressure on the Companies' rivals. Economist Margaret Sanderson has observed that lower competitive pressure on the Companies' competitors will have a further dampening effect on investment.<sup>103</sup> This is bad competition and bad for customers.

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<sup>100</sup> Attachment 3, paragraph 58.

<sup>101</sup> Decision 2006-15, paragraph 150.

<sup>102</sup> TPR Final Report, page 3-20.

<sup>103</sup> The Companies' Petition, Attachment 2, paragraph 66.

## 4.0 THE PETITIONS ARE ABOUT PREVENTING HARMFUL REGULATION

### 4.1 Harm to customers

66. The Companies' Petition described how economic regulation of the traditional telephone companies' VoIP services will severely limit their ability to react nimbly to changing market conditions and restrict opportunities to make their best offers to customers. Economist Margaret Sanderson has stated that if economic regulation were removed from the traditional telephone companies' VoIP services, Canadians would have access to a wider selection of VoIP offerings faster.<sup>104</sup>

67. The cabletelcos *et al.* dismiss the notion that regulation has any practical effect on the Companies' ability to compete. MTS Allstream states "...there is no reason why the incumbents will not be able to compete fully with cable companies" despite the economic regulation imposed by the CRTC.<sup>105</sup> This is a telling comment. It is a tacit acknowledgement that competition from the Companies is beneficial to customers. But if regulation has no practical effect, then why the interest in retaining it? Of course the answer is that it has a very real practical effect in protecting the Companies' competitors from legitimate customer-welfare enhancing competition, and this harms customers.

68. Section 3.2 of the Companies' Petition provided examples of harm caused by the VoIP decision in terms of delays, uncertainties, higher prices due to restrictions on promotions and winbacks. A recent example of how customers are harmed by economic regulations concerns an application made by Bell Canada on 17 November 2005 to waive the one-time charge on traditional residential local service for customers who try the Company's VoIP service, Bell Digital Voice, but then wish to switch back to traditional service. The waiver would encourage those customers who might otherwise be reluctant to make the switch to try the service, knowing that if they wish to they can switch back without charge. This would benefit such customers because they would have the opportunity to make an informed choice. As of 12 April 2006, almost 5 months later, the CRTC has still to deal with this application.

69. This an example where, even with the streamlined processes put in place by the CRTC last year, some of the initiatives necessary in order to compete raise issues which the

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<sup>104</sup> The Companies' Petition, Attachment 2, paragraph 61.

<sup>105</sup> See MTS Allstream's 12 December 2005 comments, paragraph 43.

Commission feels compelled to address in a lengthy process. The cabletelcos and the Companies' other unregulated competitors are not subject to any such regulatory delays – let alone delays which can in some cases be several months – to implement price changes.

70. Another example of how consumers are harmed by delays and unnecessary economic regulations is the case of SaskTel's WebCall service. As noted earlier, SaskTel only recently gained CRTC approval to provide its WebCall service in Saskatchewan. SaskTel submitted its original application for tariff approval in January 2006, but CRTC Staff refused to put that application forward for Commission approval on the basis that the price of one element of the service offering, "WebCall Basic", would be anti-competitive (i.e., in Staff's view, the price was too low). This is a striking conclusion since the WebCall service itself passed the Commission's established cost-test criteria demonstrating that it was not anti-competitive,<sup>106</sup> and the same WebCall Basic element, offered in other parts of Canada at the same price requested by SaskTel for Saskatchewan, is not deemed to be anti-competitive. The tariff for a reduced set of WebCall service plans was finally approved some three months from its original submission; thus delaying the full benefits of SaskTel's VoIP service offering to consumers.

71. The CCTA refers to the concerns of certain consumer representatives raised in the forbearance proceeding that not all customers will benefit equally from competition.<sup>107</sup> This is not a reason to apply economic regulation to the Companies' VoIP services. Competition is here and here to stay. The best way to make sure that the benefits of competition are available as widely as possible is not to diminish the benefits, but to ensure that customers have the fullest possible information at all times on the best offers available in the marketplace. The rules in the VoIP decision prevent this.<sup>108</sup>

72. As discussed in section 2.3, customers themselves believe a level playing field is more conducive to meeting their needs than one where the traditional telephone companies are hobbled by economic regulations that do not apply to their competitors.

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<sup>106</sup> As noted at paragraph 32 of the Companies' Petition, the Companies tariff filings must be supported by complex cost studies. Of course, this requirement does not apply to the Companies' VoIP competitors.

<sup>107</sup> The CCTA's 7 November 2005 comments, paragraph 46.

<sup>108</sup> The cabletelcos misrepresent the Companies' position concerning the Commission's so-called price cap rules. These rules limit price increases for various traditional local services offered by the Companies. The CCTA states (at paragraph 54 of its 7 November 2005 comments) that the Petition would result in the dismantling of price cap regulation. This is not true. If the Governor in Council grants the relief requested in the Companies' Petition, the price cap rules will continue to operate as they do today, except that they will not apply to VoIP services.

## **4.2 Harm to competition**

73. The economic regulations flowing from the VoIP decision are harmful to the competitiveness of the Canadian telecommunications industry. Through their opposition to the Petitions, the cabletelcos *et al.* seek to preserve these regulations.

74. As discussed in the Petitions, the CRTC's economic regulation of VoIP is based on its unfounded fears of anti-competitive behaviour and the flawed proposition that legitimate competitive behaviour by the Companies must be constrained in order to protect the cabletelcos and foreign-based VoIP service providers. This misguided preoccupation with protecting competitors rather than the competitive process itself is even more incomprehensible given the nature of the competitors in question. Other Petitioners make this point. For example, the CEP describes the cabletelcos as "...large, well-financed multi-billion dollar companies with experienced work forces, extensive marketing experience and a loyal customer base" who have built extensive networks and whose entry into telephony has already proven effective. As for foreign-based providers, the CEP notes that U.S.-based companies such as Vonage have rolled out VoIP service across the U.S. without protection from U.S. regulators, and "[t]hey certainly do not need such protection from the Canadian regulator."

75. Speaking for the many thousands of businesses it represents, the Coalition predicts that, as a result of the VoIP decision, "[i]nvestment will be slowed and the pace of service innovation will be retarded". In the words of the Coalition, "[t]hese are losses or costs that will fall on users and on the whole Canadian economy". Granting the relief in the Petitions will remove this very real risk to Canada's overall competitiveness.

## **4.3 Harm to Canada's public policy goals and the need for intervention**

76. In section 3.3 of their Petition, the Companies discussed how giving unwarranted advantages to the cabletelcos, and to foreign-based VoIP providers with absolutely no incentive to invest in Canada, contributes nothing to achieving increased innovation in Canada. Moreover, the economic regulations in the VoIP decision also run counter to best practices internationally, and are the opposite of "smart regulation".

77. The cabletelcos *et al.* question whether the VoIP decision raises public policy issues that are of sufficient significance to warrant intervention by the Governor in Council. There can be

no question that the five Petitions from a broad range of interests amply demonstrate that intervention is necessary.

78. The cabletelcos *et al.* portray the differences between themselves and the Petitioners as largely a technical dispute on the facts. Unquestionably, the spin the cabletelcos *et al.* put on the facts is not credible. For instance, the cabletelcos *et al.* portray vigorous VoIP competition as fragile and competitors such as themselves as weak and puny fledglings, legitimate competitive behaviour as unlawful, and (as discussed in section 5.0 and Attachment 1), regulators in other jurisdictions who have decided not to apply price regulation to VoIPs as the exception rather than the rule. This is, however, much more than a dispute concerning the facts. Serious issues of public policy at stake.

79. Notably, the VoIP decision jeopardizes this government's ability to:

- free competitive forces to deliver to Canadians the best choices of telecommunications products and pricing;
- make policy decisions that have real meaning to the Canadian businesses which are helping to drive the economy;
- make crucial policy investments in Canada's infrastructure, economic productivity and quality of life; and
- remove unnecessary regulations.

## **5.0 THE CRTC NEED NOT AND SHOULD NOT REGULATE VOIP**

### **5.1 Regulating VoIP is not OECD "best practice"**

80. The CCTA refers<sup>109</sup> to a 2002 OECD Report which commended Canada's telecommunications industry and praised the CRTC's progress in opening up competition as "best practice". This report was based on data collected in 2001. The progress commended by the OECD in opening up regulation through forbearance was described in the OECD's report as follows:

"The CRTC has taken a number of decisions to streamline regulation by forbearing from regulation. Major decisions include forbearance in the context of

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<sup>109</sup> The CCTA's 7 November 2005 comments, paragraph 8.

sale of terminal equipment by public telecommunication operators, long distance services, mobile cellular services, Internet services, international telecommunication services, and interexchange private line and some data services."<sup>110</sup>

81. As noted by the OECD in its 2002 Report, the key area where forbearance had yet to be granted and progress was still required was local services. On VoIP itself, which was still in its infancy at the time, the OECD stated that "...it is unlikely that any attempts would be taken to impose regulations." On this basis it does not appear that the OECD would consider the CRTC's decision to impose economic regulation on VoIP as consistent with "best practice". For example, in a February 2006 report concerning policies for VoIP, the OECD warns against establishing regulatory policy based on the so-called "duck test". In essence the "duck test" states that if a service appears to a consumer to be indistinguishable from traditional telephone services in all key respects (even if entry conditions are different and/or the service offers unique additional features or has unique limitations), then it should be regulated as like traditional telephone service. The OECD rejects this approach, emphasizing that just because a service passes the "duck test" does not mean it has to be subject to regulation. Forbearance will be justified in these circumstances "if there are benefits to users or the economy in general".<sup>111</sup> The OECD's report does not endorse retail economic regulation of VoIP.

82. Confirming its view that VoIP should not be regulated, the OECD's March 2006 Report, *Policy Considerations of VoIP*, recommends "[e]xcluding VoIP applications from particular *ex-ante* regulation for the retail voice market...".<sup>112</sup>

83. In terms of opening up competition, the CRTC has made little further progress since the OECD issued its 2002 report. Rather, as indicated in section 3.0, the Commission's focus has shifted from fostering competition to bolstering the prospects of particular competitors. This is bad for customers, bad for competition and bad public policy.

## **5.2 International precedents**

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<sup>110</sup> *Regulatory Reform in Canada: From Transition to New Regulation Challenges*, OECD Reviews of Regulatory Reform, 2002, section 2.11.

<sup>111</sup> *The Policy Implications of Voice Over Internet Protocol*, Working Party on Telecommunications and Information Services Policies, OECD, 13 February 2006, page 9.

<sup>112</sup> *Policy Considerations of VoIP*, Working Party on Telecommunication and Information Services Policies, OECD, 20 March 2006, page 5.

84. As noted in section 1.3, as an attachment to its Petition, the CCTA submitted a report by Lemay-Yates Associates (the LYA Report) which, so the CCTA claims, finds that "...Canada is a leader in VoIP regulation and many countries are following a similar path."<sup>113</sup> The CCTA's claim is without foundation.

85. In Attachment 1 to these Reply Comments, international telecommunications legal experts, Gilbert and Tobin find nothing in the LYA Report to change their original assessment that the CRTC's decision to apply extensive economic *ex ante* regulations to ILECs' VoIP services is out of step with the policies of regulators around the world. They state: "The LYA Report obscures the single fundamental fact that LYA has not been able to identify any other country which requires *ex ante* approval of an ILEC's VOIP prices with the single exception of Singapore".

86. The following are Gilbert and Tobin's key findings on conclusions reached by the LYA Report:

- The LYA Report claims that regulators who have found that VoIP is in the same market as traditional wireline telephony, have adopted the regime that applies to traditional telephony for VoIP. This is not the case. While regulators around the world have approached the question of the appropriate level of economic regulation of VoIP from different directions, aside from Singapore, they have reached, or are all likely to reach, the conclusion that extensive *ex ante* regulation and in particular prior tariff approval of VoIP services should not apply. This includes a number of regulators who have found, as has the CRTC, that VoIP is a substitute for traditional telephone service.
- The LYA Report claims that other countries will follow the CRTC's lead in the future and apply extensive *ex ante* regulation to VoIP. There is no evidence whatsoever to support this hypothesis. Many regulators have already addressed the regulatory regime for VoIP and have determined that the market and competitive conditions do not warrant economic regulation but that a level of non-economic regulation is required, for example, to ensure the reliability of emergency calling services. Non-economic regulation is not at issue in the Petitions.

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<sup>113</sup> The CCTA's 7 November 2005 comments, paragraph 66.

- The LYA Report implies that the reason VoIP is not regulated in many countries is because VoIP penetration or usage is so low that VoIP is too insignificant for regulators to worry about. LYA implies that regulators will move to regulate VoIP once penetration begins to climb and that the CRTC has taken a prudent approach by acting before that occurs. However, as Gilbert and Tobin demonstrate, VoIP is not subject to significant *ex ante* retail regulation in both markets which have high and low VoIP penetration.
  
- The LYA Report tries to explain away the lack of VoIP regulation in many other countries on the basis that those countries have a much lower broadband penetration than Canada making VoIP unattractive and not significant enough to regulate. LYA claims that, as broadband penetration increases, regulators will move to regulate VoIP. This argument is so thoroughly contorted it meets itself coming the other way. The reason that Canada's broadband penetration is comparatively high is because cable companies' networks parallel most of the ILECs' telephone networks. The high penetration of competing network infrastructure in Canada is not, as LYA implies, a basis to regulate VoIP but is the reason why Canada can be less dependent on regulation than many other countries as broadband penetration increases. In fact, the cable companies have the majority of customers with approximately 52% of broadband households (over 3 million customers) at the end of 2004.<sup>114</sup>

87. As recently as February 2006, the European Commission has re-iterated its direction to national regulatory agencies (NRAs) in the European Community to adopt a light-handed touch in regulation of VoIP:

"The Commission supports a light regulatory touch and welcomes the fact that a number of NRAs have taken a forward-looking stance, which reflects the Commission approach, on regulatory treatment of VoIP. The Commission has agreed with a number of NRAs that VoIP is part of the calls market, and has expressed a preference for light-touch regulation. Regulation of VoIP in the Member States has accordingly been very measured so far. In practice there appear to be low barriers to market entry."<sup>115</sup>

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<sup>114</sup> *North America Broadband*, eMarketer, March 2005, page 13.

<sup>115</sup> Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: European Electronic Communications Regulation and Markets 2005 (11th Report)*, 20 February 2006, page 9 ([http://europa.eu.int/information\\_society/policy/ecomm/doc/implementation\\_enforcement/annualreports/11threport/com\\_2006\\_68\\_en\\_final.pdf](http://europa.eu.int/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/11threport/com_2006_68_en_final.pdf)).

## 6.0 CONCLUSION

88. The Companies reiterate the urgency for the Governor in Council to intervene to ensure that the Canadian telecommunications industry is not hampered by harmful and unnecessary economic regulation as it goes about the important task of delivering the innovation that is critical to Canada's productivity and economic future.

89. Specifically, the Companies requested that the Governor in Council, pursuant to section 12(1) of the *Telecommunications Act*, vary Decision 2005-28 so as to eliminate economic regulation of VoIP services (including, without limitation, elimination of the winback rule in the context of VoIP, specifically winback restrictions should not apply to VoIP and there should be no restrictions on a party's ability to contact customers at any time for the purposes of marketing VoIP) by declaring that sections 25, 27, 29 and 31 of the *Act* do not apply to VoIP services. The Companies also requested that the Order refer the VoIP decision back to the CRTC for reconsideration so as to make it conform in all respects to this variation within 90 days.

90. It must be emphasized that the Petitions are for relief from economic regulation. The Companies acknowledge there is a role for the CRTC to ensure that all VoIP service providers meet important social policy objectives, such as the provision of 9-1-1 services, privacy safeguards and the availability of comparable access to services by the handicapped.