



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC

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August 16, 2006

VIA Fax and E-mail

Mr. Leonard St. Aubin
Acting Director General
Telecommunications Policy Branch
Industry Canada
300 Slater Street, 16th Floor
Ottawa, ON
K1A 0C8

Dear Mr. St. Aubin:

Re: Order under Section 8 of the *Telecommunications Act* – Policy Direction to the Canadian Radio-television and Telecommunications Commission

On June 17, 2006, in Part I, Vol. 140, No. 24, at p. 1606, notice was given in the *Canada Gazette*, Part I, pursuant to s. 10(1) of the *Telecommunications Act*, that the Governor in Council proposed to make, under s. 8 of the Act, an Order providing policy direction to the Canadian Radio-television and Telecommunications Commission.

In accordance with subsection 10(1) of the *Telecommunications Act* and the procedure established in the *Canada Gazette* referenced above, the Public Interest Advocacy Centre submits the attached comments for consideration by the Governor in Council. We would be pleased to provide any further comment or information that the Governor in Council may consider useful or necessary upon request.

Yours truly,

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**IN THE MATTER OF a proposed Order under Section 8
of the *Telecommunications Act* – Policy Direction to
the Canadian Radio-television and
Telecommunications Commission**

Comments of The Public Interest Advocacy Centre

August 16, 2006

**Comments of The Public Interest Advocacy Centre on a proposed Order under
Section 8 of the *Telecommunications Act* – Policy Direction to the Canadian
Radio-television and Telecommunications Commission**

I. Introduction

1. The Public Interest Advocacy Centre (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. PIAC was a participant in the public consultations that culminated in the issuance of the Telecommunications Review Panel Report (the “TPR Report”) earlier this year.
2. On June 17, 2006, in Part I, Vol. 140, No. 24, at p. 1606, notice was given in the *Canada Gazette*, Part I, pursuant to s. 10(1) of the *Telecommunications Act* (the “Act”), that the Governor in Council proposed to make, under s. 8 of the Act, an Order providing policy direction to the Canadian Radio-television and Telecommunications Commission (the “CRTC” or the “Commission”).
3. PIAC makes these representations with respect to the proposed Order in accordance with the Notice in the Canada Gazette.

II. The Policy Direction Unjustly Favours Incumbent Telecommunications Providers

4. The proposed Policy Direction arbitrarily selects elements from the TPR Report that favour incumbent local exchange providers (“ILECs”) such as Bell Canada, TELUS Communications Inc., Aliant, MTS Allstream and Sasktel. The partial implementation in this format only serves to force the Commission into deregulation without ensuring protection of all stakeholders.
5. In particular, s. 1(a)(i) of the proposed Policy Direction directs the Commission to interpret s. 7, and in particular subsections 7(c) and 7(f) of the *Act* in such a way as “to rely on market forces to the maximum extent feasible”. However, the TPR also makes other recommendations, of at least equal importance, that could just as easily be turned into policy recommendations in relation to s. 7.

6. For example, Recommendation 6-1 of the TPR Report recommends the amendment of the *Act* to “impose a clear obligation on incumbent telephone companies to provide basic telephone service in areas where they have the available network infrastructure”. This suggestion could be made into a policy objective as well, one that would in particular be relevant to subsections 7(a), 7(b) and 7(h).¹ The Panel also proposed the creation of a Telecommunications Consumer Agency (Recommendation 6-2) to provide remedies for consumers in a rapidly deregulated environment. The Report is replete with further examples; however, the point is that the objectives in the proposed Policy Direction are uniformly those that favour incumbent telecommunications providers over both consumers and competitors, in contrast with the more comprehensive and balanced approach of the TPR Report.
7. In PIAC’s submission, the meaning of “maximum extent possible” reflects political rather than legal concepts appropriate to regulation. If ‘maximum efforts” are to be the goal of the proposed Policy Direction in what is essentially an administrative evaluation procedure, how much more strenuous should be the effort with regard to important public objectives that may not be addressed by market forces?
8. PIAC also must conclude that the proposed Policy Direction appears to be crafted as an attempt to make an end run around the existing legislation, which mandates the regulation of dominant carriers in the absence of a finding supporting a forbearance decision. The bald statements in proposed s. 1 of the proposed Policy Direction appear to contradict the requirements of s. 34 of the *Act*, in particular subsection 34(3), which denies forbearance where “the Commission finds as a question of fact that to refrain [forbear] would be likely to impair unduly the establishment or continuance of a competitive market . . .”

¹ These subsections read:

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

[. . .]

(h) to respond to the economic and social requirements of users of telecommunications services;

9. Even the TPR report did not recommend the Commission forbear from regulating dominant telecommunications providers, such as the ILECs in most residential local service markets, where they exercise significant market power.² Although stated negatively in the TPR report, this is clear in Recommendation 3-3(a), which reads: “economic regulation shall apply only if there is a finding that a service provider has significant market power . . .”. In other words, economic regulation should continue in markets where a dominant firm exercises significant market power, such as the local services market, a market that directly affects millions of Canadian consumers.
10. The proposed Policy Direction, as written, risks an erroneous interpretation of the Commission’s statutory mandate under the Act to economically regulate where markets are not sufficiently competitive. As such, it is possible to view the proposed Policy Direction as either directly or indirectly running contrary to the current will of Parliament as reflected in the legislation.

III. The Policy Direction is Unnecessary and Will Not Impede Innovation or Productivity

11. There is no evidence that we are aware of that the current regulatory framework is impeding productivity, innovation and financial return, particularly for the incumbents subject to such regulation. There is considerable consensus that premature deregulation and market dominance will impede economic efficiency and the ability of competition to deliver any benefits to ordinary consumers. By encouraging an accelerated course to deregulation, the provisions in the proposed Policy Direction increase the risk of premature deregulation by entrenching incumbent positions, stifling competition and raising prices for consumers. The directive implemented in its current form is more likely to have the opposite result to its implied goal of a more competitive telecommunications market.

² The most recent Telecommunication Monitoring Report (July 2006) from the CRTC at p. 32, fig. 4.2.5, notes that “Within the provinces, the incumbents held 90.3% of local retail lines.” In some markets, such as Saskatchewan, the percentages still approach 100%.. Online: <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2006/tmr2006.pdf>

IV. CRTC Operational Practices Promoting “Efficiency” May Not Produce Good Results

12. Subsection 1(c) of the proposed Policy Direction seeks not to improve the policy objectives of the *Act*, but instead the internal processes of the Commission. The meaning of “efficiency” as used in subsection 1(c) of the proposed Policy Direction is effectively skewed and narrowed to reflect concerns associated with the swiftness of CRTC processes rather than the regulatory results. Elsewhere in the proposed Policy Direction, “efficiency” is used, at least nominally, in the sense of achieving the maximum from the telecom objectives set out in s. 7 of the *Act*.
13. The implication of the proposed direction in this section is that the less the CRTC were to regulate, the more it would be “efficient”, in the sense presumably of taking less time to consider matters and, for example, approve tariffs (see for example proposed subsection 1(c)(i)). The flaw in the logic of this argument is that regulating less may make the Commission more “efficient” procedurally while becoming less effective and efficient at resolving regulatory issues under the *Act* that are its reason for being. Measuring paper shuffle without measurement of results of the measures approved or rejected in the real world is false economy.

V. The Proposed Policy Direction is, at Least in Part, *Ultra Vires* the Act

14. Finally, section 8 of the *Act*, that determines the powers of the Governor in Council to issue policy directions to the Commission, reads:

Powers of Governor in Council, Commission and Minister

[Directions]

8. The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives. [Emphasis added.]

15. Although it is arguable that several sub-subsections of the proposed Policy Direction, such as sub-subsections 1((b)(ii), (iii) and (iv) also are not covered by the power given under s. 8 of the *Act*, it seems clear beyond question that the direction to the CRTC in subsection 1(c) of the proposed Policy Direction, setting out specific new duties for the Commission, is well outside the scope of even the widest reading of Section 8 of the Act. In fact, this subsection, which purports to give directions to the Commission about how to do its job, clearly has no direct relevance whatever to s. 7 of the Act, as required by s. 8 of the Act³.
16. In short, the direction to the Commission in subsection 1(c) (and possibly in other sub-subsections) of the proposed Policy Direction is *ultra vires* the power granted in s. 8 of the Act. The proposed Policy Direction as worded therefore exceeds the powers of the Governor in Council and should be amended to comply with the power granted to Governor in Council under the Act, s. 8.

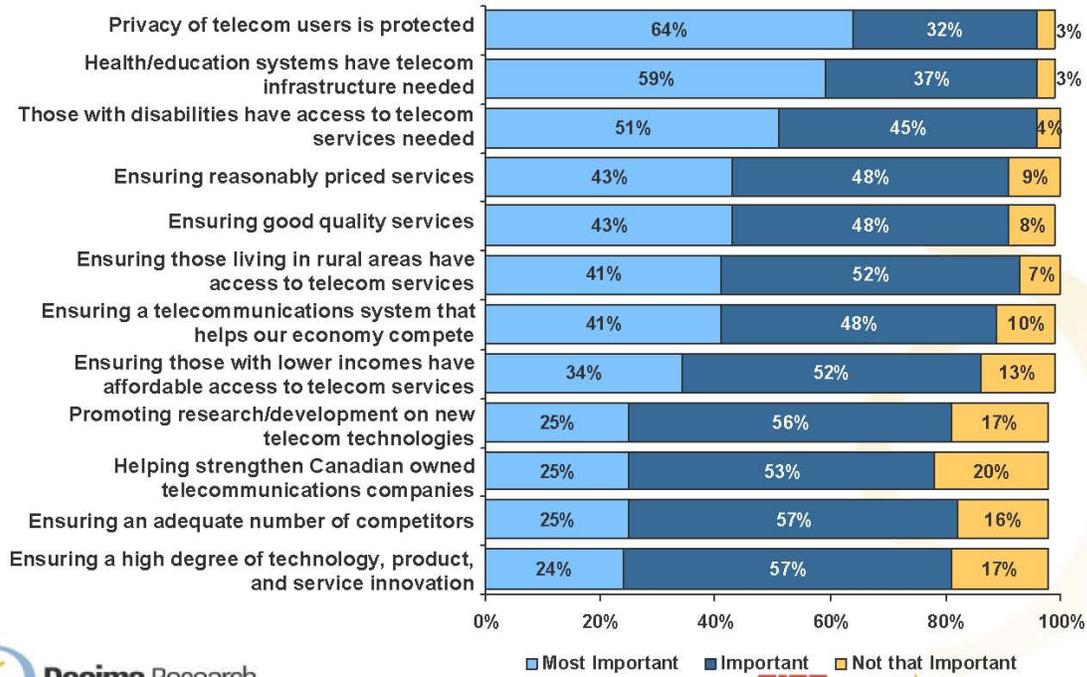
VI. The Proposed Policy Direction is Out of Step with Public Opinion

17. The proposed Policy Direction is out of step with public opinion. A Decima Survey performed in 2005 in preparation for the TPR report and commissioned by Bell Canada, TELUS Communications Inc. and PIAC shows that huge majorities of Canadians expect a strong government role in regulating telecom services. Reproduced below is the relevant slide from that survey.

³ Orders in Council may not create new duties for statutory authorities that go beyond the legislative expression of intent of such regulation. *Parklane Private Hospital Ltd. v. British Columbia (Attorney-General)* 1975 2S.C.R.47

Federal Responsibilities

The federal government has announced that it is conducting a review of policy and regulation in the area of telecommunications services, such as the Internet, telephone, and television. I want to begin by asking you what you think should be the important responsibilities of government in this field. Please tell me for each of the following, whether you feel it is something that should be considered among the most important responsibilities of the federal government, important, or not at all that important?



VII. The Proposed Order is Unnecessary in Light of the CRTC's Forbearance Record

18. The CRTC has forbore from regulation of most major telecom services, including long distance, wireless and Internet services. The CRTC, in early 2006, set out detailed guidelines for the deregulation of local services⁴. The proposed Policy Direction appears simply as unnecessary given the Commission's own movements towards deregulation. This sends the wrong message to the regulator, namely, that it is somehow not doing its job and that its careful approach should be abandoned in favour of hasty action.

VIII. Conclusion

19. The Government, with the proposed Policy Direction, is not facilitating competition. Instead, it is intervening to protect the interests of the regulated incumbents without

⁴ CRTC Telecom Decision 2006-15

ensuring that the interests of other stakeholders are protected. This proposed Policy Direction even appears to do by policy direction that which must be done by legislation.

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