

**Before the House of Commons Standing Committee
Industry, Natural Resources, Science and Technology**

October 19, 2006

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

**Speaking Notes
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Thank you Mr. Chair and members of the Committee for extending to our organization the opportunity to attend today and address the Committee.

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. PIAC also made representations to the Minister concerning the proposed policy direction pursuant to notice given in the Canada Gazette.
2. PIAC makes the following submissions concerning the direction and will discuss each under the subheadings below:
 - (i) The policy direction unjustly favours incumbent telecommunications providers
 - (ii) The policy direction is unnecessary and will not impede innovation or productivity
 - (iii) CRTC operational practices promoting “efficiency” may not produce good results
 - (iv) The proposed policy direction is, at least in part, *ultra vires* the *Telecommunications Act*
 - (v) The proposed policy direction is out of step with public opinion
 - (vi) The proposed order is unnecessary in light of the CRTC’s forbearance record

I. The Policy Direction Unjustly Favours Incumbent Telecommunications Providers

3. 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.

4. 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.
5. 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.
6. 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?
7. 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

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;

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 . . .”

8. 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.
9. 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.

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

10. 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

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>

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.

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

11. 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*.
12. 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.

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

13. 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.]

14. 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 *Act*³.
15. 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.

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

16. The proposed Policy Direction is out of step with public opinion. In September 2006, PIAC commissioned a survey of Canadians from Pollara concerning several regulatory issues. The results from some of the questions are instructive in that not only do they show a public reluctance to depart from traditional approval of telephone rates by the CRTC but also considerable skepticism that cable competition will be sufficient to protect their interests.

Right now, the rates for local phone service charged by the large local telephone companies (Bell, Telus, Aliant, Sasktel, etc.) have to be approved by an independent commission appointed by the Canadian Radio-television and Telecommunications Commission (the “CRTC”).

Please indicate whether you strongly agree, agree, have no opinion, disagree or strongly disagree with the following statement: “My local telephone company should be able to charge what it wants for monthly local telephone rates without having them approved as reasonable by the CRTC.”

Strongly Agree	(4%)
Agree	(16%)
Have No Opinion	(7%)
Disagree	(36%)
Strongly Disagree	(36%)
Don't Know/Refused	(2%)

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

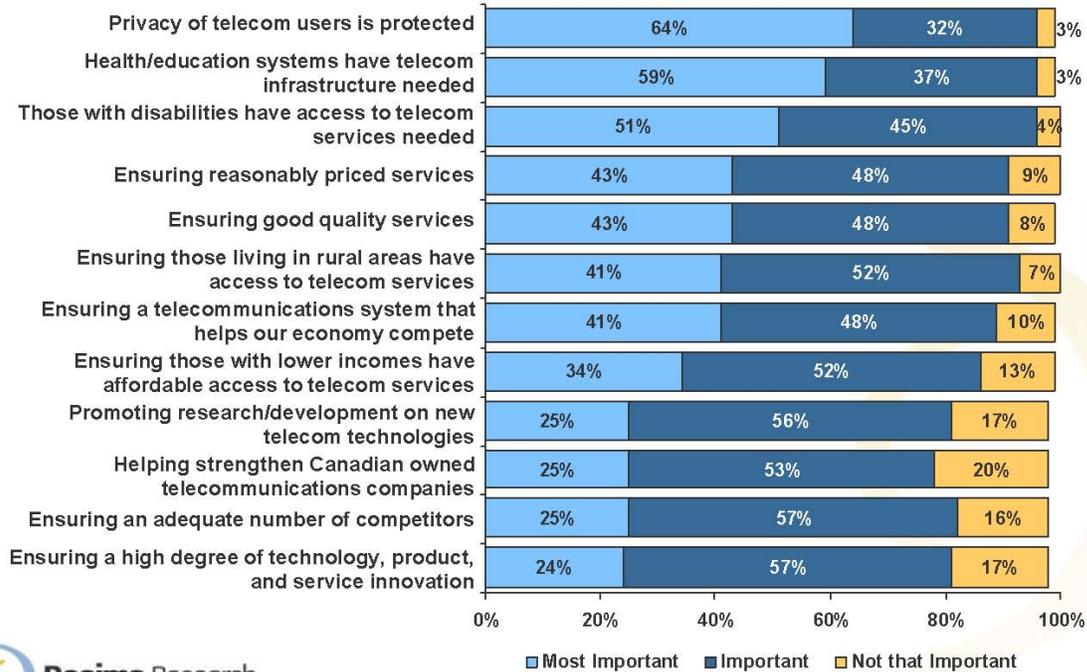
4. "The local telephone company and the cable company will provide sufficient competition for my local phone service to protect me without the need for the CRTC to ensure reasonable rates or quality of service." Do you strongly agree, agree, have no opinion, disagree or strongly disagree with this statement?

Strongly Agree (7%)
 Agree (28%)
 Have No Opinion (10%)
 Disagree (36%)
 Strongly Disagree (16%)
 Don't Know/Refused (3%)

17. The Pollara survey confirm results of 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.

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.

Conclusions

19. The Government is not facilitating competition with the proposed Policy Direction. Instead, it is intervening to protect the interests of the regulated incumbents without ensuring that the interests of other stakeholders are protected. This proposed Policy Direction even appears to attempt do by policy direction that which must be done by legislation. We submit that it should not be issued in this form.

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⁴ CRTC Telecom Decision 2006-15