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2 February 2006

Ms. Martine Dagenais
Senior Advisor to the Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street
Gatineau, Quebec
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Dear Ms. Dagenais:

Re: ***Consultation on the Technical Bulletin on "Regulated" Conduct***

1. TELUS Communications Inc. ("TELUS" or the "Company") is in receipt of a Competition Bureau (the "Bureau") information notice entitled *Competition Bureau Seeks Public Comment on its Regulated Conduct Bulletin*, dated 1 November 2005. In this information notice, the Bureau indicated that it was seeking public comment on its *Technical Bulletin on "Regulated" Conduct*, dated November 2005 (the "Technical Bulletin") that was drafted and circulated for public consultation.

2. It is expected that a final Technical Bulletin will replace the current Bureau *Information Bulletin on the Regulated Conduct Defence* that was issued in December 2002. TELUS has previously made submissions to the Bureau on the regulated conduct defence ("RCD") as part of Bureau consultations conducted in late 2004 and June 2005. TELUS continues to rely upon the positions expressed to the Bureau regarding the RCD in its two previous submissions, dated, respectively, 4 January 2005 and 6 June 2005, copies of which are attached to these Comments.

3. TELUS commends the Bureau for undertaking this consultative approach with respect to finalizing the Technical Bulletin. As TELUS previously stated in its 6 June 2005 submission, a full public consultation on this very important matter is necessary to ensure that all interested stakeholders have an adequate opportunity to prepare and present their views on the Technical Bulletin. The present Bureau consultation is fully responsive to these concerns.

4. The Bureau has made another significant positive step by articulating the jurisprudence it is relying upon to formulate its opinion on the RCD within the Technical Bulletin. This step corrects a major deficiency in the Bureau's June 2005 consultation process and the November 2002 information bulletin. By including the relevant jurisprudence in the Technical Bulletin, the Bureau has made its views on the RCD and its approach to regulated conduct more transparent and has given interested parties a better opportunity to provide informed opinions on the views expressed in the Technical Bulletin.

5. In these Comments, TELUS provides its response to particular matters raised in the Technical Bulletin. TELUS highlights both the areas where the Technical Bulletin reflects positive developments in light of the current jurisprudence and those areas where the Technical Bulletin requires further enhancement. TELUS focuses its Comments on the statements in the Technical Bulletin that deal with federally-regulated conduct as well as on those matters that have specific relevance to industries in which the Company operates, the telecommunications and broadcasting industries.

The Technical Bulletin Provides Fuller Guidance Regarding the Bureau's Approach to Regulated Conduct

6. It is useful that the Bureau has taken the requisite time to draft a Technical Bulletin that more fully outlines its approach to regulated conduct. It is also helpful that the Bureau has clearly stated that there are other statutory tools and defences beyond the RCD that may act to shield regulated conduct from provisions of the *Competition Act* (the "Act"). This is a marked improvement to

the existing Information Bulletin as that document only outlined the Bureau's approach with respect to the RCD.

7. At the same time, it would be helpful if the Bureau would more fully articulate and explain the other statutory interpretation tools and defences and their scope with respect to regulated conduct. TELUS notes that the Bureau has simply listed defences "such as a lack of *mens rea*, official inducement of error, statutory justification, or Crown immunity. [underlining added]"[1] The Bureau should make clear that this is not an exhaustive list and also give examples as to how each of these defences would operate in practice. By broadening the Technical Bulletin to encompass a more complete discussion of the defences to the application of the Act, beyond the RCD, the Bureau will provide interested parties with a more complete view as to how the Bureau will enforce the Act *vis-à-vis* regulated conduct.

The Technical Bulletin Should Explicitly Recognize the RCD for Federally-Regulated Conduct

8. In the Technical Bulletin, the Bureau indicates its expected approach in applying the Act to conduct that has been authorized or required pursuant to a federal regulatory scheme. In particular, the Bureau states that it

> …will not pursue a matter under any provision of the [*Competition Act*] where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and giving an accountable regulator.[2]

9. While it is positive that Bureau has indicated that federally-regulated conduct should be shielded from *Competition Act* scrutiny, the Bureau fails to make an express statement regarding the availability of the RCD when a federal regulatory regime conflicts with the Act. As such, TELUS has concerns about the Bureau's approach as stated in the Technical Bulletin because the Bureau should clearly state that the RCD is available to resolve conflicts between the Act and a federal

[1] Technical Bulletin, at p.1.
[2] Technical Bulletin, at p.4 [footnote omitted].

regime. This conclusion is based upon existing case law, including the Supreme Court of Canada decision in *Garland*[3] and separate Federal Court pronouncements on the RCD, as well as other general principles of statutory interpretation and policy. TELUS explains each of these below.

(a) The Supreme Court of Canada's Decision in *Garland* Does Not Direct a Cautious Application of the RCD Regarding Conflicts with the *Competition Act*

10. The Bureau's lack of explicit acknowledgement of the RCD in the federal sphere seems to stem from the Bureau's overall cautious approach to the RCD. In the Technical Bulletin, the Bureau states that its approach to the RCD is based on its interpretation that "the most recent decision of the Supreme Court of Canada to address the RCD directs a cautious application of the RCD."[4]

11. TELUS disagrees with the Bureau's assertion that *Garland* endorses a cautious application of the RCD. First, TELUS submits that the Bureau is incorrectly interpreting *Garland* by taking an overly restrictive view of the RCD from that decision. Following a discussion of the RCD with respect to offences under section 45 of the Act, the Technical Bulletin goes on to explain how the Bureau would apply the RCD for other Part VI offences, (offences in relation to competition).

> With respect to the other provisions of Part VI, in compliance with *Garland*, the Bureau will strive to determine <u>whether Parliament intended that the particular provision(s) of the Act apply to the impugned conduct</u> and may not pursue the case by application of the RCD. [emphasis added][5]

12. TELUS does not agree that the federal Parliament's intention is the foundation for the RCD with respect to criminal offences under the Act. The historical case law on the RCD clearly provides that for the RCD to shield conduct from the criminal provisions of the Act, all that is necessary is that the conduct be mandated or authorized pursuant to a valid regulatory scheme. The cases show that

[3] *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629 (*"Garland")*
[4] Technical Bulletin, at p.2 [footnote omitted].

determining Parliament's intention is not necessary prior to granting a RCD-defence for regulated conduct.

13. For example, in the Supreme Court of Canada decision in *Reference re: Farm Products Marketing Act*,[6] Locke J. stated that provincially-regulated conduct cannot be found to be an offence under the federal competition law.

> In my opinion, neither the provisions of the *Combines Investigation Act*…nor of s. 411 of the *Criminal Code*…are objections to the [provincial] schemes in question to the extent that they are within the powers which may be validly granted by the Legislature under the terms of the British North America Act…Furthermore, the offence defined by s. 2 which renders a person subject to the penalties prescribed by s. 32 is a crime against the state. I think that to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state. [emphasis added][7]

In addition, the Supreme Court of Canada stated in *Jabour*,[8] that in order to be found guilty under the criminal prohibitions of the *Combine Investigations Act*, a party's conduct had to be contrary to the public interest. The Court indicated that conduct pursuant to a validly-enacted regulatory scheme could not be found to be contrary to the public interest.

> The courts in these cases have said in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest…So long as the [*Combines Investigation Act*], or at least Part V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that these cases all conclude can be negated by the authority extended by a valid provincial regulatory statute. [emphasis added][9]

14. Given the reasoning in these (and other) judicial rulings, TELUS submits that the RCD operates such that conduct mandated or authorized under validly-enacted

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[5] Technical Bulletin, at p.3.
[6] *Reference re: Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198 ("*Reference re: Farm Products"*).
[7] *Reference re: Farm Products*, at p.239.
[8] *Jabour v. Law Society of British Columbia et. al.* (1982), 137 D.L.R. (3d) 1 ("*Jabour").*
[9] *Jabour*, at p.37.

regulatory schemes cannot be found to be contrary to the criminal offences of the Act. It is not necessary that Parliament show an intention as to whether the Act should apply to such conduct. Indeed, it may actually be necessary for Parliament to demonstrate an intention to exclude the RCD in order for the Act to apply to such conduct. This is because it seems very unlikely that Parliament, without a demonstrated intention to exclude the RCD, would have intended that parties acting pursuant to validly-enacted regulation could be subject to criminal prosecution under the Act for the same conduct. In addition, because *Garland* involves a *Criminal Code* offence (as opposed to an offence under the *Competition Act*), that case does not change this line of reasoning. Therefore TELUS recommends that the Technical Bulletin be amended to reflect an approach with respect to the criminal provisions of the Act that reflects the historical case law on this point.

15. Furthermore, TELUS submits that the case of *Garland* may not have any application at all to matters under the *Competition Act*. The Bureau should not use *Garland* as the basis of any conclusions about the RCD where regulated conduct conflicts with the Act because that case involved a provincial regulatory scheme in conflict with the *Criminal Code*, not the *Competition Act.* As stated by TELUS in its 4 January 2005 Submission, the Court found in *Garland* that

> …an otherwise valid provincial regulatory scheme cannot displace the application of the *Criminal Code* unless Parliament indicates, either expressly or by necessary implication, that the relevant section of the *Criminal Code* grants leeway to those acting pursuant to a valid provincial regulatory scheme. [emphasis in original][10]

Therefore, because *Garland* involved a conflict with the *Criminal Code* it should not be read as restricting the availability of the RCD with respect to conflicts involving the *Competition Act*. Thus, TELUS submits that the Bureau should remove the general statement in the Technical Bulletin that the "most recent decision of the Supreme Court of Canada to address the RCD directs a cautious application of the RCD" for conflicts involving the Act.

[10] TELUS' Submission to the Competition Bureau, 4 January 2005, at paragraph 8.

16. Moreover, because the facts of *Garland* involved a provincial regulatory scheme in conflict with the *Criminal Code*, the Supreme Court's decision did not posit any conclusion regarding the availability of the RCD in the federal versus federal sphere. As TELUS stated in its 4 January 2005 submission,

> If *Garland* represents any change, at all, to the law in the area of the RCD, its impact will be confined to parties subject to provincial regulatory schemes where such schemes are potentially in conflict with provisions of the *Criminal Code*….[T]he *Garland* case deals only with a conflict between the federal *Criminal Code* and an otherwise valid provincial regulatory scheme and, therefore, it has no relevance to the manner in which potential conflicts between two or more federal statutes would be resolved by the courts. [emphasis in original][11]

17. Given the reasoning above, what is apparent is that *Garland* does not direct a cautious application of the RCD with respect to its use to resolve a conflict between a federal regulatory scheme and the *Competition Act*. In addition, because *Garland* is confined to conflicts of a provincial regulatory scheme with a piece of federal legislation, the case has nothing to do with the availability of the RCD in the federal sphere. Therefore, *Garland* provides no scope or authority for limiting or eliminating the RCD for federally-regulated conduct. The Bureau must go beyond *Garland* and examine the relevant case law that speaks specifically to the RCD and its use to resolve conflicts between federal laws.

(b) Existing Jurisprudence Recognizes the RCD in the Federal Versus Federal Sphere

18. TELUS acknowledges that RCD jurisprudence is limited to a small body of cases that are more focused upon conflicts between the federal competition law and a provincial regulatory regime. However, the Federal Court has, in two separate cases, given specific indication that the RCD is available to resolve conflicts between the *Competition Act* and a federal regulatory regime. In the first case, *Industrial Milk Producers Association et al. v. Milk Board et al.,*[12] the Federal Court made reference to the possibility of applying the RCD to exempt activities

[11] TELUS' Submission to the Competition Bureau, 4 January 2005, at paragraph 9.

that are "required or authorized by the federal or provincial legislation." In a later case,[13] the Federal Court found that the actions of the Copyright Board in establishing and certifying the royalties to be paid to copyright holders of music works were exempt from the illegal price fixing provisions of the Act by operation of the "regulated industry defence."

19. The Federal Court decisions referred to in the previous paragraph point definitively to an explicit RCD-defence in the federal versus federal sphere, a conclusion that has yet to be contradicted by another court, including the Supreme Court of Canada in *Garland*. Therefore, the Bureau should make specific reference to these Federal Court decisions in the Technical Bulletin and, thereby, give explicit recognition of the RCD to resolve conflicts between federal regimes and the Act.

(c) Other Statutory Interpretation Tools and Policy Principles Support the Application of a Complete RCD-Defence for Federally-Regulated Conduct

20. In addition to the jurisprudence discussed above, general statutory interpretation principles support a full RCD-defence to shield federally-regulated conduct from *Competition Act* scrutiny. (In fact, it can be argued that these general statutory interpretation principles provide the foundation for the RCD in the federal sphere.) For example, there is a presumption that Parliament intends its entire statute book to be coherent and that the government does not intend to contradict itself or to create inconsistent schemes, as the Bureau itself acknowledges at footnote 26 of the Technical Bulletin.[14] In addition, the recognition of the RCD in the federal sphere is consistent with the doctrine of implied exception where the application of a matter-specific statute is to be preferred over that of a statute of general application where the two statutes are in conflict. As well, there is the existence of legal doctrines such as issue estoppel, abuse of process and collateral

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12 *Industrial Milk Producers Association et al. v. Milk Board et al.* (1988) 47 D.L.R. (4th) 710 (F.C.T.D.).
13 *Society of Composers, Authors and Publishers of Canada v. Landmark Cinemas of Canada et al.* (1992), 45 C.P.R. (3d) 346 (F.C.T.D.).
14 Technical Bulletin, at p.7.

attack, all of which strongly suggest that it is undesirable for there to be duplicate judicial or administrative proceedings in respect of the same dispute.

21. TELUS acknowledges that the preponderance of case law on the RCD involves conflicts between a provincial law and a federal law (and in all of these cases, the federal competition law). However, this is understandable because the RCD was developed to overcome the constitutional presumption of paramountcy of the federal law. In conflicts involving a federal law with the *Competition Act*, there may be no need to cite the RCD as a defence because other statutory principles apply to shield the conduct from Act scrutiny. Indeed, since there is no need to overcome a constitutional presumption of federal paramountcy, it ought to be considerably easier to invoke the RCD in the federal sphere than in the provincial sphere. Therefore, regardless of how the defence is characterized, what is apparent is that a full RCD-defence applies for conflicts between federal regulatory regimes. This is the logical conclusion stated by Janet Bolton and Tim Kennish in a previous joint submission to the Bureau:

> The essential rationale for the RCD is that conduct that is mandated or authorized by valid legislation cannot violate the [*Competition Act*], and we believe this basic rationale should apply equally in both the federal and provincial regulatory spheres. The fact that a particular form of regulation is allocated in our Constitution to the federal rather than provincial legislator should not change the overall approach of the Bureau to regulation.[15]

22. Given that the existing case law supports the RCD in the federal versus federal sphere, and that other principles of statutory interpretation and policy require the RCD to apply, TELUS submits that the Technical Bulletin must make specific reference to the RCD as a defence from the provisions of the *Competition Act* for federally-regulated conduct. Furthermore, because the full RCD must apply in the federal sphere, TELUS disagrees with the requirements as presently stated in the Technical Bulletin for a "comprehensive regulatory regime" and the need for an "accountable regulator." All that is required is that the conduct in question be authorized or mandated by valid federal law. Provided the conduct is mandated

or authorized pursuant to a federal law, there is no legal or policy reason why that same conduct should be subject to duplicative oversight by the Bureau.

23. In the case of telecommunications and broadcasting, Parliament has regulatory regimes under each of the *Telecommunications Act* and *Broadcasting Act* and, pursuant to those Acts, has granted regulatory responsibilities to the Canadian Radio-television and Telecommunications Commission (the "CRTC"). As a result, conduct that has been mandated or authorized by the CRTC should not be subject to review by the Bureau pursuant to the *Competition Act.*

There Is No Requirement for an Operational Conflict Between Two Regimes Prior to Resorting to the RCD

24. In the section entitled "Conduct That May Be Regulated By Other Federal Laws," the Bureau continues to suggest that there is a requirement that an "operational conflict" exist between the *Competition Act* and another federal regime prior to granting an RCD-like defence for mandated or authorized conduct. The relevant passage from the Technical Bulletin states

> …the Bureau will first consider whether the provisions can stand together and both operate without either interfering with the other *i.e.* whether a party may reasonably comply with both the Act and the other federal law(s). [emphasis added][16]

In addition, TELUS notes that at footnote 27, the Technical Bulletin states

> an actual – often coined an "operational" – conflict must be apparent before a court should resort to any mechanisms for resolving a conflict arising from a plain reading of the legislation…[17]

25. TELUS disagrees with the Bureau's interpretation that an "operational conflict" is required to be found prior to the availability of the RCD for federally-regulated conduct. As previously stated by TELUS,

> …the existing case law on the RCD does not discuss a requirement that two regimes have an operational conflict prior to resorting to the

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15 Submission of Janet Bolton and Tim Kennish to the Competition Bureau, 28 December 2004, at p.3.
16 Technical Bulletin, at p.4 [footnote omitted].
17 Technical Bulletin, at p.7.

> RCD for resolution of such conflict. The only requirement given in the RCD cases is that the two regimes potentially conflict. To predicate the availability of the RCD on the existence of an operational conflict would limit the availability of the RCD in a manner not justified by the current jurisprudence. [emphasis in original][18]

26. Given that there is no basis for the Bureau to require an operational conflict between two regimes, the draft Technical Bulletin takes an overly restrictive view of the RCD-defence. Therefore, TELUS recommends that the Bureau remove all references to an operational conflict standard from the Technical Bulletin. In the alternative, given that TELUS disagrees with the Bureau's interpretation of the case law on this matter, the Technical Bulletin should cite the relevant RCD cases that outline the operational conflict standard.

There Should Be No Distinction Between the Applicability of the RCD for a Regulator and a Regulatee

27. In the Technical Bulletin, the Bureau continues to raise a distinction between the scrutiny it will give to a regulator versus that given to a regulatee. The Technical Bulletin states that "regulatees have not typically benefited from an application of the RCD by Canadian courts."[19] In addition, regarding conduct regulated by a federal regulatory regime, the Bureau states that

> …activities of regulatees may be subject to greater scrutiny by the Bureau than the activities of regulators and the Bureau will always consider the regulatory context in which the conduct occurs where it is relevant to the application of the provision(s) of the Act in question, regardless of whether a doctrine or defence(s) immunizes a party from the provision(s) of the Act.[20]

28. TELUS disagrees with any approach where the standard set for a regulator is different than for a regulatee and submits that such a distinction is not supported by the existing case law. As TELUS stated in its 6 June 2005 submission, if a regulatee is acting within its statutory mandate or authorization, there is no reason why it should be denied the applicability of the RCD in situations where its acts

[18] TELUS' 6 June 2005 submission to the Competition Bureau, at paragraph 35.
[19] Technical Bulletin, at p.4.

may conflict with another statute.[21] Further, a distinction between a regulatee and a regulator seems illogical as it would create a halfway house where the RCD applies to one party, the regulator, but not to another, the regulatee, with respect to the same conduct. Surely the outcome must be that the application of the RCD to both parties be the same, given that the conduct is the same. It is difficult to understand why the Bureau wishes to insist otherwise, especially in light of its own acknowledgment that "no Canadian court has expressly indicated that the application of the RCD differs as between regulators and regulatees."[22]

29. Moreover, existing case law clearly indicates that regulatees can avail themselves of protection from the *Competition Act* with the RCD. In the case of *2903113 Canada Inc. v. Québec (Regie des marche agricoles et alimentaires),*[23] the Quebec Court of Appeal held that the RCD applied to protect regulatees who had entered into marketing agreements that were approved by a provincial regulator. In that decision, the Quebec Court of Appeal applied the RCD and shielded both the regulator and regulatees from the provisions of the Act. Given that existing Canadian jurisprudence contradicts a notion that a regulator is to be treated differently than its regulatees, the Technical Bulletin must be amended to remove such a distinction regarding the availability of the RCD and similar defences.

30. Finally, TELUS notes that a notion whereby the standard for regulators is different than for regulatees would have serious repercussions for the existence and availability of an RCD-defence for parties subject to Bureau investigation. At the present time, the vast majority of Bureau investigations of alleged violations of the Act with respect to regulated conduct involve the actions of regulatees, not the actions of regulators. Thus, the proposed approach in the Technical Bulletin means that the Bureau will restrict the availability of the RCD in the vast majority of its regulated conduct investigations. This would clearly be inappropriate since TELUS expects that the Bureau will continue to focus its investigatory efforts

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[20] Technical Bulletin, at p.5.
[21] See TELUS' 6 June 2005 submission to the Competition Bureau, at paragraph 36.
[22] Technical Bulletin, at p.4.

almost exclusively on the conduct of regulatees, and will only examine a regulator's conduct when it may be acting beyond its statutory or constitutional jurisdiction. In those Bureau investigations involving the conduct of regulators, the RCD is irrelevant because a regulator cannot use the RCD to justify actions beyond its statutory or constitutional jurisdiction. The foundation of the defence, after all, depends on actions taken pursuant to a validly-enacted regulatory scheme. Therefore, under the Bureau's proposed approach, when regulatees are being investigated, the RCD would be restricted in its availability, and when regulators are being investigated, the RCD would be irrelevant.

31. In light of the above, TELUS is accordingly extremely concerned about a view of the jurisprudence that holds that a regulatee has less recourse to the RCD than a regulator. Such a view, if acted upon, would mean that for all practical purposes, the RCD would not be available to a party subject to a Bureau investigation. TELUS submits that a Bureau interpretation that effectively removes the availability of the defence in competition law investigations runs manifestly contrary to the jurisprudence and the logical basis of the defence. In short, the interpretation embedded in this aspect of the Technical Bulletin could render the RCD virtually meaningless for parties whose regulated conduct is subject to Bureau investigation.

The Availability of the RCD Is the Same for Both the Criminal and Civil Reviewable Provisions of the *Competition Act*

32. In the Technical Bulletin, the Bureau has given indication that the availability of the RCD in the provincial sphere may differ depending upon whether the Bureau is enforcing a criminal provision or a civil reviewable practice provision of the Act. The Bureau cites *Garland* as underlying this assertion.

> Most recently, the Supreme Court, in *Garland*, held that the "regulated industries defence" (RCD) can only immunize conduct from the *Criminal Code* where the *Code* clearly allows for application of the RCD, e.g. by "leeway language" such as

[23] *2903113 Canada Inc. v. Québec (Regie des marches agricoles et alimentaires)* (1997), 79 C.P.R. (3d) 403 (Que. C.A.), leave to appeal refused April 30, 1998 (S.C.C.).

> "[contrary] to the public interest" or "unduly [limiting competition]"…
>
> RCD caselaw is extremely limited in respect of the reviewable practice provisions of the Act…Neither the "public interest" nor the "*mens rea*" rationales…directly support the application of the RCD to these provisions. Moreover the "leeway language" referenced in *Garland* does not appear in the reviewable practice provisions of the Act…In light of the above, it is by no means certain that the RCD immunizes conduct from the reviewable practice provisions of the Act. [emphasis added][24]

33. As noted earlier, the Technical Bulletin states that the Bureau "will not pursue any provision of the [*Competition Act*]" for federally-mandated or authorized conduct.[25] TELUS agrees that the RCD should apply to shield federally-mandated or authorized conduct from any provision of the Act, whether the provision is a criminal or civil reviewable practice provision under the Act. In any event, TELUS disagrees with any notion that the RCD does not apply with equivalent force for the civil reviewable practice provisions as for the criminal provisions of the Act, regardless of whether the conduct is federally or provincially-regulated. Furthermore, contrary to the Bureau's opinion, the "leeway" language cited in *Garland* - words or phrases such as "unduly" or "in the public interest" - are included in many cases in the civil reviewable practice provisions of the Act.

TELUS made a similar submission to the Bureau on this subject in its 6 June 2005 submission. In that submission, TELUS stated

> …If the Bureau is attempting to lessen the applicability of the RCD to the reviewable practices provisions of the *Competition Act*, TELUS disagrees with this approach. TELUS submits that the reviewable practices provisions of the *Competition Act* contain considerable language that suggest that leeway should be granted to a party, similar to the language of "undue" or in the public interest. For example, subsection 79(1)(c) of the *Competition Act*, that deals with abuse of a dominant position, includes the statement that the "practice has had, or is likely to have the effect

[24] Technical Bulletin, at p.3.
[25] See paragraph 8, above.

> of preventing or lessening competition [substantially] in a market". In addition, the Competition Tribunal is given discretion as to whether it should issue an order under subsection 79(1). These are just two of the many examples within the civil reviewable practice provisions where considerable leeway is granted towards parties acting under another statutory regime.[26]

34. Given that Parliament expressly provided for leeway language in certain of the civil reviewable practices provisions of the Act, a party acting under the authority of a separate regulatory regime, whether provincial or federal, should be able to avail itself of the RCD to protect from Bureau scrutiny should those provisions of the Act be contravened. Therefore, the Bureau should amend the Technical Bulletin to remove the criminal versus civil reviewable practice distinction.

35. Finally, it is illogical for the Bureau to apply the RCD for the criminal provisions of the Act but to resist its application for the civil reviewable provisions. The criminal provisions of the Act are, by definition, penal in nature. Thus, by implication, the criminal provisions constitute more serious violations of the Act than contraventions of the civil reviewable practice provisions. Given this fact, the Bureau should be <u>less reluctant</u> to apply the RCD against the civil reviewable practice provisions than for the criminal provisions. Simply put, if the RCD can apply to shield conduct that would be contrary to the most serious violations of the Act, then the RCD should apply to shield conduct that contravenes the less consequential provisions of the Act. In order to avoid this illogical outcome, the Technical Bulletin should be amended to remove altogether the criminal versus civil reviewable practice provision distinction.

The Bureau Must Review the *CRTC / Competition Bureau Interface* Document After Issuing a Final Technical Bulletin

36. As TELUS noted in its 6 June 2005 Submission, the finalized Technical Bulletin will have impact upon the existing *CRTC / Competition Bureau Interface*.[27] The Technical Bulletin outlines a regulatory model that acts to limit duplicate

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[26] TELUS' 6 June 2005 submission, at paragraph 38

[27] Canadian Radio-television and Telecommunications Commission and Competition Bureau, *CRTC / Competition Bureau Interface,* 8 October 1999 (the "Interface").

jurisdiction where a regulator has been granted the authority to administer a regulatory regime, with a particular focus on an explanation of the RCD. The Interface itself purports to describe the respective areas of responsibility of the CRTC and the Competition Bureau. In particular, the Interface outlines (1) the areas where the CRTC and the Bureau both have authority, (2) the areas where the CRTC has exclusive authority, (3) the areas where the Bureau has exclusive authority, and (4) how the authority of the two agencies is delineated when the CRTC has forborne or exempted from regulation. However, while it is clear that the RCD forms the primary legal basis of the Interface, the doctrine is never explicitly mentioned within the document.

37. In light of the fact that the RCD and other statutory interpretation and legal principles[28] substantially underpin the Interface, it may be the case that a final Technical Bulletin that correctly articulates the law with respect to regulated conduct obviates the need for any Interface document at all. Therefore, in TELUS' view, the Interface should be reviewed after the release of the final Technical Bulletin, and it should be determined whether that document is still necessary to accurately delineate the responsibilities as between the Bureau and the CRTC. If it is determined that the Interface is still required, TELUS recommends that the Interface be amended to note that the RCD and other statutory interpretation and legal principles form the basis of the delineation of each agency's responsibilities. In particular, the revised Interface should state that conduct that is required or authorized by the CRTC pursuant to its delegated regulated powers is exempt from the application of the *Competition Act*. In addition, the revised Interface should say that once the CRTC has exercised its forbearance powers in relation to a service or class or services or has exempted a carrier from regulation, the *Competition Act* applies to the extent of such forbearance or exemption. In this way, the Interface will act in a harmonious fashion with the Technical Bulletin, and the interpretation of the roles of the

[28] Principles that include legislative coherence, the doctrine of implied exception, abuse of process, issue estoppel and collateral attack as described in paragraph 20, above.

CRTC and the Bureau will be predicated on the Bureau's general policy regarding the applicability of the *Competition Act* with respect to regulated conduct.

Conclusion

38. TELUS thanks the Bureau for the opportunity to make these Comments on the Technical Bulletin. TELUS commends the Bureau on the release of a Technical Bulletin regarding the Bureau's approach to regulated conduct generally, rather than merely its interpretation of RCD, as was the case for the December 2002 Information Bulletin. Moreover, the Technical Bulletin contains significant enhancements over the previous Information Bulletin and other previous Bureau pronouncements on the RCD. In particular, the Technical Bulletin reveals the Bureau's appreciation for defences beyond the RCD, a more reasoned approach regarding conduct mandated or authorized by federal laws and the Bureau's consideration and interpretation of the existing regulated conduct jurisprudence. These are all extremely positive developments.

39. At the same time, TELUS remains concerned regarding some of the Bureau's statements and opinions in the Technical Bulletin. These concerns include (1) the need for fuller guidance from the Bureau on its approach regarding regulated conduct, (2) the lack of explicit recognition of the RCD in the federally-regulated sphere (in contrast to existing Federal Court pronouncements on this matter), (3) a distinction between a regulator and a regulatee regarding the availability of the RCD or similar defences, (4) the requirement for a finding of an "operational conflict" prior to a RCD- or similar defence and (5) the possible limitation on the RCD and other similar defences when the Bureau is attempting to enforce the civil reviewable practice provisions of the Act against regulated conduct. In each of these circumstances, TELUS submits that the Bureau is making an overly restrictive interpretation of the existing RCD case law. As a result, the Bureau should revise the Technical Bulletin to reflect the Comments provided by TELUS in relation to these areas of concern.

40. Finally, it is important that the Bureau review the Interface immediately after the issuance of a final Technical Bulletin and determine whether the Interface is still necessary. If so, the Interface must be revised to incorporate and acknowledge the Bureau's approach to regulated conduct as stated in the final Technical Bulletin. In particular, specific recognition must be given in the Interface that the RCD forms the primary basis of the delineation of responsibilities as between the CRTC and the Bureau, and that other statutory interpretation and legal principles apply as well. This revision is necessary to ensure that the two documents work in harmonious fashion. Finally, should the Technical Bulletin alter the respective roles of the CRTC and the Bureau as presently delineated in the Interface, the Bureau and the CRTC should undertake a joint consultation process with telecommunications and broadcasting stakeholders to ensure that parties fully appreciate any change in the roles for the Bureau and the CRTC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF FEBRUARY 2006.

Yours truly,

{Original signed by Willie Grieve}

Willie Grieve
Vice President
Telecom Policy & Regulatory Affairs

Attachments

EE/sa