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4 August 2006

**By email and by courier**

Mr. Kevin Lynch  
Clerk of the Privy Council and Secretary  
to the Cabinet Privy Council Office  
Langevin Block  
80 Wellington Street  
Ottawa, Ontario  
K1A 0A3

Dear Mr. Lynch:

Subject: Canada Gazette Part I Notice No. DGTP-007-2006 – Petitions to the Governor in Council concerning Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services.*

The attached constitutes MTS Allstream Inc.'s response to the Petitions to the Governor in Council made by Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications and TELUS Communications Company, the Province of Saskatchewan and the Coalition for Competitive Telecommunications requesting that the Governor in Council refer Telecom Decision CRTC 2006-15 back to the Canadian Radio-television and Telecommunications Commission for reconsideration.

It is MTS Allstream's submission that the CRTC has set out a sound and orderly framework for the deregulation of local telephone services that will serve all Canadians by assuring genuine competition and its attendant benefits. MTS Allstream urges the Government not to be persuaded by the Petitioners, who only seek to further their own interests, but rather to dismiss these Petitions outright.

Yours truly,

*Original signed by Teresa Griffin-Muir.*

c.c.: Interested Parties to Public Notice 2005-2.

Attachment

**Canada Gazette Part I**  
**Notice No. DGTP-007-2006**

**Petition to the Governor in Council**  
**Concerning Telecom Decision CRTC 2006-15,**  
***Forbearance from the regulation***  
***of retail local exchange services***

**Comments of**  
**MTS Allstream Inc.**

**4 August 2006**

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## Executive Summary

- i) The Local forbearance decision was the culmination of a major CRTC process initiated for the very purpose of providing the former monopoly Petitioners with a set of criteria that, when met, would trigger local forbearance or deregulation. The eleven member Commissioner panel reached this decision after listening to countless oral representations made by a wide range of parties and analyzing an extensive body of evidence on the realities of the Canadian market and the experience of the last ten years. Not only is the decision supported by market evidence, it is grounded in sound economic analysis and competition law principles.
- ii) The Decision supports the public interest: it is designed to promote and advance competition by ensuring that forbearance is granted only where competition is sustainable, and thus where there are clear benefits to consumers. Experience has shown that continued competition, a goal of the government and a requirement under section 34 of the *Telecommunications Act*, is only possible if the forbearance criteria employed addresses the Petitioners market power, particularly in the provision of wholesale facilities and services. A strong wholesale regime is directly linked to enduring retail competition. The goal of any forbearance process should be to assure genuine competition – competition that will produce the innovation, choice and lower prices that will benefit consumers, and that will support the Government's productivity agenda.
- iii) The outcome of this decision will be genuine and sustainable competition in the retail market for local voice services with all the attendant benefits for Canadians. This is the outcome the Petitioners fear most and is the real reason for the petition to the GIC.
- iv) Instead of a fact based assessment or sound economic analysis the Petitioners, who include Canada's largest former monopoly telecommunications firms, use a combination of rhetoric, media headlines and selective mischaracterizations of the report of the Telecommunications Policy Review Panel in their attempt to challenge the CRTC's Local Forbearance Decision. The only thing that is clear from the Petition is that the former monopoly Petitioners are seeking the eradication of all regulation at any costs.

- v) There is not even a modicum of evidentiary support for the Petitioners' claims that: there are no barriers to entry for competitors; that the decision and the CRTC are out of step with the regulatory practices of other jurisdictions and the recommendations of the Telecom Policy Review Panel, and; that the decision will impede innovation, investment and productivity.
- vi) On the contrary, the barriers to entry have been aptly illustrated by the behaviour of the Petitioners and consequent effects on the market. This behaviour necessitated the inclusion of forbearance criteria relating to competitor access to wholesale broadband and competitor quality of service. It has included an array of anti-competitive tactics - outright refusal to deal, the imposition of rates for wholesale facilities and services that far exceed costs, sometimes with mark-ups close to 1000% and poor service quality. Indeed Aliant, the only company actually seeking forbearance in the proceeding had, at the time of the decision, failed to provide a tariff for a wholesale broadband service and had failed to meet the competitor quality of service targets 57% of the time in the six months preceding its application.
- vii) As actual experience with an aggressive deregulatory agenda makes clear, premature deregulation, particularly absent a robust wholesale regime, inhibits competition and investment. The American incumbents similarly pursued an aggressive and highly coordinated political strategy to cut off their rivals' use of their networks at cost-based rates. The resulting deregulation of pricing for unbundled network elements in the U.S. and the corresponding increases in the prices of wholesale services, particularly for local residential services, has had disastrous effects on competitors, causing many to exit that market altogether and severely reducing the amount of capital available to these competitors to invest in their own facilities.<sup>1</sup> The success of the American incumbent lobby also manifested itself in the swift withdrawal of AT&T and MCI from the local market in direct response to wholesale deregulation and their subsequent consolidation into SBC and Verizon (the two largest former monopolies).

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<sup>1</sup> In some cases, prices charged to competitors for wholesale services to provide basic local service are higher than the retail rates charged by U.S. ILECs to their own retail customers. See L. Selwyn, *Avoiding Missteps Made South of the Border: Learning from the US Experience in Competitive Telecom Policy*, August 2006, pages 1 to 3; 16 to 18; and 20.

- viii) Equally important is the dampening effect premature deregulation has on innovation. Of necessity, competitors must innovate to find and exploit new products and services if they are to gain a foothold in the market and compete successfully against entrenched former monopolists. The former monopolists, on the other hand, with their already built networks and vast resources, will "catch up" to competitors' innovations and in fact co-opt these initiatives – but only once demand for them has already been established and the incumbents perceive a direct threat to their dominant market share.
- ix) The former monopoly Petitioners make much of the Telecom Policy Review Panel report reference to "market forces" and the treatment of former monopolies in other jurisdictions. However, the Petitioners' notion of when this reliance on "market forces" should begin is when they have lost a miniscule 5% market share, leaving them with an overwhelming market share of 95%. Certainly the only force at play when a dominant former monopoly is unregulated is the whim or will of that service provider exerted on consumers. This is most clearly depicted by the recent calls for increases to the prices for residential voice service being made by Bell Canada and Bell Aliant. It is extraordinary that at the very time these former monopolies are telling the Government that the local voice market is effectively competitive they are seeking to increase the monthly rates for all local residential telephone subscribers by \$0.80 cents.<sup>2</sup> These same companies have also recently increased the rates for local voice services to the government and large businesses by 10% and over the course of the last year have increased rates for similar services to small and medium customers by the same amount.
- x) The Petitioners try to use statistics from other jurisdictions to obfuscate the facts in Canada. In fact, the concentration of significant market power (SMP) is a key difference between Canada and other jurisdictions to which our regulatory regime is often compared. In 2004, the largest player in Canada – Bell Canada – had almost twice the market weighting of the largest player in the US (Verizon), and 25% greater market

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<sup>2</sup> This rate increase is being sought to offset revenue losses that will arise as a result of the proposed elimination of a one-time service connection charge. According to Bell and Bell Aliant the proposed increase is needed because of competition. Given Bell has about 7.8 million residential local accesses this \$0.80 per month increase would generate about \$75 million annually.

weighting than BT in the UK.<sup>3</sup> In the European Union (specifically among the countries referred to as the EU15), the average market share of incumbent telephone companies for local calls was reported as 67.3% at the end of 2004, meaning that the incumbents in these countries had experienced a market share loss of more than 30% on average at that time across their entire serving territory. This is a significantly higher loss of market share than has been experienced by any Canadian former monopoly to date. As of year-end 2005, the former monopolies held 90% of local residential access lines and 86% of business access lines across the country.<sup>4</sup>

- xi) Given this context, it is particularly ironic that Saskatchewan has brought a petition in this case complaining that the CRTC has failed to recognize "competitive conditions" in Saskatchewan, when SaskTel still retains virtually 100% market share in that province!
  
- xii) The lobby efforts of the former monopoly Petitioners also include a deliberate misrepresentation of the type and degree of regulatory oversight that would ensue subsequent to deregulation. The Petitioners complain that all local exchange carriers will continue to be subject to approximately 50 regulatory rules even after forbearance and that the former monopolies will be subject to a further 15 or more regulatory rules. However, virtually all of these rules are designed to protect consumers, including the most vulnerable, for example:
  - a. Ensuring access by the deaf to message relay service (MRS) technology;
  - b. Requiring provision of billing information to the blind;
  - c. Protecting customer privacy;
  - d. Enabling access to 911 services; and
  - e. Ensuring that those who do not have competitive alternatives or who are on fixed incomes can still subscribe to "stand-alone" primary local exchange service.

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<sup>3</sup> MTS Allstream's submission to the TPRP, Exhibit B, Lemay-Yates Report, page 5.

<sup>4</sup> Excluding out-of-territory. Source: CRTC Telecommunications Monitoring Report, *Status of Competition in Canadian Telecommunications Markets*, August 2006, pages 31 to 33.

- xiii) It appears, judging by their complaints, that the Petitioners would prefer to avoid responsibility for consumer protection measures, as well as measures aimed at meeting the needs of the disabled, enhancing public safety and security, protecting personal privacy and limiting public nuisance.
  
- xiv) Contrary to the exaggerated and misleading claims of the Petitioners, the Decision rests on: a solid and well-tested framework for deregulation that in fact has been repeatedly endorsed by the former monopolies, sound economic principles rooted in competition law, and, is consistent with the TPRP's recommendations. The Government should not be persuaded by their misleading and self-serving rhetoric, but should recognize that the Commission has set out a sound and orderly framework for the deregulation of local telephone services that will serve all Canadians – now and in the future.



## Introduction

1. This is the Response of MTS Allstream Inc. (MTS Allstream) to the Petitions of: (1) Aliant Telecom Inc. (Aliant), Bell Canada (Bell), Saskatchewan Telecommunications (SaskTel) and TELUS Communications Company (TELUS) (together, the former monopoly Petitioners); (2) the Province of Saskatchewan (Saskatchewan); and (3) and the Coalition for Competitive Telecommunications (the Coalition) (collectively, the Petitioners) requesting that the Governor in Council refer Telecom Decision CRTC 2006-15, *Forbearance from the regulation of retail local exchange services* (the Decision) back to the Canadian Radio-television and Telecommunications Commission (the Commission or the CRTC) for reconsideration.
2. MTS Allstream is both an incumbent local exchange provider (ILEC), in Manitoba, and Canada's leading competitive provider of telecommunications services, outside Manitoba. It is thus in a unique position to respond to the Petitioners' claims respecting the treatment of competition generally, and ILECs specifically, in the Decision.
3. These petitions are an attempt by Canada's largest former monopolies and their allies to challenge the Decision because it ensures the one thing that the former monopolies fear the most: genuine and sustainable competition in the retail market for local voice services. To "support" their arguments, the Petitioners rely on a combination of rhetoric, media headlines and selective mischaracterizations of the report of the Telecommunications Policy Review Panel (the TPRP Report). They provide no hard evidence to support their arguments, because there is none.
4. Rather, the Petitions are a clear attempt to misrepresent the findings in the recent the TPRP Report, still under study by the Government, and to use them to hijack a specific ruling of the Commission respecting forbearance from retail rate regulation of local telephone services. The former monopoly Petitioners are unhappy with the Decision because it recognizes that they continue to exercise significant market power (SMP) in this last, and most critical, segment of the telecommunications market. This market power has been conclusively demonstrated over and over again, and is flagrantly evidenced in the recent action of Bell and Aliant to raise their rates by close to 5% in the local residential market and 10% in the business market. The ability to sustain a

non-transitory rate increase of this nature is the *sine qua non* of market power. It is extraordinary that the former monopoly Petitioners would come to the government claiming that regulatory forces impede their ability to compete while they demonstrate their continued ability to raise prices at will.

5. The Petitioners take broad themes and principles from the TPRP Report - such as greater reliance on market forces - and then twist these themes to serve the Petitioners' specific objectives in overturning the Decision. A prime example is the Petitioners' selective quoting from the TPRP Report's observations on the state of competition in telecommunications markets generally in Canada, and then their misleading contrasting of these observations with findings of fact made by the CRTC in respect of the local market specifically.
6. In doing so, and in employing overheated rhetoric, the Petitioners misrepresent:
  - a. What was at stake in the local forbearance proceeding and therefore what that proceeding was in fact about;
  - b. The Commission's actual process, analysis and determinations in the Decision; and
  - c. The consequences of the Decision: the public interest versus the interest of the Petitioners.
7. What is at stake? The Petitioners pretend the overall regulatory regime applicable to telecommunications in Canada is at stake. The fact is that the CRTC has already deregulated services representing 70% of the industry's revenues. What is at stake in the proceeding is but one issue: the deregulation of retail local telephone services. These form part of the former monopoly Petitioners' last enduring bastion of market power over local access services (which include both voice and data). Local access is the last segment in which the former monopoly Petitioners continue to exercise SMP, but this segment is critical: it affects every individual Canadian and business' most basic ability to communicate. Therefore, what is at stake is precisely the appropriate criteria for transitioning the retail phone market to competition from its former monopoly, and

therefore currently regulated state, and the post-forgbearance conditions that will apply to protect Canadians who will not enjoy competitive alternatives.

8. What the Commission did. The former monopoly Petitioners have aggressively lobbied for local forbearance and, in the proceeding itself, called for clear and specific criteria to enable expeditious deregulation of the retail local phone market. The Commission responded to this call by setting exactly such criteria in the Decision, applying its established framework – taken directly from competition law – for the deregulation of telecommunications services. As a quasi-judicial tribunal, the Commission employed competition law principles and sound economic analysis to assess the evidence before it respecting such highly technical issues such as the appropriate geographic market and criteria such as market share loss and barriers to entry in determining the framework for forbearance. This process was consistent with competition law analysis at home and around the world.
9. The former monopoly Petitioners misrepresent the Commission as having unduly relied on market share in establishing its criteria. Ironically, the former monopoly Petitioners themselves proposed that market share loss be the only criterion for forbearance going forward – and yet the market share loss they proposed would still leave them with a startling 95% market share. The former monopoly Petition is ostensibly motivated by their disappointment at the 25% figure for market share loss ultimately required by the CRTC, although this figure is still highly conservative by any competition law standard.
10. In fact, however, the former monopoly Petition is really motivated by the other criteria established by the Decision – in particular, the requirement that ILECs provide their competitors with adequate wholesale quality of service (Q of S). It is telling that the former monopoly Petitioners avoid any substantive explanation of why this is problematic, begging the question as to why they should be permitted to provide inferior service to their competitors. Such inferior service persists despite the fact that competitors are paying significant sums to the former monopoly Petitioners for both wholesale and retail services.
11. Consequences of the Decision: the public interest vs. the Petitioners' interests. The Decision serves the public interest: it is designed to promote and advance competition

by ensuring that forbearance is granted only where competition is sustainable, and thus where there are clear benefits to consumers. Genuine competition will produce the choice and lower prices that benefit consumers and support the Government's productivity agenda.

12. In contrast, the Petitioners' proposals do not serve the public interest: they are designed to serve only the Petitioners' interests in eradicating regulation at all costs, which will then allow them to engage in, or benefit from, anti-competitive tactics which serve to decimate the competition. Indeed, the Petitioners have presented no sound evidence at all for their proposals, preferring to campaign against the CRTC using the media, marketing campaigns and rhetoric, in every forum they can find. This "petition by headline" approach is truly an abuse of process, and when stripped of its rhetoric is superficial and ultimately unpersuasive.
13. The ramifications of the Decision are also important for innovation and investment. Although the Petitioners pretend that regulation is bad for innovation and investment, the truth is that the former monopoly Petitioners have rarely been the source of innovation in telecommunications markets. Only genuine competition spurs innovation, and hence increases investment. In recognition of this fact, many of the CRTC's determinations were specifically aimed at remedying the lack of any competition in certain areas, the poor quality of service offered by the former monopoly Petitioners to competitors where competition exists, and the need to ensure competitive investment is not eradicated prematurely through anti-competitive behaviour by incumbents. Indeed, as discussed in more detail below, many of the overarching principles in the Decision reflect those in the TPRP Report.
14. A careful review of the Petitioners' arguments reveals a fatal lack of substance. The Petitioners have chosen to rely on media headlines, overwrought rhetoric and selective mischaracterizations of the TPRP Report to attempt to persuade the Government of their views. Moreover, their petitions show a careful avoidance of damaging truths, including (a) the fact that, until this Decision, the Petitioners have consistently endorsed the CRTC's approach to deregulation, which is founded on competition law principles; (b) the former monopoly Petitioners have consistently failed to achieve their Q of S targets, preferring to use them as anti-competitive tools, and thus do not come with "clean

hands" to their proposal that such criteria be eradicated; and (c) the consistent lack of innovation on the part of the former monopoly Petitioners, which belies their arguments that deregulation based on market share alone is sufficient to ensure that competitive market forces will bring benefits to Canadians. A look at the record, rather than at abstract theory, demonstrates why the Petitioners can present no persuasive evidence for their case.

15. Acceding to the Petitioners' requests would not advance the debate respecting the future of telecommunications regulation in Canada but rather would create even greater uncertainty in the market place by calling into doubt clear, achievable criteria for the deregulation of the critical retail market for local services established in accordance with both the *Telecommunications Act* (the *Act*) and competition law principles. Accordingly, the Governor in Council should **deny** these Petitions.

***At stake: Genuine competition in the retail market for local services***

16. The Petitioners adopt overheated rhetoric to attempt to convince the Governor in Council that the overall regulatory regime applicable to telecommunications in Canada is at stake. However, as detailed below, this ignores the fact that CRTC has already deregulated services representing 70% of the industry's revenues.<sup>5</sup> What is at stake in the proceeding is but one issue: the deregulation of retail local telephone services. These form part of the former monopoly Petitioners' last enduring bastion of market power over local access services (which include both voice and data). Local access is the last segment in which the former monopoly Petitioners continue to exercise SMP, but it is a critical segment: it affects every individual Canadian and business' most basic ability to communicate. Therefore, what is at stake is precisely the appropriate criteria for transitioning this specific market segment from its current state of retail price regulation to competition, and the post-forbearance conditions that will apply to protect Canadians who will not enjoy competitive alternatives.

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<sup>5</sup> See Appendix 1 for a summary of the Canadian Telecommunications Markets currently subject to the CRTC's forbearance rulings.

***The Critical Significance of the Local Telephone Market***

17. The market for local exchange services is the most fundamentally important telecommunications market in Canada. Virtually every Canadian enjoys local telephone service, and in a country the size of Canada, with its remote regions as well as urban centres, this is no small achievement. Local telephone service is not only Canadians' connection to the world at large for a myriad of personal and business purposes, but it is their connection to essential emergency services. Thus, the deregulation of retail rates for local phone services affects almost every individual and business in Canada.
18. As noted in the TPRP Report, regulation of local telephone service has two functions: economic and social.
  - i) *The TPRP Report recognized that economic regulation is required where a player has SMP*
19. Although the TPRP Report recommended moving from a system of *ex ante* to *ex post* economic regulation, it also recognized that "regulation would continue in markets where there is significant market power."<sup>6</sup>
20. Economic regulation in the local telephone market has taken place in recognition of the SMP of the ILECs. As historic monopoly providers, the former monopoly Petitioners possess numerous incumbency advantages, which contribute to their continuing SMP in the local telephone market. They own and control ubiquitous networks, connected to virtually every residential and business customer in their serving territories. They have long-standing relationships with almost all local exchange customers. They possess the informational advantages that come from understanding customers' unique histories and calling patterns. In contrast, competitors must build or access infrastructure, face customer inertia in local markets and shoulder high customer acquisition costs, among other barriers to entry. As a result, almost ten years after the Commission opened the way to competition in the local exchange market, the ILECs continue to retain enormous market share for local exchange services in their serving territories across the country, even in those few geographic markets where competition has finally begun to take root.

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<sup>6</sup> TPRP Final Report, page 5.

21. The arguments of the former monopoly Petitioners completely ignore this central issue. Moreover, a recent and flagrant example demonstrates unequivocally how the former monopoly Petitioners continue to exercise significant market power in the market for local voice services, all the while pleading the very opposite to the Government.
22. Under competition law, the ability to sustain a non-transitory price increase of 5% is the *sine qua non* of market power. Recently, both Bell and Aliant filed tariff applications in which they proposed to eliminate their Service Connection charges (applicable to new or moving Bell local exchange service customers) in favour of increasing the monthly rates for all local residential telephone subscribers by \$0.80 cents per month – across their entire serving territories.<sup>7</sup> Both claimed that the overall impact of this would be revenue-neutral. In its filing, Bell focuses only on its claim that elimination of the service connection charge will "align the Company's pricing practices with those of its competitors"<sup>8</sup> – surely the first time that competition has been relied upon to justify higher prices! Moreover, both Bell and Aliant have just received approval to raise their rates for Centrex and a suite of related local business services by 10%.<sup>9</sup>
23. Bell's and Aliant's competitors do not charge service connection fees because they can't, and they would be delusional if they believed they could succeed in compensating for the costs of service connection by charging their existing base of customers higher rates. Only former monopoly providers like Bell and Aliant have the ability to make sure they are kept whole for measures they take ostensibly to meet the competition. Their ability to simply impose a 5% non-transitory rate increase in the price of the underlying service in this fashion, and to impose that increase on their entire residential customer bases, as well as a 10% rate increase for their business customers, is an unequivocal demonstration of their significant market power. Their ability to reap millions from their customer base purportedly because of competition defies logic and brings into sharp focus the lack of workable competition in the marketplace, which would ordinarily serve to discipline prices to the benefit of consumers. In MTS Allstream's view, it is absolutely extraordinary that the former monopoly Petitioners would have the effrontery to come to the Government and claim that they no longer possess SMP at the same time as they

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<sup>7</sup> Bell Tariff Notice No. 6967, 7 July 2006; Bell Aliant Tariff Notice 18, 7 July 2006.

<sup>8</sup> Bell Tariff Notice No. 6967, 7 July 2006; Bell Aliant Tariff Notice 18, 7 July 2006, paragraph 4.

actively take steps that demonstrate their continued possession and abuse of that very power.

24. The Petitioners' contention that Canada is out of step with other countries around the world fails to recognize that incumbent telephone providers possess SMP in local markets in most countries around the world and hence continue to be subject to some degree of regulation. Accordingly, even under a different regulatory regime, an analysis of market power in Canada would bring us to the same factual conclusion: that the incumbents possess SMP in the market for local exchange services.
25. The Petitioners cite, as one international example, the UK, where they claim that *ex ante* regulation has been replaced with regulation based on the principles of general competition law. The UK example bears more than a passing mention, however. When the UK moved to implement the introduction of European law, a package of supposedly "deregulatory" reforms was introduced. Notably, the conclusions reached at the end of this reform process were substantially the same as the conclusions reached in the Decision of the CRTC – that the incumbents possessed SMP.<sup>10</sup>
26. The EU framework required that the first step to be followed by national regulators was to conduct a market analysis of a wide list of markets to establish whether carriers had SMP. This resulted in British Telecom (BT), the incumbent, being subject to conditions consequent on BT's SMP largely in the same markets where it was previously subject to regulation, including the retail market for local voice services.
27. In lieu of the prospect of Ofcom, the UK regulator, making a reference to the Competition Commission for investigation of whether the only solution to existing market failures would be the full structural separation of BT's wholesale network operations and its retail

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<sup>9</sup> Telecom Order CRTC 2006-191 (Interim approval), 21 July 2006.

<sup>10</sup> In *The Communications Market 2005: 3 Telecommunications*, at 107, Ofcom discussed Phase 2 of its strategic review of the telecommunications sector and options for future regulation. It noted that although full deregulation would "significantly reduce intervention in fixed line markets...given BT's continued market power, this would be unlikely to encourage the growth of greater competition; consequently, Ofcom does not believe this would serve the best interests of the consumer." Report available online at <http://www.ofcom.org.uk/research/cm/cm05/telecommunications.pdf>



service provision,<sup>11</sup> BT offered to undertake to provide "equivalency of inputs" to its competitors for specified products and services – i.e., to provide them to its competitors on the same terms and conditions that it provided them to its own retail businesses. Not only does this increase transparency and lessen the advantage previously held by BT, but it ensures that competitors receive the same Q of S from the wholesale operator as BT's retail business itself.

28. Accordingly, implementation of the EU's supposedly deregulatory approach did not result in any lessening of regulation of BT in local markets, even though it was based on the competition law principles espoused by the Petitioners. Indeed, the review resulted in some tightening of regulation on BT in certain areas and a strengthening of wholesale regulation.<sup>12</sup> Appendix 2 compares the Canada/UK local phone service forbearance environment.
29. Moreover, MTS Allstream notes that concentration of SMP is a key difference between Canada and other jurisdictions to which our regulatory regime is often compared. In 2004, the largest player in Canada – Bell Canada – had almost twice the market weighting of the largest player in the US (Verizon), and 25% greater market weighting than BT in the UK.<sup>13</sup> In the European Union (specifically among the countries referred to as the EU15), the average market share of incumbent telephone companies for local calls was reported as 67.3% at the end of 2004, meaning that the ILECs of these countries had experienced a market share loss of more than 30% on average at that time across their entire serving territory. This is a significantly higher loss of market share than has been experienced by any Canadian ILEC to date – a key consideration for the deregulation of rates in the local services market.<sup>14</sup>

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<sup>11</sup> For a full description of the UK regime and developments, see MTS Allstream's submission to the TPRP, Appendix D, Report of Towerhouse Consulting available online at <http://telecomreview.ca/epic/internet/intprp-gecrt.nsf/en/rx00043e.html>

<sup>12</sup> See MTS Allstream's submission to the TPRP, Exhibit D, Towerhouse Report, pages 9 to 11.

<sup>13</sup> MTS Allstream's submission to the TPRP, Exhibit B, Lemay-Yates Report, page 5.

<sup>14</sup> Lemay-Yates Associates Inc., "A Comparison of VoIP regulations between Canada and Other Countries," 5 June 2006, page 1, Appendix 1 to the comments of Cogeco Cable Inc., Quebecor Media Inc. and Rogers Communications Inc. submitted in response to Public Notice CRTC 2006-6, *Reconsideration of Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision 2005-28, 10 May 2006.

30. Similarly, in the U.S., only two states have deregulated ILEC retail rates for basic services: Michigan, where ILEC market share loss in the 30 largest exchanges was 36% at the time of deregulation (mid-2005); and South Dakota, where competitor share in mid-2005 was 32%.<sup>15</sup>
31. Given this context, it is particularly ironic that Saskatchewan has brought a petition in this case complaining that the CRTC has failed to recognize "competitive conditions" in Saskatchewan, when SaskTel still retains 100% market share in that province!<sup>16</sup>
32. The Petitioners also cite the TPRP Report as stating that Canada is "falling behind" other nations. But the TPRP Report makes this claim in respect of two markets, neither of which are subject to retail regulation: broadband, where Canada has moved from second to fifth place in the world; and wireless, where penetration lags.<sup>17</sup> Notably, the Commission took steps to ensure that both markets were sufficiently competitive before deregulating retail rates, and today both markets continue to be much more competitive than the retail market for local voice services. Under the Petitioners' ideology, such deregulation should have meant that wireless and broadband services would be more advanced when compared to other nations, but this has obviously not been the case. Accordingly, the Petitioners' attempt to link regulation of the ILECs in the retail market for local phone service with Canada's purportedly "lagging" performance in the world is patently misleading.
33. Thus, far from being "out of step" internationally as the Petitioners claim, the Commission's approach to forbearance, which starts with an analysis of SMP in the relevant market using competition law principles, is consistent with that used around the world, and is particularly apropos in the critically important market for local services.
- ii) The Petitioners attempt to evade social regulation despite its endorsement by the TPRP*

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<sup>15</sup> Lemay-Yates Associates Inc., "A Comparison of VoIP regulations between Canada and Other Countries," 5 June 2006, page 27.

<sup>16</sup> Report to the Governor in Council, *Status of Competition in Canadian Telecommunications Markets*, October 2005 (2005 Competition Report), Table 4.3.5, *Incumbent Local Retail Market Share by Province (lines)*, page 45.

<sup>17</sup> TPRP Final Report, pages 1-13 and 1-14; 1-17 and 1-18.

34. In addition to economic regulation, social regulation has helped to ensure the reliability and affordability of local services for all consumers in line with the policy objectives of the *Act*, and to achieve important social goals. The Petitioners complain that all local exchange carriers will continue to be subject to approximately 50 regulatory rules even after forbearance, and that the ILECs will be subject to a further 15 or more regulatory rules. However, virtually all of these rules are designed to protect consumers, including the most vulnerable: for example, they ensure access by the deaf to message relay service (MRS) technology; they require provision of billing information to the blind; they protect customer privacy; they enable access to 911 services; and they ensure that those who do not have competitive alternatives or who are on fixed incomes can still subscribe to "stand-alone" primary local exchange service.
35. Significantly, the TPRP Report recommended the retention of social regulation and proposed that the policy objectives of the *Act* explicitly recognize such key social objectives as meeting the needs of the disabled, enhancing public safety and security, protecting personal privacy and limiting public nuisance.<sup>18</sup> One must conclude, judging by their complaints, that the Petitioners do not agree with this aspect of the TPRP Report and would prefer to evade any social responsibility.
36. Any forbearance from regulating local exchange services must ensure that these public policy goals are not left solely to market forces. This is particularly important when considering those customers who, even in a forborne geographic area, may not have access to competitive alternatives. The post-forbearance criteria designed by the Commission, as discussed in more detail below, was intended to reduce economic regulation as far as possible while still retaining those protections for vulnerable customers – the elderly, the disabled, those in remote or underserved areas and those on fixed incomes, among others - who may not have a choice of local telephone providers.
37. The Commission recognized that for some customers (particularly residential customers), the operation of market forces after forbearance could result in either a loss of services on which they relied, or increases in prices for services essential to their daily

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<sup>18</sup> TPRP Final Report, page 9.

lives. It also recognized that, even within forborne markets, there could be pockets of uncontested customers. It therefore retained certain powers to impose conditions, should that prove necessary.<sup>19</sup> The few "additional" rules the Petitioners complain of (and list in their supplementary information provided 2 June 2006 to the Governor in Council) are not in fact new and are hardly onerous. They relate primarily to the requirement to provide stand-alone primary exchange service, which the Commission found was important in order to ensure that basic telephone service remains affordable for those on limited incomes even in a forborne environment. They also include the provision of certain services to the disabled and to shelters for victims of domestic violence.<sup>20</sup>

38. In short, all of the regulations that the Commission retained are key to ensuring the accessibility and affordability of basic telephone services in a forborne environment, and are directly related to the social policy goals of the *Act*.

***The Commission's track record of forbearance and its reliance on competition law***

39. The Petitioners claim that the CRTC adopted a "flawed" approach to regulation, that it failed to comprehend or use basic economic principles<sup>21</sup> and that its approach is inconsistent with that recommended by the TPRP Report.<sup>22</sup> They accuse the Commission of being out of touch with market realities,<sup>23</sup> unwilling or unable to reform regulation,<sup>24</sup> and out of step with international models.<sup>25</sup>
40. Reality, and history, belies each of these accusations.
41. Contrary to the exaggerated and misleading claims of the Petitioners, it is clear that the Decision rested on a solid and well-tested framework for deregulation, was based on

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<sup>19</sup> Decision 2006-15, paragraphs 354 to 361.

<sup>20</sup> The rules applicable only to ILECs include: provision of stand-alone PES; retention of the ILECs' obligation to serve with respect to residential stand-alone PES; provision of publicly available rate schedules for PES; and certain of the ILECs' terms of service, including disconnection and suspension policies, termination of PES service and deposit policies for PES customers; and a rate ceiling on residential stand-alone PES.

<sup>21</sup> The former monopoly Petition, paragraph 17.

<sup>22</sup> The former monopoly Petition, paragraph 14.

<sup>23</sup> The former monopoly Petition, paragraph 11.

<sup>24</sup> The former monopoly Petition, paragraph 17.

<sup>25</sup> The former monopoly Petition, paragraph 17.

sound economic principles rooted in competition law, was consistent with the TPRP's recommendations, and was moreover based on an approach which was specifically endorsed by the former monopoly Petitioners.

42. First, far from exhibiting a failure to comprehend economic principles, the Commission's forbearance analysis is based directly on competition law, specifically on an analysis of market power that is used by competition authorities around the world. In Decision 94-19, the Commission first set out its framework for forbearance, noting that all of the parties to that proceeding had recommended criteria drawn from competition law principles, namely:

- (1) the Commission should forbear when a market becomes workably competitive;
- (2) a market cannot be workably competitive if the dominant firm possesses substantial market power;
- (3) market power is a function of three factors: (a) market share held by the dominant firm; (b) demand conditions affecting responses of customers to a change in price of the product or service in question; and (c) supply conditions affecting the ability of other firms in the market to respond to a change in the price of the product or service;
- (4) high market share is a necessary but not sufficient condition for market power; other factors must be present to enable a dominant firm to act anti-competitively.<sup>26</sup>

43. It is key to recognize that this approach has been specifically endorsed by the Petitioners (many of whom were parties to the proceeding that led to Decision 94-19) on numerous occasions until the release of the Decision, when they suddenly and inexplicably found this to be a "flawed approach to regulation."
44. The principles set out by the CRTC in Decision 94-19 reflect standard market power assessment criteria used not only by the Competition Bureau in Canada, but by competition authorities around the world. These principles have been used repeatedly and successfully by the CRTC to deregulate the majority of telecommunications markets in Canada. Indeed, the TPRP itself noted: "In deciding whether or not to regulate, account should be taken of the CRTC's telecommunications sector experience to date."

including its experience in establishing criteria for forbearance in the local exchange services market."<sup>27</sup> (emphasis added)

45. Second, the CRTC is keenly aware of market realities and has shown itself more than willing to reform regulation where required. Indeed, it has steadily deregulated markets over the past 12 years: today, approximately 70% of the Canadian telecommunications market (by revenues) has been forborne from rate regulation.<sup>28</sup> As can be seen from the table in Appendix 1, the Commission has already forborne from regulating, for example, long-distance services, mobile wireless services, retail Internet services and data services. Its determination to refrain from regulation in each case has been based on its finding that, pursuant to section 34 of the *Act*, there was competition in these markets sufficient to protect the interests of users. Given that the majority of Canadian telecommunications markets are now deregulated, it is disingenuous at the least for the Petitioners to accuse the Commission of being "unable or unwilling" to deregulate.
46. Third, the Petitioners selectively quote from the TPRP Report to argue that "market forces" are more efficient than regulators. However, as noted above, the Petitioners omit to note that the TPRP also stated that "Economic regulation should be maintained or imposed only where there is a finding that the service provider has SMP in the market for a service"<sup>29</sup> (emphasis added). A market with an unregulated dominant player will certainly have a "force" at play – that of the dominant provider's whim or will, exerted on consumers without effective alternatives. But that is the force of a monopoly market, not the competitive market sought by the Government. Put another way, unless there are competitors – and competitive market forces – you cannot have workable competition.
47. The TPRP Report was focused primarily on efficiency, not on the creation of sustainable competition. The former monopoly Petitioners have conflated these two concepts. Market forces can only be efficient when there is sufficient competition to create a competitive market in the first place. It is competition which disciplines all players and generates efficiencies-not the other way around. In a market where one or more players exercise SMP, it is highly unlikely that competitive market forces will ever take hold on

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<sup>26</sup> Decision 94-19, Part III FORBEARANCE, Item B *Criteria for the Application of Section 34*.

<sup>27</sup> TPRP Final Report, pages 3-14.

<sup>28</sup> CRTC submission to TPRP, 17 August 2005, paragraph 82.

their own, as can be witnessed by the demise or restructuring of numerous competitors in the telecommunications market for local phone services over the last several years.<sup>30</sup>

48. As discussed above, it is undeniable that the ILECs continue to exercise SMP in the market for local services. In fact, this is the proverbial elephant in the room that goes ignored throughout the Petitioners' submission. As of year-end 2005, the ILECs held 92.4% of local residential access lines and 86% of business access lines across the country.<sup>31</sup> Given this finding, and in line with the TPRP's recommendation, economic regulation must be maintained in this market.
49. Notwithstanding the overwhelming SMP possessed by the former monopoly Petitioners, the Commission has recognized that in certain pockets of the country, competition has begun to advance. In view of this fact, the Commission initiated this proceeding by which it could establish the appropriate criteria to transition the market for local exchange services to competition, based on the principles that it had established in Decision 94-19. In the Decision, the Commission also recognized the need to expedite applications for forbearance based on the evolving nature of the market:

In deciding to establish the local forbearance framework in this Decision, the Commission has been cognizant of the dynamic nature of the local exchange services market in which competition is developing rapidly. The Commission is concerned that to subject every application for forbearance from regulation of local exchange services in a relevant market to a full Decision 94-19 analysis would run the risk of delaying forbearance beyond the point at which regulation was efficient and effective.

The Commission has, therefore, established a local forbearance framework in this Decision, which sets forth criteria, that will enable it to reach more expeditious determinations on ILEC applications for local exchange services forbearance in particular

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<sup>29</sup> TPRP Final Report, pages 3-13.

<sup>30</sup> In 2001 and 2002 alone, eleven competitive telecommunications providers failed: Axxent, C1, Connect, Maxlink, Norigen, NorthPoint Canada, Psi Net, Riptide, RSP.com, Vidéotron Telecom and Wispra. Three others underwent major restructurings and have all since been purchased by larger undertakings: Call-Net Enterprises Inc., which was purchased by Rogers Communications Inc.; GT Group Telecom Limited, which was purchased by 360 Networks, which in turn was purchased by Bell Canada; and AT&T Canada Corp., the predecessor to Allstream Corp., which was purchased by MTS.

<sup>31</sup> Excluding out-of-territory. Source: CRTC, Telecommunications Monitoring Report, *Status of Competition in Canadian Telecommunications Markets*, July 2006, pages 36 and 37.

relevant markets than would a full Decision 94-19 analysis in each case. The Commission considers that this framework will enable it to determine whether forbearing in a particular relevant market would be consistent with the requirements of section 34 of the Act without delaying the potential benefits of competition, particularly facilities-based competition, to customers any longer than is necessary.<sup>32</sup>

50. As discussed in more detail below, the Commission's criteria are (a) carefully crafted, in line with competition law principles used around the world, to ensure that consumers will enjoy the benefits of sustainable competition in local markets where forbearance is granted; and (b) designed so as to expedite forbearance applications where appropriate – consistent with the requests by the Petitioners themselves in the proceeding leading up to the Decision. In addition, MTS Allstream notes that the Commission has also stated elsewhere that while the criteria it has chosen will allow it to accelerate determinations where the applicant has requested forbearance on an expedited basis, to the extent that an applicant does not meet these criteria, it remains free to apply to go through the full Decision 94-19 analysis.<sup>33</sup>

***What the Commission did***

51. The Decision establishes clear, specific criteria for deregulating retail prices in the local services market. It applies to this market the CRTC's established framework for forbearance, which is taken directly from competition law. In doing so, the CRTC, a quasi-judicial tribunal, assessed the evidence before it respecting such highly technical issues such as the appropriate geographic market and criteria such as market share loss and barriers to entry in determining the specific criteria applicable to the local market. Far from creating uncertainty, as the Petitioners claim, the Decision provides a precise set of criteria, none of which is onerous for the ILECs to meet, aimed at ensuring that the ILECs' services are forborne as soon as – but no sooner than – sustainable competition has taken root that can protect consumers.
52. A review of the Decision demonstrates that the CRTC's analysis was balanced, expert and appropriate. The CRTC, a quasi-judicial tribunal, based the Decision on the

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<sup>32</sup> Decision 2006-15, paragraphs 20 and 21.

<sup>33</sup> See CRTC Memorandum of Fact and Law in *Aliant Telecom Inc. v. CRTC et al*, Court File No. 06-A-26 (Application for leave to appeal), paragraph 89.



evidence before it, including evidence as to the evolving nature of the market place. Every party to the proceeding, including the Petitioners, had ample opportunity to submit all evidence felt to be of relevance to the CRTC's analysis. In addition, the CRTC asked interrogatories of parties and conducted a lengthy public hearing at which it fully explored parties' various claims respecting conditions in the market and proposals for criteria.

53. In contrast to the Petitioners, who appear to be basing their arguments on a confluence of media coverage, mischaracterizations of the TPRP Report and wishful thinking rather than on any substantive proof, the Commission gathered hard evidence and made determinations based on the facts before it, supported by its significant expertise.

***Relevant Market***

54. The Petitioners complain that in determining the relevant product market, the CRTC excluded mobile services. This conclusion, however, was clearly supported by both the evidence and standard competition law analysis.
55. Since their inception, mobile services have been treated as being in a separate market, as the Decision found. Moreover, based on the record of the proceeding, the CRTC took into consideration the following relevant facts regarding mobile services (including the Petitioners' mobile services) that are clearly relevant to a competition law analysis of substitutability:
- a. pricing methodologies are fundamentally different in the mobile market than in the local wireline market, particularly with respect to usage-sensitive pricing of mobile;<sup>34</sup>
  - b. mobile services are not marketed as substitutes for wireline services, as demonstrated by evidence that several Canadian carriers offer bundles consisting of both wireline and mobile wireless services, which the CRTC

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<sup>34</sup> Decision 2006-15, paragraph 58.

correctly observed, "would suggest that the two services are not substitutes for each other;"<sup>35</sup> and

- c. the evidence in the proceeding demonstrated that only 2.7% of all households had replaced their wireline service with wireless service, despite the fact that 67% of Canadian households have at least one subscription to a mobile service.<sup>36</sup>
56. With perfect hindsight, the Petitioners claim that this latter finding was "out-of-date," citing statistics which came out on April 5, 2006, one day before the Decision was issued, which show that the proportion of Canadian households relying solely on mobile phones has increased to 4.8%.<sup>37</sup>
57. One cannot assume, however, that even had these new statistics been available during the proceeding, the CRTC should necessarily have arrived at a different conclusion. That is because the relevant question in competition law is not just whether 2.7 or 4.8% of persons are substituting one service for another. The issue is also whether mobile services, of which the ILECs are themselves major suppliers, are capable of exerting discipline on the ILECs' pricing of wireline services. Taking into account all of the evidence submitted in the proceeding, including relevant evidence relating to the actual manner in which the two services are priced and marketed, the CRTC was not able to hold at this time that there is a basis for finding that they are substitutes. If and when the evidence demonstrates otherwise, the CRTC may change its view.
58. The Petitioners also incorrectly claim the CRTC ignored economic principles in its analysis of the relevant geographic market.<sup>38</sup>
59. In fact, the CRTC reviewed and evaluated all of the options suggested by the parties as to the most appropriate geographic market. It noted that the parties to the proceeding (including the Petitioners) "generally agreed that the Commission should adopt a

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<sup>35</sup> Decision 2006-15, paragraph 59.

<sup>36</sup> Decision 2006-15, paragraph 60.

<sup>37</sup> The former monopoly Petition, paragraph 11. In any event, the Commission has recently issued a new public notice calling for comment on whether it should revisit this aspect of the Decision in light of these new statistics, proving again that it is responsive to the evolving conditions of the marketplace.

<sup>38</sup> The former monopoly Petition, paragraph 45.

geographic component that reflects a social and economic community of interest, that, for example, has substantially similar local telecommunications market conditions, including common pricing and marketing strategies, local service providers and local service offerings; that is administratively practical and competitively neutral; and that has well-defined, stable boundaries."<sup>39</sup>

60. Contrary to the Petitioners' unsubstantiated claims regarding the CRTC's abandonment of economic principles, the CRTC rested its analysis on the very test outlined in the Competition Bureau's Merger Enforcement Guidelines (the MEGs), and applied it in a manner explicitly consistent with regulatory efficiency, as demonstrated by the following excerpt from the Decision:

...The Commission notes that, according to [the Competition Bureau's Merger Enforcement Guidelines and adopted by the Commission in Decision 94-19], the geographic component of the relevant market for local exchange services would be each location, as buyers would not be willing to substitute calling from their location for calling from another location. The Commission notes that the Competition Bureau indicated, in this proceeding, that this would be too narrow a basis to evaluate local forbearance. The Commission also considers that it would be extremely impractical to evaluate local forbearance on a location-specific basis. The Commission considers that there are economic, social and practical factors that will allow locations to be aggregated into a larger geographic area for the purposes of determining the appropriate geographic scope of local forbearance.<sup>40</sup> (emphasis added)

61. This passage makes clear that application of the test from the MEGs would have resulted in each customer location being a geographic market, and the Competition Bureau itself indicated that would be too narrow a basis for evaluating local forbearance. Accordingly, a requirement arose to apply the evidence, and the CRTC's expertise, in order to aggregate locations.
62. After considering all of the evidence on the record, and after carefully reviewing the benefits or detriments of every proposal made by parties, the CRTC determined that the test under the MEGs and Decision 94-19 was most effectively met by aggregating all locations within a census metropolitan area (CMA) in urban areas, and using an

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<sup>39</sup> Decision 2006-15, paragraph 83.

<sup>40</sup> Decision 2006-15, paragraph 141.

economic region (ER), for aggregating locations outside of the CMAs. Both of these aggregations are based on Statistics Canada measures. The Commission referred to both as local forbearance regions (LFRs).<sup>41</sup>

63. Aggregation of markets for purposes of the MEGs is a standard feature of competition law.<sup>42</sup> Moreover, the bases for the CRTC's specific choice, which included the fact that use of a local exchange is more prone to anti-competitive behaviour, are absolutely relevant to competition analysis. Ultimately, the CRTC noted that there are approximately 2700 local exchanges, and the regulatory and administrative burden involved in the ILECs' proposal to use these as the relevant geographic market (multiplied by two to take into account the residential and business markets) would not assist in an orderly transition to a forborne environment.
64. Saskatchewan – where SaskTel holds almost 100% market share – has filed a petition with the Governor in Council specifically complaining about the LFRs established for that province pursuant to the Decision. However, the CRTC explicitly stated in the Decision it would allow for a measure of flexibility and expressed a willingness to entertain applications for local forbearance in an LFR different from that designated in the Decision, where (a) the ILEC can identify an LFR that better achieves the principles and objectives that the CRTC has set out in coming to its conclusions about the appropriate LFRs, and (b) the ILEC can adequately address the impact of its proposal on adjacent LFRs.<sup>43</sup> Clearly, if SaskTel has a good case to make in this regard it would be more appropriate to make it to the Commission at such time as competition has developed in that province, rather than asking the Government to overturn a well-considered and economically sound decision.

### ***Criteria***

65. The Petitioners also complain about the criteria established by the CRTC for local forbearance. These complaints, too, are unfounded.

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<sup>41</sup> Decision 2006-15, paragraphs 141 to 168.

<sup>42</sup> See, for example, *The Director of Investigation and Research v. Hillsdown*, CT-1991-001, Reasons and Order dated March 9, 1992; *The Director of Investigation and Research v. Air Canada*, CT-88/1, Reasons and Order; and *The Commissioner of Competition v. Superior Propane*, CT-1998-02, Reasons and Order dated August 30, 2000.

<sup>43</sup> Decision 2006-15, paragraph 168.

66. The CRTC concluded that an applicant ILEC would be able to demonstrate to the Commission's satisfaction that it could no longer exercise market power in a particular market when it could show that it met the following relevant criteria:
- a. Market share loss of 25% in the relevant market;
  - b. The ILEC has, for the six months prior to the application, met standards for 14 specified Q of S indicators for competitors, when the results are averaged across the six-month period;
  - c. The ILEC has put into place the necessary Competitor Services tariffs;
  - d. The ILEC has provided competitor access to its Operating Support Systems where required; and
  - e. The ILEC has demonstrated that rivalrous behaviour exists in the relevant market.

*A. Market share loss of 25% in the relevant market*

67. Although the Decision means that an ILEC could qualify for forbearance even when it still retains as much as 75% of the relevant market, the Petitioners claim loudly that the 25% market share loss criterion is too high.<sup>44</sup>
68. In the proceeding, Aliant, Bell and SaskTel all proposed a market share loss of a mere 5% as being sufficient for deregulation and further proposed that this would be the only criterion applied on a going-forward basis.<sup>45</sup> In other words, upon the ILEC's market share hitting 95%, their services would be automatically deregulated. It is necessary to place this arrogant and extreme claim into context, particularly in light of the Petitioners' complaints that the CRTC is somehow out of step with competition law and practices in other jurisdictions.
69. In Canada, when assessing mergers, the Competition Bureau has often required remedial measures where the merged firm would account for more than 50% of the

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<sup>44</sup> The former monopoly Petition, paragraphs 20 to 24 and 44.

<sup>45</sup> TELUS effectively proposed a requirement for the presence of a facilities-based competitor.

sales, production or capacity in a relevant market, if there is evidence of significant barriers to entry and an absence of countervailing factors.<sup>46</sup>

70. Similarly, in the European Community, a 40% market share gives rise to a rebuttable presumption that a firm has SMP; the European Union uses a 25% share as a benchmark for possible market power, and 50% for possible market dominance.<sup>47</sup> Moreover, an operator who has SMP in a given market may also be deemed to have SMP in a closely related market if the relationships between the two markets are such that the operator can leverage its existing market power into the second market.<sup>48</sup>
71. It is clear that the CRTC's criterion, under which an ILEC becomes eligible for deregulation despite retaining 75% of the market, still allows a dominant provider to hold far more of the market than would be permissible under the market share component of an SMP analysis employed by either Canadian or European competition authorities. Accordingly, contrary to the indignant claims of the Petitioners, the 25% market share loss criteria is considerably more conservative than would be found under competition law, both nationally and internationally.
72. One of the Petitioners' main complaints appears to be the different approach taken by the CRTC to deregulation of local telephony and basic cable rates. This comparison is badly flawed. The two services are very different; the legislative regimes and public policy frameworks underlying their regulation and hence the analysis used for

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<sup>46</sup> See *Commissioner of Competition v. Bayer AG Aventis Crop Science Holding S.A.* (CT2002-003) (market concentration of 60% in agricultural pesticides used for tomato crops and 47% for apple crops) (Statement of Grounds and Material Facts, paragraph. 45); *Commissioner of Competition v. United Grain Growers Limited* (CT2002-001) (merged firm would have held over 50% of primary grain handling in several markets and 63% of port terminal grain handling capacity in Vancouver) (Statement of Grounds and Material Facts, paragraph. 12); and *Commissioner of Competition v. Lafarge S.A.* (CT2001/004), (merging parties would have held 58% of cement capacity in Ontario). (Statement of Grounds and Material Facts, paragraph 33).

<sup>47</sup> European Commission, *Commission Guidelines on market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services*, OJ C 165, 11.07.2002 at paragraph 75, available online at [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/smp\\_guidelines/c\\_16520020711en00060031.pdf](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/smp_guidelines/c_16520020711en00060031.pdf).

<sup>48</sup> European Commission, *Commission Guidelines on market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services*, OJ C 165, 11.07.2002 at paragraph 75, available online at [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/smp\\_guidelines/c\\_16520020711en00060031.pdf](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/smp_guidelines/c_16520020711en00060031.pdf).

deregulation are different; and in any event, the Commission's decision to allow deregulation of cable rates after market share loss of only 5% has not increased consumer welfare, as rates for basic cable have gone up, not down, in markets where cable deregulation has taken place.

73. Comparing cable with local telephony is just not an "apples to apples" exercise. On the one hand, as discussed above, local telephone service is Canadians' most basic social, economic and safety link to the world around them. It is an essential service supported by a universal access obligation under the *Act*. On the other hand, television is, well, television. It is used to inform and entertain.
74. The *Act* contains specific provisions for detailed economic regulation, including the explicit regulation of rates, and includes among its policy objectives the enhancement of efficiency, competitiveness and increased reliance on market forces.<sup>49</sup> In contrast, the *Broadcasting Act* refers to the affordability of cable rates among a long list of cultural objectives that relate primarily to cultural concerns such as, for example, the provision of Canadian content, programming standards, and the carriage of foreign and domestic television and radio services by Canadian distribution undertakings. The *Broadcasting Act* does not include any explicit provision relating to economic regulation, let alone rate regulation. Indeed, the Federal Court of Appeal, in a case dealing with the deregulation of cable rates, expressly noted this difference between the two pieces of legislation. After referencing s. 25 of the *Act* (which requires Commission approval of rates) the Court stated: "There is no similar provision in the *Broadcasting Act*, which demonstrates that Parliament did not intend to provide for the strict regulation of rates."<sup>50</sup> The two Acts are thus fundamentally different in both structure and purpose.
75. Under the forbearance provisions of the *Act*, the CRTC engages in a competition law analysis, as urged upon it by government and industry. In the case of the deregulation of basic cable rates, the deregulatory framework was established by the CRTC itself in regulations promulgated by it in response to a new regulatory framework for broadcasting. A small part of this framework dealt with rates charged by the largest

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<sup>49</sup> *Telecommunications Act*, S.C. 1993, c. 38, s. 7(c) and 7(f).

<sup>50</sup> *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission* (F.C.A.), [2004] 2 F.C.R. 3, paragraph 68.

cable companies for a subset of their service offering – the provision of basic cable service. It is notable that the majority of programming services offered by cable companies are not and have never been subject to price regulation. The CRTC did not adopt any aspect of competition law in this endeavor, nor need it have, given the context of cultural objectives that drive broadcasting regulation in Canada.

76. Ironically, the Petitioners, who elsewhere argue for a strict competition law standard, here base their argument on a precedent with no competition law component whatsoever. Moreover, the 5% market share loss that they seek to emulate did not discipline prices in the cable market: in every case where cable companies were deregulated, the price of basic cable went up, not down, to the detriment of consumers. Thus, far from serving as proof of the Petitioners' argument that market forces will provide benefits to customers, the cable precedent stands for the opposite proposition entirely.
77. The former monopoly Petitioners' own arguments are also internally inconsistent. On the one hand, they endorse a competition law approach, claiming that the Decision "reflects a lack of comprehension of basic economic principles" and imposes "arbitrary conditions" on the telephone companies.<sup>51</sup> On the other hand, they themselves recommend an approach so simplistic as to render any economic analysis virtually moot, proposing a streamlined test whereby 5% market share loss would be the only criterion by which individual applications should be judged – despite their strident contention that market share is not a sufficient condition for a finding of SMP.<sup>52</sup>
78. What they conveniently omit to mention is that their "solution" to the remaining criteria, such as an examination of barriers to entry and actual evidence of competition, is simply to declare "mission accomplished" for the entire country. Having thus paid lip service to these other criteria, they revert to a 5% market share loss figure as the sole criterion for forbearance. MTS Allstream submits that forbearance is a major step which merits more than a superficial analysis of the type proposed by the former monopoly Petitioners.

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<sup>51</sup> The former monopoly Petition, paragraphs 17 and 18.

<sup>52</sup> The former monopoly Petition, paragraph 23.



79. In the Decision, the CRTC disagreed with those parties that argued that a market share loss (or commensurate gain by a competitor) could, by itself, "constitute a bright-line test justifying forbearance in a relevant market."<sup>53</sup> While an important measure, the Commission noted that, on its own, market share does not assure the future sustainability of competition. The Commission therefore, after a thorough analysis, made forbearance reliant not simply on market share loss but on other criteria which were designed to alleviate barriers to entry and ensure that competition would be sustainable, pursuant to the legislative scheme for forbearance established by Parliament pursuant to the *Act*, and in accordance with accepted competition law principles.

*B., C. and D: Q of S indicators, Competitor Services tariffs and competitor access to ILECs' Operating Support Systems*

80. The Petitioners would have the Government believe that "barriers to entry into local telecommunications are low, if not non-existent."<sup>54</sup> This statement is simply wrong. In the proceeding leading up to the Decision, a number of competitors – including MTS Allstream, the Canadian Cable Telecommunications Association (CCTA), Shaw, Rogers/Call-Net, Vonage, Cybersurf, FCI Broadband, Yak Communications and the Consumer Groups – presented evidence as to significant existing barriers to entry, ranging from technical to regulatory to legislative factors. All of these parties recommended the retention of certain criteria with respect to, *inter alia*, the provision of wholesale services in a forborne market.

81. One common theme of the competitors was the need to ensure competitor Q of S standards, to ensure that the former monopolies do not use their control over facilities to delay or withhold delivery of essential and near essential services to competitors. In the Decision, the CRTC noted that it considered "that the achievement of this minimum standard of service by a former monopoly is an important factor in limiting an ILEC's

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<sup>53</sup> Decision 2006-15, paragraph 245.

<sup>54</sup> The former monopoly Petition, paragraph 23.

market power and helping to ensure that competition within a relevant market will be sustainable."<sup>55</sup>

82. Notably, the TPRP Report also makes a point of highlighting the role of fair interconnection arrangements as a way of limiting SMP, and observes that regulation of wholesale access and interconnection are common in Europe and Australia as a way of promoting competition:

Regulation can...take the form of requiring services providers with SMP to interconnect with, and to make certain facilities and services available to, competitors at regulated wholesale prices on specified terms and conditions. Such measures encourage competition and may be sufficient to remove existing SMP...

The Panel notes that the European Union's Framework Directive, Access Directive and Universal Service Directive attempt to resolve problems of lack of competition in telecommunications markets by regulating wholesale access and interconnection and by turning to retail regulation only when wholesale regulation is not sufficient. This approach is being implemented by members states of the European Union such as the United Kingdom. It is also the approach being followed in Australia and New Zealand.<sup>56</sup> (internal footnotes omitted)

83. The TPRP itself stressed the need for regulation of essential wholesale services provided by ILECs to competitors. If an former monopoly was permitted to forgo Q of S requirements, then it could engage in anti-competitive behaviour whereby it allows its service to its competitors to decline to the point where competitors cannot offer a feasible alternative, driving out competition and paving the way to re-monopolization – exactly the opposite effect to the competition that forbearance is intended to promote.
84. Ensuring Q of S across the former monopoly's entire serving territory is not only essential for the sustainability of a competitive market generally, but is a necessary precondition for expanding competition into areas that may not be the first to experience competition. Competitors who are vigorously participating in one LFR are likely to have the capacity to expand into neighboring LFRs in an former monopoly's serving territories, but can only do this effectively if Q of S standards are being met.

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<sup>55</sup> Decision 2006-15, paragraphs 262 to 271.

<sup>56</sup> TPRP Final Report, pages 3 to 18.

85. Under the current regulatory framework, the former monopoly Petitioners are, essentially, the gatekeepers to competition. This means that those with the most to lose from a competitive market are the ones who can dictate terms to their competitors. Where the CRTC has not established cost-based access to the former monopoly Petitioners' network infrastructure, the rates for such access can carry mark-ups from 50% to 300%. As a result, competitors are paying exorbitant rates for wholesale access – not to mention markups of up to 1000% for some retail services - and yet are often receiving inferior service, which impedes competitors' abilities to provide quality service in turn to their own customers. Since the Petitioners generally achieve most of their service metrics for their own customers, there is no reason for them to have difficulty providing the appropriate Q of S to competitors.
86. The Commission's establishment of Q of S standards and competitor service tariffs was based on clear evidence that the former monopoly Petitioners were using these elements as anti-competitive tools to thwart competition and grant themselves preferential treatment. Accordingly, the Petitioners' complaints about the imposition of such criteria really amounts to an argument that they should not have to follow rules that are already in place, and which they already breach on a regular basis. This was nowhere clearer than in the Commission's finding in the Decision that Aliant had achieved its competitor Q of S targets only 43% of the time in the six months preceding its application for forbearance. With such an abysmal record even in a regulated environment, the Petitioners are hardly in the position to argue that this forbearance criterion is misplaced. Indeed, it is noteworthy that the Petitioners say very little about Q of S, preferring no doubt to obscure the importance of this criterion and their consistent anti-competitive failures to provide it.
87. In addition to attempting to shirk their responsibilities respecting Q of S, the Petitioners complain that the CRTC's requirement for Competitor Service tariffs is "open ended." But as noted in the TPRP Report, facilities and services that are considered essential to competitors will not be static: technological and market developments may result in a shift of facilities from essential to non-essential status and vice versa, while new essential facilities may emerge. It is for this reason that the TPRP recommended that a

regular review of this category be conducted every three to five years.<sup>57</sup> These recommendations recognize that Competitor Services are critical to competition, including many forms of IP-based competition lauded by the Petitioners as bringing competition and thus, according to them, removing the need to regulate.<sup>58</sup>

88. In requiring these Competitor Services tariffs to be offered, the Commission noted that they offer facilities, functionalities and services that are key inputs into competitor services "and are therefore important to the promotion and sustainability of local competition in a relevant market."<sup>59</sup> Moreover, the Commission noted that, based on the record of the proceeding, there was general agreement that most tariffs for these Competitor Services were already in place (although MTS Allstream notes that such tariffs are not necessarily cost-based).<sup>60</sup> As recognized by the TPRP, however, the Commission must take note of evolving markets and technologies to ensure that ILECs are not gaining an anti-competitive advantage by withholding services that may be key inputs for competitors in the future.
89. Finally, the fact that cable competitors may not require certain of these Competitor Services ignores the fact – raised by the Petitioners themselves at paragraph 10 of the Petition – that there are many different kinds of competitors, of which cable is only one. VoIP providers, facilities-based competitive local exchange providers and resellers are all active in the competitive market and may require some or all of the Competitive Services set out in the Decision. While cable is a growing source of competition, it is far from the only one, and is unlikely to be a major source of competition in the business market for some time to come.

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<sup>57</sup> TPRP Final Report, pages 3-37 and 3-38.

<sup>58</sup> In the residential market, the ILEC is required to have an approved tariff for bundled asymmetric digital subscriber lines (ADSL) available over loops not used for primary exchange service (dry loops) as well as in conjunction with PES. In the business market, the ILEC is required to have an approved tariff for bundled ADSL available both over dry loops and in conjunction with PES, a competitor Ethernet access service and transport service tariffs (Competitor Services tariffs): Decision 2006-15, paragraph 242.

<sup>59</sup> Decision 2006-15, paragraph 262.

<sup>60</sup> Decision 2006-15, paragraph 265.

***E. Rivalrous Behaviour***

90. The Petitioners concede that the requirement for the existence of rivalrous behaviour is appropriate, but nonetheless complain that they are prevented from engaging in many types of rivalrous behaviour. MTS Allstream submits that the modest competitive safeguards that apply to the ILECs do not stand in the way of their use of superior financial resources and incumbency advantages to compete.
91. Moreover, throughout the last year, the Commission has steadily lessened its restrictions on ILEC promotions and increased their flexibility to price services in response to competition. In Decision 2005-25, for example, the Commission permitted promotions in the local wireline services market with certain competitive safeguards to prevent the ILECs from using them to engage in anti-competitive behaviour.<sup>61</sup> Similarly, the Commission has permitted Bell to price its offerings within a range for its VoIP services and has recently issued a call for comments on guidelines for dealing with applications requesting approval of rate ranges for other kinds of services.<sup>62</sup>
92. In the Decision, the Commission substantially reduced the no-contact period under the Winback Rule (which prohibits the ILECs from contacting customers who have changed to a competitive provider for their local service) from 12 months to 3 months in the residential market, and set out a clear and simple process by which an ILEC can apply to have the Winback Rule removed altogether.
93. Despite these actions to lessen the restrictions on the ILECs' abilities to market their service, the actions of the former monopoly Petitioners to date do not indicate that competition in local markets is sufficient to provoke genuinely rivalrous behaviour. For example, until very recently, none of the former monopoly Petitioners offered VoIP services, and Bell only offers its purported VoIP service – called Bell Digital Voice – to those customers it deems vulnerable to switching. Similarly, Bell's and Aliant's recent proposal to raise their rates for primary local exchange service for all of their customers in the residential market by 5%, and their recently approved price increase of 10% for business customers, speaks not to competitive market forces, but rather to the singular

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<sup>61</sup> Telecom Decision CRTC 2005-25, *Promotions of local wireline services*, 27 April 2005, paragraph 72.

and arrogant actions of a dominant provider. Indeed, in the local forbearance hearing itself, one Commissioner questioned Aliant keenly as to why, if the company was concerned about competition from EastLink in Halifax, Aliant was not "fighting back" with lower prices and more rivalrous behaviour when it clearly had the scope to do so within the existing regime.<sup>63</sup> The Commissioner stated:

I don't see evidence that you are using the tools available. And to me that demonstrates ... I bring it up because it seems to me that you have got too much riding on what isn't going to offer you what you want.

And it seems to me that I don't see the kind of proactive marketing and pricing and product definition of somebody who really feels they are under threat by a competitor.

I don't see before me, I don't hear before me, and I don't read in your papers the kind of sense that you feel threatened.

It just seems to me you want it easier.<sup>64</sup>

94. The complaints of the former monopoly Petitioners, once again, are therefore not borne out by the facts; if there was genuine competition in local markets, it would be demonstrated by genuinely rivalrous behaviour.
95. In sum, the Decision creates straightforward, supportable criteria for the deregulation of retail pricing for local telephone services with a sound basis in competition law. These criteria ensure that as competition grows and the former monopolies make applications for forbearance, the amount of regulation in Canadian telecommunications markets will be drastically reduced, allowing market forces to rule the day where regulation is no longer necessary to protect the interests of users.

**Consequences of the Decision: The Public Interest vs. The Petitioners' Interest**

96. The Decision supports the public interest: it is designed to promote and advance competition by ensuring that forbearance is granted only where competition is sustainable, and thus where there are clear benefits to consumers. Genuine competition

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<sup>62</sup> Telecom Public Notice CRTC 2006-8, *Rate ranges for services other than voice over Internet protocol services*, 9 June 2006.

<sup>63</sup> Transcript, Local Forbearance proceeding, Sept. 25/05, Volume I, paragraphs 743 to 853.

<sup>64</sup> Transcript, Local Forbearance proceeding, Sept. 25/05, Volume I, paragraphs 770 to 773.

will produce the innovation, choice and lower prices that benefit consumers and support the Government's productivity agenda.

97. In contrast, the Petitioners' proposals serve only the Petitioners' interests in eradicating all regulation at all costs. The Petitioners' proposals, in particular their belief that forbearance should be granted upon the mere loss of a 5% market share, are tantamount to granting them permission to engage in anti-competitive tactics that can uproot budding competition.

***The transition to a competitive environment is crucial***

98. Due to the fundamental importance of the local telephone market, and the overwhelming SMP of the former monopolies, the rules regarding the transition from a regulated to a competitive environment are critically important. Many of the CRTC's determinations were specifically aimed at remedying the lack of any competition in certain areas, the poor quality of service offered by the Petitioners to competitors where competition exists, and the need to ensure competitive investment is not eradicated prematurely through anti-competitive behaviour by incumbents.
99. Competition itself is at stake: if deregulation takes place prematurely, the ILECs will have every incentive to frustrate the very competition that forbearance was intended to promote. Despite the Petitioners' claims that they are hampered by regulation, there is very little that they cannot do to compete already. As noted above, the CRTC has considerably streamlined its restrictions on the abilities of former monopolies to engage in various kinds of promotions over the past year, has increased the amount of flexibility they have to price their services in response to competition, and has expedited its tariff approval process.
100. Those regulations which remain either serve important social goals, as discussed in the first section of this submission, or constrain anti-competitive behaviour, which the TPRP also recognized as a key reason to justify regulation of a provider with SMP.<sup>65</sup> Anti-competitive behaviour comes in many guises: through direct price undercutting;

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<sup>65</sup> TPRP Final Report, pages 3-9.

through indirect leverage of market power; and through the provision of poor service to competitors.

101. The former monopoly Petitioners have a history of anti-competitive behaviour. For example, Aliant has been found to have engaged in anti-competitive pricing on numerous occasions, particularly through illegal targeting of discounts.<sup>66</sup> And in a particularly audacious example, Bell used its former Bell Nexxia affiliate to offer illegally targeted bundles in over 100 cases to customers in the large business market: a clearly anti-competitive pricing strategy aimed at lessening competition in that market segment.<sup>67</sup> It is no wonder the Coalition has put in its own petition supporting the ILECs: as large business customers, they are the ones who benefit from such illegally targeted price reductions. The fact that the former monopoly Petitioners and the Coalition members benefit, however, does not make such anti-competitive behaviour good public policy. And while the largest businesses may attract such tactics, Canada also needs the benefits of competition to extend to small and medium-sized enterprises – the engines of the Canadian economy. Finally, despite their apparent sophistication, the largest businesses are naïve if they think that rates would not go up in the absence of competitors who can make viable competing offers.
102. Another way in which the former monopoly Petitioners can attempt to eliminate competition, as discussed above, is by providing poor Q of S in the provision of Competitor Services. The Commission's finding, in the Decision, that Aliant had met its competitor Q of S targets only 43% of the time in the six months preceding its application for forbearance is a scathing indictment of the level of service provided by former monopolies to their competitors. And Aliant is not alone: In order to ensure that the transition to competition is sustainable, the Commission justifiably included a criterion

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<sup>66</sup> See, for example, Telecom Decision CRTC 2003-23, *GT Group Telecom Services Corp. v. Aliant Telecom Inc. – Tariff violations and contraventions of the Telecommunications Act*, 10 April 2003; Telecom Decision CRTC 2002-48, *EastLink Limited v Aliant Telecom Inc. – Non-compliance with bundling rules*, 14 August 2002; and Telecom Decision CRTC 2004-21, *EastLink vs. Aliant Telecom – Compliance with bundling rules and Public Notice 2003-1-1*, 29 March 2004.

<sup>67</sup> Telecom Decision CRTC 2002-76, *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*, 12 December 2002; see also Telecom Decision CRTC 2003-63, *Review of Bell Canada's customer-specific arrangements filed pursuant to Telecom Decision CRTC 2002-76*, 23 September 2003.



requiring that the former monopolies maintained a high level of Q of S for six months prior to the application for forbearance.

103. Such tactics make it even more important that the Commission's criteria for local forbearance be carefully crafted to ensure that competition is genuinely sufficient to protect the interests of users in those areas where deregulation takes place. MTS Allstream is of the view that the Decision recognizes the ingredients for thoughtful deregulation and puts into place a clear and expeditious process for getting there in the local phone market.

***Competition will drive innovation and investment***

104. Competition is not only key to protecting the interests of individual users: it is also essential to drive innovation and investment.
105. Most innovation in telecommunications is driven by competitors, who have both the motive and the ability to find and exploit new markets. Former monopolies, with their superior networks and resources, will "catch up" (often after an initial period of anti-competitive behaviour) and supersede competitors in the provision of these same services – but only once demand for them has been created and the former monopoly Petitioners perceive a threat to their market share.
106. History makes this abundantly clear, as the following examples demonstrate. *Voicemail* was a competitive response by the former monopolies to the introduction of answering machines by third parties. *Digital network services* were first launched by CNCP Telecommunications in the late 1980s, only to be emulated and outpaced by the former monopolies (who then resisted offering competitor pricing for their own digital network access services for over a decade). *IP networking* was first created by competitors, who reduced customers' costs by offering frame relay services and managing customer premise routes - spurring the former monopolies to respond with high-speed Ethernet access and transport facilities. *Dial-up internet*, again, was first provided by competitors leasing Centrex telephone lines from the former monopolies that connected to modems at the competitors' premises, and was only then eventually provided by the former monopoly Petitioners themselves. Most recently, Canadians have benefited from the introduction of *VoIP services*, which were pioneered by new entrants and only then

pursued by the ILECs. In each of these cases, it was competitors who innovated and invested to provide new services to customers, and the former monopoly Petitioners who followed behind.

107. Indeed, MTS Allstream (and Allstream's predecessors) were providers of many competitive "firsts" in the Canadian telecommunications industry: it was the first facilities-based long distance provider; the first competitor to enter the local market; and the first to offer frame relay and Ethernet services.
108. The Petitioners' arguments that regulation is bad for innovation, competition and investment must be assessed in the light of this history. Again, VoIP is a case in point. The ILECs claim that IP has transformed the world and their economists claim that regulating this service risks sacrificing potential gains to consumers that will derive from lower rates and innovative services.
109. The fact is that the former monopoly Petitioners have been spectators in this market: Despite the fact the Commission issued the VoIP Decision more than one year ago, TELUS and Aliant have yet to roll out a VoIP product (this notwithstanding Aliant's constant woe-begotten tale of having to endure competition from Eastlink); and Bell's principal so-called VoIP product, "Bell Digital Voice," in reality has little to do with IP technology at all.
110. In the place of innovating, and providing Canadians with better services, the ILECs have instead been content to produce an endless stream of innovative arguments for why less regulation would help them "innovate". It is improbable that these arguments, unsupported by actual innovation by the Petitioners in the market place, will help Canadians realize the increased benefits of competition.
111. Moreover, a brief look at the U.S. makes it clear that deregulation can also act to inhibit investment. Following the passage of the 1996 *Telecommunications Act*, which opened several paths to sustainable competition (including the ability of competitors to lease individual components of the incumbents' network on a wholesale basis at reasonable costs), the American incumbents pursued an aggressive and highly coordinated political strategy to cut off their rivals' use of their networks at cost-based rates. The resulting

deregulation of pricing for unbundled network elements in the U.S. and corresponding increases in the prices of wholesale services, particularly for local residential services, has had disastrous effects on competitors, causing many to exit that market altogether and severely reducing the amount of capital available to these competitors to invest in their own facilities.<sup>68</sup> Moreover, although the revenues and shareholder dividends of the former Bell companies in the U.S. have increased, the amount of investment in capital plant has sharply decreased, eroding by as much as 26% over the past decade.<sup>69</sup> While total amortization and depreciation of capital plant for those companies totalled almost \$60 billion between 2001 and 2005, re-investment in plant over the same period was just \$17 billion.<sup>70</sup> In sum, deregulation has had a detrimental effect on investment for both ILECs and competitors in the U.S.

112. Accordingly, only genuine market competition among a number of players – not just the incumbent telephone companies versus the incumbent cable companies – will drive the innovation and investment sought by the Government.

## Conclusion

113. The Petitioners claim that the Decision will create uncertainty in the industry. But acceding to the Petitioners' requests will not advance the debate respecting the future of telecommunications regulation in Canada. Rather, it will create even greater uncertainty in the market place by calling into doubt clear, achievable criteria for the deregulation of the critical market for local services established in accordance with both the *Act* and competition law principles.
114. The Petitioners may not like the criteria established by the CRTC, preferring instead their simplistic criterion of a market share loss that would still leave them with an overwhelming 95% share of the local phone market. But the reality is that the

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<sup>68</sup> In some cases, prices charged to competitors for wholesale services to provide basic local service are higher than the retail rates charged by U.S. ILECs to their own retail customers. See L. Selwyn, *Avoiding Missteps Made South of the Border: Learning from the US Experience in Competitive Telecom Policy*, August 2006, pages iii-v, 13, 21, 22.

<sup>69</sup> L. Selwyn, *Avoiding Missteps Made South of the Border: Learning from the US Experience in Competitive Telecom Policy*, August 2006 page 20.

<sup>70</sup> In some cases, prices charged to competitors for wholesale services to provide basic local service are higher than the retail rates charged by US ILECs to their own retail customers. See Lee Selwyn,

Commission's criteria are based in competition law, easily achievable, and serve competition in the public interest. Sending back the Decision for further reconsideration will only breed uncertainty and delay the pace at which deregulation in local markets can take place.

115. A careful review of the Petitioner's arguments reveals a fatal lack of substance. The Petitioners have chosen to rely on media headlines, overwrought rhetoric and selective mischaracterizations of the TPRP Report to attempt to persuade the Government of their views. Moreover, the petition shows a careful avoidance of damaging truths, including (a) the fact that, until this Decision, the Petitioners have consistently endorsed the CRTC's approach to deregulation, which is founded on competition law principles; (b) the Petitioners have consistently failed to achieve their Q of S targets, preferring to use them as anti-competitive tools, and thus do not come with "clean hands" to their proposal that such criteria be eradicated; and (c) the consistent lack of innovation on the part of the Petitioners, which belies their arguments that deregulation based on market share alone is sufficient to ensure that competitive market forces will bring benefits to Canadians.
116. The Government should not be persuaded by the misleading rhetoric of the Petitioners, but should recognize that the Commission has set out a sound and orderly framework for the deregulation of local telephone services that will serve all Canadians – now and in the future. MTS Allstream therefore requests that the Government deny these Petitions.

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*Avoiding Missteps made South of the Border: Learning from the US Experience in Competitive Telecom Policy, August 2006, page 30 (table 5).*

**Summary of Canadian Telecommunications  
 Markets Subject to CRTC Forbearance Rulings**

Market	Year	Details
Terminal Equipment	1994	Sale and rental of terminal equipment.
Wireless	1994	Cellular, personal communications services, mobile radio and paging, except in the case of incumbent in-house mobile service providers. Forbearance extended to incumbent mobile operations, starting in 1998, once competitive safeguards had been implemented.
Satellite Services	1994	Telesat's digital video compression services initially; further services offered by Telesat, such as sale/lease of earth stations and RF channels, in subsequent years.
Services Provided by Non-dominant Carriers	1995	Services, such as long distance, data, Internet and private line, provided by non-dominant competitive carriers.
Data and Private Line	1997	High-speed/DDS interexchange private line services provided by the incumbent telephone companies on a route-specific basis.
Internet Services	1997	Incumbent telephone companies' retail Internet services in 1997 and those of cable providers in 1998.
Long Distance	1998	Toll and toll-free services.
International Services	1998	Initially excluded Teleglobe; however, certain international services provided by Teleglobe later forborne as well.
Data and Private Line	2004	With some conditions, additional high capacity digital data interexchange private line services forborne from regulation on routes for which competitors of several incumbent local exchange carriers now offer, or provide, services at DS-3 or greater bandwidth.

*Source: 2005 Competition Report*

**Canada/UK local phone service forbearance environment**

	<b>United Kingdom</b>	<b>Canada</b>
Geographic area on which to determine market share	Entire country territory is the basis of assessment for market share loss	Local area such as a Census Metropolitan Area (CMA)
Market share loss (criteria or achieved)	BT's actual market share loss: <ul style="list-style-type: none"> <li>• 38% of access lines take a non-BT service<sup>71</sup> (IIIQ2005)</li> <li>• 46% of local calling revenues in the residential market (Dec. 2004)<sup>72</sup></li> </ul>	Criteria: 25% or more of access lines within each defined local area. Note: to date, only Aliant in the Halifax area has incurred a market share loss in excess of 25% in the residential market segment.
Requirement to split the incumbent telephone company into retail and wholesale separate entities to provide equality of service to competitors	Yes	No
Requirement to meet specified service standards and service functionality as offered to competitors	Yes	Yes

Source: Lemay-Yates Associates Inc., 2006

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<sup>71</sup> Includes lines on carrier pre-selection as well as those using direct access competition such as telephony offered by cable operators and wholesale line rental lines. Cable and other direct access represented 18% of all access lines in the UK as of IIIQ 2005, per Ofcom.

<sup>72</sup> European Electronic Communications Regulation and Markets 2005 (11<sup>th</sup> Report), Annex 2, Market Overview, Figure 10, page 14, 20 February 2006.