IN THE MATTER OF CANADA GAZETTE NOTICE NO. DGTP-007-2006

AND IN THE MATTER OF PETITIONS TO THE GOVERNOR IN COUNCIL TO REFER TELECOM DECISION CRTC 2006-15 *FORBEARANCE FROM THE REGULATION OF RETAIL LOCAL EXCHANGE SERVICES* BACK TO THE CRTC FOR RECONSIDERATION

SUBMISSION OF COGECO CABLE INC., QUEBECOR MEDIA INC. AND ROGERS COMMUNICATIONS INC.

Filed: July 21, 2006

EXECUTIVE SUMMARY

1. These comments are jointly submitted by an alliance of telecommunications carriers who compete with the incumbent local exchange carriers (ILECs) in the provision of local telephone services in various regions of Canada (the Competitors). The Competitors consist of Cogeco Cable Inc., Quebecor Media Inc., and Rogers Communications Inc.

2. The Competitors' comments are submitted in response to Canada Gazette Notice No. DGTP-007-2006 of May 26, 2006 in which the Governor in Council invited submissions in respect of a Petition filed by Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications and Telus Communications Company (the "ILECs") pursuant to section 12 of the *Telecommunications Act*.

3. In their Petition, the ILECs have asked the Governor in Council to 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") for reconsideration.

4. The Competitors oppose the ILECs' Petition and urge the Governor in Council to deny it. Alternatively, the Competitors request the Governor in Council to wait for a ruling by the Commission in connection with the public process initiated by Telecom Public Notice CRTC 2006-9, *Proceeding to examine whether mobile wireless services should be considered to be in the same relevant market as wireline local exchange services with respect to forbearance, and related issues*, June 16, 2006, prior to making a decision on whether to refer the Decision back to the Commission for reconsideration.

5. The Commission's Decision is the correct one. It is based on sound economic principles and is consistent with the requirements of the *Telecommunications Act*. Despite all the rhetoric and hyperbole of the ILECs, the truth is that one cannot deregulate telephone companies that retain a 92% share of the local telephone market. These companies are still dominant by any reasonable measure and are in a position to exploit their dominance to the detriment of consumers. The ILECs can also use their power to thwart the development of a strong competitive market that will ultimately negate the need for regulation unless they remain subject to regulatory oversight.

6. This is a timing issue. The CRTC's forbearance regime is a transitional one. It is designed to enable deregulation to occur on a market-by-market basis as soon as market conditions permit. The Commission has defined local markets and market power in a manner that is entirely consistent with economic and competition law principles and has put in place mechanisms to expedite forbearance in relevant markets as soon as these requirements are met. While there may be some rural and remote markets where competition takes longer to develop, the fact is that in the larger urban centres it will only take a year or two

to reach the Commission's threshold requirements. This process should be allowed to take its course and ought not to be circumvented by acquiescing to the ILECs' demands.

7. The Decision was made by the Commission after an extensive review process that involved thousands of pages of evidence and an oral hearing in which dozens of parties participated. In the end, the Commission reached a unanimous decision of all eleven Commissioners which was completely consistent with the expert evidence it heard, and the practices of countries around the world. Moreover, it is a balanced decision that succumbed neither to the demands of the ILECs nor their competitors.

8. There is therefore no need to send this Decision back to the CRTC for reconsideration. The Decision is a good one that satisfies both the policy objectives in section 7 of the *Act* and the explicit statutory requirements for regulatory forbearance in section 34. For the most part, the Petitioners are simply repeating arguments that the Commission heard and considered at the hearing. The Competitors submit that it would be inappropriate for the Cabinet to overturn the Commission on these issues, when it has not had the benefit of the extensive review conducted by the Commission.

9. The Petition raises only two new issues which could conceivably justify referral of the Decision back to the Commission: one concerns the possible impact of new statistics on use of mobile wireless services as a substitute for wireline local telephone services; and the other concerns the recommendations of the Telecommunications Policy Review Panel (TPRP) released in March, 2006.

10. As regards the substitutability of mobile wireless services, the ILECs accuse the Commission of being "very short-sighted", "out of touch with market realities" and "out-of-date" for failing to anticipate new data on Canadians' substitution of mobile wireless services for conventional telephone services. This is a rather harsh and unfair condemnation of the Commission, given the fact that the new statistics were not released until April 5, 2006 – the day before the release of the Commission's decision and months after the close of the record of that proceeding. The ILECs' rhetoric is also unfair given the fact that previous data released by Statistics Canada showed relatively little wireless substitution. This is characteristic of other recent pronouncements by the ILECs who appear eager to undermine the Commission's credibility even if it means distorting the facts.

11. In any event, soon after the release of the new data, the Commission was quick to acknowledge publicly in Telecom Public Notice 2006-9 that the data indicates an increase in the number of persons using mobile wireless as a substitute for conventional telephone service. The Commission has responded in a timely manner by initiating a public process to consider the implications of

the new data for Decision 2006-15. This renders completely redundant any possible referral of Decision 2006-15 back to the Commission for reconsideration prior to conclusion of the Commission's own reassessment process.

12. As regards the release of the TPRP report, the ILECs have seriously overstated the recommendations of the TPRP in respect of local forbearance. Contrary to what the Petitioners say, the TPRP did not purport to second-guess the Commission on the issue of local forbearance and did not criticize the tests for forbearance employed by the Commission. In fact, the TPRP endorsed the Commission's consideration of significant market power (SMP) as the appropriate test for forbearance and acknowledged that this is similar to the test used in other advanced telecommunications jurisdictions, as well as in Canadian competition law. The TPRP also anticipated a transition period of twelve to eighteen months, following the release of its report and prior to the enactment of enabling legislation, in which the Commission would continue hearing forbearance applications. Even after the passage of such legislation, the TPRP recommended the creation of a new tribunal, the Telecommunications Competition Tribunal that would take over the job of assessing whether SMP still exists in given markets and, if so, whether economic regulation is justified to protect consumers from abuse of SMP.

13. In assessing the recommendations of the TPRP, great care must also be taken to distinguish between the legislative amendments proposed by the TPRP and the statutory framework that currently governs the Commission's operation. The TPRP's report is a forward-looking one. Many of the reforms proposed by the TPRP require legislative amendments to implement. These include the presumption of regulation in Part III of the *Telecommunications Act*. The Commission cannot be told to prefer *ex post* remedies over *ex ante* economic regulation when the enabling legislation states the tests that must be applied to issue a forbearance order and otherwise requires the Commission to impose economic regulation on an *ex ante* basis. Not even the proposed Policy Direction to the CRTC, which was recently published in the Canada Gazette, can mandate a reversal of the requirement for ex ante regulation enshrined in Part III of the *Telecommunications Act*. The *Act* dictates this approach and can only be amended by legislation.

14. Therefore, nothing in the TPRP's report places the Decision in doubt or merits its reconsideration by the Commission.

15. The ILECs have also urged reconsideration of the Commission's marketing restrictions, including the rules that prevent targeted winback activity. They say that these rules prevent ordinary competitive responses to the activities of their competitors and should therefore be eliminated. In this regard, the Decision contained a major victory for the ILECs, in that it reduced the winback period from one year to three months. This represents a radical change in the

regulatory environment, which was not anticipated by the Competitors when they prepared their business cases for telephony entry.

16. The ILECs would have the Governor in Council ignore the fact that the local markets in question are not "ordinary competitive markets." They are markets in which the ILECs have been found to possess SMP and in which the ILECs have both the incentive and opportunity to exploit this SMP to the detriment of consumers. The ILECs are also ignoring the fact that the winback restrictions were not imposed until after the ILECs had started engaging in anti-competitive conduct that threatened the establishment of a competitive local market. The regulatory response was a measured one that addressed a specific form of conduct that the Commission had found to breach section 27(2) of the *Telecommunications Act*. The bottom line is that one cannot rely on market forces to protect the interests of users if the ILECs are using their market dominance to thwart the establishment of a competitive market and eventual reliance on market forces.

17. The ILECs have also sought to discredit the Commission's determinations in Decision 2006-15 on the basis that the Commission's decision to apply *ex ante* obligations to the ILECs' local services is out of step with the policies of regulators around the world. In addition to ignoring the fact that the Commission is required by the *Telecommunications Act* to apply *ex ante* economic regulation unless the statutory tests for forbearance in section 34 have been satisfied, the ILECs have also distorted what is going on in other jurisdictions.

18. Regulators all over the world are grappling with the transition of local telephone markets from monopoly to competitive structures. No two markets are at precisely the same stage of this transition and each exhibits a different mix of facilities and non-facilities-based competition. This has led some regulators to focus on wholesale rates and others to address the structural changes needed to produce true facilities-based competition. Those countries that have opted for wholesale regulation will likely end up regulating the ILECs' wholesale services for many years to come with all of the attendant problems associated with trying to set wholesale rates at a perfect level that will be fair to both the incumbent and the competitors that rely on the underlying services. Other countries, like Canada, are striving to achieve true facilities-based competition. This form of competition will produce more benefits for consumers in terms of innovative services and price competition. It will also ultimately result in more complete deregulation of the ILECs, once SMP is lost, than will be possible in European markets that rely on regulation of wholesale rates to generate competition in retail markets. It therefore provides a better long term solution to the transition of local markets from regulated monopolies to deregulated competitive markets.

19. Cracks are also starting to appear in the lighter form of regulation established in some of the countries that have been held up by the ILECs as the models to follow. For example, as recently as June 14, 2006, the European

Commission issued a directive to the German national regulatory authority, BNetzA, requiring it to reconsider its decision to impose only *ex post* regulatory measures on the incumbent local exchange carrier, Deutsche Telekom AG (DTAG). Having made a finding that DTAG possessed SMP in local exchange markets with a 94% market share, the BNetzA had sought to rely on a combination of carrier pre-selection rules, two months prior notice of new tariffs (to supervise the *ex post* price obligations it proposed) and a wholesale tariff regime to prevent abuse of DTAG's dominant position in the market. The European Commission reviewed the decision and sent it back to the national regulator for reconsideration, finding the *ex post* regulatory regime to be insufficient to protect the interests of users from abuse of SMP.

20. In making this ruling the European Commission noted that a number of other national regulators in Europe have made similar findings in respect of their retail access markets and have already remedied the market failure through ex ante price regulation. This includes national regulators in Austria, Ireland, Slovakia, Slovenia, Netherlands, Hungary, Malta and Spain.[1]

21. The ILECs' attempt to isolate the Commission as "out of touch" and as the only national regulator engaging in *ex ante* economic regulation of local markets is both inaccurate and unfair to the Commission. In addition, it ignores the fact that Canada is on the path to establishing real, facilities-based competition that will ultimately result in less on-going regulation that most other countries in the world and will produce more meaningful benefits for consumers. This is what the ILECs are fighting against. They would prefer for the market to be prematurely forborne so that Canadians will never get to enjoy the benefits of a viable competitive market in which the ILECs no longer possess market power.

22. In these circumstances, it is respectfully submitted that this is an inappropriate case to refer back to the Commission for reconsideration. The Governor in Council's power of referral pursuant to section 12 of the *Telecommunications Act* is an extraordinary one that ought only to be exercised in the clearest of cases. To exercise it too frequently will do a disservice to the integrity of the Commission as an independent, *quasi-judicial*, expert tribunal. This is not a case that justifies extraordinary intervention and, in any event, the Commission is already re-examining a key aspect of its decision in light of new evidence on wireless substitution.

23. The Commission is well on the way to successfully managing the transition from a monopoly supply model to sustainable, facilities-based, competition. Canada is in an enviable position of rolling out more than one advanced broadband network that will ultimately provide the basis for a strong

[1] European Commission, *Telecommunications: Commission urges the German regulator to impose more effective competition remedies for fixed telephony*, Press Release, Brussels, June 15, 2006.

competitive market that will not require economic regulation. The time horizon for achieving this goal is neither unattainable nor distant, as the ILECs now claim. Forbearance will occur in major markets over the next two years if the regulatory regime established by the Commission in Decision 2006-15 is allowed to run its course. Now is not the time to abandon the Commission's blueprint for facilities-based competition and succumb to the wishes of ILECs for premature forbearance. To do so at a time when the ILECs continue to enjoy SMP in local markets would jeopardize the interests of users and perpetuate the ILECs' dominance in these markets.

THE ISSUE OF WIRELESS SUBSTITUTION

24. In their Petition, the ILECs have been extremely critical of the Commission for failing to consider mobile wireless service as a substitute for conventional telephone service when assessing whether the ILECs have SMP in a given local market. The ILECs point to recent Statistics Canada data (released on April 5, 2006) as evidence of this failing.

> The Decision is emblematic of the fact that the CRTC is out of touch with market realities. This is exemplified by its out-of-date view that Canadians do not use mobile wireless service as a real competitive alternative to traditional wireline telephone service. As a consequence of this view, Decision 2006-15 does not take into account market losses to mobile wireless services in the test for de-regulation. This is a very short-sighted view, as was graphically demonstrated by a Statistics Canada report issued on 5 April 2006, the day before Decision 2006-15 was issued. Statistics Canada reported that "[t]he proportion of Canadian households relying only on cellphones …has more than doubled [going from 1.9% to 4.8%] in just two years". In Vancouver, the percentage was 9.6%.[2]

25. This is a rather harsh condemnation of the Commission given the fact that the data relied upon was only released one day prior to the release of Decision 2006-15 and was not available to the Commission during its public proceeding or its deliberations.

26. As indicated by the ILECs in the passage cited above, the increase in cellphone substitution reported by Statistics Canada was quite substantial growing from 1.9% to 4.8% in just over two years. The information that the Commission had before it during the public proceeding that led to Decision 2006-15 was that only 2.7% of households have actually replaced their wireline services with mobile wireless services, while 67% of households have at least one mobile wireless service.

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[2] ILEC Petition, para. 11.

> The Commission notes that Statistics Canada has estimated in *Residential Telephone Service Survey*, December 2004, that as of December 2004, only 2.7 percent of all households in Canada have replaced their wireline services with wireless services. The Commission considers that 2.7 percent is very low in comparison to the 67 percent of all Canadian households that have at least one subscription to mobile wireless services.
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> The Commission considers that while some consumers are substituting mobile wireless services for their wireline service, at present, the level of substitution is not significant enough to provide a constraint on the market power of the ILEC in a relevant market.[3]

27. Given the statistical information before the Commission, this was not an unreasonable conclusion to reach. When compared with the 96% of households that had conventional telephone service, evidence that 2.7% of households had wireless only, did not provide cogent evidence of widespread substitutability.

28. It should also be noted that while functionality is a key indicator of substitutability of products, it is not the only criteria to examine. As indicated by the Commissioner of Competition in her evidence in the *Local Forbearance* proceeding, *"…functional interchangeability is a necessary but not sufficient condition for concluding that two products are close substitutes".*[4] Other criteria include price, quality of service and evidence of customers' willingness to substitute one product for another. The Commissioner of Competition provided the following table of factors to consider when assessing whether residential PES and mobile wireless services are in the same local market.

[3] Decision 2006-15, paras. 60 and 61.
[4] Evidence of the Commissioner of Competition, June 22, 2006, PN 2005-2, at para. 177, emphasis added.

Table 1

The following table lists and compares some key features and service characteristics for mobile and local wireline services that relate to functional interchangeability of these services[5]:

Features and service characteristics	Wireline	Mobile
Ability to make local calls	*Yes*	*Yes*
Flat rate local calling	*Yes*	*Not always*
Cost to consumer		*Typically higher than local wireline*
Ability to make long distance calls	*Yes*	*Yes*
Cost of long distance		*Typically higher than wireline*
Mobility	*No*	*Yes*
Internet access (narrowband)	*Yes*	*Yes*
Internet access (broadband)	*Yes*	*Not generally*
Voice quality	*Excellent*	*Perceived to be lesser*
Reliability	*Excellent*	*Perceived to be lesser*
Call longevity	*Unlimited*	*Limited by battery life*
Calling features (e.g. forwarding, display, waiting)	*All available*	*All available*
Service Availability	*All of Canada (except far north and certain remote regions)*	*Less than for local wireline*
Camera, MP3 capability	*No*	*Yes*
Text messaging	*No*	*Yes*
Health concerns	*No*	*Yes (issue of radiation levels)*

29. These factors led the Consumer Groups to argue that mobile wireless services should not be considered as part of the same product market as local exchange services for purposes of a forbearance analysis at this time.[6] The usage based rate structure and pricing of wireless mobile service still makes it an expensive substitute for flat-rated PES. In addition, the quality and reliability of

[5] Competition Bureau (CRTC) 202(b) PN 2005-2.
[6] Decision 2006-15, para. 56.

service is not generally considered to be equivalent to PES. Furthermore, for households with more than one person, the mobility of wireless service seriously mitigates the usefulness of the service as a substitute for PES since, if one occupant takes the terminal with them when they leave their premises, the other occupants will be left without phone service. In light of these factors, relatively few Canadians have in fact given up PES in favour of exclusive use of mobile wireless services. It should also be noted that, as recently as last year, the Competition Bureau found that PES was not a substitute for mobile wireless service in the context of Rogers' acquisition of Microcell.[7]

30. These considerations led the Commission to reach the following determinations respecting wireless substitutability:

> The Commission considers that while the prices of wireline local exchange services and mobile wireless services may be similar in some cases, the pricing methodologies, particularly usage-sensitive pricing of mobile wireless services, represent a fundamental difference in how the services are priced.
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> The Commission considers that generally mobile wireless services are not marketed as a replacement for wireline services. The Commission notes that there is increasing evidence that several Canadian carriers offer bundles consisting of both wireline and mobile wireless services, which would suggest that the two services are not substitutes for each other.[8]

31. Viewed against the type of analysis endorsed by the Commissioner of Competition, it can be seen that the issue of wireless substitutability is a complex one that is not easy to answer at a time when relatively few Canadians have actually discarded their wireline phones in favour of mobile wireless service. Given the data before the Commission at the time of its public process and deliberations, the Commission's decision is not unreasonable.

32. However, the April 5, 2006 data released by Statistics Canada in its Residential Telephone Service Survey does indicate that more Canadians are now substituting mobile wireless for wireline telephone service. This is a significant new fact that has prompted the Commission to re-examine the issue of whether mobile wireless services are in the same relevant product market as wireline local exchange services. In Telecom Public Notice CRTC 2006-9 the Commission has convened a public process to consider the following issues:

> …the Commission invites comments regarding whether mobile wireless services, or a subset thereof, should be considered to be part of the same relevant market as wireline local exchange services for forbearance

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[7] *Technical Backgrounder – Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc.,* April 12, 2005, at page 2.

[8] Decision 2006-15, paras. 58 and 59.

> analysis purposes. To the extent that parties consider that a subset of mobile wireless services should be part of the relevant market, comments are also invited on the criteria necessary to define the subset.
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> In the event that mobile wireless services, or a subset thereof, are determined to be part of the same relevant market, comments are also invited as to: (i) how mobile wireless services, or a subset thereof, should be measured for the purpose of inclusion in the relevant market, and (ii) what modifications should be made to the formula set out in paragraph 515 of Decision 2006-15 for the purpose of calculating market share loss.[9]

33. The Competitors intend to participate in the Commission's public proceeding to reconsider this issue and to argue in favour of including those customers who have actually substituted mobile wireless service for conventional telephone service in calculating the ILECs' market share loss for purposes of forbearance analysis.

34. Given the Commission's timely response to the new Statistics Canada data, and the fact that the Commission is already reconsidering this aspect of Decision 2006-15 in a public process, it is both premature and unnecessary to refer the Decision back to the Commission for reconsideration on this ground.

THE TPRP REPORT

35. In their Petition the ILECs have asked the Governor in Council to direct the Commission "to reconsider Decision 2006-15 including its pre-forbearance, forbearance and post-forbearance rules in light of the conclusions and recommendations contained in the [TPRP] Report."[10]

36. The ILECs have painted the recommendations contained in the TPRP's Report as undermining the Commission's approach to forbearance in Decision 2006-15, and as supporting deregulation of local telephone markets. While it is clear from the Report that the TPRP favours a reversal of the presumption of regulation currently contained in the *Telecommunications Act*, and reliance on market forces to the greatest extent possible to achieve telecom policy objectives, the TPRP did not purport to determine whether the ILECs still enjoy SMP in local markets or whether economic regulation was required to protect consumers in the face of SMP. It had no mandate to make this type of determination, it did not purport to review the record of the CRTC's public proceeding and it was very careful in its Report not to prejudge the outcome of the Commission's local forbearance proceeding.

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[9] Telecom Public Notice CRTC 2006-9, paras. 5 and 6.
[10] ILEC Petition, para. 7.

37. The TPRP's Report is a forward-looking report that will require legislation to implement, if its many recommendations are to be adopted. The TPRP was careful in its Report to distinguish between measures, like the presumption of regulation in sections 25 and 27 and the tests for forbearance in section 34, that will require legislation to change, from other measures that might be achieved through changes in Government policy or in the form of a Policy Direction pursuant to section 8 of the *Telecommunications Act*.

38. In their Petition, the ILECs have ignored these distinctions and have laid all of the legislative and non-legislative problems associated with our existing regulatory framework at the feet of the Commission. This is unfair and it clouds the issue of whether a reconsideration of Decision 2006-15 is justified based on the provisions of the *Telecommunications Act* and the policy objectives enshrined in section 7 of the Act. That is the statutory framework that continues to bind both the Commission and the Governor in Council until such time as Parliament sees fit to amend it.

39. While the TPRP generally favours *ex post* regulation over *ex ante* regulation, where *ex post* remedies are considered to be adequate to carry out the new objectives proposed by the TPRP, it recognizes that this approach requires legislation to implement. The TPRP also recognizes that *ex ante* regulation may still have a role to play in markets where SMP exists, even after the statutory presumption in favour of economic regulation is changed.

40. As regards *ex post* regulation, the TPRP does not favour the application of general competition law, as the ILECs suggest. Rather, the TPRP favours the creation of new telecom-specific competition provisions to be developed and then applied by a new hybrid tribunal comprised of CRTC and Competition Bureau personnel (to be called the Telecommunications Competition Tribunal or "TCT"). It also recommends greatly strengthening the enforcement powers of this body to offset the void created by the elimination of *ex ante* regulations.

41. In the absence of these legislative reforms, which can only be enacted by Parliament, the Commission must apply the existing provisions of the *Telecommunications Act*. These include a presumption of regulation and specific statutory tests for forbearance. The Commission cannot step outside these requirements of the *Act* and has not done so in this instance. Rather, it has applied the law in a manner that is wholly consistent with the *Act* and the policy objectives set forth in it.

42. As indicated above, the TPRP's preferred reversal of the presumption requires legislative amendments to implement. The *Telecommunications Act* currently has a presumption in favour of rate regulation that can only be overcome if competitive forces are sufficient to justify forbearance. The CRTC is a creature of statute and must act within its legislation. It is therefore bound by the presumption of regulation in sections 24 and 25 of the *Act* until such time as

forbearance is granted or the *Act* is amended.

43. The TPRP recognized this in its Report, where it states that:

> The CRTC should continue entertaining applications for forbearance until the proposed regulatory regime is in place.[11]

44. This is precisely what the Commission is doing.

45. Even if new enabling legislation is passed reversing the presumption of regulation, the TPRP did not propose the deregulation of local telephone service. In a section entitled "Transition to Deregulation", the TPRP proposed that retail basic transmission services that are currently subject to economic regulation should remain regulated for a transition period of twelve to eighteen months to determine whether any service provider has SMP. Similarly, services that have been conditionally forborne should remain so until the Commission (or the TCT) has reviewed whether a service provider has SMP.

> Under the proposed new framework, services that the CRTC has forborne from regulating should continue to be unregulated. Where the forbearance is conditional, with the CRTC having retained some regulatory conditions, these conditions should be reviewed and removed where no service provider has SMP. This is consistent with the presumption against regulation.
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> As noted in the preceding subsection, retail basic transmission services that currently are subject to economic regulation should remain regulated for a transition period, during which telecommunications markets should be reviewed to determine whether any service provider has SMP.[12]

46. This is the path that the Commission has already taken in its recent proceeding on local forbearance. Having found SMP to exist, the Commission has continued economic regulation in compliance with the *Act*, and consistent with the TPRP's recommended approach for the transition period.

[11] TPRP Report, page 3-13, emphasis added.
[12] TPRP Report, page 3-15, emphasis added.

47. The TPRP also indicated how it would like to see “new basic transmission services” addressed once the presumption of regulation is changed:

> Consistent with the presumption against regulation, new basic transmission services should not be subject to economic regulation, unless there is a finding of SMP in the relevant market. However, any party could apply for a determination on whether a service provider has SMP in these new markets.[13]

48. What the CRTC has done in Decision 2006-15 is to consider whether forbearance is possible pursuant to section 34. Finding it is not possible due to the presence of SMP in the relevant market, it has then looked at what lighter forms of regulation might be justifiable under the Act. This is the correct approach under the *Telecommunications Act*. It also represents sound public policy.

49. It is also entirely consistent with what the TPRP recommends the CRTC do in the interim period prior to new legislation being enacted by Parliament, as well as with the outcome prescribed by TPRP even after enactment of new legislation in relevant markets where SMP is found to exist.

50. It should also be noted however that the TPRP is not categorical in its preference for *ex post* regulation or its dislike of retail rate regulation:

> The Panel believes, where a service provider has SMP in a retail market, the preferable approach to regulation in that market is to reduce SMP by applying competition law principles designed to lower barriers to entry, thereby relying on competition where possible. It is only when lowering the barriers to entry is not an effective means to prevent the harm done by an abuse of SMP that recourse is needed through direct regulation of retail services.[14]

51. Where retail price regulation is required, the TPRP favours price caps over other types of rate regulations:

> Since price cap rules are relatively simple, *ex ante* ("prior") approval is not required for effective enforcement, particularly given the stronger *ex post* ("after the fact") remedies recommended in this report. Given the desirability of minimizing regulatory burden, enforcement of price cap constraints should be limited to *ex post* enforcement by means of an annual filing requirement or upon complaint by a customer or a competitor.[15]

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[13] Ibid.
[14] TPRP Report, page 3-17.
[15] TPRP Report, page 3-19.

52. The price cap regime described by the TPRP is very similar to the regime established by the Commission in respect of retail local services. The only real difference is the TPRP's proposal to do away with *ex ante* price approval of tariffs which is currently required by section 25 of the Act. However, in making this recommendation to do away with most *ex ante* price regulation, the TPRP is cognizant of the need to strengthen the regulator's enforcement powers:

> The Panel considers the absence of statutory authority for deterring unacceptable behaviour to be particularly unsatisfactory in an *ex post* model of regulation, with less detailed regulation and greater reliance on competitive forces.[16]

53. For these reasons, the TPRP recommends considerable strengthening of enforcement powers, including the power to levy large fines and to order divestiture.

54. When the TPRP Report is properly read, it becomes obvious that the TPRP is recommending neither the deregulation of local telephone markets, nor the abandonment of economic regulation in the face of findings of SMP. Moreover, the TPRP recognizes that legislation is required both to reverse the presumption of regulation in the existing Act, and to replace *ex ante* regulation with new *ex post* enforcement powers and competition remedies that the Commission currently lacks. What the ILECs are pushing for is the opposite: deregulation in the face of SMP; and no new enforcement powers or competition law remedies to replace *ex ante* regulation. This is totally unsatisfactory in the current environment in which the Commission has made a finding of SMP based on sound economic principles and the best evidence available to it.

55. The TPRP Report therefore does not give rise to any need to refer Decision 2006-15 back to the Commission for reconsideration.

Removal of Other Marketing Restrictions

56. In their Petition, the ILECs have asked for the elimination of all forms of economic regulation of local telephone services, including the winback rule. They have also argued that economic regulation is not required to prevent targeted pricing since targeting is a normal competitive response.

57. What the ILECs appear to ignore in their Petition is the fact that these other marketing restrictions were originally imposed in response to anti-competitive conduct by the ILECs and were not imposed in advance of evidence of such conduct that was brought to the Commission's attention. Indeed, if one examines the history of the winback rules, it is readily apparent that the rules were developed over a period of time in direct response to the ILECs' ongoing

[16] TPRP Report, page 9-34.

attempts to evade the rules and abuse their market dominance.[17] With respect to below cost pricing, there have also been examples of Bell Canada using its former affiliate, BCE Nexxia, to evade floor price rules to win contracts with below-cost bids even when price controls and floor price regulations were in place.[18]

58. The marketing restrictions that the ILECs would like to see removed were designed to combat a very real abuse of a dominant position by the ILECs – one that threatened the development of a competitive local market.

59. While it is true that the TPRP and the Competition Bureau favour a minimalist approach to regulation, neither body has categorically rejected these types of regulatory safeguards in markets where SMP is found to exist.

60. In the Commission's recent forbearance proceedings, the Commissioner of Competition made the following statements on this issue in her Evidence:

> The safeguards implemented by the Commission, and referred to in its Public Notice, were based on findings that the ILECs possess significant market power in the residential and local markets. Earlier this year, in *Promotions of Local Wireline Services*, the Commission expressed the view that lessening or removing the safeguards on promotions under review in that proceeding, should only be considered following an assessment of the degree of competition in the local wireline market, taking into account numerous quantitative and qualitative factors. The Bureau agrees with this approach, as stated in its April 26, 2005 comments on Aliant's application to remove these safeguards.
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> …
>
> As discussed above, the Bureau generally favours a minimalist approach to regulation that tailors the regulatory response to the particular problem and weighs the benefits of regulating against the benefits or detriments of not doing so. Competition is rarely perfect and the Commission must guard against trying to micro-manage it. At the same time, if significant barriers to entry are found still to exist in local markets, and if competition

[17] Commission Letter Decision regarding CRTC Interconnection Steering Committee Dispute on Competitive Winback Guidelines, April 16, 1998; Telecom Decision CRTC 2002-1, 10 January 2002, Application of winback rules with respect to primary service; Telecom Decision CRTC 2002-73, Call-Net Enterprises Inc. vs. Bell Canada – Compliance with Winback Rules, 4 December 2002. Telecom Decision 2006-16, at para. 102: "[t]he Commission's specific objective is to prevent the ILECs from deriving an unfair or undue competitive advantage, or benefiting from an unfair opportunity, arising from this enhanced ability to directly communicate with competitors' customers for winback purposes."

[18] Telecom Decision CRTC 2003-63, *Review of Bell Canada's Customer-Specific Arrangements Filed Pursuant to Telecom Decision 2002-76*.

> is not likely to control the ILECs market power in the near future, tailored regulatory responses to address this imbalance may be justified.[19]

61. The Commission has since conducted this analysis and has concluded that the ILECs continue to possess SMP in local markets and market conditions are not sufficient to eliminate the existing safeguards. The Commission has however reduced the no-winback period for residential services from 12 to 3 months.

62. It should also be noted that the TPRP, despite preferring a presumption against regulation, has also recognized that one can't simply do away with *ex ante* regulation without putting something in its place to enforce compliance with regulatory or competition law requirements. The TPRP does not view the *Competition Act* and the laws of general application as sufficient to discipline the ILECs' market power in markets where they are found to retain SMP. The TPRP has expressed the view that in order to properly ensure enforcement in a telecommunications environment, competition law provisions need to be adapted to that environment and a new hybrid tribunal (the TCT)) needs to be established combining the experience of the CRTC and the Competition Tribunal. Furthermore, according to the TPRP, the TCT needs to be conferred with new powers equivalent to those of the CRTC and the Competition Tribunal. These would include the power to levy stiff fines for infractions, order divestiture and disallow mergers – none of which the CRTC currently enjoys. All of these reforms would require legislation to implement.

63. Similar powers have been conferred on Ofcom, the national telecommunications regulator in the UK. Ofcom has been conferred with concurrent jurisdiction to apply that countries' anti-trust legislation, as well as its telecommunications legislation, to telecommunications service providers subject to Ofcom's jurisdiction. This gives Ofcom a much broader range of powers to punish anticompetitive behaviour, than is currently available to the CRTC.

64. This should be recalled when the ILECs argue for *ex post* remedies over *ex ante* prescriptions. They are arguing for one half of the equation (elimination of *ex ante* regulation) without the accompanying prescriptions (stronger enforcement mechanisms). This is a recipe for disaster.

65. It should also be noted that the targeting issue is already before the Commission in the context of Telecom Public Notice CRTC 2006-5, *Review of Price Cap Framework*, May 9, 2006, in which the Commission announced that it will address the issue of rate deaveraging within rate bands which currently prevents targeted price responses. The Commission's jurisdiction to impose the winback rules is also before the Federal Court of Appeal in proceedings initiated by the same ILECs that are asking the Governor in Council to refer the issue back to the CRTC for reconsideration. Given these facts, there is no need for the

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[19] Commissioner of Competition, Evidence, June 22, 2005, PN 2005-2, at paras. 323 and 326.

Governor in Council to refer these issues back to the CRTC and it would be premature to do so.

Canada is not lagging behind European and other countries in its telecommunications policies

66. In their Petition, the ILECs have also sought to discredit the Commission's determinations in Decision 2006-15 on the basis that the Commission's decision to apply extensive *ex ante* obligations to the ILECs local services is out of step with the policies of regulators around the world. In support of these assertions, the ILECs have relied on reports prepared by Peter Waters of Gilbert & Tobin, and Joel Winnik of Hogan and Hartson.

67. In the Commission's recent proceeding to reconsider Telecom Decision CRTC 2006-28,[20] the Competitors retained Lemay-Yates Associates (LYA) to investigate the ILECs claims and the conclusions they have reached regarding international "best practices". A copy of the LYA Report entitled *A Comparison of VoIP Regulations between Canada and other Countries* was filed with the Commission as Appendix 1 to the Competitors' Submission.

68. The LYA Report demonstrates that the Commission is not in fact out of step with other regulators - many of which operate under different statutory frameworks and regulate markets with different characteristics than the Canadian market. One has to understand these differences in order to properly evaluate whether other regulators' approaches to economic regulation are consistent with the Commission's approach. One also has to understand the statutory framework that governs their approach to regulation.

69. For example, in some jurisdictions, local telephone calling services are no longer regulated because the ILEC has been found to no longer possess SMP. With ILEC market shares losses in those countries in excess of 25%, a similar result would have occurred using the Commission's criteria for local forbearance under section 34 of the Telecommunications Act, as set out in Decision 2006-15. The fact that one market ends up subject to economic regulation due to the presence of SMP and another ends up being forborne from economic regulation due to the absence of SMP, does not mean that different approaches are being taken. In fact, common principles of economics are being used in both cases and it is the presence or absence of SMP that is dictating the outcome.

70. This is the case in the EU where there is extensive wholesale regulation of local access services in some member countries, and local calling services are largely not subject to *ex ante* economic regulation. This is again because the ILECs have lost substantial market share and are no longer considered to possess SMP in the relevant market. LYA points out that the average market

[20] Telecom Public Notice CRTC 2006-6.

share of ILECs for local calls among countries referred to as the EU15, was reported at 67% at the end of 2004:

> … the average market share of incumbent telephone companies for local calls among countries referred to as the EU15 was reported at 67.3% at the end of 2004[21], meaning that the ILECs of these countries had experienced a market share loss of more than 30% on average at that time, and across their entire serving territory. This is a significantly higher loss of market share than that experienced by Canadian ILECs to date and understandably, a key consideration in the removal of price controls.[22]

71. Had competing carriers in Canada managed to garner a similar market share, forbearance would also have occurred under the Commission's criteria in Decision 2006-15 (assuming that the ILECs could satisfy the Q of S requirements for interconnection arrangements). What is important to consider in light of the ILECs' claims that the Commission is out of step with the rest of the world, is the fact that the market definition and the market analysis applied by the Commission is in fact consistent with the analysis applied in other jurisdictions.[23]

72. The ILECs have characterized the Commission's criteria for forbearance in Decision 2006-15 as "profoundly disturbing" and as "hold[ing] out no hope for removal (or even relaxation) of economic regulation of VoIP in the foreseeable future."[24] If one looks beyond the ILECs' inflammatory rhetoric to the facts, one can discern that, if anything, the Commission's forbearance criteria are less stringent, will result in forbearance at an earlier stage, and will result in less post-forbearance regulation, than the approach adopted by Ofcom in the United Kingdom. This is demonstrated in Table 2 of the LYA Report, which is reproduced below.

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[21] European Electronic Communications Regulations and Markets 2005 (11th Report), Annex 2, P. 12, Figure 8.
[22] LYA Report, June 5, 2006, at page 3.
[23] Ibid, page 2.
[24] Reply Comments of the ILECs in connection with Canada Gazette Notice DGTP-007-05, April 13, 2006, at para. 26.

Table 2 – Canada/UK local phone service forbearance environment

	United Kingdom	Canada
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 : • 38% of access lines take a non-BT service[25] (IIIQ 2005) • 46 % of local calling revenues in the residential market (Dec. 2004) [26]	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

73. As pointed out by LYA:

> In each of the elements listed above, Ofcom's criteria or *de facto* choice was equal to or more stringent than the requirement put forward by CRTC. It is much more difficult for competitors to achieve a specific market share gain over the entire serving territory of an incumbent telephone company

[25] 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. On July 19, 2006, Ofcom noted that this latter statistic had increased to 23% by the end of 2005. In this regard, Ofcom also noted that underpinning previous findings of SMP for BT has been "BT's very high market shares." *Retail Price Controls Explanatory Statement*, Ofcom, 19 July 2006, page 19, para 4.8.

[26] European Electronic Communications Regulation and Markets 2005 (11th Report), Annex 2, Market Overview, Figure 10, p. 14, February 20, 2006.

> than it is to achieve it on a narrower piecemeal basis where the focus is placed on key urban areas.
>
> Another key difference is also that Ofcom intervened very strongly to force BT to offer good quality services to competitors leading to the split of BT in two entities, one for wholesale and one for retail.
>
> In Canada, the CRTC has only required that incumbent telephone companies provide a good level of service to competitors, to ensure equal access and opportunity.[27]

74. Far from being impossible to meet, the Commission's criteria for forbearance are in fact less stringent than the tests applied in the UK under the European Community regulatory framework that the ILECs tout as being more enlightened and less intrusive.

75. Regulators all over the world are grappling with the transition of local telephone markets from monopoly to competitive structures. No two markets are at precisely the same stage of this transition and each exhibits a different mix of facilities and non-facilities-based competition. This has led some regulators to focus on wholesale rates and others to address the structural changes needed to produce true facilities-based competition. Those countries that have opted for wholesale regulation will likely end up regulating the ILECs' wholesale services for many years to come with all of the attendant problems associated with trying to set wholesale rates at a perfect level that will be fair to both the incumbent and the competitors that rely on the underlying service. Other countries, like Canada, are striving to achieve true facilities-based competition. This form of competition will produce more benefits for consumers in terms of innovative services and price competition. It will also ultimately result in more complete deregulation of the ILECs, once SMP is lost.

76. Cracks are also starting to appear in the lighter form of regulation established in some of the countries that have been held up by the ILECs as the models to follow. For example, as recently as June 14, 2006, the European Commission issued a directive to the German national regulatory authority, BNetzA, requiring it to reconsider its decision to impose only *ex post* regulatory measures on the incumbent local exchange carrier, Deutsche Telekom AG (DTAG). Having made a finding that DTAG possessed SMP in local exchange markets with a 94% market share, the BNetzA had sought to rely on a combination of carrier pre-selection rules, two months prior notice of new tariffs (to supervise the *ex post* price obligations it proposed) and a wholesale tariff regime to prevent abuse of DTAG's dominant position in the market. The European Commission reviewed the decision and sent it back to the national regulator for reconsideration, finding the *ex post* regulatory regime to be insufficient to protect the interests of users from abuse of SMP.

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[27] LYA Report, June 5, 2006, at pages 14-15.

> DTAG has a market share of approximately 94% in the retail access market. Competitive pressure resulting from LLU may be limited in particular in certain geographic areas. On a prospective basis, WLR is not available in Germany rendering it more difficult for alternative operators to climb the ladder of investment towards full unbundling. The Commission considers that in view of the fact that DTAG hence faces limited (potential) competition on the retail access market, the risk of excessive pricing by DTAG cannot be excluded. Ex post price control may not be effective in protecting consumers against that risk, in particular in view of the fact that the ex post price control foreseen in the Telekommunikationsgesetz (TKG) only prohibits tariffs that would be *manifestly* abusive. Therefore BNetzA should consider imposing a more efficient price control mechanism.[28]

77. This is not the first European national regulator to resort to *ex ante* regulatory measures to counteract SMP. In a press release that accompanied the aforementioned order, the Commission indicated that eight other national regulatory authorities in Europe that have implemented *ex ante* price control measures:

> In order to enhance competition and consumer protection against excessive pricing by Deutsche Telekom, the Commission invites the German regulator to consider imposing a more efficient price control mechanism. A number of other national regulators who found the retail access markets not competitive have already remedied the market failure through ex ante price regulation (regulators in Austria, Ireland, Slovakia, Slovenia, Netherlands, Hungary, Malta and Spain).[29]

78. Therefore, great care needs to be taken in interpreting the European Commission's approach to regulation. Whereas it is true that the European Commission generally favours *ex post* measures over *ex ante* measures when *ex ante* measures are considered adequate to fulfill the regulatory obligations imposed on carriers, it is quite clear that the European Commission is ready to impose ex ante regulation where it is considered necessary to fulfill its regulatory policies. This includes the imposition of ex ante price regulation in local markets where SMP is found to exist. As discussed above, this is also consistent with the TPRP's recommended approach.

79. Much can be learned of the European approach from a June 27, 2006 speech by Viviane Reding, Member of the European Commission responsible for

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[28] European Commission, June 14, 2006, SG-Greffe (2006) D/203096, emphasis added.

[29] European Commission, *Telecommunications: Commission urges the German regulator to impose more effective competition remedies for fixed telephony*, Press Release, Brussels, June 15, 2006.

Information Society and Media, entitled: *The Review 2006 of EU Telecom rules: Strengthening Competition and Completing the Internal Market*.[30] In her remarks Ms. Reding states:

> "I simply do not buy the argument that investment will only happen if we stop regulating monopolies."

Interestingly, while Canada's incumbent telephone companies are envious of European regulation, the European regulator speaks glowingly of facilities-based competition between cable and telephone in the United States. Far from walking away from regulation, Ms. Reding argues that structural separation may need to be imposed in Europe in order to achieve the success that has already been achieved in the United States.

80. Here in Canada, the Commission is well on the way to successfully managing the transition of the local telephony market from monopoly to sustainable facilities-based competition. Canada is in an enviable position of rolling out more than one advanced broadband network that will ultimately provide the basis for a strong competitive market that will not require economic regulation. The time horizon for achieving this goal is not distant, as the ILECs now claim. It will happen in major markets over the next two years. Now is not the time to abandon the Commission's blueprint for competition and succumb to the wishes of ILECs who remain intent on preserving their dominance in local markets.

OTHER INACCURACIES IN THE ILECS' PETITION

81. There are many other inaccuracies in the ILECs' Petition. Failure to respond to all of them should not be taken as agreement with any of the points made. However, some of the more egregious misstatements are addressed in the Appendix to this submission.

CONCLUSIONS

82. In conclusion, the Competitors urge the Governor in Council not to refer Decision 2006-15 back to the Commission for reconsideration or to otherwise disturb the Commission's findings and proposed tests for forbearance.

83. The Petition raises only two new issues which could conceivably justify referral of the Decision back to the Commission: one concerns the possible

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[30] http://europa.eu/rapid/searchResultAction.do?search=OK&query=infso&username=PROF&advanced=0&guiLanguage=en.

impact of new statistics on use of mobile wireless services as a substitute for wireline local telephone services; and the other concerns the recommendations of the Telecommunications Policy Review Panel (TPRP) released in March, 2006.

84. As regards the substitutability of mobile wireless services, the Commission has already initiated a public process to consider the implications for Decision 2006-15 of the new data released by Statistics Canada. This renders redundant any referral of Decision 2006-15 back to the Commission for reconsideration prior to conclusion of the Commission's own reassessment process.

85. As regards the release of the TPRP report, that report does not in itself give rise to any need for reassessment of Decision 2006-15. Contrary to what the ILECs say, the TPRP did not purport to second-guess the CRTC on the issue of local forbearance and did not criticize the tests for forbearance employed by the Commission. The TPRP also anticipated a transition period in which the Commission would continue hearing forbearance applications prior to the enactment of new legislation. Even after the passage of such legislation, the TPRP recommended the creation of a new tribunal, the Telecommunications Competition Tribunal, that would take over the job of assessing whether significant market power (SMP) still exists in given markets and, if so, whether economic regulation is justified to protect consumers from abuse of SMP. Nothing in the TPRP's report places the Decision in doubt or merits its reconsideration by the Commission.

86. Many of the recommendations of the TPRP will require statutory amendments to be enacted by Parliament. In the meantime, the Commission and the Governor in Council must continue to apply the provisions of the *Telecommunications Act*, until such time as the tests for forbearance in section 34 of the *Act* have been satisfied. Given this situation, section 25 of the *Telecommunications Act* requires the Commission to continue to regulate the ILECs' rates for local telephone service on an *ex ante* basis.

87. The Commission's Decision on *Local Forbearance* opens the door to forbearance of local services on a market-by-market basis based on objective criteria. While these local markets are not yet sufficiently competitive to justify forbearance, the Competitors fully expect that many major markets soon will satisfy these criteria over the next two years. Now is not the time to abandon the Commission's role of managing the transition to a competitive local market.

88. Contrary to what the ILECs would have the Governor in Council believe, Canada is not lagging behind the rest of the world in its treatment of VoIP services. The Commission's criteria for forbearance of the local telephone market are entirely consistent with the approach taken by regulators in other industrialized nations, as well as with the principles of competition law. The fact that regulators in some countries have forborne from regulating local markets in

advance of the Commission reflects the different market conditions in those countries – not a fundamentally different approach to regulatory forbearance. In some countries, the ILECs have lost considerably more market share than the Canadian ILECs. Had similar market share losses been experienced by Canadian ILECs, the conditions for forbearance established in Decision 2006-15 would similarly have been met.

89. As regards the ILECs' request for reconsideration of the winback rules and the rules restricting targeted pricing, these kinds of marketing restrictions have a legitimate role to play in the prevention of abuse of SMP by the ILECs. Nonetheless, these rules are already subject to reconsideration by the Commission in other proceedings and it would again be redundant to send these issues back to the CRTC for reconsideration.

90. For all of these reasons, the Competitors urge the Governor in Council not to grant the relief sought in the Petition. In the alternative, given the fact that the Commission is already reconsidering certain key parts of the Decision in other proceedings that are already under way, including the issue of wireless substitutability and targeted pricing, the Competitors urge the Governor in Council to wait for the conclusion of the Commission's proceedings before responding to the Petition.

APPENDIX

OTHER INACCURACIES IN THE ILECS' PETITION

1. In support of their request that the Governor in Council refer the Decision back to the Commission for reconsideration, the ILECs rely on a number of inaccurate and misleading statements and arguments. The Competitors have already addressed the ILECs' mischaracterization of the TPRP recommendations and the CRTC's consideration of the inclusion of wireless subscribers in the local market.

2. As the Competitors have established, when the TPRP Report is properly read and understood and the CRTC's ongoing proceeding to examine whether wireless services should be considered in the same market as local exchange services is taken into consideration, the ILECs have not established a need for the Governor in Council to exercise its extraordinary power of referral.

3. However, the Competitors would like address some of other inaccurate and misleading evidence and arguments advanced by the ILECs in support of the Petition.

Reliance on Commentators

4. The ILECs rely heavily on the opinions of certain newspaper columnists to try to substantiate their dissatisfaction with the Commission's approach to the orderly deregulation of the residential local exchange services market. In particular they quote National Post columnist Terence Corcoran's criticism of the Decision on the basis that it will prevent the ILECs from competing on price.[31] Despite the colourful rhetoric, Mr. Corcoran's analysis is flawed. Commission regulations do not prevent the ILECs from lowering the prices of their residential local exchange service. Under the price cap regime, ILECs have the flexibility to change rates within the bounds of the price cap formula. Under new streamlined procedures, orders granting interim approval of ILECs tariff filings are approved within 10 days. What is prohibited is selectively targeting certain consumers within a market with special promotions or offers to drive out nascent competition before it has an opportunity to establish itself.

5. Also among the list of "commentators" the ILECs turn to in support of their position was economist Neil Quigley who authored an article critical of the Decision that was published in the National Post.[32] One might get the mistaken impression from the National Post article and the Petition that Mr. Quigley is an impartial observer commenting on the Decision. In fact, he was an expert witness retained by the Bell to provide evidence on its behalf in a number of

[31] Petition at paragraph 13.
[32] Petition at paragraph 21.

recent CRTC proceedings.[33]. Both pieces of evidence supported Bell's deregulation campaign. It is no small surprise then that he agrees with and supports their position.

6. In paragraph 29 of their Petition, the ILECs cite National Post columnists Mark Evans and Paul Vera for the proposition that: "…even after the CRTC's market share of 25% loss of lines is reached, it could take up to 2 years (in some cases more) for economic regulation to be lifted."

7. There is quite simply no basis to make this sort of claim. In its Decision, the Commission has established detailed timelines for considering future applications for local forbearance. The maximum timeline from the date of filing until the issuance of a decision under these procedures is 200 days – and the process could be a lot shorter depending on the procedures selected by the Commission.[34] In addition, the Commission has put in place measures for the quarterly publishing of market share data in order to assist the ILECs in making their applications. Past history with cellular, long distance and private line forbearance indicates that once a decision to forbear is made, it can be implemented immediately.

Deregulation in the UK and Germany

8. In paragraph 34 of their Petition, the ILECs have spoken in glowing terms about the deregulation of local markets in the UK and Germany:

> Today, there are few countries where detailed rate regulation and tariff approval requirements continue to apply, even for traditional wireline service. Prescriptive *ex ante* regulation has been largely replaced with regulation based on the principles of general competition law. This fundamental shift towards a competition-based approach, in which regulation is not applied unless markets are demonstrated to be noncompetitive, has taken place across both large markets, such as the UK, and small markets, such as Sweden; markets where the incumbent has lost significant market share, such as the UK, and markets where it has not, such as Germany; and in markets all of which have a fraction of Canada's alternative (i.e., cable) infrastructure, ranging from Germany with a tenth of Canada's cable penetration to the UK with half of Canada's.

9. As indicated in the main body of this submission and in Table 2, had the ILECs lost the same share of the local market that British Telecom (BT) lost in

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[33] Appendix 2 of Bell Canada's Comments in Telecom Public Notice CRTC 2004-2: *Regulatory framework for voice communication services using Internet Protocol* and Attachment 2 of Bell Canada's Comments in Telecom Public Notice CRTC 2003-10: *Amendments to Telecom Public Notice CRTC 2003-8, Review of price floor safeguards for retail tariffed services and related issues.*

[34] Decision 2006-15, at paras 521 to 528.

UK, forbearance would already have occurred in Canada as well. Furthermore, while Ofcom has deregulated retail prices in the local calling market, it has imposed onerous regulatory conditions on BT that include structural separation of its wholesale division from its retail division and extensive economic regulation of wholesale prices. Neither of these conditions is a requirement for retail price forbearance in Canada and, once the Commission's forbearance criteria are met, the ILECs will be subject to far less regulation than BT.

10. The situation in Germany has also been addressed in the main body of this submission. As reported above, since the filing of the ILECs' Petition, the European Commission has criticized the German National Regulator's decision to rely on *ex post* remedies in the face of SMP and has directed it to come up with more effective *ex ante* price controls.

Comparisons with Cable TV Regulation

11. The ILECs' repeatedly point to the fact that cable operators can apply for rate deregulation after losing 5% of market share to support their argument that the 25% loss of market share threshold established by the Commission in the Decision is inconsistent and economically unsound.[35]

12. As the ILECs are well aware, the comparison of the 5% and 25% thresholds is an "apples and oranges" comparison. Unlike the local telephone market, the television market has been characterized by one form of competition or another for several decades. Indeed, when cable television undertakings were first licensed in the mid-1960's, all Canadians received their television signals off-air. Many still do, despite the fact that cable has been in the market for many years and numerous other forms of broadcasting distribution undertakings have also entered the market. At the time the Commission settled on the 5% market share threshold for rate deregulation, 99% of Canadian homes had television sets – but only 80% of those homes had cable television service. The remaining 20% obtained their service off-air, via their own antennae, or via illegal satellite services. When the Commission superimposed the 5% market share loss threshold on this scenario, it in effect required cable's market share loss to increase to 30% prior to forbearance.

13. The situation in the local telephony market is quite different. Here, the ILECs started with 100% of the local market and, in all but one local market, have not yet reached the 20% level of market loss that the cable companies were at in the late 1990's when the 5% additional market share loss threshold was imposed.

14. Looking back at the speed at which the cable companies lost market share to BDU operators, it is easy to see that the barriers to entry in the two markets are also quite different. Whereas local plant has had to be upgraded to

[35] Petition at paragraph 19-20.

accommodate competition in local telephony in all local markets to be served, competing BDUs have been able to obtain ubiquitous coverage through satellite distribution. This ease of entry is borne out by the statistics released by the CRTC on July 6, 2006. After launching service in 1997, from 2004 to 2005, subscribers to basic DTH and MDS services continued to grow from 2,316,714 to 2,486,372, while subscribers to basic cable television services dropped from 6,641,569 to 6,617,378 in the same period.[36] Looking solely at the BDU market, cables' share was 72.6% at the end of 2005. However, its share of the total television market, including off-air television and illegal satellite services, is considerably lower at below 55%. No ILEC has experienced any where near this type of market share loss to date.

15. The ILECs have also neglected to mention that long after the cable operators were rate deregulated, they continued to be subject to winback restrictions imposed by the Commission. In fact, in 2004 the Commission imposed new winback restrictions with respect to residential services offered by cable operators in multi-unit dwellings. In contrast, under the Commission's transitional regime to forbearance, an ILEC will be able to apply to have the winback restrictions lifted even before it has met the criteria for forbearance.

Entry Barriers

16. In their critique of the Commission's application of competition principles, the ILECs make the claim that as a result of the introduction of VoIP technology, barriers to entry into the local exchange market are now "low, if not non-existent".[37] The ILECs argue that the Commission has failed to taken into account the evidence of these low barriers to entry in its analysis.

17. In fact, it is the ILECs that have ignored the evidence when they overstate the ability of new competitors, including cable companies, to enter into the local exchange market.

[36] CRTC Press Release, July 5, 2006, *CRTC Releases Financial Results for the Canadian Broadcast Distribution Industry*.
[37] Petition at paragraph 23.

18. As the Commission found in Decision 2005-28:

> 156. …cable companies face certain obstacles that the ILECs do not, and that the ILECs have certain advantages not shared by the cable companies. For example, the cable companies' existing shared cable network must be upgraded in order to offer quality local exchange service currently offered by the ILECs and expected by customers. Furthermore, the Commission notes that cable companies – with the exception of EastLink – have virtually no experience in either the residential or business market for local exchange services, and will therefore have to build expertise in serving telephone customers. Processes related to customer transfer, including number portability, directory listings, operator services, E9-1-1, and billing, will have to be implemented successfully.
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> 157. Alone among existing and potential VoIP service providers, the ILECs own and operate a ubiquitous PSTN network, including the access and underlying infrastructure that encompasses both business and residential customers. PSTN access is an integral component of any local VoIP service and the ILECs are the only provider with ubiquity.[38]

19. The deployment of local phone service requires cable companies to undertake significant new capital investments to upgrade their networks; to acquire and implement new technology; to develop new back-office processes and customer service capabilities; to enter into interconnection agreements with the dominant incumbent; and to compete in an unfamiliar product market against that dominant incumbent provider who has a 100-year head start and virtually ubiquitous penetration of its residential local exchange service throughout the cable competitor’s entire potential serving area.

20. The fact that significant barriers to entry to the local exchange market continue to exist is evident from the fact that, despite the emergence of all of the competitive residential service providers listed by the ILECs in their Petition, the ILECs continue to enjoy a dominant national market share of more than 92%.

[38] Decision 2005-28, paragraphs 156-157.

On-going Need for Regulation

21. The ILECs repeatedly accuse the Commission of wanting to "micro-manage" the industry or achieve a "planned industry structure" and accuse a representative from Rogers Communications of suggesting in a letter to the National Post that the Commission should never forbear from the regulation of the ILECs' local exchange services.[39] In fact, what Ken Englehart, Vice-President Regulatory with Rogers Communications, actually said in his May 6 letter, was that both the Commission and the TPRP agree that regulation of the local telephone market is currently necessary and would remain necessary while the ILECs enjoy significant market power.[40] Mr. Engelhart then made the comment that he would not want Rogers to be the test case of what would happen to competition in the local market if there was premature forbearance. He never suggested, as claimed by the ILECs in the Petition, that regulation of local phone market should continue in perpetuity. As stated in the main body of this submission, the Competitors fully expect the Commission's criteria for forbearance to result in forbearance of the ILECs' rates for local service in major Canadian markets over the next two years.

22. In paragraph 39 of their Petition, the ILECs claim that the Decision's forbearance test: "…is most unlikely to ever result in the complete economic deregulation of any market regardless of the degree of competition in that market."

23. Once again, there is no basis to make this assertion. A 25% market share loss has already occurred in the Halifax local market and could well be achieved in other major markets over the next two years. Once this loss of market share is established (which can easily be measured using the data collection procedures established by the Commission), it is entirely within the ILECs' own hands to satisfy the interconnection requirements established by the Commission. As soon as Aliant does so, the Halifax market will be forborne from regulation.

24. As indicated above, once the Commission forbears from regulation, its history has been to stay out of economic regulation. This has been the case in all markets deregulated to date, including the long distance, wireless mobile and private line and data markets.

[39] Petition, paragraph 28.
[40] National Post, Saturday, May 6, 2006 at page FP19.