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The Federal Government Signals a New Policy Approach for the CRTC in the Telecom Sector

By Stephen Zolf

On February 26, 2019, the Minister of Innovation, Science and Economic Development (ISED) tabled a *Proposed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation* (the “Proposed Policy Direction”). Section 8 of the *Telecommunications Act* permits the government to issue directions to the CRTC “of general application on broad policy matters” with respect to the statutory policy objectives relating to Canadian telecommunications that are set out in the Act.

If implemented substantially in the form as proposed, the Proposed Policy Direction will likely have a significant impact on the telecommunications regulatory framework overseen by the CRTC, in particular the manner in which the Commission exercises its powers and performs its duties in implementing the Canadian telecommunications policy objectives set out in section 7 of the Act.

The potential impact of the new Direction to the CRTC is best understood in contrast to the 2006 government *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, which was enacted during the Harper government by then ISED Minister Maxime Bernier (the “2006 Policy Direction”). The 2006 Policy Direction focused primarily on minimal regulatory intervention by the CRTC. The Direction instructed the CRTC “to rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives.” Moreover, if the CRTC decided that regulatory intervention was warranted, the 2006 Policy Direction required the Commission to “use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.”

The Proposed Policy Direction moves away from this *laissez faire* approach to one which mandates the CRTC to engage in regulatory measures that will “promote competition, affordability, consumer interests and innovation.” There are no less than four references to “affordability” in the new Direction and three express references to “consumers” or “consumer interests.” Moreover, rather than promoting “market forces,” the Proposed Policy Direction focuses on the existence of “market power” and the need for the Commission to adopt measures that foster affordability and lower prices in such circumstances.

Further, the Proposed Policy Direction appears to have de-emphasized the policy of “facilities-based competition,” in contrast to the 2006 Policy Direction which favoured the investment in and ownership of competing telecommunications network facilities as a means of creating more competition among service providers and hence more consumer choice. The Proposed Policy Direction de-emphasizes reliance on facilities-based investment. In its place, the CRTC is directed to “encourage *all forms* of competition” and to “reduce barriers to entry and barriers to competition for new and smaller telecommunications *service providers*”.

Thus, resale and service-based competition models now appear to be given equal prominence alongside facilities-based competition. In the wireless sector, there is an ongoing debate on whether non-facilities-based telecommunications service providers should have mandated access to the networks of the national wireless providers (Bell Mobility, Rogers and Telus) in order to provide services on a resale basis as “mobile virtual network operators” (MVNO). The Proposed Policy Direction may alter this outcome in prospective regulatory proceedings in view of its express direction to the CRTC to consider the use of measures that “reduce barriers to entry and barriers to competition for new and smaller telecommunications service providers” (i.e., all providers, not just facilities-based carriers).

It is significant to note that the CRTC commenced a policy proceeding on February 28, 2019, indicating its “preliminary view” that MVNOs should have mandated access to carrier networks “until they are able to

establish themselves in the market.” This is a departure from previous CRTC rulings in which the Commission declined to mandate wholesale MVNO access due to concerns for undermining incentives for investment by facilities-based carriers.

This more “facilities-agnostic” approach will likely be fiercely debated among stakeholders, many of whom have argued that policies which force reseller access to facilities-based providers will threaten the economic linkage between facilities-based competition and increased investment incentives. By lowering the relative price to “lease” infrastructure rather than building facilities, “service-based” regulation can distort the incentive for facilities-based entry by resellers and diminish the investment incentives for facilities-based service providers.

Many economists argue that abandoning an express policy favouring facilities-based investment would lead to social welfare losses if foregone investments in new technology and new service products are not made available to consumers. The other side of the debate views the adherence to the policy of facilities-based competition as no longer sustainable in the age of the Internet. This issue will clearly be front and center in stakeholder debate over the “outcome-based” objectives of the newly Proposed Policy Direction.

A further layer of uncertainty relates to whether the 2006 Policy Direction will be repealed following the enactment of the Proposed Policy Direction. There have been reports in the media that the government intends that the two policy directions will co-exist. If both policy directions were to remain in force, significant issues of interpretation will inevitably arise, rendering it increasingly difficult to read the “tea leaves” of government policy in the telecommunications sector.

The Order-in-Council will be formally published in the *Canada Gazette* on March 9, 2019, followed by a 30-day comment period.

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