Telecom Policy Review Panel

Reply Comments of the Consumer Groups (Public Interest Advocacy Centre, the Canadian Internet Policy and Public Interest Clinic, the Consumers Association of Canada)

September 15, 2005

Table of Contents

Introduction

1. The Consumer Groups welcome this opportunity to make reply comments to the submissions of other parties to the Telecommunications Policy Review Panel.

2. Due to the number of interested parties and the sheer volume of the submissions, the Consumer Groups are unable to reply to every submission. Failure to respond to any submission by another party adverse in interest does not indicate acceptance by the Consumer Groups of that submission. While focusing these reply comments on a few submissions (most notably those of Bell and Telus), the Consumer Groups reserve the right to comment on other submissions in the hearing phase of the review or in their final submissions.

ILEC submissions are driven by private, not public, interests

3. As a preliminary matter, the Consumer Groups wish to make what should be an obvious point: that the ILECs (Bell Canada (Bell), TELUS, MTS Allstream, Aliant, Sasktel) do not speak for the public interest, but rather in corporate self-interest. The ILECs have no social or public interest mission; rather, their sole interest is in maximizing shareholder value. It would be unusual for the achievement of corporate goals to coincide perfectly with the achievement of public interest objectives.

4. This point needs to be made because the ILEC submissions imply that these businesses speak in the public interest.

5. In the main TELUS submission, for example, at Para. 49, TELUS tells us that telecommunications 'reform' in Canada is urgent because Canadians are being deprived of competitive choice. It cites the recent CRTC VoIP regulation decision:

> 49. The tension between today's policy goal of competition and archaic regulatory tools makes it difficult for the CRTC to adapt and step away from traditional regulation. The unfortunate result of regulating incumbents in a competitive environment is a restriction on **customer choice**. Regulation **thought to be in the interests of consumers** has ironically ended up depriving them of choice. For example, earlier this year, instead of letting market forces guide the development of VoIP, the CRTC grafted the old model of prior approval of tariffs, the traditional ex ante regulatory approach, on the telephone companies and then imposed restrictive, asymmetric rules limiting communication with customers, which limits consumer choice every day.

6. The Telus characterization of the VoIP decision is neither accurate in terms of the use of the phrase "depriving them of choice" nor does it fairly set out the potential benefits to consumers associated with the Decision. The implication of this statement appears to be that the public interest should yield to the principle of the promotion of competition, or of consumer choice, as this is a somehow higher goal. The Consumer Groups do not agree.

7. This observation is particularly relevant in the context of this review. Not even the ILECs are bold enough to contend that the Canadian public was clamouring for a review of telecommunications policy. In fact, most consumers are unaware of the specifics of telecommunications regulation and have a greater awareness of the broadcasting role of the CRTC. Whatever the merits of conducting a review of telecommunications regulation at this juncture, its appearance upon the government policy horizon is solely in response to the stated (and much lobbied) desires of the ILECs, and Bell Canada, in particular.

8. The considerable Canadian achievements in telecommunications products and services have been obtained under the current regulatory regime. The Consumer Groups note that little has been put on the table except rhetoric by erstwhile reformers who would urge the ejection of the current framework that amounts to throwing out the regulatory equivalent of the bathwater, tub, baby, mother and house. Although telecommunications policy could be improved, especially in the areas of consumer redress (as detailed below and our initial submission) this does not mean that the present regulatory regime is dysfunctional.

9. At the risk of being accused of sour grapes, we would comment that the ILECs, in particular, seem to have buried their competitors and the Consumer Groups and other parties in this Review with paper prepared well in advance. The Consumer Groups trust that the size of interested parties' research budgets won't be determinative in the resolution of the issues in play in this review.

10. Secondly, we cannot but note that stakeholders which were nurtured and protected by monopoly regulation for much of the last century have now embraced the religion of competition so forcefully that all social and economic fairness considerations must seemingly bow to their need for unfettered access to customers and their pocketbooks. The Consumer Groups would remind such stakeholders that the consumers, whose regulatory protections are sought to be stripped, have paid over the decades for the current capacity of such stakeholders to compete. They are entitled to more than a right to look for another provider.

Telecommunications Regulatory Principles

11. In response to Bell Canada's telecommunications regulatory "Guidelines" and TELUS's telecommunications regulatory "Principles", the consumer groups propose a different formulation of telecommunications policy principles, driven by public interest concerns and motivations. The Guiding Principle under this public interest formulation is:

> *Telecommunications policy should be designed to achieve specified social and economic policy goals through effective regulation where market forces alone are not effective in achieving those goals.*

12. Further to this Guiding Principle, we propose adoption of the following principles:

Regulatory Principles for Telecommunications

1. Regulation is appropriate whenever it is the most efficient means of realizing the public interest.

2. Regulatory institutions should be designed with a clear assignment of duties for general policy-making, implementation and adjudication, and judicial oversight.

3. Regulatory instruments should align the incentives of the service providers with the public interest.

4. Economic regulation should strive to be symmetric as well as competitively-, technologically-, and provider-neutral.

5. Social objectives should be clearly stated in enabling legislation and should be pursued in a manner that is competitively-, technologically-, and provider-neutral.

6. As far as possible, economic regulation should strive to be symmetric, as well as competitively-, technologically-, and provider-neutral.

7. Social objectives should be defined in enabling legislation and should be pursued in a manner that is, as far as possible, competitively-, technologically-, and provider-neutral.

8. Technical objectives should be pursued in a manner that is, as far as possible, competitively-, technologically-, and provider-neutral.

9. Regulation needs to be supported by effective enforcement tools as well as complaint and dispute resolution mechanisms.

10. The effectiveness of regulation should be periodically evaluated.

13. Just as regulation should not be a policy goal *per se*, nor should reliance on market forces. Instead, both should be treated as means of achieving ultimate social and economic policy goals. The focus of policy should be on ensuring effective regulation where effective competition has not yet been achieved and where competition cannot, on its own, achieve policy goals. Telecommunications policy should reflect the importance of telecommunications to Canadian society in general, not just to the telecom industry and telecom users. In particular, it should recognize that social objectives can and do often trump market objectives. Finally, it should recognize that efficient, targeted regulation is critical in order to achieve <u>sustainable</u> competition in a previously monopolized industry.

Bell's and TELUS's proposed regulatory Guidelines and Principles

14. Bell Canada and TELUS Inc. have each proposed a set of telecommunications regulatory "guidelines" or "principles" to guide Canadian telecommunications policy in the future. Both of these proposals are far removed from the public interest regulatory principles suggested by the Consumer Groups, as well as the regulatory reality in Canadian telecommunications. Both are well designed to serve ILEC shareholders, but sorely lacking to serve the Canadian public.

Bell Canada Guidelines

15. Dr. Johannes Bauer[1] has provided an analysis of Bell's Guidelines, which analysis is filed as Appendix A to the Consumer Groups' reply. The Consumer Groups endorse his analysis.

16. In addition, the Consumer Groups wish to underline the narrowness of Bell's proposed "Telecommunications Guidelines". The suggestion made in them is that the role of the marketplace is not simply the efficient delivery of goods and services but also that the market can and should take the place of the government regarding social regulation, at least in the area of telecommunications. Such faith in the power of the market to achieve non-market (social) objectives appears to be self-servingly myopic.

TELUS' Regulatory Guidance Principles

17. Likewise, the analysis of TELUS's proposed Regulatory Guidance Principles is flawed by over-reliance on market forces. An analysis of TELUS's principles is contained the opinion of Dr. Johannes Bauer, filed as Appendix B to the Consumer Groups' reply. Again, the Consumer Groups endorse his analysis.

The role of "social regulation" in telecommunications

18. The Panel has used the term "social regulation" to refer to "regulation intended to address a range of issues related to social values, such as protection of privacy, access by disabled consumers, public safety and basic consumer protection measures such as clarity in billing, reasonable terms of payment and prior consent to transfer of service." It has posed a number of wide-ranging questions regarding the appropriate regulatory approach to issues of consumer protection, privacy, universal service, quality of service, access to marketplace information, and effective redress.

[1] See Appendix E for Dr. Bauer's curriculum vitae.

19. Bell has responded in varying and inconsistent ways to these questions. In Recommendation #11, Bell acknowledges an important, but very narrow role for "social regulation", as follows:

> *"Social regulatory rules should concentrate **solely** on promoting access to basic telecommunications, public and emergency safety issues, ensuring access to telecommunications by the disabled and limiting public nuisance associated with telecommunications services (including telemarketing). The Commission's authority to make rules respecting privacy issues should be limited to the extent a telecommunications service itself involves the protection of customer privacy or disclosure of customer information to the public."* (Emphasis added)

20. Yet, in paragraph 123 of its submission on Regulatory Policy (Part D), Bell seems to allow for a broader role for social regulation:

> *"…social regulatory rules should be permitted that, **for example**, relate to promoting access to basic telecommunications, public and emergency safety issues, ensuring access to telecommunications by the disabled and limiting public nuisance associated with telecommunications services (including telemarketing), where market forces do not, and are not likely to, adequately address the issues."* (emphasis added)

21. In response to Question B13, Bell acknowledges the need for subsidies to deliver basic service to high cost areas, and states that it does not propose any changes to the existing contribution regime.

22. But in response to Question B28 (regarding the provision of services to all Canadians), Bell states:

> *"The CRTC should only intervene [re social policy issues] when there is some evidence that there is a problem with the adequacy of market forces to ensure that **suitable services are made available to disabled consumers**."* (emphasis added)

23. It is thus unclear exactly what role Bell sees the regulator playing with respect to social policy issues – other than quality of service, fair contract conditions, and access to marketplace information, which Bell argues are adequately dealt with via market forces and/or laws of general application.

24. Whatever the case, the Consumer Groups strongly disagree with Bell that laws of general application in Canada are adequate to deal with the many, often industry-specific, consumer issues that arise in telecommunications. See below, under "Competition Bureau and the CRTC", for an explanation of why the *Competition Act* and competition authorities in Canada cannot be expected to maintain adequate consumer protection in

telecommunications, and under "Privacy", for an explanation of why issues of customer confidentiality in telecommunications should not be left to the Privacy Commissioner alone to resolve.

25. If the goals of telecommunications policy, as currently formulated in Canada (and as formulated in most other western nations) are to be achieved, telecommunications regulators must play a central role not only in universal service, emergency services, accommodation of those with disabilities, and public nuisance associated with telecom services, but also in ensuring that telecom services are delivered to Canadians:

    - at just and reasonable, as well as affordable, rates;
    - at high (or at least acceptable) levels of quality;
    - under fair terms and conditions;
    - with full information about the relevant services and associated terms and conditions;
    - in a manner that respects their privacy; and
    - under a regime that provides effective avenues of recourse for aggrieved consumers.

26. As our albeit incomplete review of the regulatory approaches of other countries, demonstrates,[2] the role of telecommunications regulators in protecting telecom consumers from unfair terms, poor quality service, unreasonable rates, inadequate information, and privacy protection is widely recognized by developed countries.

Telecommunications Policy Objectives

27. Section 7 of the *Telecommunications Act* currently states:

> *It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:*
>
> *(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;*
>
> *(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;*
>
> *(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;*
>
> *(d) to promote the ownership and control of Canadian carriers by Canadians;*

[2] See Appendix D - International Comparison of Purposes and Objectives of National Telecommunications Legislation.

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services; and

(i) to contribute to the protection of the privacy of persons.

28. Bell Canada proposes that this statement of objectives be radically altered – eviscerated of any reference to the broad implications of telecommunications policy for Canadian society, sovereignty, and economy, and instead narrowly focused on the provision of telecommunications services to consumers. Bell would reword section 7 as follows:

The purpose of this Act is to ensure Canadian consumers have access to a choice of high quality, affordable and innovative telecommunications services. This objective is best achieved:

From an economic standpoint by

• Relying on market forces to the maximum extent feasible; and

• Ensuring that any regulatory measures adopted are welfare-enhancing, consistent with economic principles.

From a societal standpoint by

• Adopting measures designed to respond to the social requirements of users to the extent that competitive market outcomes will not likely achieve such requirements.

From a technical standpoint by

• Creating rules that are designed to facilitate network interoperability in the most efficient manner applicable in the circumstances.

29. The Consumer Groups strongly oppose Bell's proposal, and any other similar proposal that fails to recognize the critical function that telecommunications policy serves in the maintenance and development of the Canadian society and economy. Bell's proposed objectives statement ignores the enormous role that telecommunications service plays in the ability of workers to find jobs, of friends and families to keep in touch, of communities to develop, of marginalized individuals to connect with others, of social support structures to operate, of small businesses to grow, and so forth.

30. There can be little doubt that Canada's accomplishment of almost universal basic phone service, with its tremendous social and economic spin-offs, has been made possible by

policy objectives that explicitly recognize both the role of telecommunications in serving "to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions", and the value of universally available, affordable, and reliable telecommunications services to Canada as a whole, as well as to individual Canadians.

31. Indeed, Bell admits as much when it states, in para.127 of Part D of its submission:

> *"While Bell Canada is not opposed to the implementation of socially desirable goals, Bell Canada considers that this type of* ***regulatory intervention should be restricted to situations and circumstances that genuinely affect the social and economic fabric of Canada and its regions.****"*(emphasis added)

32. However, Bell's proposed new wording of statutory policy objectives is far narrower than this formulation, and would inappropriately limit the regulator's ability to intervene where necessary to achieve broad social and public interest goals.

Bell has recognized broader telecommunications policy goals in the recent past

33. Indeed, we are struck by the contrast between Bell's narrow vision of the role of telecommunications in these submissions, and its much broader vision of the role of telecommunications, as set out in the 2001 report to the National Broadband Task Force of which Bell's CEO (along with CEOs of several other major telecommunications service providers, including TELUS, Aliant, Rogers, and Call-Net) was a member. Together with the rest of the Task Force, Bell's representative recognized in no uncertain terms the considerable importance of telecommunications policy to the social, economic and cultural health of the country. For example, the Task Force began its work by identifying guiding principles, under the following "overarching principle":

> *After considering the positive impact the Internet has already had in providing Canadians with improved access to a wide range of economic, learning, health care and cultural opportunities; being convinced that the broadband communications revolution has the potential to transform these and other aspects of our national life, in particular by reducing physical location as a barrier to opportunity; and noting initiatives already under way in other countries as well as in some Canadian provinces, territories, municipalities and communities, the Task Force agreed to the following overarching principle:*
>
> *We believe, as a matter of urgency, that all Canadians should have access to broadband network services so that they can live and prosper in any part of the land and have access to high levels of education, health, cultural and economic opportunities.*

34. It is striking that, just four years later, Bell's views as to the appropriate role and scope of telecommunications policy would have changed so dramatically. Now, Bell proposes to rid Canada's telecommunications policy objectives of any reference to:

    a) the role of telecommunications in safeguarding, enriching and strengthening the social and economic fabric of Canada and its regions;

    b) the value of ensuring affordable, reliable, high quality telecommunications services throughout Canada, in both urban and rural areas (i.e., universality); and

    c) the importance of consumer access to reliable telecommunications services (as well as affordable, high quality and innovative services).

35. Moreover, Bell proposes to rid the *Telecommunications Act* of provisions requiring:

    a) that rates for basic telecommunications services be just and reasonable; and

    b) that carriers do not engage in unjust discrimination.

36. Both of these provisions, in the view of the Consumer Groups, are essential cornerstones of a telecommunications regime designed to achieve optimal social and economic results for Canada and telecommunications end-users, as well as for the telecommunications industry itself. Both principles are commonly included in the telecommunications legislation of developed countries. For example, the USA *Communications Act*[3] includes provisions explicitly requiring "just and reasonable" rates as well as non-discriminatory provision of service,[4] and requires the FCC to forbear from regulation only if it determines that:

    > *"enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are* ***just and reasonable and are not unjustly or unreasonably discriminatory****;*
    > *(2) enforcement of such regulation of provision is not necessary for the protection of consumers; and*
    > *(3) forbearance from applying such provision or regulation is consistent with the public interest." (*emphasis added)

37. Without a "just and reasonable" rate requirement (or at least objective), the benefits from improvements in the efficiency and effectiveness of telecommunications networks may flow entirely to corporate shareholders at the expense of ratepayers, who have an equally valid claim to them. Without a rule against unjust discrimination, suppliers with market power can abuse that power in ways that are damaging to competition and consumers, and we can expect to see more examples like that of Telus using its gatekeeper power to unilaterally block access to a website critical of it.

[3] Section 10(a)
[4] Sections 47 U.S.C. 201 and 202 (See Appendix D)

Bell's proposed objectives do not reflect Canadians' views and values

38. Bell's proposal to make consumer choice the focus of Canadian telecommunications policy is particularly interesting, in light of the results of the Decima report "Consumer Attitudes on Telecommunications Regulation" that Bell funded and submitted as Appendix D-12. On page 4 of that report, Decima provides the results of a question asking people for their views as to the importance of various federal government responsibilities in the area of telecommunications. "Ensuring an adequate number of competitors" was near the bottom of the list, with only 25% of respondents considering it among the "most important" responsibilities of government, while privacy protection rated the highest at 64%, followed by (among other goals): ensuring reasonably priced services (43%), ensuring good quality services (43%), ensuring rural access (41%), and ensuring low income access (34%). Clearly, Bell's views as to policy priorities do not reflect those of Canadians as measured by Bell's own research.

39. The Decima survey confirms that Canadians expect the federal government to ensure:

- that telecommunications services are provided at reasonable prices to everyone,
- that telecom services are accessible to those living in rural as well as urban areas,
- that telecom services are affordable to those with lower incomes, and
- that the privacy of telecom services is properly protected.

The Consumer Groups submit that these expectations are reasonable and should be reflected in the statutory objectives of telecommunications policy.

40. Moreover, the Consumer Groups further note that the importance to Canada of universal telecommunications services and rural/urban equity has been repeatedly acknowledged by federal Task Forces, Ministers, and Canadians themselves – not only when asked. In 1998, dozens of municipal, community, consumer, and other public interest organizations from across the country signed a declaration entitled *Consumer Charter for a Connected Canada* calling for rural/urban equity in telecommunications.[5]

41. The *Charter for a Connected Canada* begins by noting that "telecommunications is an essential service for Canadians, and is increasingly essential to the social and economic well-being of Canada and its regions". This fundamental fact has not changed since 1998, and should continue to guide the development of Canadian telecommunications law and policy.

[5] See http://www.piac.ca/ , under "Telecommunications".

Bell's proposed objectives do not reflect the Australian approach

42. It is interesting that, while lauding the Australian approach to telecommunications regulation and suggesting that Canada follow the Australian model,[6] Bell proposes a much more narrow formulation of telecommunications policy objectives than that in Australia. Section 3 of Australia's *Telecommunications Act 1997* sets out a long list of policy objectives, including the following:

> *(2)(a) to ensure that standard telephone services, payphones and other carriage services of social importance are:*
>
> *i) reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and*
>
> *ii) are supplied as efficiently and economically as practicable; and*
>
> *iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;*
>
> *(g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:*
>
> *iv) the provision of telecommunications networks and facilities; and*
>
> *v) the supply of carriage services; and*
>
> *(h) to provide appropriate community safeguards in relation to telecommunications activities and to regulate adequately participants in sections of the Australian telecommunications industry.*[7]

43. Moreover, while indicating a preference for industry self-regulation (to which Australia has a unique approach, significantly different from that in Canada – see below) and avoidance of "undue financial and administrative burdens on participants in the Australian telecommunications industry", the Australian Act explicitly requires that this approach "*does not compromise the effectiveness of regulation in achieving the objects mentioned in section* 3".

44. Interestingly, the Bell proposal does not include any such qualification; instead, it would entrench a preference for reliance on market forces "to the maximum extent feasible", regardless of whether or not such reliance is welfare-enhancing or actually compromises the achievement of policy goals. This approach is short-sighted and unbalanced, and tellingly, does not reflect the approach of any other country we examined.

---

[6] See Bell's submission, Appendix D-8 : Ergas & Waverman, *Would Canada benefit from Australia-style Regulation?*

[7] s.3(2)(a), (g), and (h). See Appendix D.

Bell's proposed objectives are markedly narrower than those of other countries

45. While the Consumer Groups caution against prescriptions based on an incomplete understanding of other countries' regulatory models and the contexts of those models, it is instructive to review statutory telecommunications policy objectives in other countries. Our review (See Appendix D) indicates that Bell's proposed objectives statement is significantly narrower than the international norm. Moreover, most countries whose legislation we reviewed see fit to include in their telecommunications statutes much more detailed policy direction and regulatory powers regarding universal service and consumer protection that proposed by Bell Canada.

46. Appendix D provides excerpts from the telecommunications legislation and related directives in the European Union and several member countries, Australia, New Zealand, and the USA. In each case, we have excerpted statutory policy objectives and directives that go beyond Bell's narrow approach in order to promote the public interest in telecommunications.

47. Aside from broader social and economic policy goals and more detailed consumer protection directives than proposed by Bell Canada, telecommunications laws in other developed countries commonly treat the promotion of competition as a central policy goal. It is noteworthy, however, that regulation is almost invariably treated as a complement to – indeed necessary for – competition and efficient telecommunications infrastructure. The objective is sustainable competition, not reliance on market forces. Telecommunications regulation is seen as necessary in order to achieve this objective. **Reliance on market forces is rarely, if ever, stated as a policy goal or even preferred means of achieving policy goals.** Other countries seem to appreciate that reliance on market forces alone will not result in healthy competition, and that regulation plays an essential role in achieving economic, as well as social, policy goals.

48. The following is a brief overview of the telecommunications policy objectives as stated in the relevant legislation of a number of European and other developed nations. See Appendix D for more complete excerpts.

<u>European Union</u>

49. The European Union's *Directive on a common regulatory framework for electronic* communications *networks and service*s explicitly acknowledges that "*the activities of national regulatory authorities established under this Directive and the Specific Directives contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and town and country planning*."[8]

50. Under Article 8 of the Directive, national regulatory authorities are required, among other things, to "*promote the interests of the citizens of the European Union by inter alia:*

[8] Directive 2002/21/EC, Consideranda 17.

a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive);

b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

c) contributing to ensuring a high level of protection of personal data and privacy;

d) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;

e) addressing the needs of specific social groups, in particular disabled users; and

f) ensuring that the integrity and security of public communications networks are maintained."

51. The EU's Universal Service Directive states, in Article 3:

1. Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.[9]

Germany

52. Germany's *Telecommunications Act* (2004) sets out its legislative purpose in section 1 as follows:

The purpose of this Act is, through technology-neutral regulation, to promote competition and efficient infrastructures in telecommunications and to guarantee appropriate and adequate services throughout the Federal Republic of Germany.

53. In section 2, the "aims of regulation" include:

1. *to safeguard user, most notably consumer, interests in telecommunications and to safeguard telecommunications privacy*; and

5. *to ensure provision throughout the Federal Republic of Germany of basic telecommunications services (universal services) at affordable prices*;

Ireland

54. Section 12 of Ireland's *Communications Regulation Act, 2002* sets out the objectives of the Commission for Communications Regulation, which include the following:

[9] Directive 2002/22/EC

(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities—
(i) to promote competition,
(ii) to contribute to the development of the internal market, and
(iii) to promote the interests of users within the Community,
…
(2) In relation to the objectives referred to in subsection (1)(a), the Commission shall take all reasonable measures which are aimed at achieving those objectives, including—
(a) in so far as the promotion of competition is concerned—
(i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality,
…
(c) in so far as promotion of the interests of users within the Community is concerned—
(i) ensuring that all users have access to a universal service,
(ii) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved,
(iii) contributing to ensuring a high level of protection of personal data and privacy,
(iv) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services,
(v) encouraging access to the internet at reasonable cost to users,
(vi) addressing the needs of specific social groups, in particular disabled users, and
(vii) ensuring that the integrity and security of public communications networks are maintained.

United Kingdom

55. The UK's *Communications Act of 2003* sets out policy objectives in Part 1: Functions of OFCOM. The principal duty of OFCOM is stated as follows:

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Sweden

56. Section 1 of Sweden's *Electronic Communications Act* (2003) states as follows:

The provisions of this Act aim at ensuring that private individuals, legal entities and public authorities shall have access to secure and efficient electronic communications and the greatest possible benefit regarding the range of electronic communications services and their price and quality.
This objective shall mainly be achieved through the promotion of competition and the international harmonisation of the sector. However, universal services shall always be available for everybody on equivalent terms throughout Sweden at affordable prices.
When applying the Act, particular regard shall be taken to the importance of electronic communications for the freedom of expression and freedom of information.

Denmark

57. Subsection 1(1) of Denmark's *Act on Competitive Conditions and Consumer Interests in the Telecommunications Market* (2003) sets out the purpose of the Act as follows:

1) to promote the establishment of a well-working, competitive market for provision of electronic communications networks or services and associated facilities, which enables end-users:
a) to choose freely the provider(s) of electronic communications networks or services under whom they want to be customers,
b) to communicate with all other end-users, whether or not these are customers under the same provider or another provider,
c) to have access to all providers of various information and content services via electronic communications networks,
d) to compose freely their usage of electronic communications networks and services as well as information and content services, whether or not these are delivered by several different providers of networks or services, and
e) to retain their subscriber numbers when changing between providers of electronic communications networks or services,
2) to ensure all end-users who wish so access to a number of basic USO2 services on reasonable terms and at reasonable prices, and
3) to ensure a number of basic user rights for end-users in connection with agreements on delivery of electronic communications networks or services with providers of electronic communications networks or services.

Norway

58. The purpose of Norway's *Electronic Communications Act* is stated in para.1-1 as follows:

to secure good, reasonably priced and future-oriented electronic communications services for the users throughout the country through efficient use of society's resources by facilitating sustainable competition, as well as stimulating industrial development and innovation.

Finland

59. Section 1 of Finland's *Communications Markets Act of May 2003* states as follows:

> *The objectives of the Act are to promote the provision and use of services within communications networks and to ensure that communications networks and communications services are available under reasonable conditions to all telecommunications operators and users throughout the country. A further objective of the Act is to ensure that the opportunities available for telecommunications in Finland accord with the reasonable needs of users and that they are competitive technologically advanced, of high quality, reliable and safe, and inexpensive.*

Portugal

60. Article 5 of Portugal's *Electronic Communications Law* (2005) sets out regulatory objectives for the National Regulatory Authority (NRA), as follows (excerpts only):

> *a) To promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services;*
> *b) To contribute to the development of the internal market of the European Union;*
> *c) To promote the interests of citizens, pursuant to the present law.*
>
> *2 – For the purposes of the provision in point a) of the preceding paragraph, it is incumbent upon the NRA, namely:*
> *a) To ensure that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;*
> *…..*
> *4 - For the purposes of the provision in point c) of paragraph 1, it is incumbent upon the NRA, namely:*
>
> > *a) To ensure that all citizens have access to a universal service defined in the present law;*
> > *b) To ensure a high level of protection for consumers in their dealings with suppliers, in particular via the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;*
> > *c) To contribute to ensuring a high level of protection of personal data and privacy;*
> > *d) To promote the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;*
> > *e) To address the needs of specific social groups, in particular disabled users;*

f) To ensure that the integrity and security of public communications networks are maintained.

Spain

61. Spain's *General Telecommunications Law* includes in s.3, as one of its objectives, the following:

e) To protect the users' interests, granting their right to access to electronic communications services under proper conditions of choice, price, and quality, and to safeguard, during their provision, the observance of the constitutional requirements, in particular, the requirement of no discrimination, the observance of the rights to honor, to privacy, to private information protection and communications secret, to youth and childhood protection, and the observance of minority groups' needs, such as disabled persons. For this, obligations can be required to service operators for guaranteeing the above-mentioned rights.

Hungary

62. Article 2 of Hungary's *Electronic Communications Act* (2003) sets out "the objectives and basic principles of this Act", including:

b) protection of consumers' interests in their relationship with all players of the electronic communications market, ensuring, in particular, that
ba) all communication services be available to consumers required for them to have access to all information and content provided by content providers accessible through means of electronic communications, subject to authorisations;…
be) consumers be able to use electronic communications services under publicly available, defined and equitable terms and conditions disclosed to the public, for the lowest price and at the highest quality;
bf) consumers be able to receive reliable, transparent and up-to-date information concerning the features of electronic communications services and the conditions concerning their use;
bg) consumers be able to have access to high quality protection in their disputes with service providers in order to settle such disputes simply and quickly;
c) provision of universal access to high quality and efficient electronic communications services defined in accordance with the interests of the entire society;
d) greater consideration of the needs of certain social groups, in particular the disabled and low-income users;…

USA

63. The USA *Communications Act of 1934 (as amended by the Telecommunications Act of 1996)* sets out the purpose of the Federal Communications Commission as follows:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,…

Conclusion re: International comparison of policy objectives

64. Most countries whose telecommunications legislation we reviewed have seen fit to establish statutory policy objectives that go far beyond those proposed by Bell, in terms of universal service, consumer protection, and other "social" goals. Few, if any, include an unqualified preference for reliance on market forces. While often focused on the achievement of sustainable competition, most countries' telecom laws recognize the need for regulation in order to achieve both competition and other social goals such as universal and equitable access to high quality telecommunications services at affordable and reasonable prices.

International Comparative Policy Analysis

65. Bell Canada has filed, as Appendix D-7, a paper entitled "Global Trends in Regulation of Retail Telecommunications Services provided by ILECs", by Peter Waters et al. While it is instructive to consider how other countries frame their telecommunications policy objectives, it is much more difficult to reach conclusions based on comparative analyses of particular regulatory policies. In particular, it is important to appreciate the full context of any particular regulatory measure or regime before advocating its adoption in a different context. Bell Canada relies heavily on selective descriptions of certain other countries' approaches to telecom regulation in support of its prescription for radical deregulation and reliance on market forces. These international comparative analyses must be viewed with caution on a number of counts.

66. First, Bell's selection of countries, as well as its selection of regulatory policies to focus on in any given country, is clearly designed to support Bell's proposals in this review. It is not surprising, for example, that Bell chooses to focus on the Australian telecommunications regulatory regime, given that, in the words of one commentator, "arguably the 1997 legislation - and implementation by bodies such as the ACCC - was 'pro-competition' but inadequately 'pro-competitor', favouring the incumbent operators."[10] This view was recently confirmed by an Australian Senate committee, which just issued a lengthy report highly critical of the current regime and recommending wide-ranging and significant reforms designed to limit the incumbent's powers.[11]

[10] Caslon Analytics profile: Australasian Telecoms; http://www.caslon.com.au/austelecomsprofile4.htm#legal .
[11] "The performance of the Australian telecommunications regulatory regime" (10 August 2005); see http://www.aph.gov.au/Senate/committee/ecita_ctte/trr/report/index.htm .

67. As noted below and in the reply evidence of Dr. Bauer, Bell's selective approach to international comparisons ignores other relevant policies and approaches even within those countries that it chose to focus on. If the Panel wishes to examine approaches to telecom regulation in other countries, it should do so comprehensively, not selectively as Bell has done.

68. Second, as Dr. Bauer points out, any comparison of regulatory policies should consider the full context – legal, constitutional, cultural, etc. – of those policies. Different approaches are often necessitated by key differences between national constitutions, legal systems, social norms, administrative frameworks and capabilities, and/or national ideology. Yet Bell's comparative analyses fail to account for these often critical differences between Canada and the countries whose selected policies Bell urges us to adopt.

69. For example, under the Canadian constitution, provinces have authority over general consumer protection matters, while the federal government has jurisdiction over "trade and commerce". Hence, the Canadian *Competition Act* focuses on promoting and protecting competition rather than on protecting consumers, and the Competition Bureau has a much more limited mandate than that of, for example, the Australian Competition and Consumer Commission. Any policy recommendation based on approaches in other countries must take into consideration differences in the mandate and authorities of relevant agencies.

70. Moreover, Canada is unlike most other countries insofar as we are next door to a major superpower, the USA. Issues of national sovereignty are much more significant here than in Australia or other countries because of the ease with which US companies can incorporate Canada into their business plans, and because of the significant infiltration of US culture into Canada. While issues of cultural sovereignty are more relevant to broadcasting policy, they are still relevant to telecommunications given the role of the infrastructure and services (e.g., broadband) in the delivery and creation of content.

71. Third, legal and regulatory rules are not like levers that, once moved, cause certain predictable outcomes. As long as certain basic conditions are met, a variety of different rules and regulations can achieve optimal performance; typically, there is no single set of regulations that is superior under all conditions.

72. See the evidence of Dr. Bauer on international comparisons, attached as Appendix C, for a more detailed reply to Bell Canada's international comparative analysis.

The Australian Model

73. Bell Canada has submitted a paper by Henry Ergas and Leonard Waverman entitled "Would Canada Benefit from Australia-style Regulations?" in Appendix D-8 to its submission. The paper characterizes the Australian approach to retail telecom regulation as "much more light-handed", "far more relaxed, less administratively burdensome and in

most respects more balanced than Canada's". The authors recommend that Canadian policy makers "take a closer look at Australia's regulatory regime".[12]

74. The Consumer Groups do not have the resources to undertake a comprehensive review and comparative analysis of the Australian vs. Canadian telecommunications regulatory regimes. We have, however, taken a closer look at the Australian regulatory regime and have consulted with colleagues from the Australian Consumers' Telecommunications Network. In so doing, we have identified some important aspects of the Australian regulatory regime that Bell has chosen to ignore or downplay, possibly because they are inconsistent with Bell's prescription for Canada.

75. We have also concluded that the contrast Bell presents between Australia's purportedly "light touch" approach and Canada's supposedly more interventionist approach is largely a matter of interpretation rather than an accepted reality. In fact, regulators in Australia are heavily involved in the ongoing hands-on regulation of telecommunications, albeit in different ways than in Canada. Given the constant industry complaints in Australia about regulatory burden as well as incumbent powers, our Australian colleagues found Bell's claims about the "light handed" and "balanced" Australian approach to be, in their words, "almost perversely amusing".

76. We also note that Ergas and Waverman's conclusion regarding comparative outcomes in Australia vs. Canada strangely ignores the striking and obvious point, clearly illustrated in Tables 9 and 10 of their submission, that Canadian prices for both fixed and mobile telecom services (as measured by the OECD) are significantly lower than those in Australia. Even just looking at the evidence provided by Bell's experts, it is by no means clear that Australian consumers are better off than Canadian consumers in respect of the price or availability of telecom services; if anything, the opposite may be the case.

77. We further note some key differences between the Canadian and Australian legal, political, and institutional contexts that make preposterous suggestions that Canada simply "adopt the Australian model".

78. Finally, we note a number of serious deficiencies in the Australian model, as reflected in a recent report from an Australian Senate inquiry into the telecommunications regulatory regime. Australia's regime, despite its many merits, is not the "holy grail" suggested by Bell's experts.

The Australian Approach to Telecommunications Regulation

79. Australian telecom carriers and service providers are subject to an array of legislative and self-regulatory requirements overseen by two regulatory agencies, each of which supervises a distinct set of issues.[13] The Australian Communications and Media Authority (ACMA)

[12] Executive Summary, paras.5, 7.
[13] For a brief description of the Australian telecom regulatory regime, see http://www.dcita.gov.au/tel/legislation/telecommunications_legislation_-_introduction

licenses carriers and radio-communications and oversees technical and general industry regulation. The Australian Competition and Consumer Commission (ACCC), in addition to its general role as competition regulator, is responsible for telecommunications-specific regulation of anti-competitive conduct (Part XIB of the *Trade Practices Act*), access (Part XIC) and monitoring of price controls. The key legislation governing the telecommunications industry in Australia is:

- the *Telecommunications Act 1997;*
- Parts XIB and XIC of the *Trade Practices Act 1974*; and
- the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

"Self-Regulation" in the Australian context

80. While it might seem that the heavy reliance in Australia on industry "self-regulation" translates into a more "light-handed" or less administratively burdensome approach, a closer look at the Australian approach suggests that the reality may not be so straight-forward.

81. It is impossible to accurately consider the Australian regime without understanding the role and meaning of "self-regulation" in the Australian context. "Self-regulation" in Australia is often, and more accurately, referred to as "co-regulation", reflecting the role of governments in both developing and enforcing the industry's "self-regulatory" codes of practice. The Australian government relies heavily on the industry to create codes of practice – similar to the CRTC's CISC process. Indeed, the Australian Communications Industry Forum (ACIF) was established in 1997 for this purpose.[14] The ACIF includes representation from consumer organizations as well as industry.

82. The Codes of practice that ACIF develops are then registered by the ACMA. Once registered, they become legally enforceable against all industry participants, not just those who have signed the Code. **According to the ACMA, one of its most important functions is to monitor compliance with industry codes and to use its enforcement powers where breaches are identified.**

83. The ACMA webpage on codes of practice lists 26 registered codes, covering issues from "End-to-end network performance for standard telephone service" to "Call charging and billing accuracy".

84. In the absence of industry codes that meet the ACMA's registration criteria, the ACMA may develop industry standards, compliance with which is mandatory.

85. Additional regulatory involvement in and oversight of industry "self-regulation" in Australia has been recommended by a Senate Committee, as a result of its inquiry into the

[14] See www.acif.org.au for information on its operations, codes of practice, and regulatory context.

effectiveness of the Australian telecommunications regime. Specifically, the Committee recommended that:

a) the *Telecom Act 1997* be amended to require the ACMA to enforce the development of codes within set time-frames (Rec.31), and

b) a new requirement for annual reporting by suppliers or industry associations of compliance with industry codes and, where the ACMA considers that monitoring is not providing adequate or accurate data, monitoring by the ACMA (Rec.32).

Regulatory oversight of the access regime and anti-competitive conduct

86. Australia also has an extensive regulatory regime governing access to incumbent facilities by competitors. The ACCC regulates access to the network and the pricing of a basic bundle of services. It is empowered under Part X1C of the *Trade Practices Act* to require that certain services be made available to access seekers, and to arbitrate disputes regarding the terms of such access. A review of legislative provisions, registered codes of practice, and regulatory practice in this area indicates that the reality is not quite as "non-interventionist" as Bell suggests. Nevertheless, it was found by the Senate Committee to be significantly inadequate and in need of additional regulation (see below).

87. Unlike the Canadian Competition Bureau, the ACCC is also specifically empowered, under Part X1B of the *Trade Practices Act*, to deal with anti-competitive conduct in the telecommunications industry. Entitled "The Telecommunications Industry: Anti-competitive conduct and record-keeping rules", this Part of the *TPA* empowers the ACCC to issue competition notices stating that the carrier or service provider has contravened the competition rule. If the company in question continues to violate the rule, the ACCC can seek an injunction and pecuniary penalty of up to $10m. for each breach, via an order of the Federal Court. A number of competition notices have been applied to Telstra as a result of anti-competitive wholesale pricing arrangements. A prominent case recently found that Telstra offered broadband services to consumers at a lower price than Telstra offered it wholesale to their competitors.[15]

88. After an extensive inquiry into the effectiveness of the Australian telecom regulatory regime this year, a Senate Committee has found the current regulatory regime to be inadequate in achieving the goals of competition and consumer protection, and has recommended extensive new requirements and powers under the *Trade Practices Act* in order to improve the situation.[16] These recommendations include, for example, that "the government consider expanding the class of 'core services' in relation to which the ACCC must determine model terms and conditions for access", and that "the ACCC be granted powers to set prices in addition to, or instead of, developing pricing principles". The Committee also recommended that "funding to the ACCC for telecommunications competition issues be substantially increased as a matter of urgent priority."

[15] See http://www.accc.gov.au/content/index.phtml/itemId/585186/fromItemId/2332 .
[16] See Recommendations 5 to 16.

Australia's approach to consumer protection in telecommunications

89. Bell's submissions regarding the Australian model focus almost exclusively on issues of regulatory symmetry and retail price regulation. Interestingly, they ignore noteworthy consumer protection aspects of Australian telecom regulation. The following is a brief overview of Australian regulation of consumer issues in telecommunications.

The ACMA

90. The Australian Communications and Media Authority (ACMA), in its own words, "plays an important role in ensuring that consumers are informed about communications products and services available to them and that adequate consumer safeguards are in place."[17] Among the many regulations and policies that it administers are the following:

a) the "Universal Service Obligation" ("USO"): a detailed set of rules and regulations applicable to Telstra (the Australian ILEC) ensuring that "standard telephone services" are accessible to all Australians on an equitable basis, wherever they live or carry on business. Included in this set of regulations is the right to make local calls at a flat, untimed rate. Also included are special requirements for the provision of service to those with disabilities. Telstra is also required to offer USO customers access to an interim or alternative service when there is an extended delay in connecting or repairing their standard telephone service.

b) the "Customer Service Guarantee": this guarantee sets timeframes for the connection of specified services, the repair of faults, and the attendance at appointments by all telephone companies. Customers are entitled to compensation if the timeframes are not met.

c) Consumer Information: Telecom service providers who use a "standard form" contract for customer agreements are required to provide customers with concise summaries of the applicable terms and conditions. The summaries are expected to be clear and simple, and readily accessible. In addition, the ACMA administers a "consumer information guideline" for Internet Service providers, for the purpose of providing consumers with readily comparable, plain-English information to assist them in making informed decisions when selecting an ISP.

d) Industry Codes of Practice: The ACMA works with industry representatives and consumer organizations to develop codes of practice dealing with various consumer as well as operational matters. These codes may be submitted by the industry to the ACMA for registration. The codes are voluntary until registered by the ACMA. Once an industry code is registered by the ACMA, all companies in the relevant section of the industry are bound by the code, whether or not they have signed it. The ACMA then has powers to issue warnings to providers about breaches of the code, to order compliance with provisions of the code, and to apply to court for penalties

[17] See the ACMA website, www.acma.gov.au, for more information on its mandate over, and approach to, consumer issues.

against non-compliant companies. Currently registered consumer codes of practice include:

- Billing Code
- Call Charging and Billing Accuracy Code
- Calling Number Display Code
- Complaint Handling Code
- Credit Management Code
- Customer Transfer Code
- Customer information on Prices Terms and Conditions Code

e) Effective Redress: Consumers in Australia are entitled to have their complaints against telecommunications companies dealt with in a prompt, transparent, and equitable manner. If a complaint is not resolved to their satisfaction, they have recourse to the **Telecommunications Industry Ombudsman (TIO)**. The TIO has the authority to make "Binding Decisions" (up to the value of $10,000) that are legally binding upon the telecommunications company, as well as "Recommendations" (up to the value of $50,000).

f) Privacy: In addition to a data protection law of general application (the *Privacy Act 1988*), the *Telecommunications Act 1997* provides data protection rules specific to the telecommunications industry in Australia.

g) Consumer Participation: Under the *Australian Communications Authority Act 1997*, the "Consumer Consultative Forum" (CCF) was established to assist the ACMA (then ACA) in performing its functions relating to consumer matters. The CCF meets regularly and provides input to the ACMA on a variety of issues. In addition, the ACMA is currently engaged in a public process to develop and support more effective models for consumer participation in the telecommunications industry. The objective of this work is to improve the effectiveness of consumer input and influence to the regulation and governance of the communications industry.

The ACCC

91. The Australian Competition and Consumer Commission (ACCC) administers the *Trade Practices Act* and *Price Surveillance Act*. Unlike the Canadian *Competition Act*, the Australian *Trade Practices Act* includes "consumer protection" as a statutory objective (along with "the promotion of competition and fair trading"). Hence, it is not surprising that the *Trade Practices Act* ("TPA") offers much broader and more detailed consumer protection than does the Canadian *Competition Act*.

92. Part V of the TPA (entitled "Consumer Protection"), in addition to prohibiting a variety of specific "unfair practices", establishes a regulatory regime governing product safety and product information, conditions and warranties in consumer transactions, and liability of manufacturers and importers for defective goods. The TPA also prohibits "unconscionable conduct" in consumer transactions (s.51AB), and contraventions of applicable industry codes of practice (Part IVB). An applicable code is one that has been prescribed as mandatory for the industry, or which the corporation has signed and is thus bound.

93. The aim of these provisions, according to the ACCC, is "to strengthen the position of consumers relative to sellers, distributors and manufacturers by ensuring that businesses compete fairly on price and quality, and by implying into consumer contracts non-excludable conditions and warranties as to quality, fitness and title."[18]

94. Thus, it appears that Australian telecom regulators (both the ACMA and the ACCC) are much more focused on consumer protection issues than is the CRTC. Certainly, the consumer protection provisions of the Australian *Trade Practices Act* are much more far-reaching than are the few comparable provisions of the Canadian *Competition Act*. This striking contrast between the two regimes must be taken into account in any consideration of the appropriate regulatory regime in Canadian telecommunications, and in particular, of Bell's rash proposal to leave all consumer protection matters to the Competition Bureau. Without similar powers, tools, and resources to those of their counterpart in Australia, Canadian competition authorities cannot be expected to provide anything like the protection that the ACCC offers to Australian telecommunications consumers and competitors.

95. That being said, it is worth noting that the Senate Committee reviewing Australian telecommunications has recommended a number of new measures with a view to better protecting consumers, reflecting the view of many Australians that their current telecommunications regime is inadequate from a consumer protection standpoint.[19]

Key differences between the Australian and Canadian contexts

96. As noted above, caution should be exercised in making policy prescriptions based on approaches in other jurisdictions, given the often significant differences in constitutional, legislative, institutional, political, cultural, economic and social contexts. While Australia shares much in common with Canada, there are also key differences between the two countries that justify or lead to very different approaches to telecommunications regulation.

97. First, our constitutions are different. In Canada, provinces have primary jurisdiction over consumer protection, leaving the federal competition authority with a much narrower mandate in respect of consumer protection than that of the Australian Competition and Consumer Commission (ACCC).

98. Second, the relevant legislative and institutional regimes in each country are already highly developed and significantly different. For example, unlike the Canadian *Competition Act*, the Australian *Trade Practices Act* includes detailed provisions applicable to the telecommunications industry alone. The ACCC is therefore much more involved in regulating the telecommunications industry than is the Canadian Competition Bureau. Emulation of the Australian model would require an enormous and unprecedented overhaul

[18] ACCC, "Overview of the Legislation"; see http://www.accc.gov.au .
[19] See recommendations 30 to 34.

of legislative and institutional regimes in Canada – the political appetite for which is simply not present.

99. Third, Australia's telecom regulatory regime is based in part on a highly developed and unique tradition of "co-regulation", involving consumer organizations as well as industry, that does not exist in Canada. This cooperative approach to regulation cannot simply be imported from one country to another; it requires the development of a supporting culture and institutions as well as a clear legislative underpinning.

100. Finally, Australia's telecommunications regime relies to in part on the involvement of strong and effective consumer as well as industry organizations, for example in the development of Codes of practice. Organizations such as the Australian Communications Industry Forum, the Telecommunications Industry Ombudsman, and the Consumers' Telecommunications Network simply do not exist in Canada and cannot be easily replicated. They form critical pillars in Australia's telecommunications regulatory framework.

Australia's telecom regime is not the 'holy grail'

101. While Australia's approach to telecom regulation has much to commend it, it is clearly not a "holy grail" even from the perspective of Australians. Coincidentally, a major inquiry into the effectiveness of Australia's telecommunications regime has just been completed, and the report is now available. As noted above, the Senate Committee conducting the inquiry found that the regime is significantly flawed and requires extensive reforms in order to achieve the goals of competition and consumer protection.

102. In the spring of 2005, the Committee was mandated to conduct an inquiry into "whether the current telecommunications regulatory regime promotes competition, encourages investment in the sector and protects consumers to the fullest extent practicable", and to recommend legislative amendments to rectify any weaknesses in the regime.[20] The Committee's report entitled "The performance of the Australian telecommunications regulatory regime", issued on 10 August 2005, makes 35 recommendations for reform. The following are some excerpts from that report.

103. Under a chapter on "The Telecommunications Environment", the Committee states:

> *"In 1997 major changes were made to the telecommunications regulatory regime in order to increase competition and promote economic efficiencies. However, it is apparent that open competition is yet to deliver the advantages across the board to consumers and industry participants that were envisaged."*[21]

104. The chapter begins by quoting a witness:

[20] For the Committee's terms of reference, report, and related information, see http://www.aph.gov.au/Senate/committee/ecita_ctte/trr/report/index.htm .
[21] Para. 2.1

"Over the last seven years of open competition the telecommunications industry has developed from monopoly to duopoly to regulated competition, but has not yet achieved fully effective competition in any market due to the continued bottleneck nature of last mile access... Unhappily over the last 7 years of supposedly open competition, a number of companies who thought they were on this ladder of opportunity found themselves on a ladder of legal process, having to rely on the access and anti-competitive behaviour powers of the ACCC to go to the next rung."

105. The Committee's chapter on Competition begins with the following quotation from one witness:

"Competition is not really working because of the structure of the industry—not because the ACCC or the ACA or ACIF are not working. They are all good people, but the structure of the industry is not correct... We have one big elephant and 12 mice playing on the soccer field and then we say, 'Okay, this is self-regulation.' Now, who wins? Obviously, if you have a self-regulatory regime linked to an industry or market structure where you have one big company dominating, then it is a folly to believe that you can create competition in the market."

106. The chapter concludes by noting that the current law appears to be inadequate to deal with anti-competitive behaviour by Telstra. In particular, the Committee found that:

"The weaknesses of the current regulatory regime lie in the ability of Telstra to mask where the delineation between its wholesale and retail prices occur; the ACCC's limited capacity to prove anti-competitive conduct; the ACCC's limited ability to identify and respond to a myriad of non-price discriminations; and ultimately the fact that the ACCC's power to impose only financial penalties is not an adequate deterrent to anti-competitive behaviour. Consequently Part XIB of the TPA does not appear to provide the regulator, the industry or the wider community with confidence in the anti-competition regime."[22]

107. In the chapter on "Access", the Committee concludes as follows:

The Chairman of the ACCC recently observed that:

... the competition that has emerged from this initial process [of regulation] continues to be heavily dependent on access and re-sale arrangements with competitors simply buying space on the Telstra network and competing on price rather than building their own facilities and offering different products and better performance.

In the absence of any significant national roll out of competing infrastructure, it has not been possible to fully realise the benefits of more sustainable competition

[22] Para. 3.143

across the entire telecommunications sector. As a result, maintaining competition has required an even greater reliance on access regulation – instead of the winding back that was envisaged when telecommunications was opened up to full competition.

4.135 The evidence the Committee has received suggests that most of the competition at the services level has been in metropolitan areas: there has been far less in outer metropolitan and regional areas.

4.136 While there has been some competition at the facilities level, this has largely been in access networks in some business districts and in transmission infrastructure between major metropolitan markets. There is also emerging competition in ULLS services as some firms install their own equipment in Telstra exchanges.

4.137 Some of these outcomes might be expected. Some infrastructure is regarded as having natural monopoly characteristics and is therefore less likely to be efficiently duplicated. Facilities based competition might be expected to be more prevalent in markets without that characteristic. However, there is evidence of under-investment in facilities where it might be expected and overbuilding of infrastructure in others.

4.138 That widespread facilities competition has not emerged may simply be the outcome of commercial considerations. However, evidence before the Committee suggests that deviations from what is expected may reflect deficiencies in the regulatory environment and impediments created by owners of bottleneck facilities. In the Committee's view, infrastructure investment by competitive carriers in the Australian telecommunications sector has been inhibited by the shortcomings of the current regulatory regime.

108. In its chapter on "Consumer Protection", the Committee states:

"The Committee heard significant concern that the current self-regulatory regime is not adequately protecting consumers. The telecommunications regulatory regime emphasises the long-term interests of end users, but it appears that many consumers are being harmed by industry practices. It appears also that widespread lack of compliance with industry codes has been compounded by insufficient compliance leadership from ACIF and a lack of enforcement action by the ACA. While there are mechanisms for consumer input, particularly in relation to the development of industry codes, these do not appear in many cases to be operating as well as they might. Moreover, consumers often lack awareness of their rights, particularly in regard to complaint resolution."[23]

109. Clearly, there is much more to the Australia model than Bell or its experts have suggested. Indeed, the very aspects of that model that Bell suggests we adopt in Canada have been

[23] Para. 5.186

found seriously wanting by a Parliamentary committee after a long inquiry. The Consumer Groups submit that if anything, the evidence from Australia suggests that Canada avoid the current Australian approach to telecommunications regulation.

The Canadian Transport Deregulation Model Will Not Work

110. The Consumer Groups find the praise lavished upon the performance of the Canadian rail and air industry in the Bell Canada submission (and indirectly in the Telus submission) to be both troubling and curious. It is troubling, for example, that the major providers of important telecommunications services find the results obtained in the Canadian domestic airline industry to be positive and worthy of emulation. It is also curious in that they are seemingly prepared to exchange a far superior regulatory and industry performance in telecommunications, for what is, at best, a questionable one.

111. There is little doubt that the study and analysis of regulation and market operation in other important public service industries can be beneficial to understanding trends and designing regulatory frameworks in the telecommunications industry. It is, however, important to ensure that the underlying parameters associated with specific industry performance are well understood.

112. The North American rail industry has undergone a radical transformation over the past 20 years, abetted by deregulation in both Canadian and American jurisdictions. These changes have led to reductions in the rail networks through railway abandonments and reduced levels of service for rural areas.

113. In the United States, the country's rail network was reduced in size by about 33% from its peak in 1916 by 1995[24] with consolidations and abandonments creating a more efficient and profitable system for the railroads. Not all stakeholders were winners in this process, as it created problems for some previously served customers and communities as well as substantial job losses in the industry.

114. In Canada, massive job cuts in the 80' s and 90's at CN and CP Rail improved the railways economic performance, but also meant considerable cutbacks in service. By 1993, CP was applying to abandon all its rail line east of Sherbrooke, Quebec and passenger rail service was becoming a patchwork quilt proposition across Canada.

115. A trenchant criticism of the deregulated rail industry by citizens and public interest groups has been that the bottom line decisions taken by that industry with its newly granted regulatory flexibility were, over the long term, destructive to the economic and social fabric of Canada as well as short-sighted from a public transportation standpoint.

116. This process would not likely benefit from a full review of the positive and negative effects of rail deregulation. The telecom industry stands in a radically different position today than

[24] http://www.ruraltransportation.org/library/rail.shtml

the rail industry did in the early 80's vis a vis profitability, technology, intermodal competition and service to existing networks. The rail regulatory framework model is of limited application either as model to be emulated or as a cautionary tale.

117. Similar observations may be made concerning the relevance of the airline deregulatory experience. While the airline industry shares certain common characteristics with telecommunications such as the magnitude of sunk costs required for entry, there are significant differences associated with the influence of overall economic activity, and intermodal competition.

118. As well, the description of the Canadian airline deregulatory experience as positive is highly debatable. There has also occurred alarming slippage in initially hopeful results from the United State that preceded Canada into airline deregulation.

119. Canadian airline performance during the early deregulatory period has been mediocre at best. Canadian air carriers, even in the heyday of the competition between Air Canada and CAI, failed to exhibit the same price discounting behavior of their American counterparts.[25]

120. In addition, efficiency efforts by carriers were difficult to translate into economic results, such that the goals of competition were incompletely realized or frustrated[26].

121. From the passenger standpoint, airline dergulation has hardly provided an increase in choice. In some respects, the structure of the Canadian airline industry has come a full circle in the deregulated environment with little change except for diminishment of quality of service. Prior to deregulation, Canadians were served by Air Canada, with CAI, Ward Air, with several small regional airlines providing varying degrees of competition. Currently Air Canada, Westjet, Canjet and other small regional airlines are hanging on in a difficult market where the sustainability of any air carrier is likely in question.

122. This "back to the future" scenario has been produced with the dominant airline, Air Canada, holding on to a current domestic market share of 63% and a transcontinental share of 70%[27] after emerging from court protection from creditors in September 2004.

123. It should be noted that the airline carrier industry has exhibited less than enviable financial performance and levels of customer satisfaction during the deregulated period. There have been numerous airline failures including the recent demise of Canada 3000, and Jetsgo. Many of the failures have left passengers in the lurch with their prepaid tickets and cancelled return flights. Other regulatory schemes such as provincial government travel insurance funds have had to bail out consumers as a direct result of the federal government's failure to monitor airline financial performance or ensure consumer protection for prepapid tickets. Other carriers such as Greyhound, Ward Air, Royal,

[25] G. Gowrisankaram, "Competition and Regulation in the Airline Industry", FRBSF Economic Letter, January 2002.
[26] See Tae Oum Winning Airlines: Productivity and Cost Competitiveness of the World's Major Airlines with Chunyan Yu (Kluwer Academic Press, New York, London; 1998).
[27] http://www.tc.gc.ca/pol/en/Airpolicy/general/data/domesticAirMarket/0620042005.htm

Canadian Airlines, and Roots, to name a few, have had to suspend operations, merge or engage in other forms of market retreat. The recent minimal air transportation productivity gains (1.3% in 2003) have largely been achieved through employee reductions and reduction of fuel costs. [28] Perhaps as importantly, the deregulated American airline system seems to have been unable to compete itself out of a financial morass with two major remaining airlines, Delta and Northwest currently contemplating insolvency proceedings.[29]

124. The Canadian transportation deregulation initiative commenced at a time when there was little experience with the requirements associated with promoting competitive markets or dealing with market failure. Customers in the Canadian deregulated airline system are largely bereft of even the information necessary to choose a carrier as Transport Canada does not collect and publish public data documenting airline performance such as on time arrivals, lost luggage, and other important customer parameters.

125. The system of airline supervision by complaint has also been a dismal failure. Statutory exemptions prevent effective intervention by the Canadian Transportation Agency (CTA) in price complaints and cooperation between the agency and the respondent airline is hampered by a lack of information filing requirements by the airlines and the process for obtaining the same by the CTA.

126. Even the recent financial restructuring of the airline industry, and the rise of a substantial competitor to the dominant airline in Westjet has produced improved service for airline customers. The most recent CTA report notes an increase in passenger complaints of almost 27% over the year before.

127. The scale of the deregulation and government non-involvement in airline customer service has been so complete, that it is difficult to obtain data to adjudicate industry performance within the current regulatory regime. One such measurement may be considered that is produced externally by Skytrax, which conducts independent surveys of airlines around the world.

128. In 2005, Skytrax[30] accorded the dominant Canadian airline, Air Canada, a three star rating which it describes as follows:

> "Star Grading awarded to airlines supplying a fair Quality performance that conforms to an industry "average" - when assessing all different areas of competitive ranking.3 Star ranking signifies a satisfactory standard of core Product across most travel categories - but may reflect less consistent standards of Staff Service / Product delivery either Onboard or in the Airport environments."

129. The rating put Air Canada in the same quality level as Air Jamaica, Air Mauritius and Air Namibia, among others, and far below a number of world airlines operating in a very

[28] http://www.tc.gc.ca/pol/en/Report/anre2004/9D_e.htm
[29] http://www.nytimes.com/reuters/news/news-airlines-bankruptcies.html
[30] http://www.airlinequality.com/index.htm

dissimilar regulatory model.[31] It is difficult to believe that such a rating would have been obtained by Canada's flagship airline some twenty years previous.

130. It strains credulity that Canadian citizens would be willing to compromise the performance of the Canadian telecommunications system on the basis that the supposed success of the deregulation of Canadian transportation networks and the impotent arrangements for ensuring their operation in the public interest. If similar industry crises occurred in telecommunications after adoption of the transportation model, it is unlikley that the existing chaos would be politically tolerated.

131. If demonstrated results in other regulatory regimes of important public services are to provide the yardstick with which to measure and choose the form of regulation for telecommunications that is most appropriate, the regulation of pipeline operation by the National Energy Board would be the likely winner. Regulation by the NEB has produced reasonable rates for pipelines and users as well as ensured stability, productivity and adequate financial return for the regulated pipelines.[32]

132. The NEB features a level of regulatory intervention including reporting and ex ante regulation far in excess of the obligations imposed upon ILECs by the CRTC. This includes the fashioning of just and reasonable rates for pipeline carriers and strict supervision and control over pipeline facilities operation and expansion.

133. The Consumer Groups note that if success is supposedly the barometer for choosing regulatory models, the NEB's regulatory framework has driven results that have been positive and sustainable for pipeline operators and customers alike. However, we do not urge its adoption by this Panel as the model for telecommunications because, in part, of the differing characteristics of the core networks.

134. Nevertheless, the success of the pipeline model directly rebuts the inference that less is always more, and that a comprehensive regime of public and consumer protection can go hand in hand with industry success.

135. The Consumer Groups submit that the current results from the Canadian transportation deregulation experience provide little comfort for the construct of a similar regulatory regime in telecommunications.

The Competition Bureau and the CRTC

136. In its August 15 submissions, Bell Canada has advanced a criticism of the CRTC's adjudicative authority over regulated markets in relation to determinations associated with the state of competition and the measures necessary to establish and maintain competitive

[31] Air Canada, however, was happy with its ranking status based on North American results.
[32] A recent NEB industry survey also revealed high levels of industry satisfaction with its operations http://www.neb.gc.ca/Publications/SurveyResults/IndustrySurvey2004_09_16_e.pdf

markets. Its solution is to abjure the CRTC from these decisions and entrust such responsibilities to the Competition Bureau.

137. Aliant's submissions sees no necessity for ex ante or ex post regulation of ILEC retail services consigning intervention exclusively to the Competition Bureau, while TELUS maintains CRTC hegemony over determinations associated with the state of competition but seeks to refine the ambit of the Commission's forbearance authority.

138. Clearly, the Bell Canada position is a restatement of longstanding currents of industry grumbling particularly as it pertains to marketing restrictions upon ILECs. It is buttressed by its Appendix D-4 containing a study examining the current and proposed relationship between the regulatory ambit of the CRTC and the Competition Bureau.

139. The study concludes that while the CRTC should set prices where appropriate, competitive concerns should be left to the Competition Bureau that has more expertise in evaluating competition in markets. This would ostensibly eliminate duplication and the postulated tendency of the CRTC to maximize its power.

140. With respect, notwithstanding the opinions of the study's authors, there is no convincing evidence that the Competition Bureau has demonstrated institutional expertise in dealing with potential abuse of market power. In fact, the record of the Bureau is scant to non-existent with respect to the Bureau's policing of abuse of dominant position, price discrimination and predatory pricing, all of which are significant concerns in emerging markets.

141. While the Bell Canada study's authors advance a theoretical construct that seeks to dismiss the validity of measures to prevent predatory pricing or other anti-competitive conduct as unproductive, it seems clear that incumbent utilities engage in this practice in emerging competitive markets. The effect upon competitive entry may be devastating. It will be hardly comforting to the consumers in the market where such conduct has eliminated competition that the "conventional competition authorities " consider this behavior to be financially injurious to the incumbent.

142. In fact, while the study seeks to show this principle through reference to Air Canada pricing campaigns following its merger/takeover with CAI, the converse conclusion is at least equally true. Air Canada concentrated on eliminating competitors and maintaining market share before, during, and after its insolvency period. It eliminated two major competitors and now sits with a comfortable 63% domestic market share and 70% of the transcontinental market, as we have noted earlier

143. The Consumer Groups specifically take issue with the premise that is advanced throughout the Bell Canada study that the analysis of competitive markets and the effect of intervention is a straightforward, matter of fact exercise, where knowledge of competition theory trumps knowledge of the specific market and common sense. In fact, competition economic theory is intensely ideological and rarely a matter of black and white. The Bureau's preference for assuming that markets are efficient and its dalliance with

questionable theories of contestable markets is well known and reflected in the dearth of Bureau precedents of acting to curb the abuses in question.

144. More importantly, there is a difference in approach between the CRTC and the Competition Bureau that is mandated by the objectives of the *Telecommunications Act*. The Commission is relying upon market forces to attempt to achieve the objectives of the Act. The Commission's concerns do not involve the formulaic application of competitive theory to determine potential competition viability in the abstract: they are based on structuring competition to fulfill the need to secure such goals as just and reasonable rates, promotion of connectivity, economic vibrancy etc. While Bell Canada may chafe at decisions on competitive issues that incorporate the *Act's* policy objectives, it is clear that market design without reference to the same would be contrary to the Commission mandate.

145. The concept that the regulator closer to the operation of the actual markets should make the call on the policing of the markets is hardly a new one. Professor Bruce Doern in his study of the Competition Bureau for the C.D. Howe Institute noted the following:

> "When considering institutional reform issues and competition policy regimes and competition policy regimes, it is vital to keep one overall point in mind: all such regimes are constructed on the basic premise that market systems are working well. Almost by definition, competition policy regimes seek to work the outer edges of commercial activity to ensure that the norms of behaviour remain reasonable. The construction of such investigative and regulatory regimes must be mindful of the fact that there are absolute limits to how much competition policy authorities can and should substitute their judgment for the judgments of others who are closer to market realities."[33]

146. Finally, if the numbers of non- ILEC, non- cable competitors have rapidly diminished and the financial rewards are seemingly flowing exclusively to those incumbents, how can the relaxation of CRTC competition restrictions over those incumbents foster competition? Is the abandonment of CRTC competitive scrutiny and insertion of the more relaxed Competition Bureau supervision going to introduce meaningful competition to residential markets? More likely, such measures are designed to produce more of the same, this time with no one available to remedy their problem.

Dispute Resolution Models – Telecom Ombudsman

B.29 Are other measures required to protect consumers in light of technology and industry changes to deal with quality of service, fair contract conditions, effective redress and access to accurate and comparable marketplace information?

[33] G. Bruce Doern , *Fairer Play,* C.D. Howe Institute 1995 *p.200*

147. Many parties to this review are simply dismissing the very important issue of customer dispute resolution and redress with telecommunications services. It is difficult to glean even a mere mention of consumer-oriented dispute resolution in the hundreds of pages filed by Bell Canada or TELUS in this review. TELUS simply does not address the matter of customer dispute resolution. Bell says this in Bell Appendix D-5, the ostentatiously titled "Dispute Resolution in the Telecom Sector", at Para. 9:

> In addition to interconnection disputes, disputes between competing service providers also frequently occur in respect of wholesale services, and access to buildings, support structures and municipal rights-of-way. The focus of this report is these five types of inter-company disputes (the "Disputes"), rather than disputes between service providers and customers, for which a multitude of provincial and federal consumer protection regimes exist. [Emphasis added.]

148. In fact, most provincial consumer-protection regimes do not in fact apply to areas of federal jurisdiction, such as telecommunications. The reaction of most provincial consumer protection agencies when approached regarding any matter involving telecommunications is to refer the individual to the CRTC. Indeed, Bell Canada itself has argued, in the context of provincially-based litigation, that these matters fall under federal not provincial jurisdiction. To the Consumer Groups' knowledge, there are no "consumer protection" regimes at the federal level besides the jurisdiction of the Office of the Privacy Commissioner of Canada in relation to privacy matters.

149. The avoidance of any discussion of consumer-oriented dispute resolution in the ILEC's TPRP submissions may speak volumes about both the attitude of large telecommunications providers to individuals with real concerns and problems with their telecommunications services and about the need for a focus on individual dispute resolution in the telecommunications sector.

150. As noted in the Consumer Groups' August 15, 2005 submissions to the Panel, the idea of a Telecommunication Ombudsman is designed to address individual complaints in a serious, independent and practical fashion.

151. Such a telecommunication ombudsman approach, as noted in the PIAC paper on the idea, has been adopted in varying formats in the larger regulated telecommunications markets, including those of the United States, the United Kingdom and Australia.

152. The Australian model in particular has been successful from a consumer point of view. In the latest annual report (2003-4) from the Australian Telecommunications Industry Ombudsman,[34] the Australian TIO investigated 59,850 complaints – 7.8% more than the 55,515 complaints investigated the previous year.[35]

---

[34] See Telecommunications Industry Ombudsman, *TIO Annual Report 2003/4*, http://www.tio.com.au/publications/annual_reports/ar2004/annual_2004index.htm

[35] A single complaint may contain more than one complaint issue. In 2003/04 the TIO recorded 68,020 complaint issues, up from 62,670 the previous year.

153. The Australian TIO also reported that 89.7% of complaints were resolved at "Level 1" of the dispute resolution process, hence informally and generally within two weeks. Given that the Canadian telecommunications environment is not that different from Australia's (a point underlined in the submissions of Bell Canada in Appendix D-6) we could expect a comparable number of complaints, and hopefully of speedy resolutions of real consumer problems with Canadian telecommunications services.

154. For those who might contend that a telecommunications ombudsman should deal only with industries that the CRTC has not forborne from regulating, such as retail Internet provision and wireless telecommunications, it should be noted that the Australian TIO's complaint breakdown shows 53% of complaints relating to wireline services, but Internet access making up 15% of complaints and wireless nearly 32%. Thus these services, which are at the moment forborne from CRTC oversight regulation in Canada, are generating a very high (and growing) minority of complaints.[36]

155. Canadians have every right to demand prompt and fair resolution of telecommunications problems at an individual level. The aggregate approach of the CRTC to consumer protection within larger public proceedings does not address the day-to-day consumer telecommunications disputes that are legion in Canada. The Consumer Groups call on the Panel to seriously consider the Telecommunications Ombudsman proposal put forth by them. The Consumer Groups believe that this proposal is the only practical and responsible way to deal with individual customer disputes in this (as underlined in the submissions of the ILECs and others) most important industry.

VoIP

156. The thread woven through the submissions of the ILECs during the first phase of this review is that the old telecommunications world has ceased to exist. No more do the incumbents have market power; no more do competitors face barriers to entry; no more need consumers fear rising telecommunications prices. The future is here, and the future is Voice over Internet Protocol (VoIP), bringing with it disruptive and apocalyptic changes to the Canadian telecommunication world.

157. The Consumer Groups are less excited. We feel that VoIP does not justify large structural changes to the Canadian telecommunications regulatory scheme, nor does it so change the competitive environment in telecom that we must wrestle as much regulatory jurisdiction from a supposedly ambitious CRTC as possible.

158. As noted in the "Consumer Groups'" submissions during the CRTC VoIP proceedings (Public Notice PN 2005-2),[37] VoIP services, whether offered by new entrant independents such as Vonage or incumbents such as Bell, are marketed as replacements for local and

[36] See TIO Annual Report 2003/4, Complaint Statistics in Tables at http://www.tio.com.au/publications/annual_reports/ar2004/annual_200412.htm

[37] See http://www.crtc.gc.ca/PartVII/eng/2004/8663/piac/040618.doc at paras. 22-26.

long distance telephone services.[38] They are not sold as completely new telecommunications services that consumers will buy in addition to their present local and long distance services.

159. The core functionality of wireline phone service, whether for local or long distance calling, is the connection of telephone devices to enable oral communications at a distance. That functionality also is at the core of VoIP services.

160. VoIP allows extra features such as conference calling to be more easily integrated at lesser expense, making such services now available to regular residential VoIP customers. Some features as well are new, such as the ability to "import" a distant area code as the area code primarily associated with the subscriber despite his or her physical location. However, none of these features is saleable without the core connectivity that VoIP relies upon – simple telecommunication.

161. Therefore, if regulation is to be technology neutral, then, as decided by the CRTC in Decision Telecom 2005-28, VoIP is best viewed at this stage simply as a new technology that does not fundamentally alter the actual realities of the present market share of the ILECs nor the realities of the need for economic regulation of the ILECs until sustainable competition exists.

162. The Consumer Groups therefore question the basis for the ILEC's assertion of a new telecommunications reality, due to VoIP, which permits the questioning of the very basis of so much regulation. As noted in the introduction to this reply, the Consumer Groups question if the simple technological advancement that is VoIP is being used as a convenient excuse to question public interest regulation and to propose a system with only one goal: increased profitability for some of Canada's largest corporations.

Privacy

B.31 Are changes required to the regulatory approach to the protection of privacy in relation to telecommunications services, as it is currently administered by the CRTC and the Privacy Commissioner?

163. As noted in the Consumer Groups submissions in response to Panel question B31, there are indeed instances of overlapping jurisdiction between the privacy protections accorded under the *Telecommunications Act*, s. 7(i) as interpreted by the CRTC and the *Personal Information Protection and Electronic Documents Act* (PIPEDA), as interpreted by the OPCC and the courts thus far.

---

[38] See Vonage Premium Unlimited Plan description at: http://www.vonage.ca/no_flash/products_premium.php See also C.McLean, "Bell plays catch-up on VoIP" Globe and Mail, Friday, Sept. 9, 2005. Online: http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20050909/RVOIP09/TPBusiness/TopStories and "Bell Digital Voice Service – How it Works" http://www.digitalvoice.bell.ca/DigitalVoice/HowitWorks/index

164. However, contrary to the suggestions of Bell and TELUS in their initial submissions to the Panel, there is no lack of 'policy rationale' (see Bell answer to Q B31) for such an overlap nor is there a serious disjunction between the privacy regimes under either Act when viewed through the lens of individual privacy protection. What has instead been achieved by the application of both regimes in parallel is a superior level of privacy protection for consumers in the area of telecommunications than in the general marketplace and than could be achieved with only one of the two regimes.

165. Sector-specific privacy protection stemming from the CRTC's interpretation of s. 7(i) of the *Telecommunications Act* in relation to customer information has generally provided superior privacy protection than the level presently required by PIPEDA. This is appropriate, given the particularly sensitive nature of telecommunications records and communications.

166. In the CRTC decision *Confidentiality Provisions of Canadian Carriers*,[39] the CRTC rightly required the higher standard of express consent to use of subscriber information for purposes other than account administration (mostly marketing). Express consent, as opposed to implied consent, assures that customers are fully aware that their personal information is about to be used in a commercial manner amongst companies. In essence, they are made aware of "paying twice" for telecom services – once for the actual service with money and once with their personal information. What express consent provides to a consumer is a measure of control over the use of their personal information. When disputes arise as to whether consent has actually been given when express consent is the standard, the consumer is not in the position (as with an implied consent standard) of firstly, bearing the burden of showing with evidence the lack of consent (difficult, if not impossible) or producing enough evidence to satisfy the company.

167. On the matter of affiliate sharing of personal information, there is no evidence filed by Bell or TELUS, only bald assertion, that consumers find the restriction on sharing information between affiliates without informed (express) as inconvenient, annoying or that they "expect" such sharing. Bell's answer to Q. B31 in particular laments this restriction. However, research conducted by EKOS Research Associates Inc. for PIAC in 2001 demonstrates the opposite: an overwhelming majority of Canadians (94%) consider it at least moderately important (87% highly important) that telephone companies obtain their consent before sharing their information with affiliates.[40] Moreover, both survey respondents and focus group participants indicated a clear preference for express (opt-in) consent over assumed (opt-out) consent, with 54% of respondents considering the use of an opt-out approach for consent to data-sharing by telephone companies to be unacceptable.[41]

---

[39] Telecom Decision CRTC 2003-33, 30 May 2003, http://www.crtc.gc.ca/archive/ENG/Decisions/2003/dt2003-33.htm; as amended, Telecom Decision CRTC 2003-33-1, 11 July 2003.

[40] *Business Usage of Consumer Information for Direct Marketing: What the Public Thinks* (August 2001), p.17; online at: http://www.piac.ca/Directmarketing%20survey%20E.pdf .

[41] *Ibid.*, p.20.

168. Moreover, the ILECs' position with respect to data sharing among affiliates is inconsistent with their position on affiliate treatment in other contexts. Bell, for example, does not contend that Bell Mobility, Bell Canada and Bell Expressvu are the same legal entity for regulatory or tax purposes. Yet it wants to treat its corporate affiliates as if they are a single company for the purposes of sharing customer data. Bell cannot have privacy rules one way (as if these companies were one) and legal and regulatory rules the other way (as if they were all separate legal entities).

169. Since, as Bell correctly notes, the CRTC's regulations regarding confidential customer information apply only to disclosure of personal information, these privacy disclosure restrictions protect telephone customers more directly from undue marketing than do PIPEDA rules. This is appropriate, since PIPEDA merely sets a baseline for cross-sectoral privacy regulation, allowing for higher-level protections in specific sectors, as governments and regulators see fit.

170. Conversely, PIPEDA raises privacy protection to minimum national standards in those areas where a dedicated, sector-specific regulator might not have the time or inclination to regulate. For example, PIPEDA allows an individual access to his or her personal information in corporate holdings and a right of accuracy. This is unlikely to form the basis of a separate CRTC proceeding, whether by Part VII application or public notice. Yet, access to one's personal information is a key privacy right. PIPEDA thus fills in the data protection gaps left by sector-specific privacy laws and regulations.

171. Bell Canada in its answer to Q. B31 admits that the CRTC is better equipped to deal with true telecommunications privacy issues and that PIPEDA and the OPCC are better suited to general privacy protection. However, where Bell and the other phone companies see conflict and overlap, the Consumer Groups see a more complete "check and balance" system that ensures the highest possible privacy standards in Canadians' telecommunications.

172. What Bell's and TELUS's submissions on privacy really amount to is an attempt to lower the baseline standard of privacy protection for customer information they hold. They wish to lower the consent standard from express to implied consent, and thus effectively to allow information sharing across affiliates (separate legal entities) without meaningful customer consent. The only advantage to this structure is the ease with which phone companies can use personal information on their millions of subscribers – for marketing purposes. This is hardly a goal of privacy protection.

*** END OF DOCUMENT ***