



BEFORE THE GOVERNOR IN COUNCIL

**IN THE MATTER OF REPRESENTATIONS BY INTERESTED PARTIES ON
THE
*PROPOSED ORDER ISSUING A DIRECTION TO THE CRTC ON IMPLEMENTING THE
CANADIAN TELECOMMUNICATIONS POLICY OBJECTIVES TO PROMOTE
COMPETITION, AFFORDABILITY, CONSUMER INTERESTS AND INNOVATION***

SUBMISSION OF CANADIAN NETWORK OPERATORS CONSORTIUM INC.

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1.0 Introduction

1. In accordance with the procedure set out in the *Canada Gazette*, Part I of March 9, 2019¹, Canadian Network Operators Consortium Inc. (“CNOOC”) is hereby submitting its comments on the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation* (“Proposed Policy Direction”) proposed by the Governor in Council.²

2. CNOOC fully supports the objectives of the Governor in Council in making the Proposed Policy Direction, but CNOOC believes that additional measures are needed to ensure the attainment of these objectives.

1.1 Structure of CNOOC’s submission

3. CNOOC strongly supports the Proposed Policy Direction as a positive development for competition in Canadian telecommunications. Section 2.0 of CNOOC’s comments explain why the Proposed Policy Direction will enhance competition in Canadian telecommunications if it is adopted.

4. In sections 3.0 through 5.0 of these comments, CNOOC proposes further measures that should be taken in concert with the adoption of the Proposed Policy Direction in order to facilitate the achievement of the Governor in Council’s objectives of promoting competition, affordability, consumer interests, and innovation. In particular, CNOOC proposes that the Governor in Council:

- a. Commit to closely monitoring the how the Proposed Policy Direction is interpreted by the Commission in order to ensure that the Governor in Council’s intent is being followed, particularly with respect to innovation;

¹ *Canada Gazette*, Part I, Vol. 153, No. 10, 9 March 2019, pg. 856, at pg. 860 [“Gazette Notice”].

² Gazette Notice, at pgs. 860-861 [“Proposed Policy Direction”].

- b. Repeal the 2006 Policy Direction³ in conjunction with the adoption of the Proposed Policy Direction; and
- c. Strengthen the impact of the Proposed Policy Direction by replacing permissive language contained therein with mandatory instructions to the Commission.

5. CNOC is concerned that the large Incumbent Local Exchange Carrier (“ILEC”) and Cable Carriers (collectively, “Incumbents”)⁴ will abuse the provisions in the Proposed Policy Direction relating to innovation in order to hinder the development of competition in telecommunications markets in the same manner that they have abused the provisions in the 2006 Policy Direction relating to investment in telecommunications facilities. CNOC is thus advising that the Governor in Council carefully monitor the Commission’s interpretation of the Proposed Policy Direction to ensure it is implemented as intended.

6. With respect to the 2006 Policy Direction it is critical that it be repealed in conjunction with the adoption of the Proposed Policy Direction. A failure to repeal the 2006 Policy Direction may cause serious interpretation problems that will render the Proposed Policy Direction inoperative or may result in unintended and undesired anti-competitive outcomes that do not benefit consumers. To the extent that there are elements in the 2006 Policy Direction that have not negatively impacted competition and that the Governor in Council wishes to retain, these may be incorporated into the Proposed Policy Direction, and CNOC is including a specific proposal to that effect in this submission. In the alternative to repealing the 2006 Policy Direction, the Governor in Council should insert language into the Proposed Policy Direction making it clear that it will prevail over the 2006 Policy Direction in the event of a conflict.

7. Finally, the language in the Proposed Policy Direction should be mandatory instead of permissive in order to ensure that the Commission carries out the laudable objectives of the Governor in Council.

³ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 [“2006 Policy Direction”].

⁴ For the purposes of this submission, “Incumbents” refers to both ILECs and Cable Carriers, as defined in footnote 7 of these comments, and their respective affiliates that provide telecommunications and/or broadcasting services

8. As explained further below, by adopting these additional measures, the Governor in Council will be far more likely to achieve its objectives of promoting competition, affordability, consumer interests, and innovation in Canadian telecommunications, which are objectives that CNOOC entirely endorses.

1.2 Background on CNOOC

9. CNOOC is a not-for-profit corporation, incorporated under the *Canada Not-for-profit Corporations Act*.⁵ Its statement of purpose includes the following objects:

1. To represent the interests of those bodies corporate in Canada that own or operate communications networks, in whole or in part, and are involved in the competitive provision of communications services to the public over those networks;
2. To promote innovation and productivity in Canada, as well as Canada's international competitiveness through the removal of barriers to increased competition in the provision of communications services;
3. To influence the development of laws and regulations, regulatory and judicial determinations, as well as public policy affecting communications in Canada;
4. To be the recognized and visible authority on the Canadian provision of competitive communications services;
5. To ensure that high levels of knowledge, training and ethics are adopted by Canadian competitive communications service providers; and
6. To increase the level of competitive communications services business in the Canadian economy.⁶

10. With these objectives in mind, CNOOC has a significant interest in the content of the Proposed Policy Direction.

⁵ S.C. 2009, c. 23.

⁶ Articles of Continuance of Canadian Network Operators Consortium Inc. dated May 15, 2013.

11. CNOC currently has 33 members and represents independent⁷ telecommunications service providers (“TSPs”) of all sizes, including the largest independent TSPs in Canada.⁸ While all CNOC members are Internet service providers (“ISPs”), many also provide voice over Internet Protocol (“VoIP”) services, and a number of them also provide traditional circuit switched telecommunications services. Various CNOC members focus on residential markets, others focus on business markets, and some serve both markets. Some CNOC members have also entered the broadcasting distribution market via Internet Protocol television (“IPTV”) platforms. In addition to providing retail telecommunications and broadcasting services to consumers, some also serve as wholesalers to other TSPs. At least two of CNOC’s current members have built mobile wireless networks in rural and remote parts of Canada, one of which spans much of the three northern territories and northern Quebec.⁹

12. All CNOC members compete vigorously with the Incumbents and all of them are reliant on obtaining wholesale broadband services to provide at least some of their retail services. At this time, CNOC members have not been able to obtain wholesale access to the mobile wireless platforms of the large national wireless carriers¹⁰, although the issue of wholesale access to these platforms is currently being examined by the Canadian Radio-television and Telecommunications Commission (“CRTC” or “Commission”).¹¹

13. CNOC has consistently advocated for fair access to the wholesale wireline and wireless services of the large Incumbents. This access is critical to enable competitors to provide Canadians

⁷ In this context, “independent” means not affiliated with any of the large incumbent telephone companies (each an “ILEC” and collectively “ILECs”), namely Bell Canada (“Bell”) (including the operations that were previously operated by Bell Aliant Regional Communications, Limited Partnership and MTS Inc., collectively “Bell”), Northwestel Inc. (“Northwestel”), Saskatchewan Telecommunications (“SaskTel”) and TELUS Communications Inc. (“TELUS”), or with any of the large cable company incumbents, namely Bragg Communications Inc. o/a Eastlink “Eastlink”), Cogeco Communications Inc. (“Cogeco”), Rogers Communications Inc. (“Rogers”), Shaw Communications Inc. (“Shaw”), and Videotron Ltd. (“Videotron”) (each a “Cable Carrier” and collectively “Cable Carriers”).

⁸ These are Distributel Communications Ltd. (<https://www.distributel.ca/>), Primus Management ULC (https://primus.ca/index.php/ont_en/bundles.html?gclid=EAlaIQobChMjYXs6NW24QIVkEsNCh35NQ-REAAAYASAAEgLHB_D_BwE) and TekSavvy Solutions Inc. (<https://teksavvy.com/>).

⁹ See, for example, Ice Wireless Inc. (<https://www.icewireless.com/>).

¹⁰ Bell, Rogers, and TELUS.

¹¹ Telecom Notice of Consultation CRTC 2019-57, *Review of mobile wireless services*, 28 February 2019.

with the breadth of affordable options they demand when they shop for telecommunication services.

2.0 The Proposed Policy Direction is a positive development for competition

14. CNOC fully concurs with the Regulatory Impact Analysis Statement accompanying the Proposed Policy Direction which summarizes some of the issues that stem from the ongoing lack of sustainable competition in Canadian telecommunications:

For more than a decade, the Government and the CRTC have acted to increase competition and affordability, promote the interests of consumers and enable innovation.

[....]

Despite progress in the advancement of consumer outcomes, significant issues remain. Canada's incumbent carriers possess and have exercised market power. Prices are high relative to those in peer countries for comparable plans. The affordability of telecommunications services challenges Canadians, and in particular low-income Canadian families, with financial constraints. The Competition Bureau has concluded that the national mobile wireless incumbents coordinate their behaviour, resulting in higher prices for Canadians. Further, Canadians have expressed substantial concern regarding the sales practices used by large telecommunications carriers, and reports have alleged that those carriers have used misleading and aggressive sales practices and abuse information asymmetries to their benefit and at the cost and harm of Canadian consumers. A decreasing but still significant number of Canadian households remain without access to high-quality services, particularly in areas that are underserved by competition.¹²

15. At the outset, CNOC emphasizes that while it has concerns that the Governor in Council's objectives of promoting competition, affordability, consumer interests, and innovation are at risk unless further measures are taken, the Proposed Policy Direction is a very positive development for competition in the provision of telecommunications services in Canada. CNOC is confident that, combined with the additional measures that it proposes herein, the Proposed Policy Direction will play an important role in ameliorating the undesirable consumer outcomes described in the Governor in Council's Regulatory Impact Analysis Statement.

¹² Gazette Notice, at pgs 853-855.

16. CNOC recently made a submission to the Broadcasting and Telecommunications Legislative Review Panel (“BTLR Panel”) that detailed problems with the current 2006 Policy Direction and proposed that a revised policy direction be issued to the Commission pending more permanent changes to Canada’s telecommunications legislation.¹³ A number of suggestions that CNOC made in its submission to the BTLR Panel for a revised policy direction have been incorporated into the Proposed Policy Direction.

17. In particular, CNOC supports the inclusion in the Proposed Policy Direction of a direction that the Commission should consider the extent to which its regulatory measures “encourage all forms of competition”¹⁴ [Emphasis added], which is similar to CNOC’s proposal that the Commission be required to rely upon competition amongst TSPs to the maximum extent feasible as the means of achieving the telecommunications policy objectives set out in section 7 of the *Telecommunications Act*.¹⁵

18. As explained more fully below, one of CNOC’s principal concerns with the 2006 Policy Direction is that its direction that the Commission rely on “market forces to the maximum extent feasible”¹⁶, combined with a statement in the 2006 Policy Direction about increasing incentives to invest in network facilities¹⁷, has been seriously misinterpreted by the Commission as a direction to avoid, retard or exercise excessive caution with respect to the effective wholesale regulation needed to curb the market power of the Incumbents that the Governor in Council notes in the Regulatory Impact Analysis Statement.

19. Through the clear instruction in subsection 1(a)(i) of the Proposed Policy Direction that the Commission’s regulatory measures should “encourage all forms of competition”, CNOC is hopeful that the Commission will no longer shy away from implementing timely, effective and

¹³ Canadian Network Operators Consortium Inc., “Submission of Canadian Network Operators Consortium Inc. to the Broadcasting and Telecommunications Legislative Review Panel”, 11 January 2019, <https://www.cnoc.ca/wp-content/uploads/2019/01/CNOC-Submission-to-BTLR-Panel-2019011-Final-Corrected-1.pdf> at section 12 [“CNOC BTLR Panel Submission”].

¹⁴ Proposed Policy Direction at subsection 1(a)(i).

¹⁵ CNOC BTLR Panel Submission at para 502.

¹⁶ 2006 Policy Direction at subsection 1(a)(i).

¹⁷ *Id.* at subsection 1(c)(ii).

sufficiently comprehensive wholesale regulation such that competitors who rely upon wholesale inputs have a fair opportunity to compete with the Incumbents in all communications markets. However, in order to ensure that the Commission follows the Governor in Council's direction, CNOC submits that it is necessary to repeal the 2006 Policy Direction, which is a topic CNOC addresses further below.

20. CNOC also strongly supports the inclusion of new measures in the Proposed Policy Direction related to affordability and reducing barriers to entry and competition for new and smaller telecommunications service providers.¹⁸

21. CNOC extensively detailed in its submission to the BTLR Panel the significant, and in some cases currently insurmountable, barriers to entry and competition faced by independent TSPs seeking to challenge the market power of the Incumbents.¹⁹ Regrettably, these barriers continue to exist today, including the ongoing inability of independent TSPs to access the fibre-to-the-premises ("FTTP")²⁰ facilities of the Incumbents on reasonable terms or conditions in order to provide competitive options for the fastest broadband speeds, or their mobile wireless networks on any terms and conditions at all. The result of this lack of wholesale access to these two vital platforms for independent TSPs is a lack of competition in Canada in the provision of both broadband services and mobile wireless services, which in turn results in the high prices for these services described in the Regulatory Impact Analysis Statement.

22. CNOC is pleased that the Governor in Council has acknowledged that significant barriers to entry and competition exist for new and smaller telecommunications service providers in Canada's telecommunications market and that the Proposed Policy Direction instructs the Commission to take action to reduce them.²¹

¹⁸ Proposed Policy Direction at subsections 1(a)(ii) and (v).

¹⁹ CNOC BTLR Panel Submission, at pgs 41-63.

²⁰ FTTP has been defined as follows in Telecom Notice of Consultation 2013- 551, *Review of wholesale services and associated policies* ("TNC 2013-551") "FTTP facilities, which include fibre-to-the-home (FTTH) and fibre-to-the-building (FTTB) facilities, bring optical fibre directly to a customer's home or building, where electronics are installed to convert optical signals to electrical signals

²¹ Proposed Policy Direction at subsection 1(a)(v).

23. CNOC has no doubt that if sustainable and effective competition is established in Canada's telecommunications markets, the Governor in Council's other objectives relating to affordability, consumer protections, access, and innovation will be readily achieved through the action of competitive forces. CNOC provided an immense amount of evidence in its submission to the BTLR Panel as to how increased competition results in lower prices, greater choices for consumers, the acceleration of access to telecommunications services, and innovations in telecommunications.²²

24. Overall, CNOC is confident that the Proposed Policy Direction will have a positive impact on the development of competition in Canada's telecommunication markets. However, CNOC is concerned that this positive impact will be significantly attenuated unless further measures are taken.

3.0 Spurious Incumbent claims about innovation must not be permitted to replace spurious Incumbent claims about incentives to invest

25. The Proposed Policy Direction instructs the Commission to consider how its regulatory measures "enable innovation in telecommunications services, including new technologies and differentiated service offerings"²³ as well as "stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services".²⁴

26. CNOC unequivocally supports both of these objectives. Indeed, the Commission is already obliged to seek to achieve them through their inclusion in subsection 7(g) of the *Telecommunications Act*²⁵, which provides that one of Canada's telecommunications policy objectives is "to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services."

27. However, based on its many years of experience in regulatory proceedings before the Commission, CNOC is compelled to sound a note of caution about how the inclusion of innovation

²² CNOC BTLR Panel Submission, at pgs 70-81.

²³ Proposed Policy Direction at subsection 1(a)(vi).

²⁴ *Id.* at subsection 1(a)(vii).

²⁵ SC 1993, c 38 [*"Telecommunications Act"*].

and stimulating research and development as objectives in the Proposed Policy Direction may be abused by Incumbents seeking to hinder the development of competition.

28. Subsection 1(c)(ii) of the 2006 Policy Direction provides that the Commission should adopt measures “with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities”. In CNOC’s experience, whenever the Incumbents are faced with the potential of new regulatory measures designed to spur competition, such as enhanced wholesale access for competitors, or in some cases the introduction of wholesale access for a particular service for the first time, the Incumbents will, without fail, argue that any new regulatory measures will undermine their incentives to invest in telecommunications facilities.

29. The Incumbents argued this position vigorously in the proceedings determining whether competitors would be permitted to have wholesale access to the Incumbents fibre-to-the-node (“FTTN”) facilities.²⁶ In fact, Incumbent efforts to create a perception that there would be a serious impact on their incentives to invest if wholesale access to FTTN was granted led the Governor in Council to refer the matter back to the Commission for further consideration after the Commission issued a decision requiring that competitors be granted wholesale access to these facilities.²⁷ These arguments turned out to be groundless and the Commission once again determined that there would be no negative impacts on incentives to invest caused by a properly calibrated regulatory framework providing wholesale access to FTTN.²⁸ However, the additional process required to address these spurious arguments by the Incumbents in various Commission proceedings and additional consideration of the matter by the Governor in Council delayed effective access for competitors to the FTTN facilities of the Incumbents for approximately twelve years after the Incumbents started using these facilities to provide retail services to their own end-users.²⁹

²⁶ FTTN facilities have succinctly been defined in TNC 2013-551 as follows: “FTTN technology upgrades the telephone company’s access network by extending fibre-based facilities closer to the customer’s premises (but not directly to the premises as with FTTP) in order to provide increasingly high-speed access services.” at Footnote 20.

²⁷ See Order of the Governor in Council PC 2009-2007, as well as Telecom Regulatory Policy CRTC 2010-632, *Wholesale high-speed access services proceeding*, 30 August 2010, at paras 10-20 [“TRP 2010-632”].

²⁸ TRP 2010-632, at para 46.

²⁹ For a detailed regulatory history of FTTN, see CNOC’s BTLR Panel Submission at paras 56-59.

30. The Incumbents made identical arguments a few years later in a proceeding examining whether the Incumbents should be compelled to grant competitors wholesale access to their FTTP facilities.³⁰ When the Commission ultimately determined that there were no grounds for these arguments³¹, Bell Canada caused further delay and confusion in the regulatory process by appealing the matter to the Governor in Council³², as it did in the case of wholesale access to its FTTN facilities, which also rejected Bell Canada's claims that its incentives to invest would be undermined by any requirement to provide wholesale access to its facilities.³³ Unfortunately, the regulatory process to provide competitors with effective wholesale access to these FTTP facilities is still ongoing and has no doubt been stretched out by the need for competitors, the Commission, and the Governor in Council, to spend time analyzing and addressing spurious Incumbent claims that they will cease investing if they are subjected to real competition.

31. In fact, **there has not been a single instance** in the history of Canadian telecommunications regulation where wholesale obligations or greater competition led to a reduction in investment in network facilities by the Incumbents.

32. However, just as the Incumbents have caused significant delay under the 2006 Policy Direction by arguing that their incentives to invest will negatively be impacted anytime that new wholesale obligations are imposed upon them, CNOC is concerned that they may now make similar arguments under the Proposed Policy Direction that their incentives to innovate will be harmed if new measures to stimulate competition are imposed upon them.

33. Of course, it is a basic economic fact that greater competition actually enhances innovation and research and development. This is because in a more competitive environment competitors of all sizes will be required to differentiate themselves from each other in order to gain market share.

³⁰ CNOC's BTLR Panel Submission at, paras 60-65.

³¹ *Ibid.*

³² *Ibid.* See also Bell Canada, "Petition to the Governor in Council to Vary Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies*" 20 October 2015, at pg 16., available at [https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/trp-crtc-2015-326-bell-canada-petition-en.pdf/\\$file/trp-crtc-2015-326-bell-canada-petition-en.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/trp-crtc-2015-326-bell-canada-petition-en.pdf/$file/trp-crtc-2015-326-bell-canada-petition-en.pdf).

³³ *Ibid.* See also Government of Canada, "Statement by the Government of Canada on Bell Canada petition of CRTC wholesale decision", 11 May 2016 available at <https://www.canada.ca/en/innovation-science-economic-development/news/2016/05/statement-by-the-government-of-canada-on-bell-canada-petition-of-crtc-wholesale-decision.html>.

In fact, in order to compete against the dominant positions of the Incumbents, CNOC members, as well as other independent TSPs, have had to develop several innovations in order to distinguish themselves in the marketplace and gain market share. CNOC showcased a small subset of these innovations in its submission to the BTLR Panel.³⁴

34. CNOC is not proposing any changes to the language in subsections 1(a)(vi) and (vii) of the Proposed Policy Direction relating to innovation and research and development, which, CNOC reiterates, it fully supports. However, CNOC urges the Governor in Council to carefully monitor how the Commission interprets the new Policy Direction to ensure that the Governor in Council's intent is followed and that the Incumbents do not subvert this intent with spurious arguments about negative impacts on innovation stemming from enhanced competition.

4.0 The 2006 Policy Direction must be repealed

35. For the Governor in Council to fully accomplish its objective of fostering competition, affordability, consumer interests, and innovation, it is imperative that the 2006 Policy Direction be repealed simultaneously with the coming into force of the Proposed Policy Direction. This step is necessary as not only are parts of the 2006 Policy Direction inconsistent with the Governor in Council's objective of promoting all forms of competition, but the 2006 Policy Direction contains provisions that refer to specific events that occurred over a decade ago and whose legal status is now unclear, thus creating regulatory uncertainty.

36. CNOC has already alluded in this submission to significant problems with the 2006 Policy Direction that negatively impacted the development of competition in Canada's telecommunications markets. CNOC analyzed these problems extensively in its recent submission to the BTLR Panel.³⁵

37. One of these significant issues is the requirement in the 2006 Policy Direction for the Commission to rely upon "market forces to the maximum extent feasible"³⁶, which CNOC believes

³⁴ CNOC's BTLR Panel Submission, at paras 229-237.

³⁵ *Id.* at paras, 499-509.

³⁶ 2006 Policy Direction at subsection 1(a)(i).

has unfortunately been misinterpreted by the Commission as a direction to avoid, retard or demonstrate reluctance to engage in effective, timely and comprehensive wholesale regulation where required to promote competition in downstream markets. For example, this reluctance on the part of the Commission to engage in effective wholesale regulation was demonstrated recently in Telecom Decision CRTC 2018-97³⁷, in which the Commission decided that due to the requirement in the 2006 Policy Direction to rely on market forces to the maximum extent feasible, it did “not consider it appropriate, at this time, to expand the types of providers that qualify for mandated wholesale access” to the Incumbent’s mobile wireless infrastructure.³⁸

38. However, as the Governor in Council is aware from its Regulatory Impact Analysis Statement, the continued lack of wholesale access to the Incumbent’s mobile wireless infrastructure for competitors has resulted in an extremely concentrated market for mobile wireless services with some of the highest prices in the industrialized world.³⁹

39. CNOC acknowledges that the Governor in Council views the Proposed Policy Direction as being complementary to the 2006 Policy Direction⁴⁰, however, it is unclear how the two can coexist. While the 2006 Policy Direction requires the Commission to rely upon “market forces” to the greatest extent feasible⁴¹, the Proposed Policy Direction explicitly makes it clear that “all forms of competition” are to be encouraged.⁴² As noted above, the Commission has interpreted the direction in the 2006 Policy Direction as preventing it from advancing all forms of competition, as, erroneously in CNOC’s opinion, it has concluded that competition based on mandated wholesale inputs is incompatible with relying on market forces to the maximum extent feasible. This is a clear conflict between the two policy directions.

³⁷ Telecom Decision CRTC 2018-97, *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service*, 22 March 2018 [“TD 2018-97”].

³⁸ *Id.*, at para 126.

³⁹ Canada Gazette, Part 1, Vol. 153, No. 10, 9 March 2019 at pgs 854-855. See also Order of the Governor in Council PC 2017-0557, 1 June 2017.

⁴⁰ Canada Gazette, Part 1, Vol. 153, No. 10, 9 March 2019, at pg. 858.

⁴¹ 2006 Policy Direction at subsection 1(a)(i).

⁴² Proposed Policy Direction at subsection 1(a)(i).

40. The 2006 Policy Direction also contains outdated language that should be repealed. For example, subsection 1(c)(ii) of the 2006 Policy Direction provides that the Commission should adopt measures:

with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities, to complete a review of its regulatory framework regarding mandated access to wholesale services, to determine the extent to which mandated access to wholesale services that are not essential services should be phased out and to determine the appropriate pricing of mandated services, which review should take into account the principles of technological and competitive neutrality, the potential for incumbents to exercise market power in the wholesale and retail markets for the service in the absence of mandated access to wholesale services, and the impediments faced by new and existing carriers seeking to develop competing network facilities. [Emphasis added]

41. Subsection 1(c)(ii) of the 2006 Policy Direction is confusing in that it directs the Commission “to complete a review of its regulatory framework regarding mandated access to wholesale services”, which the Commission did in fact complete in 2006⁴³, but it is not clear if the rest of the provision continues to have any legal effect, which results in regulatory uncertainty. Repealing the 2006 Policy Direction would remove the redundant language in subsection 1(c)(ii) as well as lingering uncertainty over the legal effect of that subsection.

42. It is significant that in the Regulatory Impact Analysis Statement, the only reason that the Governor in Council gave for maintaining the 2006 Policy Direction in force was the need for the Commission to continue to streamline its processes and continue to regulate efficiently.⁴⁴ CNOC concurs that these are important objectives and notes that complying with regulatory obligations is still a significant burden for many smaller TSPs. CNOC submits that if a desire to encourage the Commission to continue to streamline its processes and seek efficiencies is the primary reason of the Governor in Council for retaining the 2006 Policy Direction, the best approach would be for the Governor in Council to take subsections 1(c)(i), (iii), and (iv) of the 2006 Policy Direction and insert them into the Proposed Policy Direction, which would then make the 2006 Policy Direction completely unnecessary.

⁴³ Telecom Public Notice CRTC 2006-14, *Review of regulatory framework for wholesale services and definition of essential service*, 9 November 2006.

⁴⁴ Canada Gazette, Part 1, Vol. 153, No. 10, 9 March 2019, at pg. 858.

43. With respect to efficiency, CNOC notes that unless the 2006 Policy Direction is repealed simultaneously with the implementation of the Proposed Policy Direction, parties in regulatory proceedings before the Commission will be compelled to make arguments demonstrating that their positions comply with a) the policy objectives in section 7 of the *Telecommunications Act*, b) the 2006 Policy Direction, and c) the Proposed Policy Direction. The result is that regulatory submissions will become increasingly lengthy and complicated and require longer to adjudicate, which is exactly the opposite of the streamlining that the Governor in Council seeks.

44. As a less ideal alternative, in the event that the Governor in Council wishes to have both statutory instruments operate in parallel, CNOC proposes that the Governor in Council insert language into the Proposed Policy Direction indicating that it will prevail over the 2006 Policy Direction in the event of a conflict, which CNOC has no doubt will inevitably occur given how the reference to market forces in the 2006 Policy Direction has been interpreted in the past by the Commission.

45. Overall, while CNOC fully understands the desire of the Governor in Council to continue to require the Commission to streamline its practices and engage in efficient regulation, the Governor in Council risks having its objectives of fostering greater competition undermined if it allows the 2006 Policy Direction to remain in force. The 2006 Policy Direction also contains the redundant subsection 1(c)(ii) which should be repealed to enhance regulatory certainty. Moreover, the inevitable need to make lengthier legal argument in order to comply with not one, but two policy directions from the Governor in Council, will be the very opposite of efficient regulation.

5.0 The language in the Proposed Policy Direction should be mandatory

46. The Proposed Policy Direction currently uses permissive language in its instructions to the Commission. More specifically, subsections 1(a) and (b) of the Proposed Policy Direction only require that the Commission “should consider how” its regulatory measures promote the Governor in Council’s objectives and that the Commission “should demonstrate” its compliance with the Proposed Policy Direction when relying upon regulation. CNOC submits that the language in

subsections 1(a) and (b) of the Proposed Policy Direction needs to be made mandatory in order to ensure that the Governor in Council's objectives are achieved.

47. In particular, the phrase "should consider how" in subsection 1(a) should be replaced with "should ensure that", such that the revised subsection 1(a) would read: "the Commission, when relying on regulation, should ~~consider how~~ ensure that the measures used can promote competition, affordability, consumer interests and innovation, namely the extent to which they [...]".

48. There is no reason that the Commission should merely "consider how" its regulatory measures promote competition, affordability, consumer interests, and innovation. Indeed, no regulatory measure should ever undermine these common sense objectives. Instead, the Commission should be required to actually ensure that its regulatory measures promote the Governor in Council's objectives and to make changes if its regulatory measures fail to promote these objectives.

49. In addition the use of "should" in subsection 1(b) should be replaced with "must", such that the revised language in subsection 1(b) would read: "the Commission, when relying on regulation, ~~should~~ must demonstrate its compliance with this Order and ~~should~~ must specify how the measures used can, as applicable, promote competition, affordability, consumer interests and innovation."

50. With respect to subsection 1(b) of the Proposed Policy Direction, there is no reason that the Commission should not be required, as a mandatory condition when relying upon regulation, to explain how its regulatory measures promote the Governor in Council's objectives of promoting competition, affordability, consumer interests, and innovation. Such a condition will allow interested parties, as well as the Governor in Council, to closely monitor the Commission's interpretation and implementation of the Proposed Policy Direction.

51. These minor changes to the language of the Proposed Policy Direction will strengthen its effect by limiting the ability of the Commission to deviate from the broad policy direction set by the Governor in Council.

6.0 Conclusion

52. CNOC supports the Proposed Policy Direction and the Governor in Council's intent in proposing it of fostering competition, affordability, consumer interests, and innovation in Canadian telecommunications.

53. However, in order for the Proposed Policy Direction to have its maximum impact, it is necessary that additional measures be taken, including the monitoring of how the Commission interprets the Proposed Policy Direction with a particular emphasis on how the provisions dealing with innovation are applied, the repeal of the 2006 Policy Direction simultaneously with the coming into force of the Proposed Policy Direction, and the change of permissive language in the Proposed Policy Direction to imperative language.

54. These additional measures will enhance the effect of the Proposed Policy Direction and speed the attainment of the Governor in Council's objectives, which CNOC completely endorses.