

**COMMENTS OF  
COGECO CABLE INC., QUEBECOR MEDIA INC.,  
ROGERS COMMUNICATIONS INC., AND SHAW  
COMMUNICATIONS INC. ON THE COMPETITION  
BUREAU'S DRAFT INFORMATION BULLETIN ON THE  
ABUSE OF DOMINANCE PROVISIONS AS APPLIED TO  
THE TELECOMMUNICATIONS INDUSTRY**

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**January 12, 2007**

## **OVERVIEW**

1. These comments are jointly submitted by an alliance of telecommunications carriers who compete with the incumbent local exchange carriers (ILECs) in the provision of local telephone services in various regions of Canada (the Competitors). The Competitors consist of Cogeco Cable Inc., Quebecor Media Inc., Rogers Communications Inc. and Shaw Communications Inc.
  
2. The Competitors' comments are submitted in response to the Competition Bureau's request as amended for public comment on its Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (the Draft Bulletin) dated September 26, 2006.
  
3. The Competitors welcome increased transparency in the Competition Bureau's approach to the application of the abuse of dominance provisions in the *Competition Act* to the telecommunications industry. It is the Competitors' position, however, that the Draft Bulletin confirms that the legal framework and process for addressing abuses of dominance under the *Competition Act* is unworkable and incapable of effectively curbing abuses of dominance in telecommunications markets where significant market power exists or which are in transition from significant market power.
  
4. The *Competition Act* establishes a framework of general application to all areas of the Canadian economy that is intended to deal with relatively infrequent instances of anti-competitive conduct that can be effectively addressed through structural remedial orders. As the Telecommunications Policy Review Panel (TPRP) recognized, neither the substantive tests nor the processes established by the *Competition Act* are conducive to dismantling barriers to entry or addressing competitive disputes in telecommunications markets.
  
5. Market power, *per se*, is not sanctionable under the *Competition Act*. This means that the framework established by the *Competition Act* does not contain

the tools necessary to dismantle barriers to entry in markets where there exists significant market power. Relief under the *Competition Act* is limited to those situations where a firm with market power engages in a practice of anti-competitive acts that results in a substantial lessening or prevention of competition (SLC). In theory, the SLC test involves an assessment of the relative state of competition in the absence and presence of the anti-competitive acts. If competition is not otherwise present in a market due to barriers to entry, no relief is available under the *Competition Act*.

6. It is absolutely essential that lighter regulation of the incumbent telephone companies be accompanied by timely and effective adjudication of and relief for anti-competitive conduct. As the TPRP unequivocally recognized and the Draft Bulletin confirms, the framework established by the *Competition Act* cannot achieve these objectives. The two-step process established by the *Competition Act* for investigation and adjudication of allegations of anti-competitive conduct by two bodies with no resident expertise in the telecommunications industry is cumbersome and results in multi-year delays. While this may be acceptable in relatively static markets involving infrequent disputes, these timelines render the availability of relief largely if not entirely ineffective in dynamic markets, like telecommunications, in which competition has only recently been introduced and competitive disputes are likely to be relatively frequent.

7. The remedial powers provided by the *Competition Act* are also insufficient to support “the development, ongoing monitoring and supervision of sector-specific competitive safeguards [that] may be required.” (TPRP Report, p. 4-14) The Draft Bulletin expressly confirms that neither the Competition Tribunal nor the Competition Bureau has the legislative mandate to impose behavioural remedies that require ongoing oversight and supervision. The TPRP Report, in contrast, recommended that abuse of dominance be enforced by a single authority vested with all of the enforcement powers under both the *Telecommunications Act* and the *Competition Act*.

8. The Competition Bureau and the Competition Tribunal also lack the industry expertise that is critical to ensuring timely and effective assessment of abuse allegations and application of appropriate safeguards against anti-competitive conduct in telecommunications markets. Even a cursory review of the Draft Bulletin confirms that the evidentiary requirements that must be satisfied to prove the elements of abuse of dominance under the provisions of the *Competition Act* are enormous, particularly if it is necessary to educate an investigatory body (the Competition Bureau) and then an adjudicative body (the Competition Tribunal) from scratch on the industry on a case-by-case basis. The limited jurisprudence under the *Competition Act* demonstrates that definition of relevant product and geographic markets alone is a highly complex and cumbersome exercise. The Draft Bulletin not only confirms this, but underscores – as the TPRP found - that market definition in the telecommunications industry is likely to be particularly complex.

9. The list of anti-competitive acts provided in the *Competition Act* is general and not specifically targeted to conduct in the telecommunications industry. The Draft Bulletin delineates a long list of theoretical elements of types of anti-competitive conduct likely to arise in the telecommunications industry. In so doing, the Draft Bulletin again confirms the enormous evidentiary hurdles involved in proving a practice of anti-competitive acts and the requirement for statutory definition of telecommunications-specific anti-competitive acts and their constituent elements.

10. The final element of abuse of dominance – proof of a substantial lessening or prevention of competition – is dealt with only in a cursory fashion in the Draft Guidelines, without any specific reference to specific characteristics of telecommunications markets and their relationship to the “substantiality” of anti-competitive effects. SLC cannot be proven where a market is otherwise foreclosed to competition. Furthermore, in markets where entry has occurred, the Competition Tribunal and the Competition Bureau have effectively required that all entrants have failed before finding a substantial lessening or prevention of

competition. The effect of this test is that relief under the *Competition Act* in respect of anti-competitive conduct is largely if not entirely illusory.

11. If sanctions for anti-competitive conduct are to provide anything more than theoretical relief, much more than the delineation of the theoretical tests established by section 79 of the *Competition Act* and identification of evidentiary issues that may arise in applying these tests to the telecommunications industry is required. In accordance with the recommendations of the TPRP, timely and effective adjudication of anti-competitive conduct demands clear definition of telecommunications-specific anti-competitive conduct and enforcement by a single quasi-judicial agency with detailed expertise in the telecommunications industry and each of the elements of abuse, including the definition of relevant telecommunications product and geographic markets and measurement of the competitiveness of markets and competitive effects of anti-competitive conduct as well as a wide range of remedial powers, including behavioural remedies and ongoing monitoring and supervisory authority.

**The existing *Competition Act* process is too cumbersome and slow to provide effective relief**

12. The *Competition Act* establishes a two stage process for dealing with competitive complaints. In the first stage of the process, the Competition Bureau investigates the complaint and determines if there is sufficient evidence to proceed with an application before the Competition Tribunal. If the Competition Bureau determines that there is sufficient evidence to seek relief, the Commissioner of Competition must bring an application for relief before the Competition Tribunal. The requirement to educate the Competition Bureau and then the Competition Tribunal from scratch on an industry and prove each of the elements of abuse of dominance on a balance of probabilities on a case-by-case basis has proven to be extraordinarily time-consuming and cumbersome. This is a process that takes years to complete and involves massive amounts of evidence.

13. It is significant that since the abuse of dominance provisions in the *Competition Act* were enacted in 1986, only 8 abuse cases have been filed with the Competition Tribunal, 2 of which were consent order proceedings and 1 of which was never fully litigated.

14. In *Canada Pipe*, the most recent contested abuse of dominance case brought by the Commissioner of Competition, the alleged practice of anti-competitive acts commenced in January, 1998. The Commissioner did not file an application for relief with the Competition Tribunal until October 2, 2002 – well over 4 years after the conduct began - and the decision of the Tribunal was not released until February 3, 2005. Thus over 7 years elapsed between the commencement of the behaviour and the release of the decision. The hearing took place over a period of three months (over 30 hearing days), 27 lay and 3 expert witnesses were examined and cross-examined, and thousands of pages of documentary evidence were filed.

15. *Canada Pipe* is not an anomaly. The *Air Canada* case involved an allegation of anti-competitive pricing commencing April 1, 2000. The Commissioner filed an application with the Competition Tribunal on March 5, 2001. The hearing was divided into two parts – the first part dealing with the measurement of avoidable costs on two specific routes only and the second part to address the remainder of the application. The hearing on Part I was initially scheduled to commence in the Fall of 2001, but was delayed in excess of a year due to exceptional circumstances and a decision on Part I was not rendered until July 2003. The Part I hearing on avoidable costs alone took 40 days, involved 20 witnesses including 6 experts, and 499 exhibits. Even ignoring the one year delay in the scheduling of the hearing, roughly two years elapsed between the commencement of the behaviour and the issuance of a decision on a portion of the application. The remainder of the application was never litigated.

16. In *Tele-Direct*, some of the alleged anti-competitive acts predated 1986, others commenced and/or escalated in the early 1990s. The Director of

Investigation filed an application with the Tribunal in December, 1994. The hearing commenced in September, 1995 and extended, with various breaks, to March 1996. The decision of the Tribunal was released in February, 1997. The hearing, which exceeded 70 days, gave rise to 15,000 pages of transcript evidence, 58 witnesses were called including 5 experts, 36 Joint Books of Documents were filed and an additional 156 exhibits were filed with the Tribunal in the course of the hearing.<sup>1</sup>

17. Even abuses of dominance that have been resolved through consent order proceedings have involved multi-year processes. In the *Enbridge* case, for example, the alleged anti-competitive pricing behaviour was implemented in January 2000. The Bureau commenced an investigation of the behaviour in February 2000, but did not open up a full inquiry until May 9, 2001 and did not file its notice of application for a consent order until December 17, 2001 – almost two years after the behaviour began.<sup>2</sup>

18. The TPRP concluded that “[t]his lengthy process is not well suited to an environment in which competitive disputes arise on a fairly frequent basis and require prompt resolution.” (TPRP Report, p. 4-14) The process established by the *Competition Act* is too long and cumbersome to provide effective relief against abuse of dominance in dynamic markets, like telecommunications, in which both technology and market dynamics are evolving rapidly. Consistent with the recommendations of the TPRP, a single quasi-judicial body “with strong sector-specific knowledge, including technical knowledge of the telecommunications industry”, and the ability to conduct investigative and

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<sup>1</sup> The other three contested abuse cases are *Nielsen*, *Laidlaw* and *Nutrasweet*. In *Nielsen*, the anti-competitive acts appear to have commenced in or around 1986, with ongoing developments through 1991/92. An application was filed with the Competition Tribunal in April, 1994 and a decision was released in August, 1995. In *Laidlaw*, the anti-competitive conduct appears to have commenced in 1986 and escalated through subsequent years. An application was filed in March, 1991 and the Tribunal released its decision in January, 1992. *Nutrasweet* involved anti-competitive conduct commencing in the second half of the 1980s. An application was filed January, 1989; the decision of the Competition Tribunal was not released until October, 1990.

<sup>2</sup> The other non-contested abuse case, involving Interac, related to conduct that appears to have commenced in the mid 80s. An application for a consent order was filed in December, 1995.

adjudicative functions as well as expedited hearings is required to short-circuit these timelines and evidentiary requirements. (TPRP Report, p. 4-12)

19. Therefore, substantive legislative amendments are required to institute a process that is conducive to addressing anti-competitive conduct in telecommunications markets. The existing legislative process under the *Competition Act* will not work.

**The remedial powers conferred by the *Competition Act* are inadequate**

20. The Draft Bulletin acknowledges that the Competition Tribunal's remedial powers are limited to prohibiting the anti-competitive conduct or mandating such other actions "as are reasonable and necessary to overcome the effect of the practice of anti-competitive acts." The Tribunal does not have the authority to engage in ongoing monitoring or supervision of rates or other conduct. Nor does the Competition Bureau have the mandate to engage in ongoing oversight or enforcement of Tribunal orders.

21. The Competition Tribunal's existing power to order divestiture and the proposed new fining power do not provide the tools necessary to ensure effective and timely relief against anti-competitive conduct in dynamic telecommunications markets where significant market power continues to exist or which are transitioning from significant market power. As the TPRP determined, the government authority tasked with dealing with competition issues in the telecommunications industry should have "the ability to impose a wide range of behavioural remedies", "monitor and supervise behavioural remedies" and "impose fines and order divestiture". (TPRP Report, p. 4-12) Effective redress of anti-competitive conduct may also involve technical issues such as interconnection or number portability. These requirements can be accommodated by constituting a new telecommunications competition authority, as proposed by the TPRP, with all of the remedial powers conferred on the CRTC under the *Telecommunications Act* and on the Competition Tribunal under

the *Competition Act* as well as the ability to hand off technical issues to the CRTC. This is similar to the Australian framework, where the competition authority has been granted sector-specific powers as well as the ability to hand off technical issues to a communications regulator. Alternatively, as is the case in the U.K, jurisdiction to enforce sector-specific rules and competition laws of general application can be unified under a single telecommunications regulator.

22. Substantive legislative amendments are therefore also required to ensure that the authority charged with addressing anti-competitive conduct in telecommunications markets has the tools necessary to take and enforce effective remedial action.

**The substantive tests for abuse of dominance are inadequate and unworkable**

23. A major focus of the CRTC has been the dismantling of barriers to entry to facilitate the introduction of competition in markets where significant market power exists. The framework established by the *Competition Act* cannot address these issues. Dominance *per se* is not sanctionable under the *Competition Act*. The Competition Tribunal can issue a remedy only if the dominant firm engages in a practice of anti-competitive acts that results in a substantial lessening or prevention of competition. The *Competition Act* provides no general tools to address barriers to entry.

24. The test adopted by the Competition Bureau and the Competition Tribunal for a substantial lessening or prevention of competition has also proven to be unworkable. In this regard, the Competition Bureau's investigation of the Stentor Alliance under the merger and abuse of dominance provisions is instructive. The Bureau commenced the investigation at the time that the Alliance was announced in 1992. Some four years later, in 1996, the Bureau announced that there were insufficient grounds to proceed with an application to the Competition Tribunal as the existing evidence could not support a finding that the formation of

Stentor would result in a substantial lessening or prevention of competition. Since the telephone companies had not traditionally competed in each others markets, the Bureau found that the formation of Stentor would not result in a substantial lessening of competition. Furthermore, despite the Bureau's finding that "the formation of SRCI amounts to an agreement by the Stentor companies not to enter in and compete in each others geographic markets", the Bureau concluded that Stentor would not result in a substantial prevention of competition since entry and price reductions had occurred in long distance markets. The Bureau discounted evidence that new entrants were experiencing "poor financial results" on the ground that these service providers had experienced increases in revenues and substantial losses were a consequence of "a more competitive market than was anticipated by some".

25. This analysis bears a marked resemblance to the analysis of the Competition Tribunal in the recent *Canada Pipe* case. In *Canada Pipe*, the Tribunal held that in markets where some entry had occurred the evidence did not establish a substantial lessening of competition because entry had occurred and resulted in price reductions. The Tribunal noted that the viability of the new entrant remained to be determined, but dismissed this consideration on the basis that a number of factors unrelated to the practice of anti-competitive acts would bear on the new entrant's future. This, of course, will always be true. In markets where no entry had occurred, the Tribunal also declined to find a substantial lessening of competition, as the Commissioner had not filed historical data showing the state of competition before and after implementation of the practice of anti-competitive acts.

26. This test for SLC renders remedial action under the abuse provisions largely, if not entirely, illusory and ineffective. If there is entry and prices have declined, there is no substantial lessening of competition. If there is no entry in a market, there is also no substantial lessening of competition as there has never been any competition. Under this approach, the only evidence sufficient to demonstrate SLC is failed entry.

27. The Tribunal's approach to the assessment of substantial lessening or prevention of competition in *Canada Pipe* has been overturned by the Federal Court of Appeal and a request for leave to appeal to the Supreme Court of Canada is pending.<sup>3</sup> The Stentor investigation suggests, however, that the Federal Court of Appeal decision is of little practical import, even if it is upheld.

28. The Draft Bulletin contains only three short paragraphs on the test for substantial lessening or prevention of competition. There is no specific discussion of the application of this test to telecommunications markets, including markets where significant market power exists.

29. The Draft Bulletin recites the statutory language and the "but for" test endorsed by the Federal Court of Appeal and states:

"More specifically, a substantial lessening or prevention of competition is an effect that significantly preserves or enhances barriers to entry and/or expansion. In examining whether barriers to entry are preserved or enhanced the Bureau will focus on whether the practice in question has materially altered the prospects or feasibility of entry, such as whether, "but for" the practice in question, an effective competitor or group of competitors could have emerged within a reasonable period of time to challenge the market power of the firm responsible for that practice."

This theoretical description of the SLC test provides no practical guidance on how the test can be satisfied. Earlier in the Draft Bulletin, the Bureau refers to the "difficulty inherent in measuring market power directly" and estimating competitive prices. Given this, how is it possible to establish that the anti-competitive conduct has "materially altered the prospects or feasibility of entry" or to measure the "effectiveness" of competitors?

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<sup>3</sup> The Federal Court of Appeal found that the Tribunal had applied the wrong legal tests for anti-competitive act and SLC. With regards to anti-competitive act, the Court held that the Tribunal had erred by requiring proof of a link between a decrease in competition and the alleged anti-competitive conduct in order to establish an anti-competitive act. In the case of SLC, the Court found that by basing its conclusion of no SLC on the fact that entry had occurred or the absence historical data on the state of competition in markets before and after the conduct began, the Tribunal had failed to assess whether the conduct had, was or was likely to result in an SLC, as required by section 79(1)(c) of the *Competition Act*. *Canada Pipe* has sought leave to appeal to the Supreme Court of Canada the Federal Court of Appeal's decision on anti-competitive act and SLC, as well as the Tribunal's finding of market power.

30. As discussed above, in practice it has not been possible to establish SLC under the framework envisioned and applied by the Competition Bureau and Competition Tribunal unless entry has occurred and failed. This means that remedial action under the *Competition Act* is available only after entry has failed and the abuse provisions have extraordinarily narrow application.

31. Anti-competitive conduct substantially undermines competition long before entrants have been driven from telecommunications markets. By the time that entrants have failed, any remedial action is largely if not entirely moot. The Bureau's existing approach to SLC therefore precludes timely and effective enforcement of the abuse of dominance provisions in telecommunications markets.

32. The Draft Bulletin also confirms that sanctions for anti-competitive conduct are likely to be illusory in the absence of statutory provisions which expressly define anti-competitive conduct in telecommunications markets. In this regard, the TPRP recommended the enactment of "a new provision to expressly address anti-competitive conduct in telecommunications markets." The TPRP noted that "[t]his would provide the [Telecommunications Competition Tribunal] with analytical tools and guidelines specifically designed for telecommunications markets and would be consistent with the approaches to telecommunications reform in the European Union and Australia." (TPRP Report, p. 4-26) The daunting description in the Draft Bulletin of the numerous theoretical hurdles that must be satisfied to establish a practice of anti-competitive acts under the *Competition Act* provisions underscores the need for precise sector-specific definitions of anti-competitive conduct and the analytical tools necessary to establish such conduct.

33. Again, this means that the legislative framework must be revised in order to make the *Competition Act* an effective statute for handling competitive disputes in the telecommunications sector.

**The Draft Bulletin does little more than reiterate the statutory and theoretical tests for abuse of dominance under the *Competition Act***

34. The Draft Bulletin largely reiterates the theoretical and statutory tests for the elements of section 79 of the *Competition Act*. In doing this, the Draft Bulletin highlights the magnitude of the evidentiary thresholds for establishing abuse of dominance under the *Competition Act* provisions and the additional complexities that arise in the telecommunications industry, but provides little in the way of concrete guidance on the application of these tests to telecommunications services.

(i) Product Market Definition

35. The Draft Bulletin contains a fulsome discussion of the theoretical tests for market definition and problems that may arise in the application of these tests to telecommunications markets. Early in the Draft Bulletin, the Bureau states that market definition “poses particular challenges because the sector is dynamic, shaped by constant and rapid technological change”. However nowhere in the Draft Bulletin is there any specific discussion of how technological change has affected or might be expected to affect product market definition.

36. The Draft Bulletin also contains a lengthy discussion of the cellophane fallacy which, according to the Bulletin “*necessitates* an evaluation of whether, and if so the extent to which, the prevailing price differs from the competitive price.” The Draft Bulletin then lists some possible evidence that may be considered “in an effort to address the cellophane fallacy.” In the course of this discussion, the Bureau refers to direct evidence of market power (supra-competitive profits and evidence in the Canada Pipe case, some of which was rejected by the Tribunal), although the Bureau later dismisses direct measures of market power in the Draft Bulletin with nothing more than a reference to “the difficulty inherent in measuring market power directly.”

37. Regardless of the availability of direct evidence of market power, the discussion of the cellophane fallacy unnecessarily emphasizes and complicates a relatively simple theoretical concept. The cellophane fallacy provides that actual evidence of substitution does not necessarily imply that products or services are “close substitutes” for market definition purposes if prices are above competitive levels. If there is no evidence of actual substitution, the issue does not arise. Moreover, many of the traditional indirect indicators of substitution that are used in defining relevant markets, such as functional interchangeability and relative price movements and price levels, are not corrupted by the cellophane fallacy. By raising the cellophane fallacy as a roadblock to market definition before discussing indirect indicators of substitution, and failing to distinguish clearly between direct measures of market power and market definition, the Draft Bulletin unnecessarily complicates this issue.

38. The discussion of the cellophane fallacy concludes with another caution on the increased evidentiary challenges associated with establishing telecommunications markets:

In recently deregulated telecommunications markets, there may be the added difficulty in assessing evidence and data. For example, in an abuse of dominance analysis, the Bureau may consider evidence, such as business plans, strategic documents and data, during both the regulated and forborne time periods but interpreting this evidence in the context of both time periods may prove difficult.

39. Application of the theoretical test for product market definition to the telecommunications industry is addressed in three paragraphs of the Draft Bulletin, two of which focus on bundling. Aside from bundling, the discussion simply confirms that the Bureau will consider functional interchangeability and switching costs in its assessment of the product market.

40. With regards to bundles, the Draft Bulletin states unsurprisingly that a bundle may be a relevant product market if consumers would continue to buy the bundle in the face of a SSNIP (i.e., a small but significant non-transitory increase in price). There is no discussion of the potential impact of supra-competitive

component prices on substitution between a bundle and its individual components. Nor is there any discussion of when bundling is a product market definition and when it is a tied selling issue.

41. The Bulletin also refers to aggregation of bundles, presumably into a single relevant product market. In this context, the Draft Bulletin discusses the ability of other service providers to duplicate a bundle. It is not clear why the focus has shifted to supply responses and the assessment of whether different bundles fall within the same relevant product market would not be conducted using the standard demand-side substitution analysis, including assessment of functional interchangeability. It is also not clear, again, why this is a market definition rather than a tied selling issue.

(ii) Geographic Market Definition

42. Although the Bureau states in both the Draft Bulletin and other guidelines that it intends to focus on demand responses in the market definition exercise, the aggregation approach proposed by the Bureau for defining relevant geographic markets for telecommunications services appears to be entirely supply-driven. The Bureau states that “where appropriate” it will “aggregate all locations that have the same competitive alternatives (within the product market) for the relevant telecommunications services into a single geographic market. ... Where there are differences in the geographic coverage of competing networks (i.e. “holes”), it may be necessary to also look at the factors listed in section 2.5 in order to ascertain whether a hypothetical monopolist would [not could] impose a SSNIP with respect to such customers.”

43. This description of geographic market “aggregation” raises more questions than it answers. In what circumstances is this aggregation “appropriate”? What is a “competitive alternative”? Where does the aggregation end? If two distinct urban areas have the same “competitive alternatives” are they considered to be the same geographic market? Are areas with different numbers or providers of

“competitive alternatives” distinct relevant product markets? Since there is, by definition, no “competitive alternative” in a “hole”, why would a hypothetical monopolist not have an incentive to impose a SSNIP on consumers located in the “hole”? On what basis will the Bureau determine that potential competitors “can easily provide service” to a location? How is this proposed approach consistent with the Bureau’s conclusion in the Microcell/Rogers merger that the geographic market was less than national in scope due not simply to “some differences in the number of competitors” but also to differences in “product offerings and prices across provinces” and because “there was no persuasive explanation showing that a SSNIP could not have been imposed on a provincial basis”?

(iii) Market Power

44. The Draft Bulletin essentially dismisses direct measurement of market power, notwithstanding that the Commissioner of Competition relied on direct evidence of market power in both the *Canada Pipe* and *Tele-Direct* cases and the Draft Bulletin refers to the *Canada Pipe* evidence in its discussion of the cellophane fallacy. A detailed discussion and assessment of the kinds of data that could be used to directly measure market power in telecommunications markets is required.

45. The discussion of market share in the Draft Bulletin is also *pro forma*. There is no indication of how capacity in telecommunications markets might be measured or whether certain measures of market share are likely to have particular significance for the assessment of market power in telecommunications markets.

46. In addition, although the Bureau identifies a number of generic barriers to entry that may exist in telecommunications markets, its discussion of “Assessing Market Power in Telecommunications Markets” focuses virtually exclusively on capacity and network coverage. The Draft, as noted above, contains no

discussion of how network capacity may be measured. Furthermore, despite the fact that sunk costs are referenced a number of times in the document, there is no discussion of how sunk costs might be measured or assessed as “relatively substantial” or otherwise.

(iv) Anti-Competitive Act

47. The Draft Bulletin sets out in detail the theoretical tests that the Bureau considers would need to be satisfied in order for margin squeezing, denial of access to a facility, predatory pricing, targeted pricing, and bundling to qualify as anti-competitive acts under the *Competition Act*, but does not provide any practical examples of evidence that would and would not satisfy the theoretical analysis. In order to provide effective relief, the telecommunications industry requires statutory definitions of telecommunications-specific anti-competitive conduct, as well as detailed guidance on how key variables, such as avoidable costs, are to be measured. Clear practical guidance on the role of the business justification doctrine in the assessment of anti-competitive conduct is also required.

(v) Substantial Lessening of Competition

48. As discussed above, the section in the Draft Bulletin on SLC provides no concrete guidance on what, if any, evidence will satisfy the “but for” test. A detailed discussion, with practical examples, of the interplay between the assessment of a SLC and the degree of competition and significant market power in telecommunications markets, barriers to entry, and network effects is required if there is to be any meaningful ability to obtain relief under the abuse of dominance provisions.

**Conclusion**

49. In conclusion, while the Competitors appreciate the Competition Bureau's objective of enhancing the transparency of its approach to application of the abuse of dominance provisions to the telecommunications industry in Canada, the Competitors believe that the Draft Bulletin merely serves to confirm the conclusions of the TPRP that *Competition Act* provisions and processes are incapable of effectively addressing anti-competitive behaviour in telecommunications markets.

50. What we need is an overhaul of the process and legislation to provide an effective regime for adjudicating competitive disputes in the telecommunications sector and removing ongoing barriers to entry and impediments to vibrant competitive markets.