



January 12, 2007

Mr. Masood Qureshi
Competition Bureau
Place du Portage
50 Victoria Street
Gatineau, Québec K1A 0C9

Via e-mail: qureshi.masood@cb-bc.gc.ca

Dear Mr. Qureshi:

Re: Competition Bureau Seeks Public Comments on its Bulletin on the Abuse of Dominance Provisions as applied to the Telecommunications Industry

Pursuant to the Bureau's Information Notice dated September 26th, 2006, Cogeco Cable Inc., Quebecor Media Inc., Rogers Communications Inc. and Shaw Communications Inc. (collectively, the Competitors) hereby submit their comments on the above-referenced Draft Information Bulletin released by the Bureau.

While the Competitors welcome the Bureau's attempt to delineate its approach to abuse of dominance in the telecommunications industry, the Draft Bulletin confirms the Telecommunications Policy Review Panel's (TPRP) recent findings that the existing legislative framework is ill-suited to this purpose. In particular, it is incapable of effectively curbing abuses of dominance in telecommunications markets where significant market power exists or which are in transition from significant market power.

The *Competition Act* Cannot Dismantle Barriers to Entry

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. This underlying premise of the *Act* is inconsistent with the state of affairs that exists in the telecommunications market, where we are still transitioning from a monopoly to a competitive market structure, where there are still barriers to entry that need to be dismantled, and where competitive disputes arise on a frequent basis due to the integrated nature of communications networks and the high degree of reliance by competitors on the former monopoly suppliers' facilities. In addition, the fact that market power, *per se*, is not sanctionable under the *Competition Act* 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). If competition is not otherwise present in a market due to barriers to entry, no relief is available under the *Act*.

Competition Act Investigative Processes Take Too Long

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.

The Competition Bureau Does Not Have Sector-Specific Expertise

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. 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*.

As pointed out by the TPRP in its report, 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. The list of anti-competitive acts provided in the *Competition Act* is general and not specifically targeted to conduct in the telecommunications industry. If any degree of certainty is to be achieved, an attempt must be made to tailor these provisions to the type of practices that have historically arisen in the telecommunications sector. Again, this was recommended by the TPRP – but has been ignored in the Draft Bulletin.

The Draft Bulletin Does Not Deal Adequately with Significant Market Power

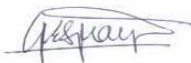
The final element of abuse of dominance – proof of a substantial lessening or prevention of competition – is dealt with only in a cursory fashion in the Draft Guidelines, without any specific reference to specific characteristics of telecommunications markets and their relationship to the “substantiality” 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. 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.

Conclusion – New Competition Legislation 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. To be effective, such an agency must be equipped with a wide range of remedial powers, including behavioural remedies and ongoing monitoring and supervisory authority. These measures require legislative changes – not the delineation of the manner in which existing, largely ineffective, provisions of the *Competition Act* are to be applied to the telecommunications market.

Yours very truly,



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