

Intelligence MEMOS



From: Konrad W. von Finckenstein
To: The Hon. Navdeep Bains, Minister of Innovation, Science and Economic Development
Date: March 6, 2019
Re: **DIRECTION TO CRTC RE: COMPETITION**

Your government is to be commended for issuing its recent draft Direction to the CRTC concerning Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation.

It is high time that the CRTC realizes we are in the age of the internet and not telephonic competition. Adherence to the policy of facilities-based competition (where companies each own their hardware and networks) in order not to discourage investment in infrastructure by established telecom companies, as they claim, is no longer sustainable.

However, this is only a draft order and you can expect a sustained and coordinated push by established telecom carriers to water down and render the direction ineffective.

I remember only too well how the 2006 declaration of your predecessor Maxime Bernier was altered and weakened between draft and final version by:

- changing the lead in 'shall interpret and implement' to 'shall implement';
- deleting specific reference to paragraphs 7(c) [*to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications*] and 7 (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*] of the *Telecommunications Act*; and
- adding a contradictory requirement that any review of essential services should take into account 'the impediments faced by new and existing carriers seeking to develop competing network facilities.'

It is hard to comprehend how much the concept of facilities-based competition has become accepted dogma of both the CRTC commissioners and staff. Equally, the lobbying and attempts at persuasion or influence (often described as co-opting) of the big carriers is constant and ongoing. Unfortunately, in the past it has generally been very successful. From my experience as Chair of the CRTC, I know how persuasive and convincing this lobbying can be.

While the draft direction is an excellent first step, it should be strengthened by two changes to fortify commissioners' and staff's ability to clearly resist the carriers.

First, there should be a clear and categorical statement that: "The 'facilities-based competition concept' shall not be further applied or considered by the CRTC in its decision making." It was useful in the days of wireline telephony, however it has a retarding effect on innovation and expansion in the age of the Internet.

Second, both subparagraphs a) and b) of the draft direction start out by stating "when relying on regulation." There is a danger that this will be interpreted by the CRTC to apply only when it issues regulations. The principles in the direction should apply to all activities of the CRTC, not just regulation making. The CRTC affects the market in many of its decisions that are not regulations. Therefore the wording from the 2006 direction should be used instead, namely "in exercising its powers and performing its duties under the *Telecommunications Act*."

Other than such changes, the direction is an excellent measure and will, one hopes, be both implemented and adhered to.

The Hon. Konrad W. von Finckenstein, Q.C., was Chair of the Canadian Radio and Telecommunications Commission, a Federal Justice and Commissioner of Competition.

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