

**Petition to the Governor in Council to Vary  
Telecom Decision CRTC 2005-28  
*Regulatory Framework for Voice Communication Services  
Using Internet Protocol***

**by:**

**Aliant Telecom Inc.;**  
**Bell Canada;**  
**Saskatchewan Telecommunications;**  
**Télébec, société en commandite; and**  
**TELUS Communications Inc.**

**28 July 2005**

## Table of Contents

	<u>Page</u>
1.0 INTRODUCTION.....	1
2.0 DECISION FAILS TO RECOGNIZE THAT VOIP SERVICES ARE DIFFERENT .....	4
VoIP is a revolutionary development that opens up new opportunities for innovation .....	4
Economic regulation of VoIP is based on an out-of-date regulatory paradigm .....	7
3.0 ECONOMIC REGULATION OF ILEC VOIP SERVICES IS THE WRONG DECISION ....	9
3.1 Bad for Consumers.....	9
Decision will maintain higher prices and restrict customer choice .....	9
Asymmetric regulation harms consumers .....	12
3.2 Bad for Competition .....	14
Decision creates disincentives for investment.....	14
Decision relies on unfounded fears of anti-competitive behaviour .....	15
Decision analysis is flawed; ignores market realities .....	16
Competitors do not need protection .....	19
3.3 Bad Public Policy .....	22
Providing incentives for innovation is a matter of national importance.....	22
Impact on <i>Canada's Innovation Strategy and Smart Regulation</i> .....	24
Decision runs counter to best practices internationally .....	26
4.0 THE COMPANIES' REQUEST.....	28

### ATTACHMENTS:

1. *Voice over Internet Protocol (VoIP) Competitive Landscape*, 28 July 2005.
2. *Retail Price Regulation of Incumbent Local Exchange Carriers' Voice Over Internet Protocol Services: A Comment on CRTC Decision 2005-28*, Margaret Sanderson, 22 July 2005.
3. *Comparative International Approaches to VoIP Regulation*, Peter Waters, Gilbert and Tobin Lawyers, 25 July 2005.
4. *United States Federal and State Regulatory Treatment of Voice over Internet Protocol Service Offerings*, Joel S. Winnik, Hogan and Hartson L.L.P., 21 July 2005.
5. *VOIP CRTC Ruling Report*, Prepared by Ipsos-Reid for Aliant, Bell Canada, SaskTel, Télébec and TELUS, July 2005.

## 1.0 INTRODUCTION

1. With this Petition,<sup>1</sup> Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications, Télébec, société en commandite, and TELUS Communications Inc. (collectively, the Companies) are asking the Governor in Council to address on an urgent basis a serious situation arising from an unprecedented decision made on 12 May 2005 by the Canadian Radio-television and Telecommunications Commission<sup>2</sup> (Decision 2005-28, or the Decision). This Decision regulates the marketing and pricing of the Companies' voice services that allow users to initiate or receive real-time voice communications using Internet Protocol, commonly known as and referred to in this document as "Voice over Internet Protocol" or "VoIP services". If allowed to stand, Decision 2005-28 will have a major negative impact on the ability of the Canadian telecommunications industry to continue to drive Canadian innovation and productivity, depriving customers of the products, prices and service innovation they have come to expect in the vibrantly competitive world of telecommunications. The Decision will also have a negative impact on the current state of competition in the industry, and in particular on the provision of VoIP services.

2. If Canada applies traditional economic regulation to the VoIP services offered by the Companies and the other so-called incumbent local exchange carriers (ILECs), it will stand virtually alone amongst its international peers, with no sound policy reasons for doing so. The Governor in Council has the authority to overturn this decision and, for the reasons set out in this Petition, we ask that it do so in the manner set out below.

3. The Companies request that the Governor in Council, pursuant to section 12(1) of the *Telecommunications Act*, vary the Decision so as to eliminate economic regulation of VoIP services (including, without limitation, elimination of the winback rule in the context of VoIP as described in section 3.1) by declaring that sections 25, 27, 29 and 31 of the *Act* do not apply to VoIP services. The Companies also request that the Order refer the Decision back to the Commission for reconsideration so as to make the Decision conform in all respects to this variation within 90 days.

---

<sup>1</sup> Filed pursuant to section 12(1) of the *Telecommunications Act*.

<sup>2</sup> The CRTC, or the Commission.

4. The Companies acknowledge there is a role for the Commission to regulate VoIP service providers in areas of important social policy such as the provision of 9-1-1 services,<sup>3</sup> privacy safeguards and access to services by disabled persons. Social regulations that apply equally to all VoIP service providers are appropriate where the market alone cannot be expected to adequately address public policy objectives. Those aspects of Decision 2005-28 that deal with, for example, access by disabled persons, message relay service for hearing-impaired persons and privacy safeguards are important initiatives in this regard. The Companies are at the forefront in implementing these directives.

5. This Petition concerns the economic regulations in Decision 2005-28 that have created a situation where one class of service providers, the traditional telephone companies, are hampered by regulation when trying to make their best VoIP offers to customers. These regulations (which apply in both residential and business markets) include the requirement to seek and obtain prior Commission approval of VoIP prices, terms and conditions of service, restrictions on flexibility to offer service bundles to customers (even where these bundles include non-regulated services), restrictions on the flexibility to offer attractive VoIP promotions to customers, and a prohibition on the Companies from direct marketing to customers for a period of one year from the time a former local residential customer takes VoIP service from a competitor.

6. Canada must remain at the forefront of telecommunications internationally. To do so, it is necessary to have the best infrastructure, and the most innovative applications to ride on that infrastructure. Hobbling the companies which are proven innovators and best positioned to move Canada where it should be, and to deliver innovation to consumers and businesses in the future, is bad public policy.

7. Today, Canada's standard of living lags behind that of the United States. According to Industry Canada, "[m]ost of Canada's standard of living shortfall with respect to the U.S. is due to our markedly lower level of productivity", and "[m]uch of Canada's overall productivity gap with the U.S. is due to differences in the size and productivity growth of the information and

---

<sup>3</sup> The Commission established 9-1-1 service requirements for VoIP in an earlier decision, Decision 2005-21, *Emergency service obligations for local VoIP service providers*. The Companies have implemented these requirements.

communications technologies [ICT] sector."<sup>4</sup> Thus Canada's productivity and standard of living are heavily dependent on improving productivity in the ICT sector, of which telecommunications is a critical component.

8. In a 7 February 2005 speech to the National Manufacturing Summit of the Canadian Manufacturers & Exporters, Minister Emerson stated the Government's intention to "...knock down barriers to innovation and competition so as to unleash the private sector's capacity to grow". The telecommunications industry was singled out as an area where this is crucial. In this regard, Minister Emerson went on to emphasize the need to make sure regulation is "adapted to changes that are rapidly reshaping the industry":

"...this involves a government-wide initiative on smart regulations, essentially asking ourselves what is the least intrusive and least costly way to achieve public policy goals.

There are a number of areas where this approach could apply at Industry Canada. One of them is in the area of telecommunications, an industry crucial to all of us.

We need to make sure regulation in this area is streamlined, efficient and adapted to changes that are rapidly reshaping the industry. The trick will be to unleash the power of competition, innovation and technological empowerment that will drive business competitiveness and consumer choice."<sup>5</sup>

9. Decision 2005-28 is at odds with the Government's drive for *Smart Regulation*. In a speech earlier this year, the President of the Treasury Board emphasized the need for *Smart Regulation* – regulation that sees the bigger picture and positions Canada to succeed in the future through innovation, growth and a higher standard of living for all Canadians:

"Smart regulation is necessary because of advances in technology, the increasing pace of change, the greater mobility of people and ideas, and the growing danger of cross-boundary health and environmental risks.

Smart regulation understands that we cannot continue to do things as they have always been done; that in today's world, regulation can – and must – become a competitive advantage and a key instrument for achieving our social, environmental and economic objectives. Smart regulation sees the bigger

---

<sup>4</sup> Industry Canada, *Achieving Excellence: Investing in People, Knowledge and Opportunity (Achieving Excellence)*, 12 February 2002, pp. 14-15.

<sup>5</sup> Hon. David L. Emerson, Minister of Industry, *Speaking Notes - National Manufacturing Summit of the Canadian Manufacturers & Exporters*, Ottawa, 7 February 2005.

picture, understands the wider trends – and positions Canada to succeed in the years ahead.

...

Regulation also sets the stage for businesses to innovate, to grow and to provide opportunity, prosperity and a higher standard of living for all Canadians."<sup>6</sup>

10. Decision 2005-28 fails to respond to the revolution that VoIP is heralding in the telecommunications industry. In particular, the Commission concludes that VoIP should be subject to the same economic regulations as traditional local wireline telephone services. As will be demonstrated in this Petition, starting from the wrong premise and a hundred year old telephone regulatory paradigm, Decision 2005-28 draws a number of conclusions which are bad for customers, bad for competition, and bad public policy.

11. In support of this Petition, the Companies are providing detailed evidence, by way of attachments. Attachment 1 reviews the state of competition for VoIP services, demonstrating the low barriers to entry and rivalrous state of competition among many service providers. In Attachment 2, economist Margaret Sanderson demonstrates the flaws in the economic analysis in Decision 2005-28 and explains the harm to consumer welfare, competition and innovation that will result from regulating VoIP services offered by the traditional telephone companies. Attachments 3 and 4, respectively, provide opinions by international legal experts, Peter Waters and Joel Winnik, demonstrating that the Commission's policy of price-regulating VoIP services is out of step with the policies of regulators around the world. Attachment 5 provides the results of national consumer research by Ipsos-Reid in which 94% of respondents agreed that all VoIP service providers, including traditional telephone companies, should be subject to the same regulatory rules.

## **2.0 DECISION FAILS TO RECOGNIZE THAT VOIP SERVICES ARE DIFFERENT**

VoIP is a revolutionary development that opens up new opportunities for innovation

12. VoIP is a revolution in voice communications, enabled by a new technology called Internet Protocol (IP), the same technology used to operate the Internet. As explained below, VoIP is revolutionary from both a service provider and customer viewpoint.

---

<sup>6</sup> Hon. Reg Alcock, President of the Treasury Board, *Government of Canada's Implementation Plan for Smart Regulation*, National Press Club, Ottawa, 24 March 2005.

13. For service providers, VoIP means that real-time two-way voice can now be provided for a small fraction of the investment required to provide traditional telephone service. Vonage, a leading VoIP provider based in the United States, was able to launch its service across the U.S. with an investment of less than US\$30 million.<sup>7</sup> Currently, Vonage has over 600,000 VoIP lines in Canada, the U.S. and the United Kingdom.<sup>8</sup> At time of writing, there are about fifty VoIP service providers operating in Canada.<sup>9</sup>

14. VoIP has removed the barrier of the so-called "last mile" connection between the customer and the traditional telephone network. In the VoIP world today, access is no longer a barrier to entry. For example, a VoIP provider can offer service to any customer who has broadband access to the Internet, whether that broadband access is obtained from the VoIP provider itself or from a telephone company, a cable company, or another Internet service provider (ISP).

15. Although the Commission continues to refer to the Companies and the other traditional telephone companies as "incumbent local exchange carriers", or ILECs, these companies are not, in fact, incumbents in the provision of either VoIP itself or the high-speed Internet access over which some VoIP services can be offered. In the case of VoIP itself, the traditional telephone companies are amongst the newest entrants. Bell Canada is the only so-called ILEC currently offering a residential VoIP service (Bell Digital Voice) in its incumbent serving territory. SaskTel is the only other major ILEC offering a residential VoIP service, through its Navigata subsidiary. The service currently is not available with Saskatchewan telephone numbers, which will require CRTC tariff approval under the Decision prior to launch. In the case of high-speed Internet access, indeed, it is the cable companies that have the majority of customers with approximately 52% of broadband households (over 3 million customers) at the end of 2004.<sup>10</sup>

16. VoIP is also revolutionary from a customer point of view. As discussed, it brings a wide choice of service providers into the marketplace. It also brings innovative new services. These new services and vendors put the customer in control in terms of choice and innovation. Moreover, even at this early stage, it is evident that VoIP service innovations can result in

---

<sup>7</sup> Vonage Holdings Corporation Press Release, 24 November 2003.

<sup>8</sup> Catherine McLean, *As VoIP comes of age, Vonage sets up a call centre in Canada*, *Globe & Mail*, 20 April 2005.

<sup>9</sup> See Attachment 1, Figure 4.

<sup>10</sup> *North America Broadband*, eMarketer, March 2005, p. 13.

increased productivity. The following gives a taste of just some such services currently available.

17. VoIP is the ultimate convergence platform because it converts voice into data which can then be integrated with data associated with other applications, such as text and video, paving the way for the development of innovative new integrated services. For example, one service that is already offered with certain VoIP services allows customers to access voice-mail messages through their email mailboxes. There is no longer any need to spend time accessing both email and voice-mail because all messages can be accessed through one mailbox.

18. In a VoIP world, customers can change their location without changing their telephone number. Their services and features, which they can customize to their needs using a web interface, follow them. This so-called nomadic capability means that all customers have to do is plug into a high-speed Internet access wherever they are. A traveller based in Calgary can therefore take his or her adapter to Toronto, plug into a high-speed Internet access, and receive calls in Toronto as if in Calgary. This is not possible in the traditional telephony world.

19. VoIP, in conjunction with other IP-based technologies, allows businesses to change the way they operate to become more efficient and effective. For example, it is now possible for employees to access their company's network from any location and become instantly productive through use of their own telephone service, telephone features, email, files, agendas – as well as through their ability to conduct on-line meetings.

20. The Vice-President of Marketing and Business Development of Vonage Canada, Joe Parent, has described just some of the unique and innovative features that distinguish VoIP from traditional telephone service as follows:

"There[']s] this level of freedom that you don't have with typical landline services. There's also the fact that you get all the included features that you completely control yourself. .... Not only do you get to control them through this great web portal, you can turn them up, you can turn them down, change the routing, change your overflow, call forwarding, check your voicemail, manage your voicemail, there's that level of empowerment again as people become more and more aware of it. In our discussions with customers, there's always that eureka

moment where people start to realize how different this really is from a phone service – it's not a phone service.<sup>11</sup>

Economic regulation of VoIP is based on an out-of-date regulatory paradigm

21. The above discussion highlights the reasons why VoIP is a revolutionary technology from both a customer viewpoint and from a service provider viewpoint. This is not telecom as usual. Decision 2005-28 fails to appreciate this, even though the record of the VoIP proceeding<sup>12</sup> is bursting with information about the revolutionary nature of IP technology, the reduced barriers to entry in the market, the rivalrous competition among the dozens of VoIP providers, and the warnings of economists and other experts of the potential harm that will result from applying traditional economic regulation in this environment. Decision 2005-28 virtually ignores this evidence and focuses instead on the proposition that, since VoIP services use traditional telephone numbers and facilitate access to the traditional telephone network (referred to as the public switched telephone network (PSTN)), then they must be regulated in the traditional manner.

22. Decision 2005-28 starts from the premise that VoIP is just a mere step in the evolution of telecommunications networks – not a revolution. For example, in the News Release accompanying Decision 2005-28, the Commission stated that VoIP services "...are not materially different than primary exchange services – the kind of local telephone service now in general use" and that "VoIP lacks the characteristics of a new service". This is wrong, for all the reasons discussed above. However, a majority of Commissioners felt that these characteristics make VoIP no different than traditional telephone service.<sup>13</sup> It is this incorrect reasoning that led the majority of Commissioners to come to the wrong conclusion regarding the appropriate regulatory treatment that should be accorded to VoIP services.

23. Significantly, two Commissioners dissented from the majority opinion that VoIP should be subject to the same economic regulation as traditional wireline telephone services. Commissioner Andrée Noël stated that VoIP is an Internet service that is not and should not be regulated:

---

<sup>11</sup> *VoIP services competition heating up with independents and cable companies*, Network Letter, 26 April 2005, p. 4.

<sup>12</sup> Public Notice 2004-2, *Regulatory framework for voice communication services using Internet Protocol*.

<sup>13</sup> Decision 2005-28, para. 63.

"[T]he fact that, for cultural reasons, voice over IP uses the North American Numbering Plan [telephone numbers] rather than e-mail addresses, for example, to transmit bytes from point A to point B does not make this service a telephone service. It is still an Internet service, and one of its functionalities makes it possible to digitize and transmit synthe[s]ized voice via data packets. In my opinion, this constitutes a retail Internet service, and it should not be regulated pursuant to Telecom Order CRTC 99-592."<sup>14</sup>

24. Commissioner and Vice-Chair, Broadcasting, Andrée Wylie<sup>15</sup> also disagreed with the majority that VoIP services provided by the traditional telephone companies in the territory should be subject to economic regulation. Commissioner Wylie would have opted for a truly competitive environment as, in her view, the best way to secure the timely investment and innovation needed from all service providers of emerging VoIP services:

"I cannot agree with the majority ...that any VoIP service provided by incumbent local exchange carriers (ILECs) in the territory where they provide traditional local wireline telephone service be subject, whether offered on a stand-alone basis or in a bundle of services, to the prior approval of tariffs, while VoIP service provided by competitors is not.

...

In my view, the public interest would be better served in Canada, and the policy objectives of section 7 of the [*Telecommunications*] Act more likely attained, if the Canadian regulator fostered, for the provision of VoIP service, a truly competitive environment conducive to the timely investment and innovation needed from all VoIP service providers to develop further applications based on the use of Internet protocol and to mitigate and resolve any inadequacy or limitation remaining in the provision of emerging VoIP service."<sup>16</sup>

25. These comments from CRTC Commissioners demonstrate the deep divide between one view which sees the present in terms of the past and another view which recognizes, in the words of the President of the Treasury Board, the need for regulation which "...sees the bigger picture, understands the wider trends – and positions Canada to succeed in the years ahead."<sup>17</sup>

26. Canada's international peers take the broader view. As discussed in section 3.3, Canada's decision to subject VoIP services provided by ILECs to economic regulation stands in stark contrast to the practices of other modern economies, virtually all of whom are not

---

<sup>14</sup> Decision 2005-28, Dissenting opinion of Commissioner Andrée Noël.

<sup>15</sup> Ms. Wylie retired from the Commission on 30 June 2005, after Decision 2005-28 was issued. In this Petition, reference to Ms. Wylie as Commissioner and Vice-Chair, Broadcasting relates to the position Ms. Wylie held at the time the Decision was rendered.

<sup>16</sup> Decision 2005-28, Dissenting opinion of Commissioner and Vice-Chair, Broadcasting, Andrée Wylie.

<sup>17</sup> Hon. Reg Alcock, President of the Treasury Board, *Government of Canada's Implementation Plan for Smart Regulation*, National Press Club, Ottawa, 24 March 2005.

regulating VoIP services. Moreover, as discussed by Joel Winnik in Attachment 4, in the U.S., no consumer group or industry participant has called for economic regulation of VoIP services provided by ILECs. Notably, the U.S. cable industry, in contrast to its Canadian counterparts, has argued against regulating traditional telephone company VoIP services differently from those offered by other providers.<sup>18</sup>

### **3.0 ECONOMIC REGULATION OF ILEC VOIP SERVICES IS THE WRONG DECISION**

#### **3.1 Bad for Consumers**

##### Decision will maintain higher prices and restrict customer choice

27. In Decision 2005-28, the Commission has determined that local VoIP services are to be subject to price regulation until such time as the Commission considers the provision of local telephone services to be sufficiently competitive for price regulation to be lifted. In Canada, unlike in many other countries, telecommunications price regulation is particularly intrusive because it involves the prior ("*ex ante*") approval of the regulator before a new price, service feature, term or condition can be implemented. Other VoIP providers, including the cable companies and Canadian and foreign VoIP resellers, do not require such approval.

28. While the Commission's ongoing proceeding to establish the criteria for local forbearance<sup>19</sup> holds out the possibility that certain marketing restrictions on the Companies and the other traditional telephone companies could be reduced in advance of price regulation being lifted,<sup>20</sup> such relief is by no means certain and would, in any event, not be available until well into 2006, at the earliest. In today's fast-moving competitive environment, delaying until 2006, or later, is too long.

29. Some experts, such as telecom consultancy firm, SeaBoard Group, have already concluded that prices will be higher and customers will be harmed as a result of Decision 2005-28. SeaBoard Group also believes that artificially high prices in Canada could result in customers turning instead to low-priced services from U.S.-based providers using U.S. telephone numbers:

---

<sup>18</sup> Attachment 4, p. 7.

<sup>19</sup> Public Notice 2005-2, *Forbearance from regulation of local exchange services*.

<sup>20</sup> Public Notice 2005-2, para. 20.

"With prices still regulated by the Commission, the revenue-loss potential of aggressive trying-to-be-more-competitive price cuts, a probable feature of a truly competitive market, will not be significant. The Commission has succeeded in keeping telephone rates higher than need be for most Canadians. Curious result, no?

...

How will our Canadian market evolve? SeaBoard suggests that should the Commission's viewpoint about telephony and incumbent carriers prevail, that we will see the unregulated services south of the border continue to drop in price while our communications costs continue at their present levels, little challenged by aggressive competition.

Importantly, given the higher Canadian prices, we expect that US-based internet telephony providers may begin offering U.S. numbers to Canadians. The margins will be attractive, and so will the volumes if the U.S. services are sufficiently inexpensive. That would be a curious result. We'd bypass the CRTC and its historical perspectives altogether. Internet telephony services do not need to be based in Canada to be available to Canadians. Is this really what we want? Is this *really* what the CRTC wants?"<sup>21</sup>

30. Decision 2005-28 applies different rules to each of three following distinct types of VoIP providers:<sup>22</sup>

- ILECs: traditional telephone companies, such as the Companies
- CLECs: non-dominant Canadian carriers, e.g., the cable companies
- VoIP resellers: service providers that do not own transport facilities and are not subject to foreign ownership restrictions

31. Under the Decision, only the ILECs (the Companies and the other traditional telephone companies) are subject to economic regulation. This will severely limit the Companies' ability to react nimbly to changing market conditions and to make their best offers to customers and, hence, will limit the choices available to businesses and consumers.

32. When the Companies introduce VoIP services in their incumbent territories (such as Bell Canada's Bell Digital Voice), the Decision requires that they obtain prior Commission tariff approval for prices, service features, terms and conditions, as well as any changes thereto – a requirement that does not apply to the approximately fifty other VoIP competitors currently active in the marketplace. In addition, under the Commission's bundling rules, if the Companies

---

<sup>21</sup> CRTC's new Workfare: Jobs for the Boys, SeaBoard Comments, Week of 10 May 2005.

<sup>22</sup> Decision 2005-28, paras. 203 and 344.

want to offer VoIP services in a bundle with unregulated services (such as wireless service, Internet service, or television service), they will have to file tariffs, supported by complex cost studies, for the entire bundle of services – again, a requirement that does not apply to the Companies' VoIP competitors, including the cable companies.<sup>23</sup>

33. Even under the streamlined tariff approval process recently announced by the Commission,<sup>24</sup> the time to approve a tariff is, in the best case, 10 business days, but then only on an interim basis. It can take up to 60 business days or more for final approval, without any guarantee whatsoever that the tariff will be approved as filed. This results in uncertainty for customers as to the future pricing of this service.

34. For example, Bell Canada received interim approval for its Bell Digital Voice service tariff 10 business days after filing. This tariff includes a price range within which changes are subject to 48 hours prior notification. The Commission has since issued a Public Notice requesting comments from any party on any aspect of Bell Canada's filing.<sup>25</sup> This proceeding is not scheduled to finish until November 2005, with a decision tentatively expected by February 2006. Moreover, any changes to prices that are mandated in the decision could be made retroactive to the date of interim approval in June 2005.<sup>26</sup> Thus, even under streamlined procedures, the delays and uncertainties inherent in economic regulation can harm customers.

35. Moreover, these timeframes do not reflect the additional delay and cost to the Companies necessitated by the requirement to prepare the tariff filing package. In particular, each tariff filing must include a detailed cost study developed according to complex and arcane imputation and costing rules. The documentation of these rules runs to approximately 1,000 pages.<sup>27</sup> As well, Commission staff has often issued significant modifications to these rules with little or no supporting rationale. Not surprisingly, these costing rules and the studies which are based on them can be subject to much debate.

36. Delays and uncertainty with regard to the level of prices and pricing flexibility the Companies will be granted hamper their ability to compete vigorously for customers in a market

---

<sup>23</sup> Decision 2005-28, para. 326 and Decision 2005-27, *Review of price floor safeguards for retail tariffed services and related issues*, section IV.

<sup>24</sup> Circular 2005-6, *Introduction of a streamlined process for retail tariff filings*, 25 April 2005.

<sup>25</sup> Public Notice 2005-9, *Bell Digital Voice Service*.

<sup>26</sup> Order 2005-223.

<sup>27</sup> See, for example, *Bell Canada Phase II Costing Manual*, 28 January 2005.

where price and product changes are a frequent occurrence.<sup>28</sup> To illustrate, VoIP prices have declined significantly as new entry has occurred. Primus Canada, for example, launched its TalkBroadband "Ultimate Bundle" in January 2004 at \$34.95 per month. By February 2005 Primus had reduced this price to \$19.95 per month.<sup>29</sup> Similarly, Vonage Canada began offering its "Premium Unlimited" VoIP service in March 2004 at \$45.99 per month, and dropped the price to \$39.99 per month in January 2005.

37. The decision to regulate VoIP services in the same manner as traditional telephone service also results in many more restrictions than tariff filing requirements – restrictions that hurt consumers and make no sense in the context of this new VoIP technology. For example, as discussed later in this section, the Companies are prevented, for a twelve-month period, from direct marketing any service to consumers that have moved to a competitor for their local service, including VoIP service.<sup>30</sup> The Companies are also restricted from offering certain types of promotional activity, such as waiving service charges for customers who return from a competitor.<sup>31</sup> The Companies are also prevented from pricing their regulated services regionally.<sup>32</sup> None of these rules apply to the cable companies or any other VoIP provider. For example, Cogeco has recently announced the pricing for its VoIP services.<sup>33</sup> These prices are different in Québec than in Ontario, reflecting different market circumstances – something which Bell Canada, for example, (which operates in Ontario and Québec), is prevented from doing as a result of Decision 2005-28.

#### Asymmetric regulation harms consumers

38. Decision 2005-28 exacerbates the current system of asymmetrical regulation because it fails to apply the same regulatory rules to the cable companies as apply to the Companies, even though both have similar access to customers through their respective broadband networks. In addition, the cable companies have a very large customer base by virtue of their traditional dominant position in the supply of television (broadcast distribution) services. The cable companies are not nascent or fledgling new entrants. The potential harm to consumers from

---

<sup>28</sup> See Attachment 1, section 2.3.

<sup>29</sup> For basic service and all local calling features.

<sup>30</sup> Decision 2005-28, para. 260, as corrected in Decision 2005-28-1, para. 5.

<sup>31</sup> Decision 2005-28, para. 326, and Decision 2005-25, *Promotions of local wireline services*, para. 72.

<sup>32</sup> Decision 2005-28, para. 326, Decision 2005-25, para. 72, and Decision 2005-27, para 302.

<sup>33</sup> Cogeco Cable Inc. Press Releases, *Cogeco Cable launches digital telephone service*, 8 June 2005, and *Cogeco Cable launches its digital telephone service in Québec*, 28 June 2005.

asymmetrical regulation, in terms of higher prices and reduced product variety and quality, is highlighted by economist Margaret Sanderson in Attachment 2:

"By regulating only the VoIP services offered by ILECs, while leaving all other VoIP providers free of regulation, the CRTC's decision unnecessarily constrains ILECs' ability to respond to other VoIP providers' efforts to capture circuit-switched customers. As a result, it is regulation that determines which providers succeed in the market as opposed to competitive rivalry. Such asymmetric regulation can lead to higher prices, reduced product variety and lower product quality than if the ILECs were allowed to compete as freely as their rivals. It can also reduce the pace at which ILECs roll out new VoIP services, and potentially the area over which these services are offered. Economics tells us that rivals will typically respond to decreased competitive pressure by stepping down the rate at which they introduce new services. If the CRTC forbears from regulating ILECs' VoIP offerings, Canadian customers will have a wider selection of VoIP offerings faster."<sup>34</sup> (footnotes omitted)

39. The asymmetries present in the regulatory treatment of services provided by telephone companies and cable companies are highlighted by the fact that the so-called winback rules prevent a traditional telephone company from contacting its former local service or VoIP service residential customers for the purpose of winning such customers back for any of the company's services, for a period of twelve months from the time that a customer switches their service to a competitor's traditional local telephone service or VoIP service.<sup>35</sup> These so-called "winback" rules interfere in an otherwise competitive market. They are particularly harmful because they mean that traditional telephone companies are constrained in their ability to market their new and innovative broadcasting distribution as well as telecommunications services to consumers who have switched, for example, to a cable competitor's local cable telephone service. The asymmetry serves to protect cable companies and other competitors from the normal working of a competitive market at the expense of traditional telephone companies and, ultimately, at the expense of consumers who are deprived of the promotional benefits of competition.

40. All of these types of rules and regulations prevent customers from receiving the best services, features and prices that competition is intended to bring. They are artificial restrictions that shield competitors from normal market forces, work against customers' interests and are in fact incomprehensible to customers. This is particularly so in the context of this new VoIP technology where the traditional telephone companies are not incumbents and the cable companies have ubiquitous networks and customer bases.

---

<sup>34</sup> Attachment 2, para. 61.

<sup>35</sup> Decision 2005-28, para. 260, as corrected in Decision 2005-28-1, para. 5.

41. Economic regulation that restricts customer choice is not in the best interests of Canadians. As SeaBoard Group commented, "Canadians' interests are best served by choice and by diversity. Choice and diversity are better safeguards of the public interest than any regulatory process."<sup>36</sup> As Attachment 5 outlines, a recent national survey conducted by Ipsos-Reid indicates that 94% of Canadians agree that all VoIP service providers, including the traditional telephone companies, should be subject to the same regulatory rules.

### **3.2 Bad for Competition**

#### Decision creates disincentives for investment

42. As noted in section 1.0, there are no incumbents in VoIP. Every VoIP service provider is a new entrant and none requires protection – in particular the cable companies, who have the majority of high-speed Internet access subscribers with approximately 52%<sup>37</sup> of broadband households and in excess of 84% of cable and satellite TV customers at the end of 2004.<sup>38</sup> Yet, as discussed further below, one of the main arguments relied upon in Decision 2005-28 to support economic regulation of the ILECs is the need to protect the cable companies and the so-called VoIP resellers, many of which are foreign-owned.

43. From its flawed premise that competitors need protection, Decision 2005-28 proceeds to put in place regulations to hobble the ILECs – the very service providers who are in the best position to deliver the innovation required to ensure that Canada remains at the leading edge of telecommunications. Those players which the regulations are designed to hinder will have disincentives to invest, and as a consequence, so too will those which the regulations are designed to protect. This is explained by Margaret Sanderson in Attachment 2:

"...if ILECs' incentives to invest are diminished because regulation is aimed at limiting ILECs' ability to attract VoIP customers, and this is borne out in a slower rate of new service introduction or a more limited geographical reach, rival firms such as the cable incumbents will not seek to introduce new products or services as quickly or as broadly, because there will be less competitive pressure to do so."<sup>39</sup>

---

<sup>36</sup> *CRTC's new Workfare: Jobs for the Boys*, SeaBoard Comments, Week of 10 May 2005.

<sup>37</sup> *North America Broadband*, eMarketer, March 2005, p. 13.

<sup>38</sup> *2005 Portable Telecom Directory*, RBC Capital Markets, Exhibit 75.

<sup>39</sup> Attachment 2, para. 66.

44. Ultimately, competition will be hurt. Decision 2005-28 puts in place a regime that places onerous economic regulations on the traditional telephone companies, thus benefitting only the cable companies, which do not need protection, and foreign VoIP resellers, which have no incentive to invest in facilities and innovate.

45. If examples are needed of how competition flourishes when freed from economic regulation, one need only look to the wireless and Internet industries. As Commissioner Wylie noted in her dissenting opinion, in the case of wireless service, the Commission "...wisely considered that the prior approval of tariffs was not necessary to protect consumers and to stimulate the development of a competitive market."<sup>40</sup> It is a major mistake with potentially far reaching negative consequences that the Commission did not take the same approach for VoIP services. The Internet and wireless sectors likely would not have developed into the vibrantly competitive, innovative, fast-developing industries that they are in Canada today had traditional wireline economic regulation been applied to only one class of service providers.

#### Decision relies on unfounded fears of anti-competitive behaviour

46. In the course of its analysis, the Commission argues that it needs to regulate because, in its view, the traditional telephone companies have incentives to price anti-competitively, even, apparently, under conditions in which they do not have market power. As explained by economist Margaret Sanderson in Attachment 2, the Companies have neither the incentive nor the ability to price VoIP services anti-competitively:

"With such easy entry [into VoIP service], it would be irrational of Bell (or another ILEC) to price its VoIP service below cost since all that this would entail is losses without any means of recouping the forgone profits at a later date in VoIP or through local circuit-switched exchange services given the regulatory regime in place. As a result, the ILECs do *not* have the motivation, means or opportunity to engage in below-cost pricing in a forborne environment."<sup>41</sup>

47. Moreover, from a policy and legal perspective, it is inappropriate to assume that the Companies would act anti-competitively and stifle competition. In its Petition to the Governor in Council concerning Decision 2005-28, the Government of Saskatchewan emphasized this when

---

<sup>40</sup> Decision 2005-28, Dissenting opinion of Commissioner and Vice-Chair, Broadcasting, Andrée Wylie.

<sup>41</sup> Attachment 2, para. 59.

it stated that "[r]egulation on the presumption of guilt is contrary to ... the principles of natural justice".<sup>42</sup> Canada's competition laws do not function in such a presumptive manner and, in any event, competition law exists to address any instances of anti-competitive behaviour. Moreover, in order for the conditions for predation to exist, it must be possible for the predator to force the exit of its competitors. The Competition Bureau has expressed the view that "[i]t seems unlikely that predation is going to induce exit in cases where the rival [for example, the cable companies] has invested in a sunk network that is ubiquitous and exists for other reasons, not only to supply telecommunications services".<sup>43</sup>

48. To build a regulatory regime under the apprehended fear and assumption that one group will act anti-competitively is neither effective nor efficient and will undoubtedly retard innovation. Regulating market prices "just in case" is not smart regulation.

#### Decision analysis is flawed; ignores market realities

49. The Decision concludes that VoIP services are in the same market as traditional telephone service, are not materially different from traditional telephone services, and should be regulated under the same regime that applies to traditional telephone service. The Commission's analysis is based on its view that VoIP and traditional telephone service are functionally equivalent, first because they exhibit the same "defining characteristics", namely the use of telephone numbers and the ability to connect to anyone on the traditional telephone network (the public switched telephone network, or PSTN),<sup>44</sup> and second, because they meet the same "general user requirements".<sup>45</sup> Specifically, the Commission notes that each provides "two-way, real-time voice communications to and/or from anyone on the PSTN", that VoIP and traditional telephone service include similar options and features, and that VoIP is being marketed and can be used as a replacement for traditional telephone service.<sup>46</sup>

---

<sup>42</sup> Province of Saskatchewan, *Petition to the Governor in Council to Vary Telecom Decision CRTC 2005-28, Regulatory Framework for Voice Communications Services Using Internet Protocol*, 5 July 2005, para. 12.

<sup>43</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from regulation of local exchange services: Evidence of the Commissioner of Competition*, 22 June 2005, para. 266.

<sup>44</sup> Decision 2005-28, para. 63.

<sup>45</sup> Decision 2005-28, para. 110.

<sup>46</sup> Decision 2005-28, paras. 113-115.

50. There are a number of serious flaws in the Commission's economic analysis of the market conditions for VoIP, as explained in detail by economist Margaret Sanderson in Attachment 2.

51. More importantly, however, while VoIP services may be in the same market as traditional telephone service, this does not mean they are the same as, or need to be regulated in the same way as, traditional telephone service.

52. Consider the example of cellular telephone service, or "wireless" service. Wireless service uses traditional telephone numbers and can be used to make and receive calls to people who have traditional telephone service. Wireless service has other features in common with traditional services (for example, call display, voice-mail). Wireless service can also be used as a substitute for traditional service. The announcement on 21 April 2005, by the Canadian Wireless Telecommunications Association (CWTA),<sup>47</sup> that Canadian wireless carriers will allow customers to keep their numbers when changing from one wireless service to another, and from traditional "wireline" service to wireless service, is a clear indication that customers, and the Government, view these services as substitutes. In a letter to the Commission prior to the CWTA announcement, Minister Emerson emphasized that customers should be able to keep their telephone numbers when moving between wireless service and wireline services.<sup>48</sup>

53. All of the same factors that led the Commission to conclude that VoIP is functionally equivalent to, and should be regulated in the same manner as, traditional telephone service apply even more so to wireless service, yet wireless service is not, and never was, regulated like traditional telephone service. Wireless telephone service has essentially been forborne from price regulation from its inception.<sup>49</sup>

---

<sup>47</sup> CWTA Press Release, *Customers to have the option of retaining phone numbers when changing service providers*, 21 April 2005.

<sup>48</sup> Letter from David L. Emerson, Minister of Industry to Mr. Charles M. Dalfen Chairperson, CRTC, 18 March 2005.

<sup>49</sup> In stark contrast to Decision 2005-28, the U.S. Federal Communications Commission has specifically rejected any view that VoIP should be treated for regulatory purposes like legacy telephone services because it might be considered to be functionally similar to legacy telephone services. The FCC said, "...we would find [VoIP] far more similar to CMRS [Commercial Mobile Radio Service, commonly known as cellular service]" (see *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*), *appeal pending* (8th Cir.), para. 22 (see also Attachment 4 to this Petition, p. 4). The retail rates of cellular operators are not regulated in the U.S.

54. In her dissenting opinion, Commissioner Wylie confronts this inconsistency, observing that if the criteria applied by the Commission in Decision 2005-28 to conclude that VoIP services should be regulated had been applied to wireless when the ILECs first offered wireless services, the ILECs' wireless services would have been subject to price regulation – which they were not:

"I note that the application of the criteria relied upon by the majority in both pillars of its analysis would have resulted in the requirement of tariffs for the provision of wireless telephone service by affiliates of the ILECs when it was first offered by them. Wireless telephony met all of them. The Commission nevertheless avoided that conclusion at the time, in reliance on the specific service attributes of wireless telephony compared to those of PES [traditional local telephone service], and on the particular circumstances surrounding the introduction of wireless telephony in Canada. It wisely considered that the prior approval of tariffs was not necessary to protect consumers and to stimulate the development of a competitive market."<sup>50</sup>

Commissioner Wylie goes on to state that, in her view, "...the Commission failed, in its decision ...to give sufficient consideration, in light of the policy objectives of the *Act* and the discretion conferred by section 34, to the specific functional and service attributes of VoIP service, compared to those of PES [primary exchange service, that is, traditional local telephone service], and to the particular circumstances and the competitive dynamic surrounding the introduction of VoIP service in Canada." Commissioner Wylie would have opted for market forces and would not have required prior approval of tariffs for any provider, including the ILECs.

55. In its analysis, the Decision failed to recognize the evidence of the number of VoIP providers and vigorous price competition among them. There are currently about fifty providers of VoIP services operating in Canada, including four major cable companies (Cogeco, Rogers, Shaw and Vidéotron) offering VoIP service tied to their own access facilities. Certainly, as noted earlier, these providers compete vigorously for customers and, as a result, price and product changes are a frequent occurrence.<sup>51</sup> There is also no evidence that customers face perceived or actual obstacles in switching to VoIP service. As shown in Attachment 5, 75% of respondents to a national consumer research survey indicated that they would have no hesitation in switching to telecommunications suppliers with more attractive offers. This has been demonstrated by the successful entry of Vidéotron in Montreal, Rogers in the Greater

---

<sup>50</sup> Decision 2005-28, Dissenting opinion of Commissioner and Vice-Chair, Broadcasting, Andrée Wylie.

<sup>51</sup> See Attachment 1, section 2.3.

Toronto Area, Cogeco in Burlington and Oakville, Ontario and in Trois-Rivières and Pointe-du-lac, Québec, and Shaw in Calgary and Edmonton. On 7 July 2005, Robert Depatie, President and Chief Executive Officer of Vidéotron, announced that Vidéotron now has 8% share of the market in the south shore of Montreal, the first place it offered the service, and has signed up 42,000 subscribers in total since launching its service in January.<sup>52</sup> In Calgary and Edmonton, Shaw had enrolled 22,450 customers to its telephone service, in just three months, as of 31 May 2005.<sup>53</sup>

#### Competitors do not need protection

56. It is evident that the Decision is preoccupied with protecting competitors – rather than with protecting customers, who are best served by a greater reliance on market forces.

57. In the case of the cable companies, the Commission acknowledges their strengths but states that they face obstacles, specifically the requirement to upgrade their networks, lack of experience and ubiquitous networks.<sup>54</sup> This analysis is flawed in key respects. First, it is never appropriate to regulate when barriers to entry are low, regardless of the strength or character of competitors. Market forces should determine winners and losers, not the regulator. Second, in addition to their extensive experience in marketing gained through their cable television business, the cable companies have proven experience in marketing telecommunications services from their thriving Internet, wireless telephone and existing wireline telephone businesses (for example, EastLink in the Atlantic provinces, Vidéotron in Québec and Rogers across Canada through its acquisition of Call-Net and its status as Canada's largest mobile wireless provider). Third, as noted earlier, with regard to the broadband access facilities used to offer IP-based services, the cable companies' networks are in fact as, if not more, "ubiquitous" than those of the traditional telephone companies.

---

<sup>52</sup> *Videotron overwhelmed by demand*, National Post, 7 July 2005.

<sup>53</sup> Shaw News Release, *Shaw Communications Inc. announces third quarter results and initial Digital Phone growth*, 7 July 2005.

<sup>54</sup> Decision 2005-28, para. 156.

58. In any event, at least one cable company executive has made it clear that the cable companies do not need protection. Recently, Ted Rogers, CEO of Rogers Communications Inc., provided his views on the relative positions of the cable companies and the traditional telephone companies, suggesting that the former, rather than the latter, presently hold the competitive advantages. He stated: "How has it happened cable guys have become the old Bell guys, and the Bell guys have given up the advantages they have had?"<sup>55</sup> Those who believe they hold the competitive advantage certainly do not need regulatory protection.

59. Recently, the Vice-President of Marketing and Business Development of Vonage Canada also explained how much easier it is to provide VoIP services than it is to provide traditional local telephony, or even cable telephony:

"It's a lot easier than a traditional telco or cableco environment. Essentially all we need to do is provide local telephone numbers and bring it back into our gateway locations. For us, it's a case of acquiring those facilities, coming out with a network plan to make sure we can manage our expected growth. We're spending a lot of time making sure we plan for these things and we're getting great learning from out west. With successful marketing programs out there, we're seeing significant increases so we can do adjustments for Central Canada when we launch there."<sup>56</sup>

60. VoIP resellers themselves have not been in favour of economic regulation of the traditional telephone companies. On the day Decision 2005-28 was released, Stephen Dorsey, President and CEO of babyTel, criticized the Commission for implementing asymmetrical regulation favouring the cable companies. In his view, competition and consumers would be better off with no regulation than with asymmetrical regulation. In fact, Mr. Dorsey suggests that the cable companies are more likely to act in a predatory manner than are the traditional telephone companies, who will be self-regulated by the need to avoid cannibalizing their legacy telephone business:

"This is asymmetrical regulation.... This is regulating Bell, Telus and other incumbent phone companies on price while ignoring the cable incumbents with their sizable territories and customer base of high-speed Internet users. Competition – and consumers – would be better off with no regulation than this asymmetrical regulation..... Bell and Telus will be partially self-regulated in that they will be restrained in VoIP offerings to avoid cannibalizing legacy telephone

---

<sup>55</sup> *Broadband venture makes odd bedfellows: Rogers surprised by Bell's investment in wireless partnership*, National Post, 14 March 2005, p. FP1.

<sup>56</sup> *VoIP services competition heating up with independents and cable companies*, Network Letter, 26 April 2005, p. 3.

business; whereas cable companies have no such constraints and can be predatory in order to take market share. In particular, they are free to 'bundle' VoIP with other services to squelch competition."<sup>57</sup>

61. Providers of VoIP services to business customers also do not need protection and have spoken out against it. As discussed in Attachment 1, a number of VoIP providers offer services to both small businesses and consumers. In the large business, or enterprise, sector, Bell Canada and TELUS already provide VoIP services to customers in each others' ILEC serving territories, in competition with each other and other providers. Other enterprise VoIP providers operating in Canada include well-established, multi-billion dollar global players such as AT&T, British Telecom and BT Infonet, Equant (a subsidiary of France Telecom), Avaya (a spin-off of Lucent), Cisco, IBM and Microsoft. The representative of AT&T Global Services, a provider of both underlying networks that support VoIP services as well as of VoIP applications, stated during the VoIP Public Consultation that applying traditional regulation to the ILECs would harm competition and customers because it "...would have the effect of impeding the efficiency of market forces which in turn impacts innovation cycles and the affordability of new forms of communication services to Canadian end users".<sup>58</sup>

62. In summary, the bottom line of Decision 2005-28's flawed analysis is the conclusion that the terms and conditions and prices charged by the ILECs for VoIP services should be regulated. The underlying theme that runs through the analysis is that the cable companies and other VoIP providers need protection. This is a flawed proposition. It is not – or should not be – the purpose of regulation to provide protection or artificial advantages to one set of competitors. Competition is not about protecting one firm, but about firms striving to understand and meet the needs of their customers and potential customers. Moreover, the types of competitors in this market do not need protection. Holding back the traditional telephone companies from competing on an equal footing with the cable companies, foreign-based resellers such as Vonage and Primus, and, in the business market, domestic and foreign equipment manufacturers such as AT&T Global Services and BT Infonet, can be expected to lead to higher prices for consumers and businesses, less investment, less innovation, and a reduced opportunity for Canada to catch the wave of IP technology and win internationally.

---

<sup>57</sup> babyTel News Release, *Consumers Lose By Regulating Bell & Telus on Price, While Ignoring Major Cable Companies*, CNW Group, 12 May 2005.

<sup>58</sup> Mr. Antecol, VoIP Public Consultation, Transcript, Vol. 2, 22 September 2004, p. 714.

### 3.3 Bad Public Policy

#### Providing incentives for innovation is a matter of national importance

63. The majority of the Commission supports its decision to apply economic regulation to ILEC VoIP services based on a purported balancing of the nine objectives of the *Telecommunications Act*. In contrast, in her dissenting opinion Commissioner Wylie states her view that the objectives of the *Act* would have been better achieved through true competition rather than heavy-handed traditional regulation:

"In my view, the public interest would be better served in Canada, and the policy objectives of section 7 of the *Act* more likely attained, if the Canadian regulator fostered, for the provision of VoIP service, a truly competitive environment conducive to the timely investment and innovation needed from all VoIP service providers to develop further applications based on the use of Internet protocol and to mitigate and resolve any inadequacy or limitation remaining in the provision of emerging VoIP service."<sup>59</sup>

64. In the Companies' view, consistent with Commissioner Wylie's dissent, there is no doubt that a better case can be made that the objectives of the *Act* could be met by freeing VoIP from the shackles of traditional telephone regulation, given that these policy objectives include enhancing Canada's competitiveness, promoting Canadian ownership and use of Canadian facilities, increasing reliance on market forces, stimulating innovation, and keeping prices affordable. Moreover, Decision 2005-28's "just in case" regulatory approach is entirely inconsistent with the *Act*'s objective of ensuring that regulation, where it is required, is efficient and effective.

65. Decision 2005-28 acknowledges the need for substantial investments in the Canadian telecommunications sector, including from the ILECs, but then proceeds to assert that regulated competition (economic regulation of the ILECs) is the best way to achieve this. The only evidence presented to support this conclusion is the presumptuous observation that the ILECs have in the past invested under regulation, are already investing in upgrading their networks for an IP world, and, therefore, can be expected to continue to do so even under economic regulation. As discussed in section 3.2, economic regulation of VoIP will hinder investment by all service providers.

---

<sup>59</sup> Decision 2005-28, Dissenting opinion of Commissioner and Vice-Chair, Broadcasting, Andrée Wylie.

66. IP is widely recognized as a disruptive technology because it radically impacts the traditional network structure of the ILECs and the associated business models. In fact, as several observers have pointed out, incumbency can actually work against the ILECs. In the VoIP proceeding, Scott Anthony, a colleague of Professor Clayton Christensen who has written extensively on the implications of disruptive technologies, made the observation that, as a result of the revolution brought about by IP, the traditional "...vertically integrated, centrally coordinated, voice-based [incumbent] business model is poised to disintegrate".<sup>60</sup> During the public consultation, Mr. Krstulich, the Chief Technology Officer of Alcatel Canada Inc., when asked whether in the VoIP environment only the large, financially strong players would be able to keep up with the pace of change, answered that the small players actually had the advantage:

"So I think in terms of the question of will the big players have an advantage in deploying innovative new services compared with small ones, I rather think the converse may be true."<sup>61</sup>

Adding economic regulations adds to the challenges. Economic regulation is, in any event, unnecessary to protect customers since the disruption itself invites new service providers, and their presence is more than enough to protect customers.

67. Disruptive technologies remove the barriers for new competitors, as they have in this case for the cable companies (with their ubiquitous broadband networks), and for VoIP resellers, such as Vonage (who ride over the CLECs' and ILECs' networks). This is not just a Canadian, or North American phenomenon; it is global in nature. If Canada wants to be at the forefront internationally, it must have the best infrastructure and the most innovative industry. Hobbling the companies which are proven innovators and well positioned to move Canada where it should be, and to deliver innovation to consumers and businesses in the future, is bad public policy. The public policy framework for IP technology, including VoIP, is a matter of national importance. However, as discussed in section 1.0, the Decision denies the revolutionary nature of IP and puts in place a framework using an out-of-date regulatory paradigm.

---

<sup>60</sup> Scott D. Anthony, *The Disruptive Potential of Voice over the Internet Protocol*, 18 June 2004, p. 11 (filed as Appendix 2 to the Comments of Aliant, Bell Canada, SaskTel and Télébec in Public Notice 2004-2).

<sup>61</sup> Mr. Krstulich, VoIP Public Consultation, Transcript, Vol. 2, 22 September 2004, p. 861.

68. Giving an advantage to companies, such as the cable companies, and putting even greater advantages in the hands of foreign-based resellers which have absolutely no incentive to invest in Canada, contributes nothing to achieving the Government's innovation objectives. It also runs counter to best practices internationally, and is the opposite of smart regulation.

#### Impact on Canada's Innovation Strategy and Smart Regulation

69. By imposing economic regulation on VoIP services, Decision 2005-28 directly contradicts two major strategies of this Government: *Canada's Innovation Strategy*<sup>62</sup> and the *Smart Regulation* initiative.<sup>63</sup>

70. *Canada's Innovation Strategy* was launched on 12 February 2002, with the release of two companion documents: *Achieving Excellence – Investing in People, Knowledge and Opportunity*,<sup>64</sup> and *Knowledge Matters – Skills and Learning for Canadians*.<sup>65</sup>

71. In *Achieving Excellence*, Industry Canada described the importance of innovation to Canada's economic and social future as follows:

"For Canadians, innovation means a better standard of living, higher incomes, and more and better jobs. When new technologies and other kinds of innovations are developed here, Canadians enjoy the double benefit of the improvements they bring to quality of life and the economic benefits they yield in terms of job creation. With innovation-driven economic growth come more opportunity and greater choice for citizens – including the wealth needed for new social investments in areas such as education, health and culture."<sup>66</sup>

72. *Canada's Innovation Strategy* recognizes that while Canadians enjoy an outstanding standard of living and quality of life by world standards, relative to the U.S., that standard of living has been falling for almost two decades.<sup>67</sup> The report underscores the need for Canada to increase its productivity in order to increase its standard of living. It states the issue starkly: "[m]ost of Canada's standard of living shortfall with respect to the U.S. is due to our markedly

---

<sup>62</sup> See [www.innovationstrategy.gc.ca](http://www.innovationstrategy.gc.ca).

<sup>63</sup> See [www.regulation.gc.ca](http://www.regulation.gc.ca).

<sup>64</sup> *Achieving Excellence*. In fact, the Government's long-term commitment to an innovation policy agenda can be traced to, at least the 2001 *Speech from the Throne*.

<sup>65</sup> Government of Canada News Release, *Government of Canada Launches Innovation Strategy*, 12 February 2002.

<sup>66</sup> *Achieving Excellence*, p. 8.

<sup>67</sup> *Achieving Excellence*, pp. 14-15.

lower level of productivity,"<sup>68</sup> and more importantly for present purposes that "[m]uch of Canada's overall productivity gap with the U.S. is due to differences in the size and productivity growth of the information and communications technologies [ICT] sector."<sup>69</sup> This is the reason why government policy must, wherever possible, encourage the growth of Canada's ICT sector.

73. In fact, this Government has turned that imperative into a government-wide vision (as highlighted by its *Smart Regulation* initiative). The Commission's actions in the Decision stand in stark contrast to both the need for policies that encourage the growth of Canada's ICT sector and the Government's commitment to innovation policy.

74. Business and institutional users of ICT services endorse a regime in which the provision of digital telecommunications services, such as VoIP, is unfettered by economic regulation. In a recent submission to the Commission, the Coalition for Competitive Telecommunications, comprising leading Canadian business trade and service associations, stated that "[d]igital communications [such as VoIP] have become the norm and means by which most businesses in Canada operate", and that, as part of the broad array of ICT services, such services are "necessary to ensure modern and efficient operations."<sup>70</sup>

75. A focus on *Smart Regulation* is key to improving the environment for innovation. In the first *Report on Actions and Plans*, one of the themes of *Smart Regulation* is listed as, "Innovation, Productivity, and Business Environment." On that topic, the report recognizes that regulation imposes costs and must therefore be kept to a minimum:

"While regulation is essential to protecting the public interest, it is not without an economic cost. Regulation imposes significant costs on businesses and citizens to comply with regulations, as well as costs on government to administer and enforce them. Regulation needs to be designed to achieve desired economic and social policy objectives while minimizing costs that hinder productivity."<sup>71</sup>

76. The Commission's decision to impose economic regulation on the ILECs' provision of VoIP services demonstrates a failure to: (i) keep regulation to the minimum level necessary to achieve public policy goals, (ii) adapt to changes that are rapidly reshaping the industry, and (iii)

---

<sup>68</sup> *Achieving Excellence*, p. 14.

<sup>69</sup> *Achieving Excellence*, p. 15.

<sup>70</sup> *Telecom Public Notice CRTC 2005-2, Forbearance from Regulation of Local Exchange Services: Comments of the Coalition for Competitive Telecommunications*, 22 June 2005, para. 5.

<sup>71</sup> Government of Canada, *Smart Regulation – Report on Actions and Plans*, March 2005, p. 13.

consider Canada's long-term competitiveness. It is, therefore, inconsistent with *Smart Regulation*.

Decision runs counter to best practices internationally

77. Recently, before Decision 2005-28 was issued, the Commission Chair stated that Canada could become the first country with "a definitive position on the regulation of VoIP."<sup>72</sup> Evidently this meant that Canada was about to become the only major industrialized country to regulate the price of VoIP services.

78. Today, there are few countries where rate regulation and tariff approval requirements continue to apply, even for traditional wireline service. And even these countries are not applying these same rules to VoIP.

79. As is evident from the reports of international legal experts Peter Waters and Joel Winnik in Attachments 3 and 4, the United States, the United Kingdom, Australia, Finland, Hong Kong, Ireland, Italy, Japan, Malaysia, New Zealand, the Philippines, South Korea, Spain, and Sweden are all taking a hands-off approach when it comes to retail price regulation of VoIP. With Decision 2005-28, Canada is now the *only* major industrialized country in the world (other than Singapore) to regulate retail prices for VoIP. Even Singapore does not regulate the prices charged by the ILECs for VoIP services when offered via a subsidiary, whereas, in Canada, the Companies could not escape price regulation by utilizing subsidiaries.

80. The regulators in these countries believe that, as in the case with the Internet generally, success can be achieved with VoIP if it is not weighed down with price regulation. They have recognized that there is no rational economic argument that justifies regulating a new service when there are virtually no barriers that prevent competitors from entering the market, as is the case with VoIP.

81. For example, in Spain, the regulator, Comision del Mercado de las Telecomunicaciones (CMT), issued a ruling earlier this year that excluded VoIP services from retail regulation. CMT determined that minimal regulation was most likely to foster innovation in, and the development of, new VoIP services. The CMT stated:

---

<sup>72</sup> *CRTC Works Just Fine*, says Dalfen, National Post, 11 February 2005.

"Regulation should always facilitate innovation and competence to the benefit of consumers and other relevant entities in the sector; it should never hinder progress towards an 'information society' which is increasingly broad and which offers increasing possibilities. Maintaining a situation of impasse or regulatory uncertainty only can delay an inevitable process that, in fact, should be encouraged."<sup>73</sup>

82. Notably, in the U.S., neither federal nor state regulatory authorities have imposed any price regulation on VoIP services, whether offered by ILECs or their affiliates. Indeed, the FCC has specifically concluded that state public utility commissions are *precluded* from regulating VoIP – and several U.S. federal district courts have said the same. In particular, the FCC found that economic regulation of VoIP service would conflict with federal policy, since a tariff requirement and rate-related regulations and rules could "harm consumers by impeding the development of vigorous competition", and would "introduce ...substantial delay in time-to-market and ability to respond to changing consumer demands".<sup>74</sup>

83. Recently, new FCC Chairman Kevin Martin has reiterated the FCC's ongoing commitment to foster investment in IP technology by leveling the playing field among service providers:

"As I have said on many occasions, and reiterate now as Chairman, investment in broadband facilities, such as the IP platforms at issue here, is critical to providing American consumers with 21st century advanced services.

Accordingly, in order to accomplish what will be one of the Commission's core priorities – promoting the deployment of new packetized networks throughout the nation – we should move forward to address the creation of a level-playing field for the provision of advanced services by similarly situated service providers. The removal of legacy regulations should spur investment and the deployment of new packetized networks and facilities that will bring new broadband services to all Americans throughout the nation."<sup>75</sup>

---

<sup>73</sup> CMT, *Conclusiones de la Consulta Pública sobre la provisión de servicios de Voz mediante tecnologías basadas en el Protocolo Internet (VoIP)*, DT 2004/757 [Conclusions of the Public Consultation on the provision of voice services by means of technologies based on the Internet Protocol (VoIP)], 3 February 2005, p. 9. See also Attachment 3 to this Petition, p. 18.

<sup>74</sup> *Vonage Preemption Order*, para. 20. See also Attachment 4 to this Petition, pp. 2-3.

<sup>75</sup> Statement of Chairman Kevin J. Martin, *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, 5 May 2005.

84. In a recent news release, the FCC stated that "[t]he IP-enabled services marketplace is the latest new frontier of our nation's communications landscape, and the Commission [the FCC] is committed to allowing IP-enabled services to evolve without undue regulation."<sup>76</sup>

85. As U.S. legal expert Joel Winnik states: "This reflects the general view, expressed by the FCC and various FCC Commissioners on numerous occasions, that IP-enabled services and the Internet in general have 'become one of the greatest drivers of consumer choice and benefit, technical innovation, and economic development in the United States in the last ten years ...in an environment that is free of many of the regulatory obligations applied to traditional telecommunications services and networks.'"<sup>77</sup>

#### **4.0 THE COMPANIES' REQUEST**

86. The Companies ask the Governor in Council to intervene to ensure that the Canadian telecommunications industry is not hampered by harmful and unnecessary economic regulation as it goes about the important task of delivering the innovation that is critical to Canada's productivity and economic future.

87. With an eye, in Minister Emerson's words, to unleashing at the earliest opportunity "the power of competition, innovation and technological empowerment that will drive business competitiveness and consumer choice",<sup>78</sup> the Companies request that the Governor in Council overturn the Commission's decision to apply economic regulation to the traditional telephone companies' VoIP services.

88. Specifically, the Companies request that the Governor in Council, pursuant to section 12(1) of the *Telecommunications Act*, vary the Decision so as to eliminate economic regulation of VoIP services (including, without limitation, elimination of the winback rule in the context of VoIP, as described in section 3.1) by declaring that sections 25, 27, 29 and 31 of the *Act* do not apply to VoIP services. The Companies also request that the Order refer the

---

<sup>76</sup> FCC News Release, *Commission Requires Interconnected VoIP Providers to Provide Enhanced 911 Service*, 19 May 2005.

<sup>77</sup> Attachment 4, pp. 1-2. Sources of FCC and FCC Commissioner statements are provided in Attachment 4, FN 1.

<sup>78</sup> Hon. David L. Emerson, Minister of Industry, *Speaking Notes – National Manufacturing Summit of the Canadian Manufacturers & Exporters*, Ottawa, 7 February 2005.

Decision back to the Commission for reconsideration so as to make the Decision conform in all respects to this variation within 90 days.

89. The Companies acknowledge there is a role for the Commission to regulate VoIP service providers in areas of important social policy such as the provision of 9-1-1 services,<sup>79</sup> privacy safeguards and access to services for the by disabled persons. Social regulations that apply equally to all VoIP service providers are appropriate where the market alone cannot be expected to adequately address public policy objectives. Those aspects of Decision 2005-28 that deal with, for example, access by disabled persons, message relay service for hearing-impaired persons and privacy safeguards are important initiatives in this regard. The Companies are at the forefront in implementing these directives.

---

<sup>79</sup> The Commission established 9-1-1 service requirements for VoIP in Decision 2005-21. The Companies have implemented these requirements.