



January 11, 2008

Mr. L. R. Wilson
Chair
Competition Policy Review Panel
280 Albert Street, 10th Floor
Ottawa, ON
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By email: Competitionreview@ic.gc.ca

Dear Mr. Wilson,

Re: Sharpening Canada's Competitive Edge

Introduction

Shaw Communications Inc. (Shaw) is pleased to provide its recommendations in support of the Government of Canada's objective when it created the Competition Policy Review Panel (the Panel) "to create a more resilient, adaptable economy to provide Canadians with more and better jobs as well as with low prices, choice, quality and service." Shaw is Canada's leading digital entertainment company, providing broadband cable and internet services, direct-to-home satellite service and digital phone to 3.3 million homes. Our number one priority – and the reason for our success – is providing the best choice, value, quality, and leading edge technology and services to our customers.

We are convinced that Shaw, the entire industry and the Government of Canada can together develop a broadband policy and regulatory framework that will support a competitive, knowledge-based economy. The dynamic and highly-competitive digital world presents several challenges but there are also limitless opportunities for broadcasting distribution undertakings (BDUs), program producers, broadcasters and telecommunications companies.

The introduction of intense competition in convergent broadcasting and telephony markets as well as the threat of the black market and the rapid increase in the use of wireless and internet-based technologies (such as YouTube, video iPods, and the SlingBox) has led to the emergence of powerful and sophisticated consumers. They demand speed, efficiency, quality, choice and "anytime, anywhere" content.

Canada and companies like Shaw are well-positioned to become international leaders in broadband technology. The system is strong and can achieve even more success in the future. There is one significant problem. The current regulatory approach – based on

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over-protection and subsidization – is totally misguided in the digital world. In the future environment, powerful consumers must be given unlimited freedom to make their own choices as they will no longer tolerate artificial limitations on content.

Instead of putting the needs of customers first, the Canadian broadcasting system continues to severely restrict the level of choice and customization that can be made available to consumers. In addition, sheltering domestic broadcasters and producers has made Canadian programming far less appealing to audiences in both domestic and international markets.

There have been a number of previous, ongoing and upcoming reviews – including a study of the impact of new technologies ordered by Heritage Canada and CRTC reviews of over-the-air television, digital migration, BDUs, specialty services and new media – but no meaningful action. It is now time for real and urgent reform. Shaw strongly urges the Panel to recommend that Industry Canada spearhead a modernization of the regulatory regime. The new regime must be based entirely on prioritizing consumer choice and increasing reliance on market forces.

In support of the Panel’s mandate to provide recommendations on how to enhance Canadian productivity, competitiveness and investment, Shaw specifically recommends the following:

- give Industry Canada authority over broadband policy (including both broadcasting and telecommunications matters) – this is essential because broadband infrastructure will contribute to Canada’s future economic development and international competitiveness,
- eliminate foreign investment restrictions to maximize investment and competitiveness,
- introduce a streamlined regulatory framework based on market forces to better serve customers, and
- eliminate subsidies to ensure the development of productive and self-sufficient domestic production companies.

These recommendations, discussed in greater detail below, are consistent with Industry Canada’s mandate to achieve three strategic objectives — a fair, efficient and competitive marketplace; an innovative economy; and, competitive industries and sustainable communities. A strong communications industry is at the heart of developing a knowledge-based economy and achieving each of these important objectives.

Give Industry Canada Authority over Broadband Policy

The broadcasting sector has been regulated by the CRTC under the direction of the Department of Heritage and governed almost entirely by vague cultural objectives that

have not been achieved. Trying to regulate content in a digital world is no longer sustainable. It will compel Canadians to abandon the regulated broadcasting system and undermine Canada's international competitiveness. The current regime – in which authority over telecom matters rests with Industry Canada and broadcasting matters rest with Heritage Canada – has simply not worked. Both sectors need a broadband industrial policy approach based on economic objectives that serve consumers, rather than a set of policies based on protections, subsidies and restrictions on choice.

The Telecommunications Policy Review Panel (TPRP) correctly recognized that two separate policy and regulatory frameworks may not be appropriate given convergence – telephone and cable telecommunications companies compete in the same markets. The Minister of Industry wisely initiated deregulation of the local telephony market (where competition is nascent). However, under the direction of the Department of Heritage, cable companies remain shackled by onerous regulations in their primary business (despite the existence of mature, effective and sustainable competition). The CRTC continues to head in entirely the wrong direction. It is considering several anti-consumer policies including taking more money from distributors and customers to give to the wasteful and unaccountable Canadian Television Fund (CTF), a fee for the cable and satellite carriage of free over-the-air stations, and new media regulation.

Responding to the new environment with more regulations will harm consumers and impair Canada's productivity and competitiveness. This has to end. We urge the Panel to recommend transferring oversight of broadband policy – both broadcasting and telecommunications – to Industry Canada within its mandate to develop competitive markets and an innovative economy.

Foreign Investment Restrictions

Both the broadcasting and telecommunications sectors are subject to Canadian ownership rules. However, although BDUs and traditional telephone companies compete with each other, they are not subject to the same rules. Emerging internet-based services, including foreign-based services, are not subject to the ownership rules at all. Furthermore, Industry Canada applies the ownership rules differently to wireless carriers that provide both telephony and programming services in competition with BDUs and conventional telephone companies. Limitations on foreign investment and inconsistencies in the approach toward the foreign investment rules place BDUs at a competitive disadvantage. Restrictions on foreign investment impair the ability of Canadian communications companies to attract the capital needed to extend broadband services to all regions of Canada, to create new media content and to compete internationally. It also increases the cost of capital to Canadian communications companies and the cost of services to consumers. Furthermore, the restrictions are unnecessary as BDUs are distributors – not creators – of programming content.

The TPRP called for a review of these ownership restrictions in its 2006 Report. The TPRP recognized that reduction or elimination of the foreign investment rules could lead to a lower cost of capital for Canadian telecommunications carriers and BDUs, thereby

increasing the competitiveness of Canadian communications companies. For similar reasons, Shaw recommends the elimination of the foreign investment restrictions on both BDUs and telecommunications carriers.

Deregulation of BDUs and Increased Reliance on Market Forces

Consistent with the approach recommended by the TPRP in the telecommunications sector and implemented with great success by the Minister of Industry, Shaw asks the Panel to recommend that the Governor-in-Council issue an Order in Council pursuant to section 7 of the *Broadcasting Act* directing the CRTC to:

- (i) rely on market forces to the maximum extent feasible as the means of achieving the broadcasting policy objectives, and
- (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

The digital environment has broken down the traditional barriers that once defined distinct telephone and broadcasting distribution networks. Broadband networks have opened the door to competition between telephone, cable television, satellite, wireless and Internet-based services. Competition benefits consumers and has created a modern, dynamic infrastructure that underpins our knowledge-based economy. BDUs have built world-class broadband networks that enable Canadians to participate and compete in the information economy. BDUs are at the forefront of technology and economic development in this new digital era. Unfortunately, despite the existence of a highly competitive broadband environment, the regulatory framework has not kept pace with changes in technology. The CRTC continues to micromanage based on a monopoly model and outdated notions of scarce spectrum.

The *Broadcasting Act* contains more than 40 policy objectives and there are seven additional regulatory principles that must be applied by the CRTC. The current framework requires the CRTC to focus on too many objectives with little regard to consumer demand. As a result, there is an unjustifiably complex set of rules that apply to BDUs. Below are just a few examples:

- onerous and unnecessary access, distribution and linkage rules that restrict customer choice by dictating which services can and cannot be carried and how they are packaged,
- limits on the distribution of analog services on a digital basis,
- the inability to drop certain low subscription services, including those whose primary language is not extensively spoken in a given market,
- limitations on the carriage of affiliated services,
- restrictions on the use of video-on-demand services,

- significant restrictions on advertising and other revenue-generating opportunities, and
- the inability to offer popular non-Canadian services that are demanded by customers and are available through unregulated and illegal sources.

The biggest impediment to maximizing the competitiveness of the broadcasting sector is the failure of regulators to understand that they should not be forcing certain programming upon customers while denying other choices that they demand. The current framework imposes a degree of inflexibility upon BDUs that makes it impossible to best serve customers.

With competition from Internet-based services and the black market, all of these rules subject BDUs to a competitive disadvantage and encourage consumers to look outside the regulated sector to satisfy their desire for choice and diversity. The existing framework is simply not sustainable. Increased reliance on market forces will promote efficiency by compelling both broadcasters and distributors to respond to consumer demand and technological innovations. By contrast, continued regulation will impose significant costs by creating inefficiencies, reducing productivity, stifling innovation and harming consumers.

Eliminate Subsidies in Broadcasting and Telecommunications

Broadcasting Example: The CTF

Television production is one of the most heavily subsidized industries in Canada. These antiquated direct and indirect subsidies are harmful to the economy, consumers and the very cultural objectives which they are meant to serve. With a guaranteed steady flow of subsidies, Canadian programming services and “independent” producers are relieved of any obligation to become more efficient and innovative or to provide content of any real value to domestic and international audiences.

By far, the worst example of a market-distorting subsidy system is the CTF, which is administered by Heritage Canada in conjunction with the CRTC’s licensing requirements. Annually, millions of dollars are siphoned from BDU customers and Canadian taxpayers to the CTF, which then distributes this money to independent producers who enter into distribution arrangements with broadcasters.

BDUs – who are actually investing in broadband infrastructure – are punished for their success as they are taxed as a percentage of their revenues. This, in turn, reduces the amount of capital that can be reinvested. Producers, on the other hand, are rewarded for their inefficiency as they claim to have no economic viability without the subsidies. Well-financed broadcasters simply rely on the CTF to subsidize their acquisition of low-quality Canadian content to fill their quotas, while spending their own money to acquire non-Canadian programs that displace domestic content. Ultimately, consumers suffer the most as they are forced to finance the production of programming that they do not watch.

The few “success” stories disguise the fact that the CTF is ultimately a wasteful, unaccountable and mismanaged body that produces thousands of hours of programming failures. Perhaps the simplest indicator of the CTF’s failure is the fact that viewing to Canadian content has not increased since its creation and the most popular domestic programs are not funded by the CTF. The CTF has achieved nothing more than a \$2.5 billion redistribution of wealth from BDUs and their customers to producers and broadcasters. An investment, market-based approach would be far more effective in stimulating this sector of the economy and increasing the number of successful domestic programs and exports.

Telecommunications Example: Deferral Accounts

A second area of concern is the attempts by the Government of Canada and the CRTC to subsidize broadband expansion on a selective basis. In 2006/2007 the CRTC authorized the incumbent local telephone companies (predominantly Bell and Telus) to use approximately \$620 million in excessive charges to residential telephone customers, which the ILECs had been ordered to place in a “deferral account”, to subsidize the expansion of their broadband networks to areas of Canada not yet served.

Despite having received submissions in favour of a system of competitive bidding for these subsidies, and despite the TPRP’s recommendations against the CRTC administering new subsidy arrangements, the CRTC ultimately decided to make these funds available solely to the former monopoly telephone companies. This measure will effectively eliminate the possibility of a competitive supply of broadband services in the areas affected, which in many cases are adjacent to the coverage area of other competing broadband networks and are all within the footprint of competing satellite providers.

Solution: Rely on Market Forces

Subsidizing inefficient suppliers in mature competitive markets (as with the CTF) will undermine the development of a self-sufficient production sector that is capable of competing internationally. Subsidizing incumbents in nascent competitive markets (as with the use of deferral accounts) will stifle the evolution of effective and sustainable telephony competition. By contrast, relying on market forces and stimulating investment will ensure the continued development of strong domestic companies and dynamically competitive markets that provide significant benefits to consumers. Shaw recommends the elimination of subsidy programs as they result in severe market distortions that will have long-term negative consequences for consumers and the Canadian economy.

Conclusion

Shaw’s proposals support the Panel’s mandate and the Government of Canada’s objective to enhance Canadian productivity, competitiveness and investment. Canada will become a world-leader in the development of a knowledge-based economy if the broadcasting and telecommunications sectors are provided with all the tools they require to maximize choice and to compete with illegal and unregulated technologies.

Although there are several challenges ahead, Shaw is excited about the opportunity to deliver the speed, efficiency, quality and unlimited choice that powerful Canadian consumers demand and deserve.

The degree to which Shaw and other communications companies succeed in building the world's best broadband infrastructure depends significantly on the introduction of a new approach to regulation. The old approach of protections, subsidies and restrictions on choice is not sustainable. Maintaining these outdated policies and regulations will be disastrous for the Canadian economy.

Shaw strongly urges the Panel to recommend that the Government of Canada implement each of Shaw's proposals. Canada needs an industrial policy and regulatory framework for broadband that puts the needs of customers first and that emphasizes competition, efficiency, productivity, innovation and investment.

Shaw thanks the Panel for requesting input on these very important issues. We would welcome the opportunity to elaborate on any of the points made in this submission at the Panel's convenience.

Yours truly,

Jim Shaw
Vice Chairman and Chief Executive Officer
Shaw Communications Inc.