The Petition to the Governor in Council procedure: Canada's wholesale broadband policies, the appeal mechanisms that challenge them, and broader regulatory trajectories

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Introduction

This paper provides a brief analysis of the Canadian telecommunications policymaking regime, focusing primarily on the "Petition to the Governor in Council,"[1] a relatively seldom-exercised governmental appeal procedure through which requests can be filed to overturn policy decisions made by the country's federal regulatory agencies. With intent to investigate how this procedure integrates with other institutional processes within Canada's federal regulatory framework, as well as the policy outcomes that arise as a result, the analysis questions the role of the Governor in Council (GiC) and whether its appeal process tends to support the view that incumbent telecommunications carriers have service obligations to both retail *and* wholesale customers (CRTC, 2009a, 2011b).[2] This question is approached by examining Canada's wholesale broadband regulatory framework, which has the potential to improve competitive retail access and the variety in choice of service provider for consumers.

By extension, this paper also explores whether or not the GiC appeal procedure may act as a contributing force to the divergent telecommunications regulatory trajectories between Canada and the United States. This comparison is considered as relevant in light of an appeal petition currently before the GiC, the result of which may potentially redefine Canada's wholesale regulatory broadband framework as fiber-to-the-premises (FTTP) deployment is continuing to become the next infrastructural standard. Policies that will shape how the next era of telecommunications infrastructures are

[1] In this paper, the "Petition to the Governor in Council" will sometimes be referred to as the "Governor in Council" or "GiC" appeal "procedure" or "process."

[2] In the view of the Canadian Radio-television and Telecommunications Commission (CRTC), the "obligation to serve" and the basic service obligation are regulatory measures imposed, as per the objectives stipulated in the Policy Direction, on incumbent local exchange carriers (ILECs) and cablecos (collectively called incumbent telecommunications carriers, or "incumbents") to provide Canadians in both urban and rural areas (low- and high-cost areas, respectively) with access to reliable and affordable telecommunications services of high quality (CRTC, 2011b). By contrast, wholesale services have been mandated through a variety of different CRTC policies, some of which have since been rescinded. These wholesale service policies are discussed in section two of this paper.

developed and regulated in Canada have, and continue to be, influenced by the American regulatory regime.

Offered largely in response to Cherry's (2015) comparative assessment of divergent telecommunications policy developments between Canada and the US, this paper presents an analysis divided into two sections. The first section questions some of the divergences between the two nation's regulatory frameworks and pays particular attention to Canada's federal policy appeal mechanism—an institutional procedure not addressed in Cherry's assessment (2015). Here, I problematize Cherry's position that the two nations are characterized by strictly divergent telecommunications policy trajectories. In challenging this position, I investigate how the government institutions that collectively shape Canada's telecommunications policies employ administrative decision-making procedures that are drastically different in format and, therefore, in implication. The tribunal hearing decisions established by the Canadian Radio-television and Telecommunications Commission (CRTC),[3] on the one hand, and the GiC appeal process's reliance on ministerial interpretation, on the other, act as fundamentally divergent institutional procedures. This is the case, the paper stresses, despite their functioning as component parts of the same federal regulatory framework.

The contrasting characteristics used to distinguish one procedure from the other are then, in turn, leveraged to help identify commonalities from across Canadian and US regulatory frameworks. With concentration placed mainly on the federal procedure's legal foundation as well as its commenting and consultation processes, section one goes on to recognize that Canada's GiC appeal process may actually function in a manner

[3] All CRTC regulatory policies, orders, notices of consultation, and decisions that are cited in this paper can be found on the CRTC website: http://www.crtc.gc.ca/eng/dno.htm

categorically similar to the written "notice and comment" practices and "ex-parte meeting" forums at the US Federal Communications Commission (FCC). Some of the procedures used by the GiC are found to be analogous to those FCC administrative practices criticized by Cherry as lacking transparency and an accessible conduit for consumer advocacy (2012a; 2015). Setting a foothold for the second section of this paper, these similarities begin to point out that the Canadian government's appeal petition process relies on a procedural format and commenting platform that have not provided adequate opportunity for the GiC to sufficiently confront the argument that incumbent telecommunications carriers have made in opposition to mandated wholesale broadband services and the policies that enforce them.

Through making this framework comparison, section two suggests that in the particular context of influencing wireline broadband access regulations, Canada's GiC appeal procedure has, thus far, tended not to be highly critical of complainants' deregulatory policy positions. Indeed, the "reconsideration" outcome generated by the 2009 Governor in Council petition (P.C. 2009-2007), in which the GiC was persuaded to some extent by the complainants' positions criticizing existing wholesale broadband obligations and speed-matching requirements, offset and temporarily curtailed certain tribunal decisions made, and objectives upheld, by the CRTC. These hearing decisions, and the objectives regarding wholesale service that guide them (DoJC, 2006, §.1(*c*)(ii)), were otherwise formulated with the express intent to uphold the responsibilities of incumbent carriers to serve retail customers as well as competitor Internet service providers (ISPs) acting as wholesale customers in Canada's fixed access (or wireline) broadband market. The second section concludes, however, that the 2009 outcome

imposed by the GiC appeal petition, which referred the wholesale obligations and speed-matching policies back to the CRTC for reconsideration, distorted the efficacy of the CRTC's procedural logic and its broader intent to uphold incumbent carriers' wholesale services obligations. Crafted by the petition complainants Bell and Telus, the deregulatory arguments used in this appeal proceeding were heavily influenced, I argue, by the positions adopted by the FCC through its rulemaking system. Deciding to send the P.C. 2009-2007 appeal outcome back to the CRTC for reconsideration, in other words, is a policy ruling that actively borrowed from the administrative procedures and forums used in the US by the FCC. The result hindered the policy-led prospects of improving market competition for Canadian broadband subscribers.

The paper concludes by considering an active GiC petition submission currently under review. Filed by Bell in October 2015, this submission is appealing the CRTC's recent decision (entitled Telecom Regulatory Policy 2015-326) to mandate wholesale-disaggregated broadband service (DBS). As it currently stands, the CRTC's decision will allow competitor ISPs to lease and resell usage of incumbent carriers' FTTP infrastructures (CRTC, 2015). My intention here is to demonstrate that, in the event of the GiC varying the wholesale DBS decision or referring it back to the CRTC for reconsideration, any determination of such nature supports the position that the GiC procedure is, once again, actively borrowing from FCC rulemaking practices and the arguments used in convincing the US regulator to instate policy. Therefore, because the GiC's administrative procedures and the arguments used in both appeal petitions discussed herein harbor closely associated parallels with the FCC, the paper asserts there are existing institutional forces that complicate the otherwise divergent trajectories of US

and Canadian telecommunications policy, forces that suggest the two frameworks may still retain certain uniting attributes that attenuate their generally contrastive regulatory paths.

§1. The GiC appeal process and FCC rulemaking: Analogous administrative procedures and forums

The "Petition to the Governor in Council," as it is officially referred to, is a procedural avenue for persons to submit an application for the government to reconsider and vary the policies established by federal regulatory agencies. As it applies specifically to Canada's telecommunications policymaking apparatus, invoking this petition allows for complainants to appeal policy outcomes of decision hearings at the CRTC (also called "the Commission") within ninety days after the decision (the *Act,* 1993, §.12(*1*)).[4] Sometimes referred to as an "appeal to Cabinet," or an "Order-in-Council" application (DoCH, 2015), use of this intervening procedure in the domain of telecommunications regulation is legally grounded by the *Telecommunications Act* of 1993. The *Act* states, "the Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives" (1993, §.8). However, unlike the face-to-face, litigated procedural format implemented by the CRTC—which operates "at arm's length from the government, and with a quasi-judicial legal framework" (Intven, 2012, p. 94)[5]—the *Telecommunications Act*, by contrast, mandates the GiC appeal procedure only with the ability to use an indirect platform of written, third-party comments in its decision-making

[4] In addition to petitions presented in writing by outside parties (within ninety days after the CRTC decision in question), the Governor in Council may also initiate a review of a CRTC hearing decision on its own motion (the *Act*, 1993, §.12(*1*)).
[5] Intven (2012) quoted in Shepherd, Taylor & Middleton (2014).

process. This commenting period officially begins after the GiC publishes notice of any new petition for appeal in Part I of the *Canada Gazette*, an obligation as per section 12 of the *Act* (1993, §.12(*4*)). Interested parties may then issue responding comments in written form to the GiC, usually within thirty days of the notice's publication (Industry Canada, 2015).

The procedure used by the GiC in processing appeal petitions and public comments follows a similar approach to what the US *Administrative Procedure Act* (*APA*) defines as "notice and comment rulemaking" (FCC, 2015; Walden, 2009). This approach is relied on by the FCC to issue legislative and organizational regulations as well as policy agenda statements (2015, §.2). The process first involves the agency issuing a notice of proposed rulemaking (NPRM) to be published in the US Government's *Federal Register* (FCC, 2015). The agency then provides an opportunity for the public to submit written comments on the proposal before a final ruling is issued (FCC, 2015, §.6). Public comments submitted during this time, the FCC claims, can be very helpful to its decisions. The agency asserts in its *Rulemaking Process* documentation that the public "may identify a better way for us to achieve our objective or it may point out problems with our proposal that we did not see. Our rules are improved through public participation" (2015, §.6). As the findings below suggest, however, there is a discrepancy between this claim and the administrative means available at the FCC to ensure such public participation is a feasible reality.

The Government of Canada also makes a concerted effort to voice appreciation for collaboration between regulators and the public. Consulting with the public and facilitating commenting platforms is certainly acknowledged as an invaluable component

in helping the nation's regulatory organizations develop public policy. As the *Cabinet Directive on Regulatory Management* (2012) emphasizes, for example, "[d]epartments and agencies are responsible for identifying interested and affected parties," and for providing them with opportunities "to take part in open, meaningful, and balanced consultations at all stages of the regulatory process" (2012, §.6(*A*)). The *Guide to the Federal Regulatory Development Process* (2014) builds on this intention to promote public discussions on federal policy matters, broadly noting that public commenting platforms are intended to "[give affected parties] opportunities to provide input and express concerns they might have related to the design, implementation, or impacts of [a regulatory] proposal" (2014, p. 8). However, because the GiC appeal procedure uses an indirect, epistolary commenting structure, interpreting each public comment submission within the wider debate around a given appeal application unfolds in a manner that necessarily lacks the type of openness, balance, and accountability associated with a face-to-face, litigated procedural format. As such, vetting the factual resilience of written public comments—particularly if they do not unequivocally address or rebut opposing viewpoints—pivots on the GiC's arbitrary, ad hoc interpretation.

The challenges faced by the GiC appeal process are not dissimilar to those that beset the FCC's written commenting platform. Rather than employing a litigated style of procedure that requires more truthful disclosure and active defense of one's argument—as is required in CRTC decision hearings—the rulemaking practices at the FCC are, instead, relegated to coping with procedural challenges that involve accurately and equitably conveying third-party input generated from written comments. "Unlike a litigated proceeding [argued] before the CRTC," writes Cherry, "...the FCC's process

provides wide latitude for manipulation or omission of information filed by parties in a proceeding" (2015, p. 468). FCC commissioners, in other words, may find themselves in the same predicament as the GiC during an appeal petition: that is, having to process policy decisions based on comments that are indirect, fragmented, or factually obfuscated. The exclusively written format of these comments adds another dimension of difficulty for both regulatory bodies and their respective respondents to commence dialogue on between the government and non-government **(i.e.)** stakeholders.

Furthermore, challenges that stem from restrictive public comment platforms relied on in both regulatory decision-making processes are exacerbated by the use of supplementary meeting forums that also lack transparency and throttle public access. For the FCC, the regulator's notice and comment process is accompanied by private forum proceedings in which oral and written presentations are delivered directly to agency decision makers (FCC, 2011, §.1.1202). When participating in this type of ex-parte meeting procedure, parties may organize face-to-face presentations with FCC commissioners or staff up until one week before the final ruling is to be issued. As a type of "permit-but-disclose" process, parties are obligated to file copies of oral summaries and any written comments from the meeting into the docket for that proceeding (FCC, 2011, §.1.1206). Notwithstanding the direct nature of these presentations and the ensuing public disclosure of each meeting's details, there is no opportunity provided, however, for any other interested party to be physically present during an ex-parte meeting (Cherry, 2015; FCC, 2011). Moreover, because regulated entities and corporate interests possess the resources to "extensively use the ex-parte process" with a much greater frequency than other stakeholder parties (Cherry, 2015, p. 468), public interest organizations and

consumer advocacy groups are commonly thereby left out of such meetings—along with their ability to immediately confront and rebut opposing policy arguments. The ex-parte meeting procedure is not, therefore, a process that promotes a more equitable commenting platform for *all* viewpoints, nor does its closed-door format enhance a more robust and informed commenting debate of policy issues on the merits.

By this measure, the same accusation can be applied to the GiC appeal procedure. When processing a Petition to the Governor in Council, the authority to interpret public comments and ultimately formulate a verdict for the appeal petition is completely incumbent upon Canada's federal Minister of Industry.[6] On behalf of the GiC, the Minister possesses the authority to "vary or rescind the decision [under appeal] or refer it back to the Commission for reconsideration [...]" (the *Act*, 1993, §.12(*1*)). It is this consolidated ministerial authority to enable policy intervention that is largely an exercise in opacity when it comes to processing GiC appeal decisions. What is more, the provincial consultation proceeding that, by law, supplements the Minister's interpretation of the appeal petition and written comments does not mitigate the overall lack of transparency in this process.

Canada's *Telecommunications Act* stipulates that a minister "designated by the government of each province" is provided the opportunity to offer provincial consultation to the Minister of Industry before the appeal decision is finalized (1993, §.13). This platform might, perhaps, exist as an opportunity for additional perspectives to contribute diversified viewpoints that represent constituent opinions when assessing the petition and

[6] Under Canada's new federal administration, the newly named Minister of Innovation, Science and Economic Development, the Hon. Navdeep Bains, oversees the portfolio containing "Petition to the Governor in Council" appeal decisions in the area of telecommunications regulations. For this paper, however, the position will still be referred to as "the Minister of Industry."

interpreting submitted public comments. However, this measure provides minimal consolation in explicitly confirming a more transparent decision-making procedure. Indeed, any provincial consultation that does occur is—like the ex-parte meetings at the FCC—behind closed doors. Finalized appeal decisions merely note that the Minister of Industry "has provided an opportunity for provincial consultation" (P.C. 2009-2007, 2009, p. 2), but do not go so far as to disclose which ministers actually contributed, or the substance of their contribution.

The lack of transparency and public access in the GiC appeal process may be derived, at least in part, from the policymaking approach followed by Industry Canada, the nation's other telecommunications regulator. Industry Canada's jurisdiction in the telecommunications regulatory domain is mainly limited to radio spectrum policy and frequency allocation processes (Industry Canada, 2011). As has been discussed above, however, the department also has a direct hand in deciding the appeal outcomes of GiC petitions—which pertain to those telecommunications regulations formulated outside of Industry Canada's departmental purview (i.e., by the CRTC) (the *Act*, 1993). As such, the Minister of Industry is not only the highest *de facto* authority in deciding GiC outcomes relating to appeals filed against CRTC policies (the *Act*, 1993), but simultaneously "[holds] considerable power within Industry Canada" as the head of the department (Shepherd, Taylor & Middleton, 2014, p. 6). The fact that the Minister's cabinet portfolio includes authority over both of these institutional regulatory avenues may suggest that the policymaking approaches and opportunities for public participation in each would be similar in format. Existing research conducted on Industry Canada seems to support this suggestion.

Aiming to increase academic policy engagement throughout Canada's telecommunications regulatory institutions, Shepherd et al. (2014) detail their experiences with the efficacy of academic policy participation in the context of CRTC consultations and written submissions to Industry Canada. In comparison to the CRTC's "court-like atmosphere," which offers "a more public vetting of concerns," the authors' findings indicate that Industry Canada operates much differently—in a capacity that is "far less amenable to public or academic advocacy" (2014, p. 7-8). Ultimately, any significant interactions involving Industry Canada that transpired during the authors' data collection process did so only in the form of dialogue between the regulator and interested business groups or industry lobbyists in closed-door meetings (Shepherd et al., 2014). Actual public engagement through the department's written comment submission platform was, in a word, "negligible" (p. 8).

Just how influential Industry Canada's approach to policymaking may be in affecting the choice of procedures and forums implemented in the GiC appeal process is beyond the immediate scope of this analysis. But the dual jurisdictional authority possessed by the Minister of Industry clearly holds relevance; possessing such authority does bring into question the values and priorities that Industry Canada carries and instills—even if tacitly—into the federal government's processing of appeal petitions. Though most petition submissions have historically been declined by the GiC (Industry Canada, 2015), the federal appeal process has, however, ruled more favorably in those select petition cases advocating a deregulatory policy position be adopted to review and vary CRTC regulations that mandate wholesale Internet services. That is to say, when processing petition submissions of this nature, the GiC decision-making process has

balked in fostering a platform sufficiently critical of complainants' deregulatory policy positions. This is particularly the case, section two finds, with a 2009 joint-petition filing that sought to halt and vary or rescind CRTC policies advancing Canada's wholesale broadband services framework, and thus the level of service-based competition in the market (Bell Aliant Regional Communications & Bell Canada [Bell], 2009; Cave, 2006; TCC, 2009). The appeal outcome also established a precedent that, as the paper's conclusion explains, may hold relevance contemporarily.

§2. Challenging Canada's wholesale broadband services framework: The CRTC policy trajectory and the 2009 GiC appeal decision

If targeted by a GiC petition submission, regulations established by the litigated decision hearings at the CRTC are vulnerable to being undercut by a policy appeal mechanism similar to certain FCC rulemaking practices. As this paper has asserted in its previous section, both of these policy avenues rely on a procedural format that tends to cater to industry interests before those of the individual citizen. For the FCC, the effects of this format are enhanced by the fact that the regulatory agency has no process by which consumer interests can retain experts for which funding will be provided through assessment of fees on parties who are entities under FCC jurisdiction (Cherry, 2015). In this regard, remarks Cherry, "the FCC lacks an important mechanism to mitigate the disparity of resources between regulated entities and representatives of consumer interests" (2015, p. 469). Turning then to the Canadian regulatory framework, Cherry goes on to praise the CRTC's administrative proceedings, which, in her opinion, uphold a scope of participation broadly defined to include a more robust array of groups representing consumer interests (2015). However, the nature of criticism proffered by

Cherry's assessment of the FCC's rulemaking practices suggests that she would not be as supportive towards the administrative procedures and forums implemented by the other institutions within Canada's telecommunications policymaking framework: namely, those used by Industry Canada and, as the analysis in this paper focuses on, the GiC appeal process. Indeed, as section one has argued, the decision-making process administered by the GiC's policy appeal platform—particularly when compared to the CRTC—demonstrably lacks some of the same procedural mechanisms as the FCC that would mitigate the disparity of resources between open-market, anti-regulation industry stakeholders and those advocating on behalf of consumer or citizen interests.

Compounding this similitude is another dimension to Cherry's criticism of FCC procedural shortcomings, one that is especially relevant in light of the GiC's having processed certain petitions leading to a specific 2009 appeal outcome regarding the regulatory status of mandated wholesale broadband services in Canada. The administrative procedures and forums at the FCC, Cherry argues, bear ramifications in the US that have prolonged policy acceptance of the so-called "monopoly theory argument"—the factually erroneous strategy used to justify the idea that incumbent carriers' historical legal duties were based on the monopoly conditions that existed at the time, and thus are, supposedly, not applicable in a competitive environment (2015). [7] In brief, the FCC's procedures and forums have been conducive to allowing this argument to persist in the US policy arena. Likewise, the administrative procedures and forums used by Canada's GiC appeal process have played a similar role in prolonging a deregulatory policy position advocated by incumbent carriers and other industry interests:

[7] The CRTC, by contrast, squarely addressed the monopoly theory argument in a 2011 public hearing, clearly defining its expectations regarding incumbent carriers' obligation to serve (Cherry, 2012b, 2015; CRTC, 2011b).

the argument opposing mandated wholesale broadband services. While the CRTC has been committed to rejecting oppositional positions to mandated wholesale access provision in the wireline broadband market, this section emphasizes that the federal government's process through which CRTC policies may be appealed has not evidenced the same commitment. Instead, this section finds, the P.C. 2009-2007 appeal outcome demonstrates that the GiC procedure not only employs a policy decision-making process similar to that of the FCC, but furthermore, that the 2009 mandated wholesale access decision was actually based on successfully argued petition submissions that cite and actively praise similar actions undertaken by the FCC.

The petitions submitted by incumbent carriers Bell Canada/Bell Aliant (collectively "Bell") and Telus argue for the GiC to vary a CRTC Decision (2008c) and rescind a CRTC Order (2009b), both of which were regulations approved by the Commission for the purpose of fostering competition under Canada's wholesale broadband services framework. Expressing their opposition to these policies, the arguments that Bell and Telus formulate in their petition submissions are underpinned by having cited and explicitly promoted the FCC's deregulatory approach to wholesale access provision—an approach that was, in turn, shaped by the American agency's administrative decision-making procedures and comment forums discussed in section one. The GiC appeal process's similar administrative procedures and opportunities for public commenting encouraged a decision outcome along the same lines, much to the opposition of the CRTC.

Despite resistance from industry interests and certain pro-business requirements imposed by the Policy Direction (DoJC, 2006), CRTC decision hearing outcomes have

regularly supported wholesale competition in the fixed access broadband market. The agency's ongoing aim has been for its regulatory decisions to help usher new-entrant and competitor ISPs into an eventual transition from service- to facilities-based competition. Referred to as the "ladder of investment" (LOI) or the "stepping-stone" approach, this regulatory strategy encourages an evolution from ISPs existing as wholesale access customers relying on tariffed usage of incumbents' networks, to eventually being able to invest in and maintain their own facilities and infrastructure (Cave, 2006; CRTC, 2009a; Industry Canada, 2006; Middleton & van Gorp, 2009). Beginning in the late 1990's, the CRTC actively adopted a position of support for mandatory wholesale access to unbundled local exchanges (CRTC, 1997). However, many of these wholesale access regulations, which have often been in accord with the LOI approach, have not made a compelling conversion into actually instilling significant competition in Canada's broadband market, a result that has garnered ongoing criticism from both academic and industry voices (Masse & Beaudry, 2015; van Gorp & Middleton, 2010). There are certainly a number of factors that have contributed to the protracted discrepancy between CRTC policy action and the overall deficit in competitiveness apparent in the marketplace. This paper points to the Policy Direction (P.C. 2006-1534) and the P.C. 2009-2007 appeal outcome—and, by extensions, the GiC administrative procedures and forums—as factors that have perhaps contributed to such a discrepancy.

Seeking to generate market competition in the recently unbundled local loop, between late 2006 and early 2007 the CRTC expanded upon the mandatory services included in its existing network sharing policy (CRTC, 2010). The agency accomplished this service expansion by requiring incumbent carriers to facilitate wholesale broadband

services for competitor ISPs—both under aggregated ADSL and TPIA provision[8]—at transmission speeds that matched their own retail service offerings (CRTC, 2006, 2007a-e; Masse & Beaudry, 2015). Though expanding its network sharing policy to include speed matching might presumably encourage a more equal playing field for competitor ISPs—and thus spur an improvement in wholesale competition—many of the policy orders contributing to this updated network sharing policy were subsequently rescinded, however (CRTC, 2007f). This decision to repeal the policy orders came after the Commission was forced to accept the position that its new regulatory framework for competitor services harbored "significant uncertainty" (CRTC, 2007f, para. 68). Uncertainty was based on the extent to which the proposed essentiality of newly approved services and rates were inconsistent with certain CRTC Policy Direction requirements (CRTC, 2007f).

Established in 2006 by the GiC on the recommendation of the Minister of Industry, the Policy Direction (P.C. 2006-1534) requires for the CRTC to, among other instructions, "rely on market forces to the maximum extent feasible as the means of achieving [its] telecommunications policy objectives" (DoJC, 2006, §.1(*a*)(i)). Furthermore, when relying on regulations passed in its decision hearings, the Commission is directed to use measures "...that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives (DoJC, 2006, §.1(*a*)(ii)). As such, the Commission found that maintaining the new speed matching services and rates, which had been previously approved on a final basis (CRTC,

[8] "ADSL," or asymmetrical digital subscriber line, refers to the copper wire infrastructure used by ILECs (Bell, 2009). Depending on the ILEC in question, incumbent carrier wholesale aggregated ADSL service provision is referred to as "Gateway Access Services" (GAS) or as "High Speed Access" (HSA). "TPIA," or third party Internet access, refers to the wholesale broadband services provided over DOCSIS (data over cable service interface specification) infrastructure used by cable companies (Cisco, 2013).

2006, 2007a-e), would ultimately not be consistent with the requirement in subparagraph 1(*a*)(i) of the Policy Direction. Accordingly, the ensuing return to the previous wholesale status quo was viewed as consistent with the requirement in subparagraph 1(*a*)(ii) (CRTC, 2007f). By contrast, subparagraph 1(*c*)(ii) of the Policy Direction, which is the only section that mentions the Commission's wholesale service framework, fails to offer any formidable wording for an interpretation to be formed in defense against subparagraphs 1(*a*)(i-ii), calling merely for a (single) review to be completed of the Commission's regulatory framework regarding mandated access to wholesale services.

Resorting to its own decision-making procedures, the CRTC responded to this administrative setback by releasing a revised policy framework for wholesale broadband services, updating the definition of "essential service" to both fit within the Policy Direction requirements, and to better respond to the regulator's expectations for high-speed wholesale service provision (CRTC, 2008a). The Commission determined that in order to be considered essential, a facility, function, or service must meet certain stipulated conditions. The conditions to be met would henceforth include: (i) the facility is required as an input for competitors to provide telecommunications services in a relevant downstream (retail) market; (ii) the facility is controlled by a firm that possesses upstream market power such that withdrawing mandated access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market; and (iii) it is not practical or feasible for competitors to duplicate the functionality of the facility (CRTC, 2008a, para. 36).

This revised wholesale framework was achieved due largely to the CRTC's procedural format. The Commission formulated this decision after "*numerous parties*

made *oral presentations* at an 11-day public hearing" (CRTC, 2008a, para. 2, emphasis added). Participating parties included incumbent carriers "and some of their national and/or regional competitors in the residential and business markets, as well as representatives of consumer organizations" (para. 2). The Canadian Competition Bureau, one such independent agency advocating for a more equitable competitive balance between business and consumer interests (CCB, 2015), was instrumental in shaping this decision outcome. The Bureau consistently stated "at all phases of this proceeding" its view that it was fundamental for the Commission to assess and link the essentiality of upstream facilities to the effects that such mandating will have on competition in the downstream market (CRTC, 2008a, para. 8). More specifically, the Bureau directly confronted the arguments repeatedly issued by incumbents to narrow the definition of an "essential facility" to apply only to those firms that have the power to *fully* prevent competition—and thereby omit in the definition facilities owned by firms that have the power to *lessen* competition (in a relevant downstream market) (CRTC, 2008a, para. 23-26). In other words, the Bureau's combative presence in the decision hearing—which rebutted incumbent positions attempting to excessively taper the definition of essential services and thereby minimize or fully circumvent regulatory mandates to provide wholesale services—was made possible as a consequence of the CRTC's litigated, public procedural format.

Importantly, this updated wholesale services framework also provided the regulatory groundwork necessary for the Commission to viably *re*-mandate incumbent carriers to provide wholesale broadband services at competitive transmission speeds over all types of existing network infrastructure. Furthermore, the framework acted as the

foundation for the two regulatory decisions that would ultimately be the target of the 2009 GiC petition submission. *1)* In "Telecom Decision 2008-117," a competitive ISP and wholesale broadband customer called Cybersurf successfully argued for the CRTC to direct incumbent carriers to provide a speed matching requirement for their essential ADSL wholesale broadband services (CRTC, 2008c). This CRTC decision outcome redeemed much of the wholesale competitive services framework previously advanced by the rescinded policy orders from 2006 and 2007 (CRTC, 2006, 2007a-e). It focused on reinstating aggregated wholesale ADSL services—which comprised both Gateway Access Services (GAS) and High Speed Access (HSA) wholesale provision—to be offered by incumbent carriers Bell Canada, Bell Aliant, MTS Allstream, SaskTel, and Telus (CRTC, 2008c). Building on this decision, *2)* "Telecom Order 2009-111" engaged the CRTC in processing another wave of wholesale broadband service mandates (CRTC, 2009b). This policy clarified that wholesale aggregated ADSL services deployed over next generation networks (NGNs) implementing fiber optic infrastructures, including fiber-to-the-node (FTTN) broadband provision, were to also be included as part of mandated wholesale access (CRTC, 2009b).

The petition submissions to the GiC issued by Bell and Telus maintain policy arguments that rely, in large part, on validation through wholesale rulemaking decisions formed at, and upheld by, the FCC. The Canadian incumbent carriers explicitly mention and justify certain FCC pro-investment policy decisions within their petitions as evidence of the negative economic consequences that wholesale policy mandates can purportedly trigger. Bell belabors this point, explaining, "[t]he FCC concluded that requiring ILECs to sell competitors access to these facilities at regulated wholesale rates would undermine

ILECs' incentives to invest in these facilities..." (2009, p. 11). Similarly, Telus claims, "the Federal Communications Commission has correctly recognized that high quality services are unlikely to develop if investment incentives are undermined by mandated access regulations," while warning, [... M]andated sharing policies discourage investment" (2009, p. 8).

Both incumbent carriers also make efforts to directly attack "Telecom Order 2009-111" by problematizing the CRTC's approval of mandating wholesale access to NGNs, and by contrasting it with their support the FCC's stance. "It is clearly possible for the CRTC to maintain its existing essential facilities policy towards existing network facilities while exempting new next generation networks from mandatory unbundling," argues Telus. "This is precisely what the FCC has done in the United States, and the result has been remarkable" (2009, p. 10). Bell, instead, targets and criticizes the Order's original complainant, while differentiating CRTC policy mandates from those the FCC has deregulated or forborn:

> It is interesting to note that Cybersurf provides services in both the US and Canada. However, the Federal Communications Commission (FCC) in the US has eliminated nearly all of the network sharing requirements for next generation fiber access facilities used to provide high-speed broadband services and therefore US ILECs are not mandated by the FCC to sell the services to Cybersurf that Cybersurf is asking the CRTC to mandate relative to Canadian ILECs. (Bell, 2009, p. 6)

The FCC policies that Bell and Telus support in their petitions are the product of US rulemaking decisions—which, as section one has highlighted, heavily favour industry interests above those advocating on behalf of consumers. These are also the same policy positions unsuccessfully argued by Bell, Telus, and other representatives in accord with incumbent positions during earlier CRTC decision hearings (CRTC, 2008a, 2008b, 2008c, 2009b).

When in December of 2009 the GiC procedure referred the two policies under appeal back to the CRTC for reconsideration (P.C. 2009-2007), the decision-making process, though opaque, clearly produced a ruling in favour of the interests of Bell and Telus. Not surprisingly, the appeal result was also in accord with the interests of most of the twenty stakeholders who submitted written comments to the Governor in Council before the finalized decision (Industry Canada, 2015). Again not surprisingly, those stakeholders who did submit comments overwhelmingly represented incumbent carriers and other corporations, organizations, and chambers of commerce supporting a deregulatory position (Industry Canada, 2015).

After being referred back to the CRTC for reconsideration, "Telecom Notice of Consultation 2009-261" and, later, "Telecom Regulatory Policy 2010-632" reaffirmed the Commission's original position established in "Telecom Decision 2008-117" and "Telecom Order 2009-111." Specifically, in the four areas (a-d) that the GiC specified the CRTC reexamine, the CRTC maintained its position:

> (a) The Commission considers that, at present, retail Internet service competition results primarily from services provisioned using wireline facilities. Other retail Internet services, such as those offered using wireless and satellite facilities, are not generally substitutes for wireline facilities at this time. (CRTC, 2010, para. 5);
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> (b) Regarding the equity of the speed-matching requirement between ILECs and cable carriers, the Commission notes that cable carriers are also subject to a speed-matching requirement for their existing wholesale high-speed access services that allow competitors to provide retail Internet services. (CRTC, 2010, para. 11);
>
> (c) The Commission is not persuaded that the ILECs and cable carriers should provide new wholesale access services [...] In the Commission's view, there is no convincing evidence to indicate that there would be a substantial lessening of competition in the absence of these services. (CRTC, 2010, para. 13);
>
> (d) The Commission finds no utility in defining what facilities should be identified as 'next generation.' The Commission will apply its existing essential services regulatory framework to any application requesting that ILECs and cable carriers make these

> facilities available for competitor use. (CRTC, 2010, para. 15).

These findings illustrate that the GiC ruling to redirect the policies under appeal back to the Commission for reconsideration ultimately had a negligible impact in altering the CRTC's initial position regarding mandated wholesale services. This unchanged result was likely influenced in no small part by the CRTC's procedural platform, which was able to accommodate oral arguments from a multitude of competitor ISPs and consumer groups, in addition to incumbent carriers (CRTC, 2010).

However, looking beyond the CRTC's resolute policy position in the 2010 reconsideration hearing, the GiC's actions did prolong the debate around mandated wholesale access provision in Canada, which is significant. By opting to send the policies under appeal back to the CRTC for reconsideration, the procedures and forums used by the GiC process supported the petitions in precipitating an additional CRTC notice of consultation and public hearing be held to re-confirm the Commission's stance on these matters (CRTC, 2010). Any delays in the CRTC's agenda caused by having two of its regulations under appeal at the GiC, as well as the time and resources required to facilitate the resulting reconsiderations, therefore went against further advancing the CRTC's wholesale broadband services framework or other agency initiatives. In other words, due in part to its decision-making procedure and commenting platform, the GiC appeal ruling for P.C. 2009-2007 actively hindered policy-led prospects that might have been established at an earlier juncture by the CRTC—potentially, then, improving market competition in Canada's fixed access broadband market.

Conclusion

This paper has provided an analysis of the Canadian telecommunications policymaking regime, with the aim of offering some insight into a federal policy appeal mechanism that has not been the subject of extensive academic scrutiny. In stressing some of the fundamental differences between the Petition to the Governor in Council procedure and the CRTC's public hearings, my aim has been to illustrate there are internal institutional forces within Canada's telecommunications regulatory framework that are perhaps underpinned by sometimes-conflicting values and priorities. Simultaneously, the paper has also maintained that the GiC appeal process has procedural characteristics that are similar to those at the FCC in the US.

In showing that commonalities are evident from across Canadian and US regulatory frameworks—particularly regarding the administrative procedures and commenting forums employed—my intention has been to challenge the position that the two nations are characterized by strictly divergent telecommunications policy trajectories. The administrative similarities that do exist between the GiC appeal process and the FCC rulemaking practices begin to highlight that the GiC appeal procedure is a process that has not been particularly critical of complainants' deregulatory policy positions, especially in the P.C. 2009-2007 appeal petition. The fact that FCC decisions are explicitly celebrated in the petitions discussed herein—and, moreover, that said petition outcomes led to an appeal ruling favourable to the complainants who constructed recycled positions argued before the FCC—further suggests that the two regulatory avenues share a decision-making and procedural logic.

As the GiC now faces a similar petition application appealing the CRTC decision to mandated wholesale-DBS, which, if unaltered, will allow competitor ISPs to lease and

resell usage of incumbent carriers' fiber-to-the-premises (FTTP) infrastructures (CRTC, 2015), the federal appeal mechanism's administrative procedures and commenting platform are being tested once more. So far, the petition submitted by Bell may suggest that the carrier is, again, adopting an approach more suited for use by incumbent parties to convince the FCC to adopt a policy position advocating forbearance of mandated wholesale obligations over FTTP infrastructure—rather than one submitted before Canada's federal appeal mechanism. This is problematic, for one, because Bell's petition is apparently predicated on the assumption that the Canadian telecommunications policymaking framework pivots on the same federal preemption foundation as the American framework. In reality, this is not the case (Cherry, 2015; Walden, 2009). In the US, policy debate must be refought in multiple forums at different levels of government; the ability to enforce Canadian telecommunications policies is, by contrast, almost exclusively within federal jurisdiction. Bell's petition position, therefore, sidesteps a fundamental point of difference between the US telecommunications regulatory framework and Canada's. Given the greater fragmentation of telecommunications policymaking among federal and state forums relative to the substantial level of federal preemption in Canada, FCC deregulation does not mean an absence of affect state or municipal regulations—particularly where broadband infrastructure development is concerned.

As Bell's current petition submission has declined to field the question of how this critical deregulatory appeal proposition might impact the absence of provincial policymaking powers in the telecommunications domain, perhaps public discussions or the petition's written comments will better address the issue. The range of comment

submissions and, in time, the appeal decision may indicate whether the GiC appeal process has since improved—and thus is now a contributing force to the divergence between the US and Canadian frameworks—or alternatively, if the characteristics that united the GiC and FCC in 2009 will continue to do so today. If the latter stands true, perhaps it will be time to seriously reconsider how to improve the transparency and level of public access inherent in this important federal administrative procedure.

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