Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2012-188

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Ottawa, 30 March 2012

ACTQ/OTA – Application to stay certain portions of Telecom Regulatory Policy 2011-291 and related matters

File number: 8680-A5-201201425

In this decision, the Commission denies ACTQ/OTA's request to stay portions of Telecom Regulatory Policy 2011-291 and various Commission decisions approving implementation plans for local competition in certain small ILEC territories. The Commission also denies the request to suspend the process for Telecom Notice of Consultation 2011-348.

The dissenting opinion of Commissioner Lamarre is attached.

Introduction

1. The Commission received an application by l'Association des Compagnies de Téléphone du Québec inc. and the Ontario Telecommunications Association (ACTQ/OTA), dated 3 February 2012, on behalf of 30 small incumbent local exchange carriers (small ILECs),[1] requesting that the Commission

    a. stay certain determinations in Telecom Regulatory Policy 2011-291[2] pertaining to changes in the subsidy regime[3] and the implementation of local competition in the small ILECs' territories,[4]

[1] See the Appendix for a list of the small ILECs represented by ACTQ/OTA.

[2] In Telecom Regulatory Policy 2011-291, the Commission, among other things, rendered determinations regarding the frameworks for local competition and wireless number portability (collectively, local competition) that apply in the small ILECs' territories. A key component of the Commission's determinations was the reaffirmation that local competition should be introduced in the territories of the small ILECs. However, the Commission adopted special considerations, including modifications to the subsidy regime and recovery of local competition costs from competitors in some small ILEC territories to mitigate potential financial impacts on the small ILECs of implementing local competition.

[3] The local service subsidy regime is a regulatory mechanism designed to adequately compensate incumbent carriers for the provision of their residential services in high-cost areas where the Commission-approved rate charged for basic residential local service does not recover the associated costs of providing that service.

[4] The Commission's determinations and directives contained in Telecom Regulatory Policy 2011-291, paragraph 122, only as they relate to the small ILECs, paragraphs 166 to 186, and Appendix B.

b. stay the implementation of the Commission's decisions approving implementation plans for local competition in certain small ILEC territories,[5] and

c. suspend the proceeding to review the small ILECs' regulatory framework, which was initiated by Telecom Notice of Consultation 2011-348

pending a determination on ACTQ/OTA's petition to the Governor in Council[6] to vary certain determinations in Telecom Regulatory Policy 2011-291 and Telecom Decision 2011-733.[7]

2. The Commission requires the party requesting the stay to demonstrate that it meets the criteria set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, as modified by the Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (the RJR-MacDonald criteria). These criteria are that

   i. there is a serious issue to be determined;

   ii. the party seeking the stay will suffer irreparable harm if the stay is not granted; and

   iii. the balance of convenience, taking into account the public interest, favours granting the stay.

3. The Commission received comments regarding ACTQ/OTA's application from Bell Canada and Bell Aliant Regional Communications, Limited Partnership (collectively, the Bell companies), Bragg Communications Inc., operating as EastLink (EastLink), Cablovision Warwick inc., Cogeco Cable Inc., and TELUS Communications Company. The public record of this proceeding, which closed on 27 February 2012, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Have ACTQ/OTA satisfied the test for a stay?

4. ACTQ/OTA submitted that their application meets all three criteria for granting the requested stay.

5. ACTQ/OTA submitted that there are several serious questions that arise from the Commission's determinations in Telecom Regulatory Policy 2011-291, generally relating to whether their implementation will lead to results that are contrary to the

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5 Telecom Decisions 2012-35, 2012-36, 2012-37, 2012-38, 2012-39, 2012-40, 2012-41, 2012-42, 2012-43, 2012-44, 2012-45, 2012-46, and 2012-47. Cogeco Cable Inc. has informed the Commission that it will not be entering the four small ILEC territories referenced in Telecom Decisions 2012-39, 2012-43, 2012-44, and 2012-46.

6 The petition was filed on 3 February 2012.

7 In Telecom Decision 2011-733, the Commission denied a request by the ACTQ, the OTA, and CityWest Telephone Corporation to review and vary portions of Telecom Regulatory Policy 2011-291.

telecommunications policy objectives set out in section 7 of the *Telecommunications Act* (the Act).

6. With respect to the question of whether the applicants would suffer irreparable harm should the stay application be denied, ACTQ/OTA submitted that implementing the subsidy and local competition cost recovery regime established in Telecom Regulatory Policy 2011-291 would fail to mitigate the financial impact of implementing local competition. Instead, the regime would have a severe negative financial impact on their member companies and they would suffer irreparable harm through significant market share loss. ACTQ/OTA further submitted that implementing the determinations would threaten their long-term financial viability and their ability to meet their obligation to serve[8] all customers in their territories.

7. ACTQ/OTA submitted that in developing the regime, the Commission did not take into consideration the fixed nature of their members' operating costs, which restricts their ability to reduce their costs, their limited ability to raise rates, or the fact that the small ILECs serve only high-cost serving areas. It further submitted that, as a result of these factors, they are much more dependent on the subsidy received from the National Contribution Fund than the large ILECs.

8. ACTQ/OTA submitted that the balance of convenience favours granting the stay, since their member companies would be far more adversely impacted than would be any potential competitors, which are larger and more financially secure than their member companies. ACTQ/OTA further submitted that refusing to grant the stay would have a negative impact on the public interest, since it could threaten access to reliable and affordable telecommunications services of high quality for Canadians in rural areas where ACTQ/OTA members operate, which is contrary to the Act.

9. Several of the interveners submitted that there was not a serious issue to be determined arising from the stay application, noting that the Commission has already given due attention to the issues raised by ACTQ/OTA during the proceedings that led to Telecom Regulatory Policy 2011-291 and Telecom Decision 2011-733.

10. The interveners submitted that any potential harm alleged by ACTQ/OTA would not be irreparable. The interveners submitted that, if the Governor in Council grants ACTQ/OTA's petition and requires new entrants to absorb all the costs of implementing local competition, payments of costs can be made retroactively. EastLink noted that the 2011 subsidy amounts were established on an interim basis and can also be adjusted as required.

11. The interveners also submitted that the ACTQ/OTA companies will have the opportunity to "win back" lost customers and recover lost market share.

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[8] The obligation to serve requires incumbent carriers to provide telephone service to existing customers, new customers requesting service where the incumbent carrier has facilities, and new customers requesting service beyond the limits of the incumbent carrier's facilities.

12. The interveners submitted that the balance of convenience did not favour granting the stay since increasing competition is in the public interest and, absent implementation of the Commission's determinations, customers will continue to be without a competitive alternative for local telephone services in the affected territories. Several interveners also submitted that a stay would continue to place competitors already operating in these territories at a competitive disadvantage due to their inability to offer these services.

13. ACTQ/OTA replied that the possibility that new entrants may be required to pay costs associated with the implementation of local competition on a retroactive basis is not adequate, since ACTQ/OTA companies lack the financial resources to absorb losses while waiting for costs to be awarded in future proceedings.

14. ACTQ/OTA further replied that their member companies are making significant financial investments to enable local competition. ACTQ/OTA submitted that should the Governor in Council grant ACTQ/OTA's petition and oblige a new entrant to absorb all the costs associated with implementing local competition, a new entrant could potentially decide that competing within a small ILEC's territory is not financially viable. A small ILEC would not be able to recover its investment in such a situation.

15. ACTQ/OTA noted that customers in the territories of ACTQ/OTA companies are not denied the benefits of competition, since customers can purchase local voice services from wireless and voice over Internet Protocol (VoIP) service providers.

Commission's analysis and determinations

16. In assessing the merits of the stay requests, the Commission notes that ACTQ/OTA did not seek variance from the Governor in Council of the Commission's decision to permit local competition in the territories of the small ILECs. Rather, the Commission's determinations that are before the Governor in Council relate to the amount of subsidy to be received by small ILECs and the recovery of costs associated with the implementation of local competition in small ILECs' territories.

17. With respect to the specific criterion of irreparable harm, the Commission notes that pursuant to subsection 12(1) of the Act, a decision by the Governor in Council in respect of Telecom Decision 2011-733 must be issued by November 2012. The Commission also notes that the local competition implementation decisions sought to be stayed require that local competition be implemented by no later than July 2012. The Commission considers that ACTQ/OTA have not demonstrated that, given this short interval of time, continuing the implementation of the relevant Commission decisions absent a stay would threaten the financial viability of the small ILECs.

18. The Commission further notes that the subsidy amounts for the year 2011 have been established on an interim basis and can be adjusted retroactively, if required. The Commission also notes that should the Governor in Council vary the Commission's

determinations respecting the recovery of costs to implement local competition in the small ILECs' territories, there are mechanisms available to compensate a small ILEC, even if a potential competitor decided to no longer pursue entry into that small ILEC's territory. The Commission therefore considers that any harm would not be irreparable.

19. With respect to the specific criterion of the balance of convenience, the Commission notes that where competition is to be implemented, the small ILECs would be required, absent a stay, to invest in facilities and incur costs likely before the Governor in Council renders a decision on ACTQ/OTA's petition. However, as stated above, there are mechanisms available to compensate the small ILECs should the Governor in Council vary the Commission's determinations.

20. The Commission considers that competition provides customers with important benefits, such as innovative services, and has determined that these benefits should be available to customers who reside in the small ILECs' territories. The Commission also considers that delaying the implementation of local competition in the small ILECs' territories would disadvantage potential competitors of the small ILECs as they would continue to be unable to offer a comparable suite of communications services.

21. The Commission therefore considers that the balance of convenience, taking into account the public interest and in particular the benefits to customers, favours implementation of the Commission's determinations under review without delay.

22. Accordingly, the Commission finds that i) ACTQ/OTA have failed to demonstrate that their member companies will suffer irreparable harm in the absence of being granted their stay requests, and ii) the balance of convenience favours not granting the stay requests.[9]

23. In light of the above, the Commission **denies** ACTQ/OTA's requests to i) stay certain determinations in Telecom Regulatory Policy 2011-291 and the implementation of the Commission's decisions approving implementation plans for local competition in certain small ILEC territories, and ii) suspend the proceeding to review the small ILECs' regulatory framework.

24. Further, the Commission requires those small ILECs subject to the Commission's decisions approving implementation plans for local competition referenced above[10] to track and maintain a record of all relevant costs associated with the implementation of local competition in their territories. This information will assist the Commission in the event of a variance of the Commission's determinations by the Governor in Council.

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[9] In light of the Commission's findings with respect to the irreparable harm and balance of convenience criteria of the RJR-MacDonald test, it is unnecessary for the Commission to consider whether ACTQ/OTA have successfully met the first criterion of the test (a serious issue to be determined).

[10] Except Telecom Decisions 2012-39, 2012-43, 2012-44, and 2012-46.

25. The dissenting opinion of Commissioner Lamarre is attached.

Secretary General

Related documents

- *Wightman Telecom Ltd. – Implementation of local competition for Bragg Communications Inc., operating as EastLink,* Telecom Decision CRTC 2012-47, 24 January 2012

- *La Compagnie de Téléphone Upton Inc. – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-46, 24 January 2012

- *Tuckersmith Communications Co-operative Limited – Implementation of local competition for Bragg Communications Inc., operating as EastLink,* Telecom Decision CRTC 2012-45, 24 January 2012

- *La Compagnie de Téléphone de St-Victor – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-44, 24 January 2012

- *Le Téléphone de St-Éphrem inc. – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-43, 24 January 2012

- *Sogetel inc. – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-42, 24 January 2012

- *Mornington Communications Co-operative Limited – Implementation of local competition for Bragg Communications Inc., operating as EastLink,* Telecom Decision CRTC 2012-41, 24 January 2012

- *Téléphone Milot inc. – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-40, 24 January 2012

- *La Compagnie de Téléphone de Lambton Inc. – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-39, 24 January 2012

- *Hay Communications Co-operative Limited – Implementation of local competition for Bragg Communications Inc., operating as EastLink,* Telecom Decision CRTC 2012-38, 24 January 2012

- *Téléphone Guèvremont inc. – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-37, 24 January 2012

- *CoopTel – Implementation of local competition for Cogeco Cable Inc.,* Telecom Decision CRTC 2012-36, 24 January 2012

- *Bruce Telecom – Implementation of local competition for Bragg Communications Inc., operating as EastLink, and wireless number portability for Rogers Communications, on behalf of Rogers Wireless*, Telecom Decision CRTC 2012-35, 24 January 2012

- *ACTQ/OTA/CityWest – Application to review and vary Telecom Regulatory Policy 2011-291 regarding determinations affecting small incumbent local exchange carriers*, Telecom Decision CRTC 2011-733, 28 November 2011

- *Review of regulatory framework for the small incumbent local exchange carriers and related matters*, Telecom Notice of Consultation CRTC 2011-348, 26 May 2011, as amended by Telecom Notices of Consultation CRTC 2011-348-1, 5 July 2011, 2011-348-2, 28 November 2011, and 2011-348-3, 21 December 2011

- *Obligation to serve and other matters*, Telecom Regulatory Policy CRTC 2011-291, 3 May 2011, as amended by Telecom Regulatory Policy CRTC 2011-291-1, 12 May 2011

Appendix

Small ILECs represented by ACTQ/OTA

ACTQ member companies

CoopTel
La Cie de Téléphone de Courcelles Inc.
La Compagnie de Téléphone de Lambton Inc.
La Compagnie de Téléphone de St-Victor
La Compagnie de Téléphone Upton Inc.
Le Téléphone de St-Éphrem inc.
Sogetel inc.
Téléphone Guèvremont inc.
Téléphone Milot inc.

OTA member companies

Brooke Telecom Co-operative Ltd.
Bruce Telecom
CityWest Telephone and Cable Corp.
Cochrane Telecom Services
Dryden Municipal Telephone System
Execulink Telecom Inc.
Gosfield North Communications Co-operative Limited
Hay Communications Co-operative Limited
Huron Telecommunications Co-operative Limited
Lansdowne Rural Telephone Co. Ltd.
Mornington Communications Co-operative Limited
Nexicom Telecommunications Inc.
Nexicom Telephones Inc.
North Frontenac Telephone Corporation Ltd.
NRTC Communications
Ontera
Quadro Communications Co-operative Inc.
Roxborough Telephone Company Limited
Tuckersmith Communications Co-operative Limited
Wightman Telecom Ltd.
WTC Communications

Dissenting Opinion of Commissioner Suzanne Lamarre

1. Unlike my colleagues in the majority, I am in favour of the applications by ACTQ and OTA, since, in my opinion, this is a question of equity, as evidenced by the analysis of the facts of the cases in light of the applicable criteria.

2. With all due respect, I believe that the Commission's analysis leading it to deny the request to stay certain determinations in Telecom Regulatory Policy 2011-291 and the implementation of the Commission's decisions approving implementation plans for local competition in certain small ILEC territories has some significant deficiencies, leading to an erroneous finding.

3. Furthermore, the decision to not suspend the proceeding to review the small ILECs' regulatory framework, which was initiated by Telecom Notice of Consultation 2011-348, is not motivated, and contradicts a recent decision made by the Commission on the same subject.

4. Finally, it is the CRTC's duty to give full effect to all relevant provisions of the *Telecommunications Act* (the Act), which it must implement to the best of its ability; therefore, in order to fulfill this duty, the stay and suspension requests should have been granted.

Background

5. The applicants filed with the Commission an application to stay Telecom Regulatory Policy 2011-291, as confirmed in Telecom Decision 2011-733, while filing a petition to the Governor in Council, and an application to stay the implementation plans for that policy. They also filed an application to suspend the review of a related regulatory framework.

6. The Governor in Council will draw its own conclusions at an opportune time on the merits of the regulatory policy issues that were submitted to it. Meanwhile, it is up to the Commission to determine whether or not, under the applicable rules of law and the circumstances of this case the stays and suspension are justified.

7. The Commission's role with regard to the applicants' requests and interveners' objections is to ensure that

    - the applicants' rights of appeal as set out in the Act are preserved, in terms of both form and effect;
    - the decision to introduce competition for basic local telephone service in small ILEC territories is implemented in an orderly manner; and
    - the Commission's decisions do not deprive of its effect any provision of the Act that is relevant and applicable in this case.

8. With that in mind, I undertake the following analysis.

Applications to stay the application of Telecom Regulatory Policy 2011-291 and its implementation plans

9. I agree with the majority that the applicable criteria are those established by the Supreme Court of Canada in *Manitoba (Attorney General)* v. *Metropolitan Stores (MTS)* Ltd. [1987] 1 S.C.R. 110, and modified in *RJR-MacDonald Inc*. v. *Canada (Attorney General)* [1994] 1 S.C.R. 311 (the RJR-MacDonald criteria).

10. I believe however that the criteria were not subjected to rigorous analysis, resulting in an erroneous finding. As such, I will review the three criteria in order: the serious question, irreparable harm and the balance of inconvenience.

Serious question

11. Surprisingly, the Commission paid no attention to this criterion, which could be a cause for complaint by either the interveners or the applicants since if the question before us is not considered serious, there is no need to examine the other two criteria. Given that the majority gave no explanation regarding this criterion and that the other two criteria were analyzed, it can be concluded that the majority considered that the seriousness of the question was self-evident.

12. Personally, I prefer to conform strictly to the order established by the Supreme Court, and to its ruling that, unless the application is frivolous or vexatious, the judge to whom the stay application is made shall generally analyze the other two criteria. In this case, the stay applications were made in the context of a petition to vary submitted to the Governor in Council under subsection 12(1) of the Act, within the established time frame, the result of which could change or even nullify a regulatory policy in effect and have a major impact on the development of several telecommunications companies, both incumbents and competitors. As such, the applicants' stay applications are neither frivolous nor vexatious, and it is therefore necessary that the other two criteria be analyzed.

Irreparable harm

13. The majority's analysis of the submission that the applicants would suffer irreparable harm is incomplete. The arguments and facts supporting this position were ignored in favour of considering only those supporting its denial.

14. To the point made above, paragraph 17 of the decision refers to the deadline set out in subsection 12(1) of the Act for the Governor in Council to make a determination that there is no possibility of irreparable harm. In other words, it is considered that the time it takes for the Governor in Council to make its decision by the deadline date and decide in favour of the applicants would, in itself, be insufficient to have caused irreparable harm. It is possible that any harm caused during that time would be reparable, but the deadline alone is insufficient justification for drawing this conclusion; objective data on what occurs in the meantime would be required. No data or further explanation was provided by the majority to support its finding.

15. The available data or explanation that must be mentioned is that provided by the applicants in their petition to the Governor in Council and quoted in the interveners' reply: small ILECs expect to lose, on average, 10% market share in the first year of competition in the territories in which competition is imminent, if the conditions set out in the regulatory policy are maintained. Could this average loss be considered irreparable harm while the applicants wait for a decision, hypothetically in favour of the applicants, by the Governor in Council by the end of November 2012? To answer this question, two elements that were also ignored in the majority decision must be considered.

16. First, the 10% in question is an **average**. An average is made up of a set of data that are either higher or lower than that average. The market loss will not be 10% uniformly across the board.

17. Second, together, ACTQ and OTA represent nearly **30 separate companies**. The 10% average applies to a little less than 20 of these companies, which have **between 3,000 and 20,000 subscribers, approximately**. For discussion purposes, note that this translates into a subscriber average of 7,502, with a standard deviation of 4,518 subscribers!

18. Based on these few pieces of general information, it can logically be expected that certain companies would lose a little and others a lot. As such, it can be of concern that some companies – likely those with barely over 3,000 subscribers who will be obligated to invest for the implementation of competition without having a large number of customers – would be the most vulnerable to the extent where a determination by the Governor in Council in November 2012 would be too late and a company might have been required to file for bankruptcy within that time. Such a situation would certainly constitute irreparable harm, since it would result in the company shutting down.

19. However, the applicants have not filed any direct evidence that such a scenario could occur **by November 2012**, since the financial projections filed as part of the petition to the Governor in Council are consolidated for the companies represented by OTA and ACTQ. While this concern is deep-seated, I must nevertheless cast it aside.

20. As such, like the majority, I find that a favourable decision by the Governor in Council would allow, if applicable, for the retroactive correction of any anticipated harm suffered by the applicants in the meantime, since the subsidy amounts were established on an interim basis and could be adjusted if the Governor in Council's decision calls for it.

21. That said, the applicants have provided evidence that there will be irreparable harm in at least one particular case while this evidence was not overturned by either the interveners or the Commission's comments in this decision.

22. If we do not approve the stay applications, the small ILECs will, indeed, have to continue to invest in territories where competitors are planning to pursue entry, with a deadline for completion of July 2012. If, following the Governor in Council's decision, it is established that competitors must absorb all the costs of implementing competition in all small ILECs territories, or at least in a larger number of territories than what is currently set out in Telecom Regulatory Policy 2011-291, those competitors will be able to withdraw **without reproach**.

23. The majority stated that "*there are mechanisms available to compensate a small ILEC, even if a potential competitor decided to no longer pursue entry into that small ILEC's territory*," but it does not identify a single one, while in the other situation analyzed, it made sure to specify that subsidy amounts could be adjusted retroactively to compensate for loss of revenue. If, at this stage, the majority cannot identify a remedy, we must admit that such a remedy does not exist.

24. The criterion of irreparable harm has therefore been met.

Balance of inconvenience

25. While in the Commission's analysis of irreparable harm, the deadline for the Governor in Council's decision is so short that it cannot cause irreparable harm to the applicant, it is so long that it is causing significant inconvenience to new competitors and the public interest!

26. I do not understand how one thing and its opposite can be argued in the same decision, based on the same facts.

27. I therefore find that the delay is indeed an inconvenience for new competitors, the applicants and the public interest. In short, the wait is annoying for everyone – annoying, yet fixed and known. According to the Act, the Governor in Council's decision must be made within one year of the contested CRTC decision date. The deadline, therefore, is 27 November 2012.

28. That said, the delay that would be caused by staying the policy and the implementation plans is not the biggest inconvenience, specifically with regard to the public interest.

29. Rather, it would be the uncertainty resulting from the **premature implementation of a regulatory policy** that, although in force and effect in the absence of a stay, is **not yet final**. I am baffled by the lack of analysis in this regard in the majority decision.

30. The interveners and even the Commission argue that the importance of competition to consumers requires the immediate implementation of Telecom Regulatory Policy 2011-291. That competition is a matter of public interest. But this immediate implementation has a sword of Damoclese hanging over it: the upcoming decision of the Governor in Council. And whatever claims may be made, public interest goes

well beyond the mere existence of a local telephone competitor at any given point in time.

31. Note, too, that this is not a case of total lack of competition. Let us recall a few facts. Small ILECs' territories are open for competition for all telecommunications services except one. Internet, long-distance services, and wireless communications may already be competitive in those territories, if competitors so wish.

32. The last service for which competition shall – I say *shall* – at last be established is the most fundamental one because it is the only service for which there is an obligation to serve for all incumbents: basic local telephone service. That competition can be established in two ways: orderly or disorderly. The public interest requires that it be established in an orderly fashion, especially since the evidence on file clearly demonstrates that that competition will be neither provided nor available to all subscribers in those territories.

33. Granting stays while waiting for the Governor in Council's decision will ensure that competition will indeed be established in an orderly manner, since whatever rules there are will then be known and final. Conversely, **denying the stays automatically creates uncertainty regarding the nature, scope, duration and benefits of this competition** while waiting for the Governor in Council's decision. How will this uncertainty, and the impact it will have on customers, be communicated to the consumers parties will want to serve during that waiting period? What will happen to those customers and the service conditions to which they agreed if the rules of competition are changed a few months after competition is implemented? No mention of this by anyone. I am greatly concerned by this.

34. One thing is certain, however: disorder and confusion will ensue if the rules are changed along the way. This means that denial of the stays may indirectly influence the file submitted to the Governor in Council. It is also possible that the existing rules will simply be confirmed. But I have no desire to wage the interests and protection of consumers, or the business plans of incumbent and competitive carriers, on the outcome of the Governor in Council's upcoming decision.

35. The balance of inconvenience with respect to the broad public interest, that is the vitality of carriers, both incumbent and competitive, the stability of the regulatory system, and the interest and protection of consumers therefore favour granting stays, not denying them.

36. Since the three criteria, established by the Supreme Court and recognized by the majority as being the appropriate test to use under the circumstances, have been met in support of the applicants, in my opinion, the stays must be granted.

Request to suspend the regulatory framework review undertaken in Telecom Notice of Consultation 2011-348

37. The request to suspend the regulatory framework review is summarily denied in paragraph 23(ii) with no valid explanation, in the same breath as the denial of the

request to stay the implementation of Telecom Regulatory Policy 2011-291, confirmed by Telecom Decision 2011-733. The only words that might be considered an explanation are "In light of the above" at the very beginning. What precedes paragraph 23 is the analysis of the criteria applicable to the requests to stay an existing decision that is already in force, not for a request to suspend a process to review a regulatory framework. **The Commission's analysis, in paragraphs 16 to 22, of the stay application and its conclusions are therefore neither relevant nor applicable to the request for suspension.**

38. The suspension request must be analyzed independently, and the applicable criterion is that of the reasonableness of the request, as already applied by the Commission **in the same context**.

39. In fact, such a suspension request was made initially in June 2011, when the applicants filed an application to review and vary Telecom Regulatory Policy 2011-291. In Telecom Notice of Consultation 2011-348-1, the Commission then stated the following:

> …they [ACTQ and OTA] requested that the Commission defer the Telecom Notice of Consultation 2011-348 process currently underway until it issues its determinations on the review and vary application [regarding Telecom Regulatory Policy 2011-291].
>
> 2. The Commission recognizes that **its determinations on the** ACTQ/OTA **review and vary application** may **have an impact on the submissions of parties** in the Telecom Notice of Consultation 2011-348 process, and considers the ACTQ/OTA **request reasonable**. [emphasis added]

40. Following the Commission's determination in Telecom Decision 2011-733 on 28 November 2011, the process initiated by Telecom Notice of Consultation 2011-348, then suspended by Telecom Notice of Consultation 2011-348-1, was set back into motion the same day by Telecom Notice of Consultation 2011-348-2, with an appropriate adjustment made to the timelines.

41. In the present case, ACTQ and OTA are filing a new request for suspension in the context of the written petition to vary Telecom Decision 2011-733, which confirms Telecom Regulatory Policy 2011-291. The comparison between the reviewing power of the Governor in Council, as set out in section 12(1) of the Act and that of the CRTC, as set out section 62 of the Act, is instructive:

12. (1) Within one year after a decision by the Commission, **the Governor in Council may**, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, **vary or rescind the decision or refer it back to the Commission** for reconsideration of all or a portion of it. [emphasis added]	62. **The Commission may**, on application or on its own motion, **review and rescind or vary any decision made by it or re-hear** a matter before rendering a decision. [emphasis added]

42. It is clear that the remedies available to the Governor in Council with respect to ACTQ/OTA's petition are identical to those of the Commission with respect to a contestation of one of its decisions. Furthermore, ACTQ/OTA are, in substance, presenting before the Governor in Council the vary request they filed with the Commission in 2011 and to which Telecom Notice of Consultation 2011-348-1 refers. If the remedies are the same, and the circumstances and applications are the same, then the result must be the same.

43. If it was reasonable in July 2011 to await the Commission's determination before proceeding, it is still reasonable in March 2012 to await the Governor in Council's decision before continuing. As long as the applicants had not filed a proper petition with the Governor in Council, there was no valid cause to suspend the process again. But now that this is done, it is essential to suspend the regulatory framework review.

44. I admit that it is obviously frustrating, for those who want to see the anticipated changes being examined move forward, to await the Governor in Council's decision before continuing a process that is already under way. But to act otherwise, in my opinion, is as much a lack of deference to the Governor in Council's prerogatives as a denial of justice for the applicants which are legitimately exercising their rights as provided for explicitly under the Act.

Giving full effect to the provisions of the Act

45. Of course, competitors eagerly waiting to offer new services to existing customers, or existing services to new customers, will therefore have to be patient a little longer before leaving their starting block. Likewise, customers who are keen to look for a new provider will also have to be patient. I am not at all insensitive to the situation; on the contrary. But in all fairness, this situation is not the only one to be considered.

46. Granting the stays requested by the applicants will delay the implementation of competition in the territories of the small ILECs for the basic local telephone service. On the other hand, that delay will be less than eight months, since the Governor in Council must render its decision by late November 2012. As well, suspending the process to review the regulatory framework applicable to small ILECs will further delay the implementation of this potential review.

47. All things considered, and with full lucidity, I am of the firm conviction that the inconveniences caused by these delays are simply outweighed by the following:

- First, the need to provide a clear and certain regulatory framework to the benefit of consumers and carriers, in accordance with the objectives of section 7 of the Act;

- Second, the need to assure for all carriers that the Commission regulates, whether incumbent or competitive, the full exercise of their rights, as conferred onto them by the Act and our legal system; and
- Last, the need to respect the Governor in Council's authority, as set out in the Act, and the exercise of that authority with equanimity.