

2 Chapter 2 Policy Objectives and Regulation



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A statement of Canadian telecommunications policy objectives was first included in legislation when the *Telecommunications Act* came into effect in 1993 (see excerpt). Prior to then, legislative policy direction for regulation was limited to several general policies embedded in legislation, principally those requiring rates to be “just and reasonable” and prohibiting “unjust discrimination.”

Excerpt from the *Telecommunications Act*, 1993

Canadian Telecommunications Policy

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives
- (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
 - (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
 - (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
 - (d) to promote the ownership and control of Canadian carriers by Canadians;
 - (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
 - (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
 - (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
 - (h) to respond to the economic and social requirements of users of telecommunications services; and
 - (i) to contribute to the protection of the privacy of persons.

The Panel's consultations have made it clear that there is a need to update and clarify the policy objectives set out in the Act. The 1993 Act was largely based on a regulatory framework that had evolved from early 20th century railway, telegraph, telephone and public utilities law. While the policy objectives set out in the Act are more modern than other provisions in the Act, some objectives are clearly dated and are linked to policy issues of the early 1990s. As described in the previous chapter, the telecommunications environment has changed significantly since that time.

Some of the core objectives of Canadian telecommunications policy have remained constant. In particular, the Panel believes telecommunications policy should continue to focus on the core objective of promoting affordable access to telecommunications services in all regions of Canada. However, a forward-looking policy should go well beyond that. It should:

- ensure that telecommunications markets can operate effectively to provide Canadians with a wide range of advanced broadband, Internet and other electronic services, including e-commerce, health, education and government services
- reflect the fact that most telecommunications services are now provided in Canada in vigorously competitive telecommunications markets, and anticipate completion of the transition away from the monopolistic telecommunications environment of the past
- provide a framework that promotes a telecommunications infrastructure that will advance not only Canada's social welfare, but also its economic prosperity.

The Panel's consultation process highlighted a number of problems with the policy objectives set out in s. 7 of the *Telecommunications Act*. Some are substantive problems that call for changes to reflect the current telecommunications environment and to include important objectives for the future that are not clearly set out in s. 7. Other problems relate to conflict and lack of clarity in the existing objectives.

The Panel believes the objectives require updating and clarification:

- to better focus regulatory and other government measures by more clearly articulating Canada's national telecommunications policy objectives
- to place greater emphasis on market forces as a means to achieve policy objectives
- to ensure that, in an increasingly market-driven environment, important social goals are properly protected and advanced
- to recognize that regulation and other forms of government intervention have costs and can, in some circumstances, undermine achievement of policy objectives
- to provide guidance, which is not currently provided in the Act, on the extent to which regulation and other forms of government intervention should be applied in competitive markets.

The Need for Change

The legislative policy objectives should provide guidance for government involvement in the Canadian telecommunications sector. At a more specific level, they should provide guidance to the Canadian Radio-television and Telecommunications Commission (CRTC), the government and the Minister responsible in the exercise of their powers under the *Telecommunications Act* and other telecommunications legislation.

The Panel believes the legislative policy objectives should be clear and explicit, and should provide practical guidance to regulators and government officials in the discharge of the responsibilities delegated to them by Parliament. The current objectives do not meet these requirements. Some are overlapping and inconsistent, while others are vaguely worded.

As an example of these problems, it is difficult to reconcile the objective in para. 7(a) of the Act “to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions” and that in para. 7(f) “to foster increased reliance on market forces. . . .” The first implies that the government must decide how to develop the telecommunications system in an “orderly” manner. It is reminiscent of legislation for a government-planned program. It conflicts with the objective of relying on market forces. Moreover, s. 7 is vague in that it provides no guidance on how much reliance should be placed on market forces as opposed to regulation, stating only that such reliance should be “increased.”

The practical implications of applying the current s. 7 objectives are often unclear. As a result, they are used by parties in CRTC proceedings to justify arguments in support of a very wide range of different and often conflicting regulatory actions.

Section 7 fails to distinguish between policy objectives, such as promoting affordability and efficiency of telecommunications markets, and the means for achieving those objectives, such as regulation or reliance on market forces. This creates a risk of confusion between the “means and ends” of telecommunications policy. The Panel believes Canada’s legislative framework should separate the objectives of telecommunications policy from the means for achieving them. This is particularly important in today’s competitive markets, where reliance on market forces is often regarded as the best means of achieving some key objectives for Canada’s telecommunications sector, such as affordability and access to telecommunications services.

The current policy objectives date from a time when most telecommunications services were heavily regulated. In 1993, it was not clear that competition would emerge to the extent it has. At that time, few policy makers had foreseen the disruptive effects that would result from technological developments such as the Internet and other Internet Protocol (IP) platforms, broadband and wireless networks, nor the potential for services enabled by such developments, such as VoIP (voice over IP) and IP television, to undermine the dominant positions of telephone and cable television companies in their respective core markets.

Telecommunications markets have changed radically since 1993. In general, today's competitive markets are functioning well to provide Canadians with a wide and growing range of advanced and innovative services at reasonable prices. At the same time, growing competition and convergence are making it increasingly difficult for regulators and governments to intervene in telecommunications markets and to direct industry behaviour in the way it was possible to do in the era of monopoly telephone and cable television companies. Today, there is a greater risk that detailed regulatory intervention can impose significant costs and unintended consequences on consumers and on the economy; for example, by promoting services or technologies that ultimately will fail or by retarding development of more efficient ones. Today, there are substantial risks that detailed and intrusive regulation may compromise realization of the full economic and social potential of Canadian telecommunications markets, rather than contribute to achievement of this goal.

Therefore, the Panel believes the legislative framework should specify the circumstances in which regulation is still warranted and that it should provide clear direction on the use of regulatory powers so regulation does not unnecessarily impede the development of market forces.

As discussed in Chapter 3, Economic Regulation, the Panel believes Canada's telecommunications markets have evolved to a point that justifies replacement of the current legislative presumption favouring regulation with one favouring reliance on market forces. While the CRTC has been moving in this direction, the Panel believes the legislative policy framework should make it clear that, going forward, regulation should continue or be imposed only where there is a clearly demonstrated need for it. At the same time, the Panel recognizes that market forces cannot be relied upon to achieve all policy objectives. This is particularly true in the case of social objectives.

The Panel believes the legislative framework should identify the key social objectives of Canada's telecommunications policy more clearly than is currently the case. The very general language of some of the current objectives provides little operational guidance on how objectives should be achieved. For example, in practice it is difficult to apply the current paragraph 7(a) objective that the telecommunications system should serve "to safeguard, enrich and strengthen the social and economic fabric of Canada." Instead of being stated in such general terms, the Panel believes key social objectives should be specifically identified.

In many cases, social objectives may be achieved by market forces alone. In other cases, they may require continued regulation or other forms of government intervention. Clarification of the social objectives of telecommunications policy will better enable regulatory measures to be specifically targeted to these objectives. Targeted and cost-effective implementation of social objectives will also contribute to achievement of the economic objectives for Canada's telecommunications policy. The specific types of regulation used to achieve social and economic objectives, and the relationship between them, are discussed in Chapters 3, Economic Regulation, and 6, Social Regulation.

New Policy Objectives

The Panel recommends replacing the current policy objectives section of the *Telecommunications Act* with new provisions that not only clarify the policy objectives for Canada's telecommunications sector but also set out guidelines for government or regulatory action to achieve them.

This subsection discusses the objectives. The next subsection deals with the proposed guidelines. The rationale for these objectives and the regulatory framework required to implement them are discussed in detail in succeeding chapters. In particular, Chapter 3 explains the rationale for proposed changes to economic regulation, while Chapter 5 discusses technical regulation, Chapter 6 considers social regulation, Chapter 7 examines Canada's information and communications technology policy, and Chapter 8 considers measures to expand access to broadband telecommunications infrastructure.

An overall thrust of the Panel's recommendations is that competitive market forces now can achieve many of Canada's telecommunications policy objectives without regulatory or government intervention. This will increasingly be the case in the future. However, the recommended objectives reflect the Panel's view that certain key social objectives continue to be of critical importance in Canadian telecommunications policy. The Panel recommends several concrete new initiatives to achieve important social objectives that market forces are unlikely to achieve on their own, even as competition increases.

In Chapter 6, the Panel recommends three initiatives:

- imposition of an explicit legal obligation on incumbent local exchange carriers (i.e. the telephone companies that have historically served an area) to continue to provide essential telecommunications services
- a new telecommunications consumer agency to provide an improved means for consumers to resolve disputes with telecommunications service providers
- a clear consumer right to access Internet content and applications of their choice, regardless of their telecommunications access provider.

In Chapter 8, the Panel recommends a new government program, the U-CAN program, to accelerate the expansion of broadband telecommunications infrastructure in non-economic areas of the country.

The Panel believes certain key social objectives will remain a priority for Canadians as telecommunications becomes an increasingly important enabler of economic and social activities, and an increasingly critical infrastructure for the delivery of government and public services such as health and education.

Accordingly, the Panel's first proposed policy objective is "to provide affordable access¹ to advanced telecommunications services in all regions of Canada, including rural and remote areas." As in the past, "affordable access" should continue to be a central objective of Canadian telecommunications policy, since affordable access to telecommunications services is required for full participation in Canadian society and economic activity. The affordable access objective also recognizes that in some areas, particularly rural and remote ones, the costs of providing telecommunications service are so high that market forces alone are unlikely to be able to provide affordable access without government intervention.

In Chapter 8, the Panel concludes that broadband telecommunications access will be an essential enabler of the economic and social welfare of individual Canadians, regardless of where they live, and that the market will fail to achieve the goal of ubiquitous broadband access by 2010, particularly in rural and remote areas. This is the basis for the Panel's recommendation of the government-funded U-CAN program.

The Panel's second proposed policy objective is to enhance the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy. This important economic objective reflects the vital role that telecommunications and information and communications technologies play in contributing to economic prosperity and to improving the overall standard of living of Canadians.

This objective recognizes that government or regulatory measures may be required to improve the economic efficiency of markets, for example, by dealing with the abuse of monopoly or "significant market power" or by ensuring efficient interconnection of telecommunications networks. In other cases, where the costs of regulation may outweigh the benefits, this economic objective should constrain excessive regulation.

As discussed in detail in Chapter 3, the Panel considers it critical for government and regulatory intervention not to undermine the second proposed objective. Therefore, the Panel recommends:

- significant reductions in economic regulation
- guidelines to limit regulation to those situations in which market forces alone cannot be relied upon.

The third recommended objective articulates four key social goals, three of which are not explicitly identified in the current *Telecommunications Act*.

¹ The Panel notes that the term "access" is used in different ways in telecommunications policy and regulation. The legislative provisions to implement this "affordable access" objective should make it clear that they are aimed at ensuring that "end-users" have affordable access to advanced telecommunications services. The term "end-users" is meant to refer to consumers, businesses, government, non-profit and other users of telecommunications services. It is not meant to refer to other telecommunications service providers that resell services, with or without adding value. Policy issues relating to "wholesale access" to telecommunications services (i.e. access between telecommunications service providers) are dealt with in Chapter 3.

In some cases, these goals cover policy areas in which existing regulatory practices are reasonably well developed. For example, the CRTC has taken a number of measures over the years to promote access to telecommunications services by persons with physical disabilities. However, the proposed objective will, for the first time, provide legislative direction to promote such access. The proposed third objective will also give explicit legislative recognition of the importance of social objectives related to enhancing public safety and security, protection of privacy and limiting public nuisance through the telecommunications system.

On the basis of the foregoing considerations, the Panel recommends restating the telecommunications policy objectives set out in the *Telecommunications Act*.

Recommendation 2-1

The Canadian telecommunications policy objectives as currently set out in the *Telecommunications Act* should be clarified to:

- (a) set out the objectives of Canadian telecommunications policy, and
- (b) provide guidelines for regulatory and government action to achieve these objectives.

Recommendation 2-2

Section 7 of the *Telecommunications Act* should be removed and replaced with the following:

*“Canadian Telecommunications Policy and Government
and Regulatory Guidelines”*

“7. It is hereby affirmed that telecommunications performs an essential role in enabling the economic and social welfare of Canada and that Canadian telecommunications policy is based on the following objectives:

- (a) to promote affordable access to advanced telecommunications services in all regions of Canada, including urban, rural and remote areas;
- (b) to enhance the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy; and
- (c) to enhance the social well-being of Canadians and the inclusiveness of Canadian society by:
 - (i) facilitating access to telecommunications by persons with disabilities;
 - (ii) maintaining public safety and security;
 - (iii) contributing to the protection of personal privacy; and
 - (iv) limiting public nuisance through telecommunications.”

Guidelines for Government and Regulatory Action

As discussed elsewhere in this report, particularly Chapter 1, Canada has one of the world's most competitive telecommunications markets. The CRTC has recognized this and is moving toward increased forbearance from regulation. However, the current Canadian regulatory framework still includes very detailed and extensive forms of economic regulation, particularly in respect of local retail services of the incumbent local exchange carriers. The current *Telecommunications Act* lacks clear direction with respect to the balance between economic regulation and reliance on market forces. The current objectives require only that “increased reliance” on market forces should be “fostered.”

Since 1970, the regulatory framework set out in the *Telecommunications Act* and its predecessor legislation, the *Railway Act*, has contained a clear presumption in favour of regulation of all telecommunications services provided by Canadian telecommunications carriers. This framework requires prior CRTC regulatory approval of all of the rates² and tariffs³ of all such carriers, including all their services, unless a class of carriers is exempted from regulation,⁴ or unless the Commission forbears from regulating the service.⁵ However, the current Act also provides the Commission with a very broad discretion to decide to forbear if it finds that a type of telecommunications service will be subject to “sufficient” competition to protect the interests of users.

The Act provides no guidance on the tests to be used to determine when such competition is “sufficient” and no direction is given regarding the relative weight to be given to regulation and market forces in markets that remain subject to some regulation. This raises the potential for overly slow or cautious forbearance from regulation in competitive markets, and for overregulation in markets where some regulation may still be required but where market forces may be sufficient to supplement some or all of it.

There will continue to be a significant role for some forms of telecommunications regulation for the foreseeable future. There are areas of the country, particularly remote areas, in which competitive market forces may never be sufficient to entirely replace economic regulation. In addition, the pursuit of social objectives is likely to require continued social regulation of some types. Government and CRTC involvement in technical regulation — for example, through oversight of interconnection arrangements, spectrum management, and access to support structures and rights-of-way — will likely also be required on an ongoing basis.

Since telecommunications markets will continue to be governed by a combination of market forces and regulation, the Panel believes Canada's telecommunications legislation should

² Subsection 25(1) of the *Telecommunications Act* prohibits all Canadian carriers from providing a telecommunications service except in accordance with a tariff filed with and approved by the CRTC. The tariff must specify the rate, or the maximum or minimum rate, or both, to be charged for the service.

³ Section 24 requires telecommunications services to be provided subject to any conditions imposed by the CRTC or included in tariffs approved by the Commission. The tariffs of carriers generally include a comprehensive description of the conditions under which the service is offered.

⁴ Pursuant to s. 9 of the Act.

⁵ Pursuant to s. 34 of the Act.

provide a clearer direction on when regulation is required as well as on the nature and extent of regulatory measures. In arriving at its recommendations to guide future regulatory and government intervention, the Panel considered the following factors.

First, there should be a general predisposition in favour of reliance on market forces. This approach is warranted by:

- the very substantial level of competition that has emerged in Canadian telecommunications markets, including the establishment of at least two competitive local access network infrastructures in the large majority of Canadian markets
- technology and global market trends, which are providing an increasing range of competitive alternatives to existing regulated telecommunications services
- the extent to which market forces have successfully provided what Canadians need; that is, widespread access to an increasing range of reliable and advanced services at reasonable prices and conditions, including one of the highest levels of advanced broadband access services in the world
- the proposition that government regulatory intervention is costly and potentially disruptive, and that it should be used selectively to solve clearly identified problems or to achieve important social or economic goals
- the related proposition that reliance on market forces is preferable to regulation in situations where both options can achieve the same policy goals.

Second, the Panel notes that effective and informed regulation of telecommunications markets is a complex and problematic endeavour. Detailed economic regulation of telephone companies worked reasonably well in the simpler and more stable monopoly environment of the past. In that era, a diligent and skilled regulator could:

- try to gather all necessary information
- try to accurately assess current and expected market dynamics
- rely on the continued validity of both that information and those assessments
- take the time necessary to come to well-considered regulatory decisions
- be reasonably confident that its decisions would have the intended impact.

In contrast, today's telecommunications markets are very competitive, dynamic and complex. This undermines the effectiveness of economic regulation in many areas and introduces new costs. In the new environment, these costs include not only the traditional costs of the regulatory process and compliance, but also the negative impact of regulation on the development of efficient markets, the disruptive implications of acting on uncertain information, the potential for unintended consequences, the distortion of market outcomes and other similar elements. Consequently, even where market forces operate imperfectly, one can no longer assume that regulation will automatically produce a better result. In fact, in some circumstances, regulation

can delay the introduction of advanced new services. It can also mandate prices higher than those that would occur in an unregulated market.

The Canadian telecommunications sector has reached a tipping point. Today, unlike in the past, one can assume that competitive market forces will generally provide a more effective and less costly means than economic regulation of achieving Canada's telecommunications policy objectives. It is time for the regulatory framework to provide clear guidance regarding the primacy of market forces and to clarify the more limited circumstances in which regulation or other forms of government intervention should be applied.

In this context, the Panel agrees with the following principles set out in *Smart Regulation: A Regulatory Strategy for Canada*⁶:

- regulation, where required, should be clearly directed at achieving the intended policy objectives
- regulators should strive for the least costly and intrusive means to achieve policy objectives, avoiding overlap, duplication and inconsistency, minimizing the potential risks of unintended consequences and providing for enforcement that is commensurate with the risks and problems involved.

Competitive market forces have evolved to the extent that they can replace regulation as the primary means for achieving Canada's telecommunications policy objectives. Accordingly, the *Telecommunications Act* should include guidelines to determine not only when regulatory or other government intervention is required but also the nature and extent of such intervention.

Recommendation 2-3

The *Telecommunications Act* should be amended by adding the following immediately after proposed section 7:

“7.1 The following guidelines shall be applied in implementing the telecommunications policy objectives:

- (a) **market forces shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives;**
- (b) **regulatory and other government measures shall be applied only where**
 - (i) **market forces are unlikely to achieve a telecommunications policy objective within a reasonable time frame, and**
 - (ii) **the costs of such measures do not outweigh the benefits; and**
- (c) **regulatory and other government measures shall be efficient and proportionate to their purpose and shall interfere with the operation of competitive market forces to the minimum extent necessary to meet the objectives.”**

⁶ External Advisory Committee on *Smart Regulation*, *Smart Regulation: A Regulatory Strategy for Canada* (Ottawa: the Committee, September 20, 2004). Available online at: http://www.pco-bcp.gc.ca/smartreg-regint/en/08/rpt_fnl.pdf

Compliance with Guidelines

The proposed guidelines for government and regulatory intervention are designed to ensure that achievement of telecommunications policy objectives is clearly advanced by regulation and other forms of government intervention, and that such intervention does not inadvertently interfere with the efficient operation of telecommunications markets. In the Panel's view, the policy objectives recommended by the Panel can best be achieved through rigorous adherence to these guidelines. Hence, the Panel believes the CRTC, as well as other government agencies and departments involved in implementing telecommunications policy and regulation, should be subject to a statutory requirement to demonstrate compliance with the guidelines on an ongoing basis.⁷

The purpose of this requirement is to focus the attention of regulators and other government officials, in each case, on whether a regulatory or government action is in fact required and, if so, whether there are other less intrusive or less costly ways to achieve a policy objective within a reasonable time frame. The Panel believes imposing this obligation on the regulator will help overcome the long-standing legislated presumption favouring regulation. This should ensure a more consistent and more rapid transition to reliance on market forces.

Recommendation 2-4

The *Telecommunications Act* should be amended by adding the following immediately after proposed section 7.1:

"7.2 All policy documents, decisions, orders or other means of introducing or amending significant government or regulatory measures shall:

- (a) specify the telecommunications policy objective that is advanced by the policy or measure;**
- (b) demonstrate compliance with the statutory guidelines for achievement of Canada's telecommunications policy objectives."**

⁷ This requirement is analogous to the requirement that regulatory impact analysis statements (RIAs) accompany new federal regulations. See the section on Regulatory Impact Analysis Statements in the Privy Council Office's *Regulatory Process Guide*, modified July 1, 2004, available online at: http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications&doc=regguide/regguide_e.htm. See also Privy Council Office, *Government of Canada Regulatory Policy*, approved in November 1999, available online at: <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications&Sub=GovernmentofCanadaRegula>. The Panel does not believe the full requirements of the Regulatory Process Guide and the other process requirements related to the development of formal regulations should be extended to the CRTC and other departments and agencies involved in implementing telecommunications policy and regulation, since this may increase regulatory lag, and frustrate the goal of expediting the telecommunications regulatory process. See Chapter 9 for a fuller discussion of telecommunications regulatory procedures.

Consistent Application of Policy

Today, a number of government departments and agencies are involved in implementing telecommunications policies and regulations. As previously indicated, the Panel believes Canada's telecommunications policy objectives should be implemented in a coherent and consistent manner by all such departments and agencies. These policy objectives should therefore apply not only to the CRTC in the performance of its duties under the *Telecommunications Act*, but also to the Minister of Industry in the implementation of telecommunications policies and programs.

Currently, there is no requirement for the Minister of Industry to exercise powers under the *Radiocommunication Act* or the *Department of Industry Act* in a manner that is consistent with Canada's telecommunications policy objectives.⁸ This report recommends a realignment and a clearer separation of the current regulatory and policy-making functions of the Minister (see Chapter 9, Policy-making and Regulatory Institutions). However, the Minister of Industry as well as other government departments and agencies may continue to develop and implement telecommunications policies, programs and regulatory measures that intervene in the operation of telecommunications markets, such as the U-CAN program recommended in this report.⁹

Recommendation 2-5

Amendments should be made to the *Radiocommunication Act*, the *Department of Industry Act* and other relevant federal legislation to ensure that all government departments and agencies that implement telecommunications policies, programs or regulatory measures act in a manner that promotes the achievement of Canadian telecommunications policy objectives and complies with the implementation guidelines as set out in the *Telecommunications Act*.

Regulation of Telecommunications Service Providers

Different kinds of service providers are entering the increasingly competitive Canadian telecommunications markets. One example of this growing diversity is the new entrants that resell telecommunications services obtained from other telecommunications carriers to provide the public with new VoIP telephone services. The CRTC's authority to regulate resellers and other telecommunications service providers (TSPs) under the *Telecommunications Act* is currently very limited. The CRTC's jurisdiction is largely confined to regulating "Canadian carriers" and the definition of that term excludes TSPs that do not own or operate their own transmission facilities.¹⁰

⁸ The *Radiocommunication Act* provides that the Minister "may have regard to" the telecommunications policy objectives in exercising his or her powers under s. 5 of that Act.

⁹ Including the broadband access programs run by the Minister of Industry, such as BRAND and NSI.

¹⁰ Telecom Public Notice CRTC 93-62, *Exemption of Resellers from Regulation*.

The government and the CRTC have recognized that the achievement of certain important social and technical objectives of regulation requires the application of some degree of regulation over the activities of TSPs that technically do not fall within the definition of “Canadian carriers.” Subsequent to the passage of the *Telecommunications Act* in 1993, Parliament enacted certain amendments to the legislation that expanded the CRTC’s authority over TSPs in order to include them within the scope of the international telecommunications licensing regime contained in s. 16.1. Section 46.5 was also enacted to enable the CRTC to include TSPs as contributors to the CRTC-established fund to support provision of affordable basic telephone service in high-cost areas.

The Act currently does not authorize the CRTC to impose other forms of regulation on TSPs, including technical or social regulation that aims to increase public safety or to ensure compliance with interconnection or technical rules. In the absence of other express powers to directly regulate TSPs, the CRTC has taken steps to establish an “indirect” form of regulation over them through the imposition of certain obligations in the tariffs of Canadian carriers that provide TSPs with underlying services and facilities. These obligations are found in provisions of the local exchange carriers’ tariffs governing resale activity and in access tariffs for various types of services.

Under this system of indirect regulation, the CRTC’s ability to ensure compliance by TSPs with its rules and regulations is limited in large measure to ordering the termination of service to the TSP by the Canadian carrier that provides the underlying transmission service if the TSP fails to comply with the provisions governing its receipt of service. Because of the economic and public safety implications of disconnection for tens of thousands of customers who rely on TSPs for the provision of telecommunications services, including local, long distance and emergency services, this type of enforcement mechanism tends not to be used, leaving the CRTC with no practical means of enforcing its social and technical regulation when it comes to TSPs.

The development of broadband technology and the increasing ability of TSPs to effectively duplicate the services offered by carriers using IP-based technologies, rather than simply reselling the underlying carrier’s services, suggests that this indirect form of regulation is not the most effective mechanism to ensure that TSPs comply with CRTC regulations under the *Telecommunications Act*.

This deficiency in the current legislative framework was highlighted by the CRTC in its submission to the Panel where it emphasized its recent experience in establishing a regulatory regime for VoIP services. As noted by the CRTC¹¹:

The recent public proceeding with respect to VoIP services has brought this issue into focus. VoIP services are now being sold that are functionally equivalent to local exchange service and are intended as a substitute for basic telephone service. In the past, resellers could resell the local exchange carriers’ basic local service, which included all of these important features. Now, in a VoIP environment, they can provide their own service with or without these features. While the objectives in section 7 of the *Act* require the Commission to address these issues, the *Act* currently limits the Commission’s ability to do so, except in an indirect manner.

¹¹ Telecom Decision CRTC 2005-28, *Regulatory Framework for Voice Communications Using Internet Protocol*.

This gap between the regulatory objectives of ensuring access to 9-1-1 emergency telephone service and other important features of local services, and the CRTC's power to enforce compliance is likely to widen in the future with the expansion of consumers' abilities to access an increasing number of telecommunications services from non-facilities-based service providers using broadband access. New measures are required to enable the CRTC to carry out its mandate effectively.

In light of these considerations, it is the Panel's view that the CRTC requires authority to directly regulate the activities of TSPs, particularly with respect to social obligations and technical regulations of general application in the industry. The Panel believes the CRTC's authority should be expanded to empower it to apply the provisions in Part III of the *Telecommunications Act* to TSPs when it finds that the exercise of any such power is necessary to carry out the policy objectives in s. 7. The CRTC should also be granted authority to enforce any such requirements with the full range of its powers under the *Telecommunications Act*.

The Panel believes these powers should only be selectively applied to TSPs as the need arises and that a decision to regulate TSPs should be supported by reasons why such regulation is necessary in the furtherance of the statutory policy objectives. This selective regulatory approach is consistent with the guidelines for regulation that are proposed earlier in this chapter. These guidelines should ensure that TSPs remain unregulated to the greatest extent possible and that regulation is limited to instances where it is necessary to meet specific objectives of the *Telecommunications Act*.

Consistent with later recommendations in this report, the Panel also recommends that when the CRTC finds it necessary to regulate the conduct of TSPs, it should do so to the greatest extent possible through the imposition of generally applicable rules enforceable by orders of the CRTC, rather than through tariff regulation or orders that apply only to specific service providers.

Recommendation 2-6

The Canadian Radio-television and Telecommunications Commission should be empowered to directly regulate all telecommunications service providers to the extent necessary to implement the Canadian telecommunications policy objectives.