REVIEW OF THE FEDERAL LEGAL INSTRUMENTS

RE TELECOMMUNICATIONS

Prepared for

The Department of Communications

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1.0 INTRODUCTION

The Department of Communications has undertaken a comprehensive review of telecommunications policy in Canada. This paper addresses one aspect of that review, namely the role of the various general and specific legislative instruments in the policy and regulatory process. The paper will also examine the suitability of these instruments for the achievement of government objectives in the field of telecommunications.

In an environment in which telecommunications services were delivered by end to end regional monopolies, Canadians enjoyed a high quality telecommunications service. Regulated pricing in this monopoly environment permitted the achievement of the important social policy goal of a universal access through system-wide averaging and cross subsidization of certain services, two fundamental concepts which are discussed in more detail in this Report.

Now the environment is changing. Technological developments and innovations are reducing product cost and are permitting increased flexibility in the use of many telecommunications services. Traditionally discrete functions such as transmission and data processing are merging. There is an increasing demand for new and innovative services which has led to an increasing demand for such services to be supplied by entrepreneurs other than the traditional suppliers of telecommunications services. CN/CP, already interconnected to the local telephone network for transmission of data, wishes to interconnect with the local network for voice toll transmission. As well, the traditional carriers are being challenged by others for competition in significant portions of the monopoly market. New carriers such as cellular radio carriers together with the more traditional cable distributors also present challenges to the traditional industry structure.

Under the present rate structure, long distance competitors of the traditional telephone carriers could enjoy a price advantage, since telephone rates for toll calls have traditionally been allowed to be priced sufficiently above cost to permit a cross-subsidy of local rates thus ensuring universal access to local telephone service. There is, therefore, increasing pressure to realign the rate structure of the telephone companies to permit local rates to move towards costs, and to move toll rates downwards towards costs. Such a realignment could pose a threat to universal access to local service.

These developments require an examination of the objectives of a new telecommunications policy. In determining how to achieve these objectives, it is necessary to examine what were the major past policy objectives and how the various legislative instruments have been used to achieve them; following such examination we will see whether these instruments could or should be used, adapted, or replaced, to achieve the objectives of the new policy.

This Report will focus on federal legislative instruments. During discussions with officials of the Department of Communications, our mandate was made more precise in this regard and it will now exclude consideration of legislative instruments in those provinces which regulate telecommunications carriers and less relevant federal legislative instruments such as customs and excise, foreign investment review and international agreements. Accordingly, our paper concentrates on those legislative instruments of direct application to federal telecommunications policy.

2.0 THE FACTUAL CONTEXT OF THE TELECOMMUNICATIONS SECTOR IN CANADA

2.1 Evolution

After the granting of the Canadian patent in 1877, a number of telephone companies were started in Ontario and Quebec. In 1880 The Bell Telephone Company of Canada was incorporated by Act of Parliament giving the company the rights to manufacture telephone equipment and to sell telephone service "in Canada or elsewhere". The company then purchased several of the existing operating companies. The demand for service in the larger urban centres of central Canada was such that the company's resources were directed to meet this demand and the rest of the country was given less attention.

As a result, many new companies not affiliated with Bell were organized to manufacture equipment and provide service. Bell sold some of its interests in other parts of the country and concentrated on Ontario and Quebec.

In the prairie provinces, the provincial governments took control and created provincially owned telephone companies serving the entire province (with a few exceptions such as "edmonton telephones"which is municipally owned). In the east and in British Columbia, shareholder owned companies eventually arose to serve the provinces.

Service is provided to the Yukon Territory and western portion of the Northwest Territories by NorthwesTel Inc. and to the rural part of Newfoundland by Terra Nova Telecommunications Inc., both companies being owned by Canadian National Railways. In addition, CNCP Telecommunications, a partnership of CNR and Canadian Pacific Ltd provides various telecommunications services throughout Canada in competition with the telephone companies.

Telesat Canada, established by Parliament in 1969, is the sole domestic provider of satellite telecommunications service. Teleglobe Canada, which provides international communications by satellite and submarine cable is owned by the federal government.

The Trans Canada Telephone System (TCTS), now Telecom Canada, is an unincorporated organization comprised of Bell Canada, BC Tel, Alberta Government Telephones, Saskatchewan Telecommunications, Manitoba Telephone System, New Brunswick Telephone Company Limited, Maritime Telegraph and Telephone Company Limited, Island Telephone Company, Newfoundland Telephone Company, and Telesat Canada. This organization, which was created in 1931, provides long distance telecommunications services, many in competition with CNCP.

2.2 Jurisdiction

Unlike broadcasting, which has been under exclusive federal jurisdiction for over 50 years, the Canadian telecommunications jurisdiction is divided between the federal and provincial levels of government, with regulation of various entities being exercised federally, provincially and even municipally in some cases. Moreover, in the case of Telecom Canada, because of its legal status, there is no overall regulation; members agree unanimously on rates revenue and settlement practices and because of the desire to have uniform national rates and to avoid extra-jurisdictional side effects, the various regulators of the individual provincial companies have generally not objected to this procedure.

Today the "traditional" telecommunications carriers (the telephone companies) can be divided, for convenience, into those regulated at the federal level and those under provincial jurisdiction. Bell Canada (operating in Quebec, Ontario and the eastern portion of the Northwest Territories) and the British Columbia Telephone

Company (BC Tel) are regulated by the Canadian Radio-television and Telecommunications Commission (C.R.T.C.) and account for the majority of telephone subscribers in Canada. The C.R.T.C. also regulates NorthwesTel Inc. and Terra Nova Telecommunications Inc. The Prairie telephone companies are owned by their respective governments and regulated provincially. The telephone companies operating in the Maritimes are privately owned (to a substantial extent by Bell Canada Enterprises Inc.) and are regulated by provincial boards. In addition, there are smaller telephone companies operating in Ontario, Quebec and Alberta which are regulated provincially. CNCP Telecommunications (CNCP) is regulated federally. There are also a number of municipally owned and regulated companies such as those servicing the cities of Edmonton, Thunder Bay and Prince Rupert.

The fragmentation of jurisdiction between the federal and provincial levels and the jurisdictional/regulatory lacuna with regard to Telecom Canada activities makes the achievement and implementation of a national telecommunications policy at the legislative level particularly difficult. Indeed, provincial and federal regulators have demonstrated disagreement over policies.

This is not to imply that efforts at federal-provincial co-operation have not been attempted in the past. There were in fact a number of formal efforts by the federal government in the 1970's to come to grips with at least some of these issues and which succeeded with considerable prescience in identifying both the existing and emerging points of controversy and had some limited success in responding to them.

In late 1969 the federal Minister of Communications announced plans for a study entitled Telecommission, which would examine the existing state and future prospects for Canadian telecommunications. Out of that process came a series of

individual studies and a general report entitled Instant World: A Report on Telecommunications in Canada (1971). However, the report was by its own admission not intended to provide recommended solutions but to serve as "an informative background and stimulus for public discussion of the complex issues involved" (p. ix).

In March 1973 the Minister of Communications published "Proposals for a Communications Policy for Canada" (the Green Paper). One of the principal thrusts of the paper was the stated intention of the federal government at page 13 "to develop, in consultation with the Provinces, a statutory declaration of national telecommunications objectives, taking due account of provincial needs and interests, which will provide a frame of reference for the federal regulatory body in exercising its authority".

With regard to the distribution of legislative authority the paper suggested two possible approaches: a two-tier system under which all "international and interprovincial aspects of all Canadian telecommunications carrier undertakings would be federally regulated, while all intra-provincial aspects would be subject to provincial authority"; or reciprocal consultative arrangements "for effective collaboration between the federal and provincial governments and regulatory bodies and the systematic disclosure and exchange of information".

Finally, the paper proposed that the existing federal legislation regarding telecommunications be revised and consolidated and that regulation of broadcasting and carriers subject to federal authority be effected by a single federal agency. The need for legislative change is perhaps best summarized at page 4 of tne paper:

> Thus today, more than ever before, it is clear that the technological and economic aspects of communications are intimately related with their social and cultural implications.

> Moreover, there is an evident and growing tendency for many formerly distinct systems of electronic communications to become interconnected, more integrated, and more powerful. One very important symptom of this development is the growing interaction of broadcasting with other forms of telecommunication. Another is the rapid integration of the technology of computers and communications, the economic benefits of which are already being vigorously exploited while little has been done to devise defences against the concomitant dangers and disadvantages that may develop. There is also a rapid growth in the consumer market for all kinds of electronic audio and visual equipment for direct use by the general public, who have increasing access to collective communications systems.

The single regulatory agency concept was the logical response to this convergence of telecommunications and broadcasting. It also had, as the report noted, the very practical advantages of avoiding the "potential duplication and conflicts which might arise between two federal regulatory bodies in the same general field" and of establishing "effective means of collaboration and consultation with provincial regulatory bodies in a way that would be difficult if not impossible if two federal regulatory bodies continue(d) to be involved". While the potential conflicts between federal regulatory bodies were effectively dealt with when the single agency was created in 1976, the problems of effective federal - provincial collaboration and consultation remained an elusive goal.

It is interesting to note that in dealing with international traffic the report concluded at page 27 that "it would clearly be desirable to establish some more effective form of Ministerial or regulatory authority over proposed policies, service arrangements, and rate structures for all telecommunications traffic between Canada and other countries".

The next formal attempt at resolving outstanding issues in telecommunications came with the April 1975 publication by the federal Minister of Communications of "Communications: Some Federal Proposals" (the Grey Paper). This was the federal

response to the federal provincial conference on communications held in November, 1973 and a series of subsequent bilateral meetings between the federal Minister of Communications and his provincial counterparts in April, 1974. The Grey Paper was expressly stated to constitute "in broad outline, the intentions of the Federal Government, taking account of views expressed by the Provinces, as a basis for further consultation and an early revision of federal communications legislation".

The Grey Paper rejected the notion of formal transfer of legislative authority to or from the provinces "precisely because all modes of telecommunications have both local and extra-provincial aspects, and because these cannot be distinguished by reference to the physical facilities employed".

The paper proposed instead a three pronged approach to legislative and regulatory matters. At the governmental level, a Committee for Communications Policy consisting of all Ministers of Communications was proposed. This Committee, through various subcommittees, would "study and advise on such matters of mutual concern as systems planning, interprovincial and international services, and technical standards".

At the regulatory level, the paper proposed an association of Communications Regulatory Bodies whose function it would be to make recommendations to the Committee "with regard to the development of telecommunications systems in the public interest". The Association would also review more technical aspects of telecommunications such as matters relating to costing, accounting procedures, and interconnection of systems. Where consensus was reached these matters could be made applicable to all regulated entities.

The third approach was what came to be known as Phase II legislation at the federal level. The paper had established Phase

I as the implementation of the single regulatory agency approach at the federal level by the introduction of what ultimately became the Canadian Radio-television and Telecommunications Commission Act. The legislation had been introduced when the paper was published. Phase II however, was intended to be a complete revision of existing statutes that would include the power of the Governor in Council to give formal directions to the regulator "on the interpretation of statutory objectives [which would also be set out in the legislation] and the means for their implementation".

The paper concluded that as all forms of telecommunications have both national and local aspects that could not be separated in any practical way, legal wrangling over the dominant aspect was not in the best interests of Canadians who were more concerned with having access to the best communications services that the country could afford. The paper concluded that "this objective can best be achieved if the federal and provincial governments can agree upon effective means of harmonizing their policies and priorities so as to arrive at the best results for the Canadian public".

It is a matter of record that none of these proposals materialized and while this may have been due in part to undue and perhaps unrealistic reliance on co-operative solutions through committee recommendations, the problems requiring resolution, and with which both the Green and Grey Papers attempted to come to grips, remain very real and even more in need of resolution. As can be inferred from Part 3.2 of this Report, legislative inaction is being countered by regulatory and judicial activity.

On the broadcasting front it appeared that some progress at federal - provincial co-operation was in sight.

In the mid to late 1970's, delegation of certain aspects of jurisdiction from one level of government, particularly federal,

to another (provincial), had attained particular prominence. At the same time, certain provincial policies regarding ownership of communications facilities were clashing with CRTC requirements, namely that cable licensees own specific portions of their delivery systems. In November, 1976, the federal government entered into an agreement with the Province of Manitoba setting out their respective jurisdictions "as to the rights and obligations of broadcasting receiving undertakings and [Manitoba Telephone System] respecting their joint use of facilities and aparatus owned or under the control" of MTS. The legal validity of the Agreement has not been challenged but from the telecommunications point of view, Article III is of most relevance. It provides:

> The regulations and supervision of telecommunications services, other than programming services, distributed [this includes transmission and/or carriage] in Manitoba by means of facilities and apparatus of [MTS] are <u>exclusive responsibilities of the Province</u>. (emphasis added)

If the trial decision of the Federal Court in the <u>AGT v. CRTC et al</u> action discussed below is reversed on the point that a provincial crown agency is not subject to the jurisdiction of the CRTC, the Manitoba Agreement may receive renewed attention in light of Article III.

In March 1979 the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, Telecommunications and Canada (the Clyne Committee) report was issued. It was followed in 1980 by constitutional negotiations between the federal and provincial governments. Both levels offered proposals that were ultimately rejected.

In light of the inability of governments to reach any acceptable solution to these telecommunications issues, it is not surprising

that CNCP, took legal action.

It brought an application under Section 320(7) of the Railway Act to the CRTC, naming Alberta Government Telephones (AGT), a provincially - regulated provincial Crown Corporation, as the respondent. CNCP's position was essentially that as AGT's undertaking connected to another jurisdiction, it was a "company" under that Act and subject to CRTC regulation.

AGT made an application to the Federal Court for an order prohibiting the CRTC from proceeding with CNCP's application.

The Federal Court Trial Division released its decision in AGT v. CNCP et al on October 26, 1984. The trial judge granted AGT's request but divided the reasons for the order prohibiting the CRTC from proceeding with the application into two sections: (1) the constitutional argument that AGT was a local work or undertaking and therefore subject to provincial jurisdiction; and (2) the crown immunity argument that because AGT was a provincial crown corporation, it was not bound by the relevant federal legislation (the Railway Act).

On the constitutional issue, the trial judge concluded, at page 21, that:

> ...[the] evidence seems to leave little scope for anything but a conclusion that AGT engages in a significant degree of continuous and regular interprovincial activity, and therefore must be classified as [an undertaking connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province].

The trial judge felt that the crucial feature was the nature of the enterprise not the physical equipment it used and, accordingly, concluded that AGT was using physical facilities to provide local, interprovincial and international services without

discrimination and that "one could not separate the local from the non-local without emasculating AGT's enterprise as it presently exists". She also noted "that there is a physical identity between the TCTS telecommunications network in Alberta and AGT's telecommunications network. In fact, it may be more accurate to say that TCTS, as such, does not have any independent physical network facilities" (page 14). Moreover TCTS generated revenues were not settled on the basis of use of a particular carrier's facilities but "so as to support the development of telecommunications services throughout the country" (page 15).

The trial judge also dismissed the argument that there nad been no federal attempt to regulate AGT by stating, at page 28:

> The fact that constitutional jurisdiction remains unexercised for long periods of time, however, does not mean that there is thereby created some sort of constitutional squatters rights.

She accordingly concluded that AGT was a non-local undertaking as described in section 92(10)(a) of the Constitution Act, 1867.

On the crown immunity issue, the trial judge found that there was no express statement in the Railway Act binding the crown provincial nor was AGT bound by necessary implication if that latter doctrine still applied in Canada. Moreover, the trial judge held that AGT had not waived this immunity <u>insofar as the relief sought by CNCP was concerned</u>. She concluded, at page 40 that:

> ...while AGT may receive many benefits from the CRTC...I do not think one can say that AGT has thereby submitted itself to the Railway Act in all its respects. There is no nexus between the waiver of immunity with respect to the TCTS agreements [submitted to the CRTC for approval by Bell, BC Tel and Telesat] and the claim being made by CNCP.

One of the issues facing the federal government is the alleged lack of accountability of the CRTC to elected officials in the exercise of its jurisdiction. On this front the federal government has recently taken action. On February 8, 1984, the Minister of Communications introduced Bill C-20 which would have given the Governor in Council the power to issue binding directions to the CRTC. That Bill did not pass beyond first reading prior to the September 1984 election.

The new government however, introduced its own Bill C-20 on December 20, 1984 which incorporated the same power of direction. The proposal would amend the CRTC Act as follows:

> "14.1(1) Without limiting any power of the Governor in Council under any other Act of Parliament to issue directions to the Commission, the Governor in Council may, of his own motion or at the request of the Commission, issue to the Commission a direction concerning any matter that comes within the jurisdiction of the Commission and every such direction shall be carried out by the Commission under the Act of Parliament that establishes the powers, duties and functions of the Commission in relation to the subject-matter of the direction".

Unlike its predecessor, the current Bill which is discussed in part 8.1.1(f) of this Report, provides under section 14.5 that before any such direction is issued "the Minister shall consult with the Executive Committee of the Commission with respect to the nature and subject matter of the direction". The nature and timing of the consultation is unspecified.

3.0 MAJOR FEDERAL TELECOMMUNICATIONS POLICIES DURING THE LAST 10-15 YEARS

Over the last ten to fifteen years, a few major telecommunications policies have evolved under economic or regulatory pressures. Under this part 3.0 of this Report, we will describe them whereas, in the following parts, we will examine the legal instruments which were used to achieve them.

3.1 Termination of the End to End Monopoly

The carriers that the CTC and its predecessor, the Board of Transport Commissioners for Canada regulated prior to 1976 constituted end to end monopolies. The telephone companies provided, to the exclusion of all others, every element of the facilities required to provide telephone service, i.e. telephone, central office equipment and transmission facilities. Furthermore, Bell Telephone, concurrently with offering public service, established its own manufacturing facility, Northern Electric, which is now Northern Telecom. Until recently, Bell used only Northern as a supplier of equipment wherever possible.

Telephone companies were considered from their inception to be natural monopolies -- a condition in which it was considered that economic efficiency could best be achieved if only one undertaking served a defined geographical area. It was believed that the cost and inconvenience associated with the provision of telephone service on a competitive basis was such that the ultimate cost to consumers would be greater than if provided on a monopoly basis under the aegis of regulator. Moreover a monopolist could devote resources to research and development not available to a competitor forced to minimize all costs. Finally, a monopoly provided service could be structured such that socially desirable goals could be achieved through price structuring, something that

would not be available in a competitive environment. It was observed however that a monopoly, if left to its own, could produce monopoly profits whereas, in a competitive environment, the marketplace could be expected to keep prices and therefore profits at a more reasonable level. Regulation of monopolies (and particularly the prices charged) was introduced with the goal being to keep prices reasonable and stand as a surrogate for competition.

The telephone companies took the position that they needed complete control of each component required to provide service so that the "integrity of the network" could be maintained.

The telephone companies were regulated on a total revenue requirement basis. The revenue requirement was distributed over the rate structure using a "broad brush" approach. The subscriber paid a monthly contract rate for unlimited local service -- an all inclusive price. The components of local service were not priced separately because there was no need to do so as long as the telephone companies enjoyed an end to end monopoly.

The end to end monopoly concept was enshrined in Rule 9 of Bell's General Regulations, which prohibited the attachment to the network of any device or equipment not authorized by the tariffs or special agreement. Bell could enforce this rule by disconnecting service (Rule 35). In one case, Bell disconnected service where a subscriber had attached a rapid dialler device. The CTC refused to grant relief to the subscriber even though the device attached was exactly the same device as offered by the company on a rental basis (Re Dr. Morton Shulman, [1975] C.T.C. Reports 244). The CTC reasoned that the company's conditions for the attachment of such devices could not be found to be unreasonable since the company did not publish any conditions pertaining to attachment of such customer owned devices. The Harding case, referred to in part 4.5.1 of this Report raised the issue of

whether the refusal of Bell to publish conditions was itself an unreasonable condition. In any event, the telephone companies, came to make exceptions for the attachment of non-company owned terminals in the case of computers and other devices used in data transmission. In these situations, however, the company insisted that a protective device be inserted in the line between its network and non-company owned equipment. This interface device, which was owned by the company and leased to the subscriber, was designed to prevent the transmission of any spurious signals which might be harmful to the network or interfere with the service of other network users. The beginning of the end of this end to end monopoly came in the United States with the Hush-A-Phone and Carterfone cases [Hush-A-Phone vs. U.S. 238 F2d 266 (1956), and Re Use of Carterfone in Message Toll Telephone Service [1969] P.U.R. (3d)417(FCC); 13F.C.C. 2d 420 (1968] reconsideration denied, 14 F.C.C. 2d 571. The results of these and other proceedings was that by the mid-seventies a wide variety of customer provided equipment could be connected without protective interface devices subject to a type certification procedure.

The first successful attack on the end to end monopoly in Canada was initiated by Challenge Communications Ltd. which operated a mobile-telephone business competing with Bell Canada (CRTC Telecom Decision 77-16 dated December 23, 1977) and which is discussed in some detail in section 4.1.9 of this Report.

In late 1979, Bell filed an application with the CRTC for an order amending Rule 9 of its General Regulations. Bell stated that its application was intended to bring before the CRTC the issue of whether the liberalization of the rules governing the connection to Bell's facilities of network addressing terminal devices provided by subscribers was in the public interest and to what extent and subject to what terms and conditions such connection should be allowed. In an interim decision (CRTC Telecom Decision 80-13) dated August 5, 1980, CRTC disallowed Bell's proposed

interim requirements for attachment of subscriber provided terminal equipment and substituted its own requirements. In rejecting Bell's proposed interim requirements, the CRTC found that "there was too great a likelihood....that the company would exercise its discretion pursuant to Rule 9 in such a way as to give rise to breaches of Section 321 of the Railway Act".

The CRTC issued its final or permanent decision dealing with the attachment of subscriber-provided terminal equipment on November 23, 1982 (Telecom Decision CRTC 82-14). Its decision was wide ranging in allowing a variety of customer provided terminal devices to be connected to the networks of any federally regulated carrier. It was a comprehensive decision dealing with the financial impact upon carriers, the impact upon quality of service, the impact upon the Canadian telecommunications manufacturing industry, unbundling of rates, ownership of inside wiring, mobile radio systems, sharing and resale of terminal equipment, interpositioning, Telex and TWX terminals, equipment type certification procedures, participation by carriers in the terminal equipment market, the supply of telephone directories in a liberalized environment, and treatment of confidential information pertaining to subscribers equipment needs.

The end to end monopoly, as far as the federally regulated carriers were concerned, was dead. Not all the provincial regulators have followed suit. The hold-outs have not yet agreed with the view expressed in that decision by the CRTC that the potential benefits that are likely to flow from liberalized terminal attachment include: "enhanced consumer choice, both in the equipment available and in the sources of supply; lower prices, as competition encourages each firm to reduce its costs; and, especially for business subscribers, increased flexibility and efficiency". For example, interconnection of any attachments not provided by Saskatchewan Telecommunications is prohibited in that province and in Manitoba it is limited to non-network addressing devices and to residential telephones other than the main set. To the

extent that the benefits of liberalized attachment rules are real and significant, the pressure upon the provincial regulators that have not permitted liberalized terminal attachment will likely become irresistible.

3.2 Interconnection

For many years, the networks operated by the telephone companies and that operated by CNCP were completely separated. CP had, as an adjunct to its railway, completed a coast-to-coast telegraph system by 1886 while CN linked the systems of its constituent companies and by 1921, had created a second coast-to-coast telegraph system.

CP entered the private wire market early and, by 1917, was providing a coast-to-coast news wire service for Canadian Press and, by 1930, was providing facilities for radio program transmission. CN and CP began to work closely together after World War II and, by 1964, completed construction of a transcontinental microwave system.

The Trans Canada Telephone System (TCTS) was formed in 1931 and by 1958 its members had completed an all Canadian terrestrial microwave network, enabling transcontinental calls to be routed through Canada rather than the United States. By this time, some interconnection of systems was occurring. In fact, it is interesting to note that about 25% of the original TCTS intercity transmission facilities were leased from CP and CN and CP continued to provide segments of the intercity transmission facilities until the late 1960's. The long distance voice service offered by the telephone companies became more popular and began to erode the market for telegraph traffic.

The result of this independent series of networks was that subscribers of the one system could not communicate with subscribers of the

other except for the subscribers of what are now NorthwesTel Inc. and Terra Nova Telecommunications Inc.

TCTS and CNCP continued to expand their markets for specialized services and increasingly data transmission services. Significant differences, however, developed in arrangements for use of local distribution facilities for the telephone companies on the one hand and CNCP on the other hand. As the CRTC eventually put it, in Telecom Decision CRTC 79-11 dated May 17, 1979 granting CNCP's application for interconnection with Bell Canada's system for the provision of private wire and data services:

> Access to the public switched telephone network is associated with the ability of a subscriber to dial or key a telephone device and, in so doing, establish a physical communications path through that network. Such access is in many cases provided by Bell to its subscribers to private network arrangements. Subscribers to CNCP's comparable private network offerings, however, are excluded from such access arrangements under present Bell interconnection policies.

CNCP complained that Bell would provide only dedicated local transmission paths from the premises of CNCP's customers to CNCP's local central offices, where connections with CNCP's intercity transmission facilities are made.

CNCP filed an application with the CRTC in June 1976, for interconnection with the Bell Canada system for a range of its data and private line voice services but not for public local or long distance voice telephone service. CNCP argued that without the capability of providing direct communication and interchange of traffic between its facilities and those of Bell, the expansion, development and evolution of its telecommunications services, particularly in the sphere of long distance data and record telecommunication, including computer communication, would not be possible and, indeed, that "the viability of CNCP as an on-going enterprise [would be] jeopardized".

CNCP argued that the public would benefit from competition while Bell resisted the application on the grounds that CNCP would "cream skim" the profitable areas of the market leaving Bell to continue to provide universal service, which would result in higher business and residential rates.

On May 17, 1979, the CRTC issued its decision (Telecom Decision CRTC 79-11) granting the application and ordering Bell to provide access to its public switched telephone network subject to certain specified terms and conditions. CNCP subsequently obtained similar interconnection rights from the CRTC with BC Tel's system in Telecom Decision CRTC 81-24.

CNCP next applied to the CRTC for interconnection of CNCP's system with that of AGT. AGT applied to the Federal Court, Trial Division, for a writ of prohibition against the CRTC seeking to prevent the Commission from proceeding. The Attorney General of Canada was added as an intervenor and CNCP as a respondent. The matter was argued on the issues of whether the CRTC had the statutory jurisdiction under the Railway Act to entertain the application and whether Parliament had the constitutional jurisdiction under the Constitution Act, 1867. On October 26, 1984, the court granted AGT's application and, on the sole ground that it is a Crown corporation and, as such, not bound by the Railway Act, it ordered that the writ of prohibition issue against the CRTC. The reasons of the trial judge are reviewed in some detail in part 4.1.6 of this Report.

In a series of decisions in 1979, 1980 and 1981, the CRTC granted to a group of radio common carriers operating radio paging services the same facilities as Bell used in a similar offering so that the competitors' subscribers could dial directly anywhere within Bell's paging zones. [Telecom Decisions: CRTC 79-12 dated June 7, 1979; CRTC 79-14 dated July 26, 1979; CRTC 80-16 dated August 29, 1980; and CRTC 81-1 dated January 12, 1981.]

More recently, in Telecom Decision CRTC 84-10 dated March 22, 1984, the CRTC addressed the issue of:

> "whether it would be in the public interest to allow radio common carriers (RCC's) offering cellular or conventional mobile radio services to interconnect their systems with those of the federally regulated telephone companies (RCC interconnection)". 9 C.R.T. 1063.

The Commission made it clear in this decision that it was not addressing the issue of interconnection of point to point microwave or satellite radio based networks which could compete in the interexchange market. However, it concluded that interconnection of cellular and conventional public and private mobile radio systems to the public switched telephone network was in the public interest and ought to be permitted on terms and conditions specified in the decision.

In October of 1983, CNCP filed an application with the CRTC for orders permitting interconnection of its system with the public switched telephone networks of Bell and BC Tel for the purpose of enabling it to compete with the telephone companies in the provision of interexchange public telephone service. The Commission also decided that the same proceeding would review the current restrictions against resale and sharing of telecommunications services.

The Commission signalled its intention of using the proceeding to set a longer term regulatory policy. It stated that it wished to consider:

> (1) the general principles that should guide the Commission in considering any possible future applications for interconnection that would enable the applicants to compete in the provision of telecommunications services and (2) whether any of the existing restrictions on the resale and sharing of the services and facilities of federally regulated telecommunications common carriers should be removed."

The Commission set out a number of issues which it asked the parties to address including: "resale and sharing of telecommunications services and facilities for the purpose of providing interexchange services other than Message Toll Service (MTS) and Wide Area Telephone Service (WATS) equivalents and for the purpose of providing interexchange services including MTS/WATS equivalents." It also asked parties to address the issues of: "interconnection of telecommunications systems for the purpose of providing interexchange services other than MTS/WATS equivalents and including MTS/WATS equivalents." And, finally, the Commission raised the issue of interconnection of telecommunications systems and resale and sharing of telecommunications services and facilities for the purpose of providing intraexchange services. The public hearing lasted a period of seven weeks, followed by written argument. A decision is anticipated in mid 1985.

3.3 Market Entry: Limited Interconnection of different types of carriers

As noted in part 3.2 of this Report, until recently, there was very limited interconnection of different types of carriers. One carrier might lease facilities from another carrier on a limited basis. Additionally, CNCP increasingly looked to the telephone companies for the provision of dedicated local distribution facilities.

The Challenge, Colins and CNCP Interconnect cases in the late seventies have broadened interconnection rights considerably through regulatory decisions, all with the stated goal of introducing an element of competition into specific areas of the telecommunications industry on the hypothesis that the public interest would be better served as a result.

Administrative decisions have also been taken to foster competition in specific areas of the industry. The federal Department of Communications issued Cellular Mobile Radio Policy and Call for Licence Applications, Notice No. DGTN-006-82/DGTR-017-82 on October 23, 1982 which invited applications to provide cellular mobile radio systems in designated metropolitan areas in Canada. Competition in the provision of this service was

specifically designated as being limited to two systems in each area of which one would be the local telephone company. It was also a requirement of the Department that there be some form of interconnection with the public switched telephone network.

Cantel Cellular Radio Group Inc. (now Cantel Inc.) was ultimately chosen December 14, 1983 to provide service on a national basis. The CRTC recently issued Telecom Decision CRTC 84-29 dated December 19, 1984 in which it disposed of the remaining points of difference between Cantel and Bell and BC Tel regarding the terms and conditions of the interconnection of Cantel to the telephone networks.

There is also some interconnection between the cable television systems and the other types of carriers, and in Saskatchewan and Manitoba all telecommunications transmission facilities are owned by the provincial telephone company as a matter of policy.

We are witnessing an interconnection of the different types of carriers at the technological level. However, these carriers are subject to different regulatory treatment. The conventional telephone carriers are subject to the relevant provisions of the Railway Act dealing with unjust discrimination, undue preferences, just and reasonable rates, and the obligation to provide facilities to competitors. They are regulated on a rate of return basis. CNCP is similarly regulated although it finds itself in competition with provincially regulated telephone companies who are not all obliged by their regulators to provide local distribution facilities to CNCP.

The cable companies are regulated by the CRTC under the Broadcasting Act which produces a different form of regulation. CATV systems are not subject to the form of rate of return regulation experienced by the telephone companies.

A radio common carrier such as a radio paging service is licensed under the Radio Act and the regulations. The General Radio Regulations Part II provides that licensees of stations authorized to handle commercial messages must file tariffs for such serv ice with the CRTC. However, it is to be noted that the material must simply be filed with the CRTC and not submitted for approval.

In the 1983 proceedings involving Telesat's 14/12 GHz rates, the issue arose as to whether Canadian Satellite Communications Inc. (CanCom), which was a licensed broadcasting undertaking, could sublet its unused capacity leased from Telesat to other entities. CanCom was not a regulated telecommunications carrier and did not, in its application, suggest that it ought to be regulated by tne Commission as to the rates it charged for this subletting of unused capacity.

Telesat submitted that, among other things, this would create unfair, unregulated competition in which CanCom could underprice Teleat's regulated rates for equivalent services.

Rather than specifically address the issue of unregulated competition, the Commission took the approach that the "economic harm adduced in this proceeding is not sufficient to justify Telesat withholding approval of resale and sharing arrangements by broadcasting undertakings" (Telecom Decision CRTC 84-9, page 83). However, the CRTC did restrict this type of activity to that of "permitting licensed broadcasting undertakings to assign, transfer or sublet excess capacity to other such undertakings for broadcast programming purposes" (Decision 84-9, page 83). As the capacity involved must be "excess", it remains to be seen what, if any, action Telesat will take to alter its tariff offerings to reduce or eliminate the probability of excess capacity.

3.4 Universality of High Quality Basic Service

This has been a goal of Canadian regulators almost since regulation of telephone companies began. The very basic service is commonly referred to as POTS (Plain Old Telephone Service), i.e. network access with a standard black terminal. By universality of service, one is to understand that POTS is available to everyone in Canada no matter how remote the location.

The high penetration of telephone service is due to several factors, including the desire of the telephone companies themselves to get as many subscribers as possible. A subscriber for local service provided a steady monthly income and also was a potential customer for long distance service. As the Rate Group system of pricing local service developed, it was to the company's advantage to sign up as many subscribers as possible within a local calling area because the more telephones within a local calling area, the higher were the monthly rates and, to the extent that economies of scale existed, reduced costs.

Statutory provisions also promoted greater penetration of telephone service. Bell's Special Act, for instance, required Bell to provide service on demand to customers within 200 feet of its lines. The Railway Act and, in particular, the regulatory provisions set out in s. 321, encouraged universality of service by requiring that rates be just and reasonable and by prohibiting unjust discrimination. It should be emphasized that the Act did not prohibit discrimination, but proscribed unjust discrimination, which was a question for the CRTC to determine on the basis of evidence before it. The onus is on the complainant to demonstrate that discrimination exists and then it shifts to the carrier to demonstrate that it is justified and not undue.

The most effective tool was, however, pricing policies. It became an axiom that local rates for basic service were to be kept low to encourage and maintain universality. From the regulator's point of view, the basic telephone service was seen as a necessity and had to be priced within the reach of everyone.

3.5 Pricing

Aside from prohibiting unjust discrimination in rate setting, the Railway Act provides little other direction to the regulator than that the rates be "just and reasonable". The powers that the Commission has exercised to set a rate base and a rate of return on that base, flow therefore, from a wide interpretation of its duty to set just and reasonable rates. This is discussed more fully under part 4.1.8 of this Report.

3.5.1 Rate Making Principles

The setting of an allowed rate of return is part of the rate making process as it is one test of the justness and reasonableness of the rate structure as a whole. The rate structure, as a whole, must produce the required revenue, but the level at which any given rate is set can be the product of an unquantifiable mixture of different (and sometimes contradictory) rating principles and objectives.

In Bell Canada's view, the rate making principles which have led to universal availability of service include the company-wide method of pricing, value of service, recognition of costs, and service classification. In CRTC Telecom Decision CRTC 79-11, the Commission described these principles as follows:

> The company-wide method of pricing means, in essence, that the entire territory served by Bell is treated as a unit in setting rates, and that tne revenues from all the services provided are considered in total in calculating the revenues necessary to meet the overall needs of the company. According to Bell, the fundamental advantage of this method is that it permits rate schedules to be designed that average out disparities in terrain, location, population density, and so forth, and permits people in areas very costly to serve to have primary local service available to them at reasonable prices.
>
> The value of service principle, according to Bell, is one which reflects the fact that a customer
>
> > ...will pay a price that bears a reasonable relationship to the value he personally attaches to the product or service under consideration. By offering service that recognizes varied subscriber requirements at attractive and saleable prices, service can be made available to a greater number of customers.
> >
> > For example, the value of telephone service to a business customer is considered to be

> greater than to a residence customer, if for no other reason than the basic purpose for which it is used. By offering residence service at lower rates in acknowledgement of this principle, the service is placed within the financial capabilities of more people. This encourages use, expands the telephone universe and enhances the utility of the total system. (Exhibit Bell 30, p.7)

> The principle of recognition of costs means that the rates charged must, in the aggregate, produce sufficient revenues to cover total company operating costs and permit adequate earnings. However, rates for a particular service are not related directly to the costs of providing that service, on the grounds that this would raise the prices of certain services, putting them beyond the reach of many existing telephone users.

> Basic telephone service is divided into two main service classifications, each with its own series of rate differentials. These are Local or Exchange service and Message Toll or Long Distance service. These main classifications are further divided into sub-classifications, such as business and residence, and Message Toll, DDS (Customer-dialed), Station-to-Station (Customer-dialed and operator handled), and Person-to-Person (operator-dialed). These classifications are designed to recognize the different conditions under which service is furnished and to group or classify services for ease of understanding and administration.

In a competitive situation, however, the proposed rate might be required to be set almost entirely on the basis of the level of the competitor's rate in order to be attractive. It is quite common in general rate increase cases to see proposed tariffs containing rates for services subject to competition which take a much lower increase than the average (or in some cases, a decrease). In a competitive environment, rates which are significantly above costs will tend to move closer to costs or traffic will be lost, a situation which today confronts the telephone companies and the regulator.

Other changes in the traditional approach to pricing of telecommunications services are worth noting. In the terrestrial carrier context the United States is moving towards the concept of an access charge which would be payable by all subscribers of a given class simply for access to the network. The charge is not usage sensitive and separate charges would be levied for usage of the network. The question of whether all usage, local as well as long distance, would be charged on the basis of actual usage is not yet resolved, although this would be a logical extension of the decision to impose an access charge in the first place.

The concept of access charges, while politically explosive, might be the logical next step in Canada if increased system interconnection was deemed appropriate. Under such a scheme all subsribers of a given class would pay the same rate for access to the network, although differing classes would not necessarily pay the same amount. For example, all cellular radio operators, regardless of whether they are independents or telephone company affiliates would pay the same access charge, although this charge could be greater than that imposed on individual residential subscribers.

The point of an access charge is to try to relate more of the costs of service to specific aspects of the total telecommunications service provided, an exercise which is of most relevance in a competitive environment. It is of little assistance to separate various cost components if no one is to be permitted to compete in the provision of any aspect of the service. However once the determination that competition is a particular aspect of telecommunications service is in the public interest, it follows that the breakdown of the total costs into their discrete components is necessary, both to ensure that competitors are not only required to pay for what they use but also are not required to pay for what they do not use. In addition, cost breakdowns may assist in detecting anti-competitive behaviour on the part of the regulated supplier of the underlying services

3.5.2 Cross Subsidization

Where telecommunications service, local and long distance, is provided by a single monopoly in a defined geographical area, the principal concern to shareholders and the regulator is that the rate structure as a whole generates the target revenues. Up to now, it has been perceived by the CRTC in its rate determinations, as desirable to encourage universality of service by offering basic local telephone service at a price to the subscriber that does not necessarily reflect the costs of providing that service. In fact, local telephone service has traditionally been viewed as priced below its cost and the deficiency was made up with revenues earned from other services, primarily long distance or message toll service.

The extent of that perceived cross subsidy has been significant. According to Bell, in 1983, it cost $1.89 to obtain $1.00 of local service revenues, and $0.31 to obtain $1.00 of toll service revenue. Bell has also testified that:

> The study of local and toll revenue/cost relationships shows that local revenues do not cover their causally related costs. Toll revenues, on the other hand, not only cover their causally related costs but cover the local service shortfall and make a substantial contribution to 'common costs' as well. The study indicates that the cost of providing toll service indicates relative to the revenues obtained, is decreasing slightly, over time. On the other hand, the cost of providing local service relative to the revenues obtained is increasing. (Telecom Decision CRTC 79-11).

For years, this cross subsidy has been taken for granted by the telephone companies, the regulators and by the subscribers. Now that a competitor (CNCP) seeks to compete with the telephone companies for the provision of long distance service, the presumed most profitable portion of what has been a monopoly service, using the telephone companies' local distribution facilities, the presumed unprofitable portion, the pressure will increase to adjust the rate structure.

In the context of the Interexchange Competition application, both Bell Canada and BC Tel are seeking approval in principle, from the CRTC to "rebalance" the rate structure over a period of years. These proposals would involve significant increases in local service rates and decreases in toll rates.

In the CNCP data interconnect case (Telecom Decision CRTC 79-11) and the Colins cases, (Telecom Decision CRTC 79-12, 79-14, 80-16 and 81-1), the CRTC required, in the past, that competitors who make use of the telephone company local distribution facilities pay an amount above the appropriate tariffed rates as a contribution to local exchange facilities costs. The degree to which local service rates may have to be adjusted upwards will depend, therefore, on the level of contribution to local service facilities required of CNCP (and any other competitors). It appears, therefore, that the cross subsidy between long distance and local service will not necessarily disappear but that the degree of the cross subsidy will change.

The issue of the appropriate principles to be applied to determine the fair level of compensation to Bell for use of its local distribution facilities has received careful consideration by the Commission. In Telecom Decision CRTC 79-11 the Commission discussed the basis of compensation under four headings: direct expenses; return on investment; value of service; and business loss and it came to the following conclusions:

> (1) direct expenses in making the physical connections themselves are compensable;
>
> (2) a rate sufficient to cover operating expenses, maintenance, depreciation and a fair return on investment in respect of the facilities furnished is compensable;
>
> (3) the use of a 'value of service' criterion for compensation is acceptable where it reflects a recognition of broad user categories but is not appropriate where its effect is to discriminate against a competitor or against a competitor's customers;

> (4) business loss arising from the introduction of fair competition is not compensable; however, the loss of contribution toward the costs of common facilities from those services jointly utilizing such facilities constitutes an acceptable component of compensation.

The Commission considered that compensation for "contribution loss" was required in the name of fairness so that both CNCP's subscribers and Bell's subscribers would make an appropriate contribution towards the costs of the facilities employed.

The Commission considered that existing tariff rates for local access services were the appropriate starting point as they would reflect the first three elements of compensation referred to above, but did not consider that this by itself would be adequate to compensate Bell for interconnection and required an additional charge of 25% of the information system access line (ISAL) rate "to compensate Bell for the contribution made by its conventional private line services to the costs of local facilities that will not be recovered from CNCP customers using the Bell facilities as a result of granting the application".

The Commission did not know whether the 25% level was higher or lower than the level of contribution to the costs of local exchange facilities currently received from Bell's data communications and private line voice services and stated:

> The Commission considers that as a matter of regulatory policy all inter-exchange services which are directly competitive and which co-use local exchange facilities should make a comparable level of contribution towards local exchange facilities costs, in the absence of exceptional circumstances, at levels to be determined by the Commission.

> Having set rates for CNCP hereunder, it will be necessary for the Commission to ensure that these rates reflect an adequate level of contribution and that in the long run Bell's directly competitive services also make a comparable level of contribution. This will be taken up in the context of future phases of the Cost Inquiry.

In the third Colins decision, the Commission considered the prices that Bell proposed to charge for access to its facilities. Bell had included a component for "loss of contribution". The Commission applied the principles set forth in the CNCP interconnection decision and considered a component for "contribution loss" to be appropriate, which it set at 25% of the costs of providing the service. The Commission ordered Bell to file "unbundled" rates for its own Bellboy service with the objective that the contribution of the Bellboy network component be at least equivalent to the contribution made by the rates charged to competitors for network access.

In the Report of the Inquiry Officer in the CRTC's Cost Inquiry, Phase III - Costing of Existing Services, released April 30, 1984, the primary recommendation with regard to regulatory concerns was that the Commission recognize that the identification of cost/ revenue relationships for services within the monopoly service category was a reasonable regulatory concern in regard to rate setting and determining the appropriateness of cross-subsidy between monopoly services.

The Report recommended that the telephone companies' monopoly services be broken down into local, toll and network access cost categories. It also recommended separate cost categories for competitive network services, competitive terminal services, other services and common costs. The Report recommended against the development of rules to allocate fixed common costs on the basis that allocations should more appropriately be dealt with in the rate approval process.

3.6 Non-Discriminatory Provision of Service

A cornerstone of telecommunications policy has been that service is offered to subscribers on a non-discriminatory basis. Rates must be charged equally to all for traffic of the same description carried under similar conditions. A carrier must not unjustly discriminate against anyone, nor confer an undue preference. A company which is the sole provider of service is required to treat all members of the public on an equal basis.

The CRTC has power to postpone, suspend or disallow a tariff of tolls that it finds to be illegal and may require the carrier to substitute an appropriate tariff.

These non-discrimination provisions of the Railway Act have greatly influenced the development of the telecommunications systems in Canada (similar statutory provisions exist provincially). Along with low rates for local service, the requirement that all subscribers be treated equally (under substantially similar circumstances and conditions) encourages the achievement of universality of service.

The design of the rate structure demonstrates the influence of these provisions. The subdivision of local service rates into rate groups means that subscribers are treated equally in the sense that a subscriber whose local calling area is in a given rate group can reach approximately the same number of other subscribers without extra fee for the same monthly price. Service charges to subscribers are the same, because otherwise, the company would attract accusations of unjust discrimination. Service is provided on a first come, first served basis.

As has been discussed in previous sections, the CRTC has applied

these provisions to the benefit of individual subscribers but has ruled that these provisions apply also to the provision of facilities and service to parties who would use the facilities to compete with the telephone companies.

4.0 SPECIFIC FEDERAL LEGISLATIVE INSTRUMENTS ON WHICH PAST AND PRESENT TELECOM POLICIES ARE BASED

Section 14(2) of the Canadian Radio-television and Telecommunications Commission Act (the CRTC Act) provides, in part, that "the Executive Committee and Chairman [of the CRTC] shall exercise the powers and perform the duties and functions in relation to telecommunications, other than broadcasting, vested by the Railway Act, the National Transportation Act or any other Act of Parliament...", formerly vested in the Canadian Transport Commisssion (CTC) and its President respectively. In the Railway Act, "Commission" is defined in section 2 as meaning the CRTC "when used with reference to telegraphs or telephones".

We will examine the main relevant provisions of the Railway Act in 4.1, the National Transportation Act in 4.2, the Radio Act in 4.3, the Broadcasting Act in 4.4, and other specific statutes in 4.5, below.

4.1 Railway Act

4.1.1 Section 320(12)

Section 320(12) of the Railway Act is the starting point in any examination of the jurisdiction of the CRTC under that Act. It provides as follows:

> (12) Without limitation of the generality of this subsection by anything contained in the preceding subsections or in section 321, the jurisdiction and powers of the Commission, and, in so far as reasonably applicable and not inconsistent with this section, section 321 or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting proceedings before the Commission and appeals to the Federal Court of Appeal or Governor in Council from the Commission,

> and respecting offences and penalties, and the other provisions of this Act except sections 11 to 210, 212 to 222, 227 to 264, 266, 267, 269, 271, 272, 275 to 283, 294 to 300, 304 to 311, 331.1 to 331.4, 337 and 338, 341, 345 to 375, 383 to 387, 393, 400 to 408, extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada... (emphasis added)

It is clear, therefore, that within the four corners of the Act itself, sections 320 and 321 are paramount and specifically applicable to telecommunications carriers and the other cited sections are relevant only to the extent that they are "reasonably applicable" and "not inconsistent" with these sections. Accordingly, much of the statute is incorporated into the telecommunications sector only by analogy, a matter which can give rise to considerable difficulty in interpretation.

4.1.2 Section 320(1) / "Company"

The jurisdiction granted the CRTC under the Railway Act is to regulate a "company" as defined in section 320(1).

> "company" means a railway company or person authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls.

There are two essential elements to this definition: (1) the entity must be a railway company or person authorized to construct

or operate a railway and having authority to construct or operate a telegraph or telephone system or line or alternatively, a telegraph or telephone company or company or person within the legislative authority of Parliament having the same power; and (2) that entity must have the authority or power to charge telegraph or telephone tolls. Section 2 of the Act defines telegraph or telephone toll, in part, as "any toll, rate or charge to be charged by any company to the public or to any person...".

The CRTC has, to date, shown little inclination to interpret "company" in an expansive manner. There are a number of recent proceedings in which this reticence has surfaced including the 1983 proceedings involving Telesat's 14/12 GHz rates and in which the issue of potential competition from Canadian Satellite Comunications Inc. (CanCom) arose. The CanCom challenge is discussed under the topic of "Market Entry" under Part 3.3, above.

The issue arose again in one of the most recent cases, the Enhanced Services proceeding which culminated in Telecom Decision CRTC 84-18 issued July 12, 1984. In that proceeding, the issue had arisen as to the need for and objectives of regulating enhanced services when provided by parties other than common carriers and the Commission's legal powers and duties in this regard.

Virtually all commenting parties -- carriers and non-carriers alike -- took the position that entities other than common carriers providing enhanced services were not "companies" as defined in the Railway Act and therefore the Commission had neither need nor power to regulate them. The Commission agreed not to regulate parties other than common carriers which would be providing enhanced services.

At pages 30-31 of the Decision, the Commission stated that it:

> ...agrees with the argument of CICA et al to the effect that the jurisdiction granted to it by the Railway Act may properly be viewed as extending only to those companies within federal jurisdiction that may be considered to be operating a telephone or telegraph system. Accordingly, the Commission has concluded that its statutory mandate does not require it to regulate a potentially wide range of enhanced service providers who make use of underlying basic telecommunications services for the provision of their service offerings.

As a result of the recommendations of the CRTC with respect to the Bell Canada corporate reorganization, the government has shown some interest in extending the definition of "company" under the Railway Act at least insofar as it related to Bell Canada, in Bill C-19, which received first reading December 20, 1984.

Section 12 of the Bill provides:

> The provisions of the National Transportation Act and the Railway Act that provide for the obtaining of information by the Commission for the purposes of carrying out its powers, duties and functions in relation to the Company [Bell Canada] apply for those purposes to and in respect of any person that controls the Company in the same manner and to the same extent as if the person were the Company.

The proposed legislation specifically defined "control" as including control in fact, whether or not through one or more persons.

On October 25, 1984, the Commission made a unique ruling in the course of CRTC Telecom Public Notice 1984-55 dealing with cellular radio service. One of the issues dealt with in the Notice was that of the regulation of cellular radio service providers.

The Commission concluded that Cantel Cellular Radio Group Inc. and any telephone company affiliate licensed to provide cellular radio service were "companies" as defined in the Railway Act and, therefore, subject to the jurisdiction of the Commission. As a matter of fact, it is the first time that the Commission specifically found that an entity is a "company". This Notice is dealt with further under 4.1.5, below.

The final proceeding of note which involves the issue of what constitutes a "company" is the application by BC Tel to prohibit the interchange of certain long distance telephone traffic as set out in CRTC Telecom Public Notice 1984-24, dated May 4, 1984.

The activity BC Tel seeks to prohibit is a service offered by discount service providers in which they route a BC Tel subscriber's long distance call to a point in the U.S. or Canada through the U.S. to a greater extent that BC Tel would, thereby taking advantage of lower U.S. long distance rates. Aside from the obvious issue of sovereignty that this application raises, the Commission has raised the issue of whether the rates charged by these discount service providers require approval under section 320 of the Railway Act. In other words, are these service providers "companies"? The Commission has decided to separate this issue from the current Interexchange proceeding but has not yet announced how it will deal with the matter.

4.1.3 Section 320(2) / CRTC's Jurisdiction Over Tolls

Section 320(2) of the Act provides as follows:

> Notwithstanding anything in any other Act, all telegraph and telephone tolls to be charged by a company, other than a toll for the transmission of a message intended for general reception by the public and charged by a company licensed under the Broadcasting Act, are subject to the approval of the Commission, and may be revised by the Commission from time to time.

This section became effective August 1, 1970, and it is instructive to contrast it with the section it repealed, which provided:

> Notwithstanding anything in any Act passed before the 7th day of July 1919, all telegraph and telephone tolls to be charged by the company, and all charges for leasing or using the telegrapns or telephones of the company, are subject to the approval of the Commission, and may be revised by the Commission from time to time; this subsection does not apply to the use of telegraph or telephone wires where no toll is charged to the public.

There were two major amendments in the revised legislation. Firstly, private line type services which were dedicated to specific customers but not provided under a general tariff offering to the public, became subject to regulation.

Secondly, the concept of what constituted a "toll" was expanded. Until that time, telephone toll had been defined as:

> "telephone toll" or "toll", when used with reference to telephone, means any toll, rate or charge to be charged by any company to the public, or to any person, for use or lease of a telephone system or line, or any part thereof, or for the transmission of a message by telephone, or for installation and use or lease of telephone instruments, lines or apparatus or for any service incidental to a telephone business.

This was amended to read:

> "telephone toll" or "toll", when used with reference to telephone, means any toll, rate or charge to be charged by any company to the public, or to any person, for use or lease of a telephone

> system or line, or any part thereof, for the transmission of a message by telephone, for installation and use or lease of any instruments, lines or apparatus attached to, or connected or interconnected in any manner whatever with, a telephone system, for any services provided by the company through the facilities of a telephone system, or for any service incidental to a telephone business.

Some differences of opinion have arisen as to the breadth of this definition and, in particular, the interpretation to be applied to the phrase "for any service incidental to a telephone business". To date, the CRTC has taken a broad approach to this definition.

In 1978, BC Tel advised the Commission that it would be starting to charge a $5.00 service charge for each NSF cheque received. The company took the position that this was a business practice in general and not particularly incidental to a telephone business. The Commission disagreed and ordered BC Tel to file proposed tariff pages together with an economic evaluation justifying the amount of the charge. BC Tel appealed to the Federal Court which upheld the Commission.

Of greater significance is the Commission's authority to regulate the sale price of terminal equipment. The definition speaks to "use or lease" which contemplates continued ownership of the asset by the carrier. However, in Telecom Decision CRTC 82-14 dated November 23, 1982, which dealt with the attachment of subscriber-provided terminal equipment, the Commission set out terms under which regulated carriers could sell such equipment. Two of the terms set out at 8 C.R.T. 879 were as follows:

> Sales of each model type of new terminal equipment shall be at a price that shall not be less than a floor price to be filed in confidence with the Commission.

> Floor prices for new terminal equipment must be shown to the Commission to be not less than the associated costs.

CNCP took the position that the sale price of this equipment was not a "toll" and that the Commission, therefore, lacked jurisdiction. It filed an application for review under section 63 of the NTA on February 10, 1983, requesting rescission of the above noted paragraphs. It also appealed to the Federal Court of Appeal under section 64(2) of the NTA. A decision, as yet, nas not been made on either proceeding.

To date, with the notable exception of the Cantel related Public Notice referred to above and the Enhanced Services Decision discussed below, the CRTC has interpreted the phrase "to be charged" in section 320(2) as requiring specific prior -- even if interim -- approval of each toll. With the advent of increasing competitive pressures, the CRTC has shown itself to be willing to provide relatively expeditious interim approval of competitive service offerings pending completion of a public notice process which typically requests comments from interested parties in the proposed offering. However, the Commission has recently indicated that it is unwilling, at the moment, to permit automatic approvals.

In the 1983 Telesat hearing into 14/12GHz space segment rates the Company had proposed that rates for all tariffs should become effective automatically 60 days after filing if no concerns were expressed by the Commission or interveners.

In Telecom Decision CRTC 84-9 at page 32, the Commission concluded on this point:

> The Commission is committed to ensuring that all tariffs filed by federally regulated carriers, especially tariffs for competitive services, are disposed of as expeditiously as possible,

> consistent with appropriate public process. However, the Commission is not of the opinion that a system of automatic approvals, interim or otherwise, would, at this time, be a necessary or desirable means to this end. (emphasis added)

In the Enhanced Services Decision referred to above, the Commission dealt with the issue of regulation of rates charged for these services by federally regulated carriers. Insofar as cost information requirements were concerned, the CRTC deferred final disposition to the resolution of Phase III of the Cost Inquiry.

With regard to rate evaluation studies to be filed in support, the Commission concluded, at page 46:

> ...the Commission has concluded that federally regulated common carriers offering enhanced services will at this time continue to be required to file rate evaluation studies for each such service at the time that the service is proposed to be introduced and whenever the carrier proposes to change the rates for the service.

The CRTC did state, however, that once evidence of technical feasibility was presented, it intended to move towards an aggregate rate evaluation test for enhanced services to be filed on an annual basis, independent of the filing of individuals enhanced service offerings. Again, the Commission was relying upon the marketplace to ensure that the level of rates was appropriate.

However, nowhere in the regulatory legislation is there a requirement that tariffs be disposed of within any particular time period. In fact, the opposite is true in that the CRTC Telecommunications Rules of Procedure built in specific delays that must occur before a tariff can be approved.

Under section 31(2) of the Rules, new and amended tariff pages must be filed (and therefore made public) at least thirty days prior to the proposed effective date. Interventions can, however, extend this period and, in fact, result in a full public hearing process.

Applications for general rate increases, under Part III of the Rules of Procedure, provide under section 37 a minimum of seven months from the date on which a regulated company files proposed directions on procedure to the effective date of the proposed increases.

Such substantial minimum delays raise the issue of under what circumstances the Commission is prepared to grant interim approval of all or part of the relief requested pending final disposition of the application.

The CRTC first dealt with the issue of interim relief in a general rate increase application in Telecom Decision CRTC 77-8, dated June 17, 1977. CNCP had applied for general increases in its service offerings March 1, 1977, with a proposed effective date of July 1, 1977. The Commission could not hear the application before September of that year and advised CNCP, who then requested ex parte interim relief. The CRTC agreed to consider the request but not on an ex parte basis.

After comments from interested parties were received, including evidence from CNCP of determination in its 1977 financial performance projections from those filed in the application and its undertaking to reimburse customers retroactively if final increases were lower than the interim relief awarded, the Commission granted interim approval.

In Telecom Decision CRTC 78-9 dated October 13, 1978, the CRTC

awarded interim rate increases to Bell and BC Tel which were offered on a Canada wide basis by the member of TransCanada Telephone System (TCTS, now Telecom Canada). In that case, the requested effective date was August 1, 1978, (Bell had filed its proposed tariffs March 15, 1978 and B.C. Tel had filed its proposed tariffs June 12, 1978). However, the CRTC had in CRTC Public Notice 1978-18 dated August 4, 1978, already scheduled a major hearing relating to TCTS rates for the latter part of 1979. Approval of the rates was "subject to any subsequent change or modification that the Commission may deem appropriate" (4 C.R.T.466).

It was not until Telecom Decision CRTC 80-7 dated April 25, 1980, relating to a Bell request for interim relief in a general rate case that the CRTC formally set out its views on interim rate relief. At 6 C.R.T.55, it stated:

> The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an application absent a general interim rate increase.

On the basis of the evidence submitted by Bell, the CRTC did not consider that interim relief was warranted and denied the application.

In that Decision, the Commission also made an interesting comment about its ability to award "catch-up" rates:

> The Commission also considers that it will be possible, in its decision on the application for

> the full rate increases, to ensure that Bell's 1980 financial results are not adversely affected by the timing of the decision, without the necessity of the proposed interim rate increases.

The Commission subsequently denied requests by BC Tel and CNCP for interim rate relief which were based on the CRTC's inability to dispose of the main application within 180 days, noting that the Rules of Procedure relating to this delay contemplated a minimum delay of that length, rather than a maximum. It even denied a similar request by Terra Nova Telecommunications in Telecom Decision CRTC 80-11 dated June 23, 1980, on the basis that without interim relief the rate of return for the year "will be 4.7%, only marginally below the comparable figure of 4.8% for 1979 and the return on total capital would increase to 5.9% in 1980 from 5.8% in 1979" (6 C.R.T.130).

In Telecom Decision CRTC 81-16 dated September 28, 1981, the CRTC did grant BC Tel interim rate relief although not to the extent requested. The company submitted evidence of two unsuccessful attempts to raise external capital within the last year and the Commission accepted that continuing deterioration of capital market conditions had seriously impaired the company's ability to raise long term capital on reasonable terms.

Most recently, in Telecom Decision CRTC 84-28 dated December 19, 1984, the Commission granted Bell a 2% increase in rate on an interim basis (Bell had sought 3.6%). In this decision the CRTC noted that a period of one year would elapse between the proposed effective date for interim increases and the proposed effective date for final rates following a hearing which the Commission could not conduct until the fall of 1985. The CRTC was satisfied that without interim relief Bell could suffer "serious financial deterioration", particularly with regard to "its interest coverage and level of ROE, the deterioration of which might well result in further downgrading of Bell's bond rating by U.S. bond rating agencies, thus restricting the Company's access to foreign capital markets" (Decision, page 9). It should be noted that one Commission member dissented, preferring not to grant any interim rate increase.

4.1.4 Section 320(3) / Filing of Tariffs of Tolls

Section 320(3) states in part:

> The company shall file with the Commission tariffs of any telegraph or telephone tolls to be charged, and such tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission, from time to time, by regulation, or in any particular case, prescribes, and unless with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in such filing, or which is disallowed by the Commission. (Emphasis added.)

The section contemplates mandatory filing of tariffs and the Commission's discretion is only as to the contents of the tariffs and not as to whether they need be filed at all.

The section uses the mandatory "shall" rather than the permissive "may" in setting out a company's obligation to file with the Commission. Furthermore, the procedural and technical matters relating to form, size, style and information "shall" be as the Commission prescribes.

The company is prohibited under this section from changing any tolls in respect of which there is "default in such [mandatory] filing or which is disallowed by the Commission", unless the approval of the Commission is granted.

It is apparent that the Commission could not "disallow" a tariff which had not been filed. Accordingly, the issue asrises as to whether Commission approval as to "default in such filing" can be interpreted as allowing the CRTC to grant a company advance approval or permission to charge tolls without having to file tariffs.

In Telecom Public Notice 1984-55 dealing with cellular radio, the Commission appears to have interpreted the section in this manner in exempting a company from filing a tariff completely and still permitting it to charge tolls.

Although the CRTC has specifically found that these entities are "companies", it has not required the filing of any tariffs at all, not even for purposes of information only. The CRTC went on to say, at page 2 of the Notice:

> However, the Commission considers that as a matter of regulatory policy it is neither necessary nor desirable, at this time, that Cantel or an arms' length telephone company affiliate be required to file tariffs for the provision of cellular service to the public. This conclusion is based on the Commission's opinion that the benefits which users may derive from this innovative service are likely to be greater if the terms of its provision are governed, as much as possible, by market forces rather than by regulation. In the case of telephone company affiliates, this conclusion is also conditional on there being adequate safeguards to ensure that their cellular activities are at arms' length from, and are not cross-subsidized by revenues from, regulated telephone company activities. Accordingly, the Commission has determined that, pursuant to section 320(3) of the Railway Act, both Cantel and any arms' length telephone company affiliate may charge tolls to the public for cellular radio service for which tariffs have not been filed. (emphasis added)

The Commission's reasoning relies on the fact that an "innovative service" is involved and that user benefits will be greater if service provision is subject to market forces rather than regulation. The same argument could be applied to virtually all competitive services and it remains to be seen if this logic will lead to deregulation (as opposed to reduced regulation) of all competitive services offered by regulated carriers once costing mechanisms are in place and the Commission can be satisfied according to its own rules that cross-subsidies from non-competitive services do not exist. This matter is dealt with in Part 8.0 of this Report.

As the Commission did not give reasons for its interpretation of section 320(3), it is not possible to ascertain its approach. However, it appears to have equated "default in such filing" with "absence of such filing". This gives the use of the word "such" which refers to the material that the company "shall" file. Moreover it misinterprets the word "default" in our opinion. "Default" has been defined as the failure to discharge a duty, to one's own advantage; the omission to do that which ought to have been done by one of the parties; the failure to perform some legal requirement or obligation. See Alsip v. Robinson (1911), 18 W.L.R. 39 (Man. T.D.); Osborn's Concise Law Dictionary, 7th ed. (London: Sweet & Maxwell, 1983) p. 112; Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979) p. 376; the Shorter Oxford English Dictionary, Vol. 1, 3rd ed. (Oxford's Clarendon Press, 1973) p. 505.

4.1.5 Section 320(7) / Terms & Conditions of Interconnection

Section 320(7) of the Act provides:

> Whenever any company or any province, municipality or corporation, having authority to construct and operate, or to operate, a telephone system or line and to charge telephone tolls, whether such authority is derived from the Parliament of Canada or otherwise, is desirous of using any telephone system or line owned, controlled or operated by the company, in order to connect such telephone system or line with the telephone system or line operated or to be operated by such first mentioned company, or by such province, municipality or corporation for the purpose of obtaining direct communication, whenever required, between any telephone or telephone exchange on the one telephone system or line and any telephone or telephone exchange on the other telephone system or line, and cannot agree with the company with respect to obtaining such use, connection or communication, such first mentioned company or province, municipality or corporation may apply to the Commission for relief, and the Commission may order the company to provide for such use, connection or communication, upon

> such terms, including compensation if any, as the Commission deems just and expedient, and may order and direct how, when, where, by whom, and upon what terms and conditions such use, connection or communication shall be had, constructed, installed, operated and maintained.

It is to be noted that the applicant for such relief can be any entity "having authority to construct and operate or to operate a telephone system or line and to charge telephone tolls". To date, no party has raised the awkward matter referred to earlier that "telephone tolls" as defined can only be charged by a "company" as defined.

The respondent in any such application has, to date, been a "company" as defined in section 320(1). However, as noted in part 2.0 of this Report, CNCP Telecommunications recently challenged the traditional concept of what constitutes a "company". It brought an application under this section naming Alberta Government Telephones (AGT), a provincially-regulated provincial Crown Corporation, as the respondent. CNCP's position was essentially that all telephone companies whose undertakings connect to another jurisdiction, provincial or foreign, were "companies" and subject to CRTC regulation. If the trial decision withstands appeals and no legislative or political changes result, investor owned telephone companies would indeed qualify as potential respondents under this section, regardless of jurisdiction of incorporation.

It is to be noted that, in an application under this section, the Commission can dictate the terms of the Agreement, the only guide-line being that they must be what the Commission believes are "just or expedient" (as opposed to "just and reasonable").

Indeed, the Ingersoll case [Ingersoll Telephone Co. v. Bell Telephone Co. (1916) 53 S.C.R. 583], which the CRTC has reviewed and relied upon to interpret the extent of its powers, is to this effect and is evidenced by Anglin J.'s words, at page 603:

> ...the addition of the word 'expedient' after the word 'just' affords a strong indication that it was the purpose of Parliament to entrust to the Board the widest discretion, not merely as to the amount of the compensation to be directed, but also as to the elements which should be taken into account in fixing it.

One of the earlier examples of the traditional use of this section is also illustrative of an opportunity that does exist under current legislation for some degree of federal-provincial cooperation. On December 29, 1976, the City of Prince Rupert which was not regulated by the CRTC, submitted an application to the Commission under this section, requesting relief in respect of its negotiations with BC Tel regarding a traffic agreement to replace the previous one which had expired.

Following receipt of a report it commissioned, the CRTC requested public comments and ultimately issued Telecom Decision CRTC 79-21, November 9, 1979. In it, the Commission directed interconnection on specific terms set out in the Decision. The federal-provincial aspects of the procedures adopted in this case are discussed in 4.2 below, dealing with section 81 of the NTA.

4.1.6 Section 320(11) / CRTC Approval of Agreements

Section 320(11) provides:

> All contracts, agreements and arrangements between the company and any other company, or any province, municipality or corporation having authority to construct or operate a telegraph or telephone system or line, whether such authority is derived from the Parliament of Canada or otherwise, for the regulation and interchange of telegraph or telephone messages or service passing to and from their respective telegraph or telephone systems and lines, or for the division or apportionment of

> telegraph or telephone tolls, or generally in relation to the management, working or operation of their respective telegraph or telephone systems or lines, or any of them, or any part thereof, or of any other systems or lines operated in connection with them or either of them, are subject to the approval of the Commission and shall be submitted to and approved by the Commission before such contract, agreement or arrangement has any force or effect.

The key element to this section is that agreement between the "company" and the other party has been reached. The best example of an application under this section is the Telesat Canada Connecting Agreement with the other nine members of Telecom Canada discussed in Part 4.5.5(f) of this Report, and which led to Telecom Decision CRTC 77-10. The Commission stated in that decision, at 3 C.R.T. 275, that its jurisdiction in such cases "is limited to that of approving or withholding approval of the present Agreement". In other words, the CRTC could not dictate any of the terms of the agreement between the parties and was obliged in the Telesat case to reject the application for approval of the Connecting Agreement.

The Commission receives no statutory guidance as to the specific criteria it must take into account in reaching its decision on such an application and has concluded that "the relevant test under section 320(11) is the public interest, viewed in a broad sense" (3 C.R.T. 276).

As to the onus of demonstrating what and where the public interest was, the Commission had this to say at 3 C.R.T. 277:

> The Commission considers that in a case of this type both applicants and interveners bear an onus to demonstrate where the public interest lies. In the event that the weight of the case respecting

> the public interest were, in the Commission's judgment, eqully balanced on both sides, however, the Commission would grant its approval.

In this particular case, the CRTC withheld its approval in Decision 77-10 and the Governor in Council varied the Decision under section 64(1) of the NTA discussed below, so as to approve it. The effect of Orders in council PC 1977-3152 and PC 1981-3456 on the Connecting Agreement is discussed under item 4.2 below.

4.1.7 Section 321(1) / Just and Reasonable Tolls

Sections 321(1) of the Railway Act states:

> All tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

It is this section which imposes the obligations, coupled with section 320(2) which grants the CRTC its jurisdiction that is the cornerstone of telecommunications regulation. As is noted below, the concept of what constitutes a "just and reasonable" toll is much broader than appears at first glance and under the CRTC has evolved considerably since 1976.

The Commission dealt with this issue first in a statement it issued accompanying Telecom Public Notice 1976-2 dated July 20, 1976, in connection with its hearing into procedures and practices. At page 3 of the statement, the Commission said:

> In applying the concept of "just and reasonable" rates, the Commission is convinced of one essential fact: Canadians enjoy a level of telecommunications service in this country that in terms of variety, high quality and low cost is second to none in the world. Whatever new directions for regulation may be suggested, it is essential that this reality be

> maintained. At the same time, the Commission is determined that this level of service should not be taken for granted. In a country where essential telecommunications services are provided largely by private enterprise with some degree of protection from competition, the public interest requires that those services should be responsive to public demand over as wide a range as possible, and equally responsive to social and technological change.
>
> The principle of "just and reasonable" rates is neither a narrow nor a static concept. As our society has evolved, the idea of what is just and reasonable has also changed, and now takes into account many considerations that would have been thought irrelevant 70 years ago, when regulatory review was first instituted. Indeed, the Commission views this principle in the widest possible terms, and considers itself obliged to continually review the level and structure of carrier rates to ensure that telecommunications services are fully responsible to the public interest.

A major source of insight into how the Commission views the term is the Bell Canada rate increase decisions. In the first Bell rate case before the CRTC, the Commission announced in Telecom Public Notice 1977-1, dated February 11, 1977, what it considered to be relevant issues in determining the justness and reasonableness of the rates. Those items were:

1. Quality of service, including non-urban services, billing practices, directory assistance, location of pay telephones.
2. Other matters respecting the proposed construction program.
3. The Company's financial position including its forecast of revenues and expenses, accounting practices, cost of capital and rate of return.
4. Inter-corporate relations including the Company's participation in TCTS and its relationship with subsidiaries.
5. Proposed rate structure.

In the decision arising out of that application (Decision CRTC 77-7 dated June 1, 1977), the Commission dwelt at some length on the connection between quality of service and rates. It concluded that the quality of service in Bell's service areas in the north did not justify increases either in local or long distance rates. Bell's proposed conversion of all multi-party lines to a maximum of four parties per line over five years was ordered to be completed in four. Four party service rates were allowed at a level lower than requested and increases for more than four party lines were denied altogether. The Commission also concluded that it would consult with the carriers and others "to develop appropriate quality of service measures that will adequately reflect customer perceptions, and will require that the quality of service be equivalent in comparable areas throughout Bell's territory" (3 C.R.T. 88).

The Commission reaffirmed its positions as to the concept of "just and reasonable" that it had set out in the July 20, 1976, statement noted above and added:

> Moreover, before the Commission can approve tariffs of tolls, which specify the price the company charges for its services, it is important to know the level and quality of service which is being offered at the price proposed. Only then can it determine whether the price of the service is just and reasonable.
>
> The Commission must also ensure that all segments of the public have reasonable access to telephone service. While access is usually considered in terms of availability of facilities, it is not necessarily restricted to this dimension. Evidence was presented at the hearings to the effect that access to telephone service was also restricted due to technical problems, to certain of Bell Canada administrative practices, and to certain rates charged in relation to the user's ability to pay.

Given the Commission's frequently stated belief that basic telephone service should be universally accessible and that service offerings should be available which mitigate the burden caused to those on limited or fixed incomes, the Commission has taken a surprisingly narrow view of section 321(1) in connection with proposals to exempt senior citizens of lower income levels from rate increases. In Decision CRTC 81-15, the Commission denied such an application by Bell as being contrary to sections 321(1) and (2) and did not even address the issue of whether it could accomodate the application by using section 320(4) which permits the classification of messages (and rates) so as to create a new class of message service tailored to this segment of subscribers.

A determination of whether a toll is just and reasonable is increasingly requiring an examination of the costs incurred in providing the service. The relationship between costs and tolls was less important when the carrier provided end to end service and the regulator could adjust individual tolls to reflect value of service to subscribers while providing that the carrier's revenue requirement in aggregate was net. With the advent of competition in an increasingly greater number of carrier services, the issue of costing has become critical. As stated in CRTC Telecom Public Notice 1981-41 dated December 15, 1981, at page 31:

> This focus on service costing is largely a consequence of concerns that carriers which operate in both monopoly and competitive markets may price their competitive services below cost, to the detriment of both their monopoly subscribers and their competitors.

To this end, the CRTC has undertaken a lengthy series of proceedings collectively known as the Cost Inquiry. The need for this review was made all the more imperative in light of the 1983 application by CNCP for access to the Bell and BC Tel local

networks in order to provide interexchange wire grade services, an application which, if granted, will inevitably force all major service offerings of the carriers towards associated costs. As this happens, the focus of the CRTC's jurisdiction under section 321(1) may shift away from the justness and reasonableness of the toll iself towards the underlying costs which are offered by the carrier as justification for the proposed toll.

4.1.8 Section 321(2) / Unjust Discrimination

Section 321(2) of the Act states:

> A company shall not, in respect of tolls or any services or faclities provided by the company as a telegraph or telephone company,
>
> (a) make any unjust discrimination against any person or company;
> (b) make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic, in any respect whatever; or
> (c) subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatever;
>
> and where it is shown that the company makes any discrimination or gives any preference or advantage, the burden of proving that the discrimination is not unjust or that the preference is not undue or unreasonable lies upon the company.

A most exhaustive review of this section was provided by the Challenge Communications case in 1977. Challenge had for years offered mobile telephone service through equipment sold to its customers, in competition with Bell which leased similar equipment to its customers. The equipment utilized a portion of the very high frequency (VHF) band, a portion of the spectrum that was

becoming increasingly congested. In addition, all calls made had to be handled by Bell operators.

In 1977, Bell applied to the CRTC for approval of a tariff covering a proposed automatic system that would not require operators and would utilize a portion of the less congested ultra high frequency (UHF) band. Bell proposed to prohibit customer owned equipment in this offering. The CRTC approved the application.

Challenge then applied to the Commission, using section 321(2), for order allowing it to compete with Bell in the new offering as it had on the old offering.

In discussing section 321(2), the CRTC stated, at 3 C.R.T. 495:

> In order for claims under s.321(2) to succeed, two essential elements must be present. The first is discrimination, preference, advantage, prejudice or disadvantage in the circumstances specified in s.321(2)(a), (b), and (c); and the second is the absence of justification as provided for the in the concluding part of s.321(2). The burden of proof with respect to the first element rests with the Applicant, and the second with the Respondent.

At page 496, the Commission continued:

> In the Commission's view there appear to be certain common denominators among the terms. For one thing, s.321(2) is intended to prohibit unjust discrimination, etc. by a company "in respect of...any services...provided by the company". This section thus applies to discrimination within a single service, which the Commission below finds MTS -- including both manual and AMTS -- to be, or as between different services.
>
> Secondly, paragraphs (a), (b) and (c) of s.321(2) all relate to the comparative treatment by the company of different persons, (which term, for

> purposes of this discussion, includes companies), who may consequently benefit or suffer from such treatment, whether intentionally or otherwise. Indeed, the Commission does not believe that any of the subsections require a showing of intent on the part of the company. The result or consequence of any corporate policy, act or omission would be a sufficient basis for a finding of discrimination, advantage or disadvantage.
>
> To the extent that the terms in the three subsections differ (and for present purposes the Commission does not consider it necessary to distinguish between preference and advantage within s.321(2)(b) or between prejudice and disadvantage in s.321(2)(c), the terms advantage and disadvantage refer to the nature, extent and result of favourable or unfavourable treatment by the company. The term discrimination refers to differential treatment by the company of different persons who are under substantially similar conditions.

The Commission concluded that, on the facts of the case, section 321(2) had been breached and pursuant to section 321(4)(b), disallowed the previously approved tariff pages.

The Commission's decision on this point was upheld by the Federal Court of Appeal, leave to appeal to the Supreme Court of Canada being refused. The Court of Appeal expressly rejected the argument that section 321(2) was "customer-oriented" and did not apply in the case of competitors as this would have the effect of ignoring the reference to the giving of undue preference or making unjust discrimination against any "person or company", company being assigned the definition found in section 320(1). Accordingly, the limitations on carrier behaviour contained in section 321(2) apply to the company itself, its subscribers and its competitors with equal force.

4.1.9 Sections 331 and 335 / Confidentiality

With the increase in competition in the telecommunications sector, the question of access to information in the possession of the regulated carriers has assumed increasing importance. The regulator obviously needs sufficient cost information -- particularly for a competitive service offering -- to determine if the rates requested are justified. The company, however, will want as much of this information as possible kept confidential from competitors. The latter will want access to it in order to be able to argue why the costs have been understated and have resulted in predatory prices.

Sections 331 and 335(5) of the Railway Act deal with the issue of confidentiality. They state:

> 331. Where information concerning the costs of a railway company or other information that is by its nature confidential is obtained from the company by the Commission in the course of any investigation under this Act, such information shall not be published or revealed in such a manner as to be available for the use of any other person, unless in the opinion of the Commission such publication is necessary in the public interest.
>
> 335(5) the Commission may authorize any part of such information [specified in section 335(1)] to be made public when, and in so far as, there may appear to the Commission to be good and sufficient reasons for so doing; but if the information so proposed to be made public by the commission is of such character that such company or any other company within the legislative authority of the Parliament of Canada would, in the opinion of the Commission, be likely to object to the publication thereof, the Commission shall not authorize such information to be published without notice to such company, or any such other company, and hearing any objection that such company or any such other company, may make to such publication.

It is instructive to contrast these statutory provisions with the rules of the CRTC on the same issue. Section 19 of the CRTC Telecommunications rules of Procedure provides, in part:

> 19(1) Where a document is filed with the Commission by a party in relation to any proceeding, the Commission shall place the document on the public record unless the party filing the document asserts a claim of confidentiality at the time of such filing.
>
> 19(2) Any claim for confidentiality made in connection with a document filed with the Commission or requested by the Commission or any party shall be accompanied by the reasons therefor, and, where it is asserted that specific direct harm would be caused to the party claiming confidentiality, sufficient details shall be provided as to the nature and extent of such harm.
>
> 19(10) Where the Commission is of the opinion that, based on all the material before it, no specific direct harm would be likely to result from disclosure, or where any such specific direct harm is shown but is not sufficient to outweigh the public interest in disclosing the document, the document shall be placed on the public record.

The rules have not yet been subjected to a judicial test and, accordingly, it remains to be seen whether or not they have misinterpreted the provisions in the Railway Act.

CRTC decisions on confidentiality have left very little that is still regarded as confidential.

In the Bell Canada Support Structures Tariff Telecom Decision CRTC 76-2 dated December 31, 1976, the issue was whether Bell should be obliged to furnish a copy of an economic analysis prepared by it in connection with the proposed tariff to all intervenors.

Bell was prepared to file a net present value (NPV) of the study indicating no burden. Bell had not filed the study with even the Commission when it was requested by an interrogatory from Ontario to make it available to all parties. Bell advised that the study was merely to examine "on an estimate basis, looking ten years into the future, whether or not the rates proposed would be a burden on the rest of the company's customers".

Following argument, the Commission ordered a copy of the study to be provided to it which Bell did with a covering letter claiming confidentiality pursuant to sections 331 to 335 of the Railway Act.

As Decision 76-2 was the first case in which the issue of confidentiality was addressed before the CRTC, most of the arguments that have been used since then, for or against confidentiality, can be found in the argument in this matter.

The arguments in favour of disclosure can be summarized as follows. If the justification for a tariff was allegedly provided or supported by the evaluation, Bell could not deny intervenors access to it. Otherwise intervenors would have no way of attacking the fundamental support for the tariff and their intervention would be meaningless. Also raised was the issue as to what extent costs should be a factor (as opposed to value of service) in deciding whether rates were just and reasonable. It was argued that the economic evaluation might assist the Commission and intervenors in that regard.

Some intervenors argued that they could not accept Bell's cost figures without the backup information behind those numbers, which could only be found in the economic evaluation. It was also argued that Section 331 was not applicable in this case as it only applied to "investigations" by the Commission. As Bell had applied for this tariff approval, it was suggested that this was

somehow different from an investigation that would be conducted by the Commission on its own motion.

Against these arguments Bell responded that the rates filed were not based on costs and, for that reason alone,the study should not have to be published. Bell also argued that, if everything was to be published, that the regulatory process would suffer as regulated companies would be much more guarded in the contents of their correspondence and written memoranda. Bell argued that all applications involve investigations and, accordingly, section 331 was applicable and that that section was to be construed as permitting publication by exception only. Bell argued that costs, by their nature, are confidential because of competitive advantages that may be realized by unregulated entities by their disclosure. Bell did agree that, in other cases involving matters other than costs, the applicant for non-disclosure would have to convince the CRTC of their confidentiality. Bell also argued the cumulative effect theory; namely that each bit of information an unregulated competitor gets from a regulated company but is not compelled to give, while in itself may be of no substantial consequence, makes it that much harder for the regulated company to compete. The CRTC rejected this argument as "generalized submission". Bell argued that the Railway Act recognizes that some information is by its nature confidential and that the public simply cannot have the right to cross-examine on it but that the CRTC has the right to review it and make appropriate decisions as to its value. the word "necessary" in section 331 means, according to Bell, that the public interest cannot get along without the disclosure of this information.

Against these arguments, it was argued by intervenors that competitors' costs will not change regardless of publication of Bell's costs. Furthermore, since Bell's tariff was not cost based in any event, it was difficult to see the merit of the argument that disclosure of costs would be relevant. To the extent that

the material included labour cost estimates, these were not binding on the company and should not impair Bell's ability to negotiate labour contracts. On a broader scale, regulation of itself is a cost and the benefit received by the regulated company is its monopoly status and approval of rates by the regulator that generate a profit to its shareholders. If this type of information is not revealed, the public hearing process is meaningless. Finally, it was argued that the information had been volunteered by Bell and not "obtained" by the Comission as contemplated in section 331, so any defense afforded by section 331 was not applicable.

The Commission agreed that the information contained in the study related to "Costs....or other information that is by its nature confidential" and agreed that section 331 of the Act was applicable. The Commission felt that "there is a balance that must be struck in the public interest between the advantages of maintaining confidentiality and the requirements of a proper determination of the matters under sections 320 and 321 of the Railway Act."

The Commission concluded that (this is the fundamental principle upon which the Commission has decided all subsequent claims for confidentiality):

> The Commission is of the view that the effectiveness of the regulatory process, based as it is in large measure upon public hearings, can be greatly enhanced or diminished depending on the quality of the participation of intervenors. It follows that intervenors must, in principle, have as much relevant information as possible in order properly to discharge their role. A limitation to this principle would arise, however, when the disclosure of certain information would be likely to cause specific direct harm to the company.

Rather than rule on the document as a unit, the Commission broke

it into four separate categories: methodology; data relating to productivity; unit labour costs; and annual cost increases for labour.

The Commission found it unnecessary to deal with section 335 because "since the opinion that the Commission must form as a precondition for publication or disclosure under section 331 is that it be 'necessary in the public interest' rather than there simply 'be good and sufficient reasons for so doing', having applied section 331 to the different aspects of the economic analysis, it is unnecessary to deal expressly with section 335".

In subsequent cases dealing with the issue of confidentiality, the Commission has held that the phrase "specific direct harm" is to be interpreted as including actual or potential short or long term harm to the regulated company. It has also been argued, without success, that section 331 falls under a sub-heading of the Railway Act entitled "Statistics and Returns" and does not fall under the "Traffic, Tolls and Tariffs" heading, which applies to section 320 and 321. From this, it was argued one could conclude that these sections on confidentiality only apply to statistics and returns and not to information filed in support of or in connection with traffic, tolls and tariffs.

In the BC Tel 1977 Rate Case which resulted in Telecom Decision CRTC 77-5 dated May 17, 1977, the issue was whether the applicant should be required to supply certain cost/revenue and marketing information relating to its pocket page business, a competitive service. The Commission ruled that it was confidential information under section 331 of the Act and need not be disclosed although it was provided in confidence to the Commission. The Commission stated that:

> [this type of information] is to be distinguished from the general type of information filed at the

> Support Structures hearing...to the extent that it is not a generalized submission, but deals specifically with aspects of the company's equipment which, if revealed, would be useful in various ways to competitors. The Commission therefore concludes that in the instant case, there is a possibility of causing specific direct harm to the applicant. (emphasis added)

It should be noted that, since this Decision was issued, the Commission has generally become much more willing to treat as confidential, material that relates to competitive service offerings because the service is competitive not because there is a possibility of a specific direct harm being caused. See, however, the BC Tel-LongNet Decision, below.

In the CNCP Interconnection application resulting in Telecom Decision CRTC 78-2 dated January 26, 1978 (dealing with Pre-hearing Conference matters), the interrogatory at issue requested Bell and CNCP to:

> provide a detailed five-year forecast a) assuming the application is granted and b) assuming it is not; for the period of 1978-82 by year including anticipated revenues, expenses, net income, debt expense, taxes, capital expenditures and return on investment. Include such breakdowns as are pertinent, including revenues broken by service category and any other numerical indicators that may assist in providing full understanding of the forecast under situations a and b. Describe any assumptions used in the development of the forecast, and highlight significant changes foreseen during the period.

In this case, the Commission concluded, at 3 C.R.T. 551, that:

> Although the Commission recognizes that revenue estimates by category of service have traditionally been kept confidential in regard to competitive

> services, the importance of the proceeding in terms of future development of the telecommunications industry transcends any narrow claims of confidentiality. The same is true for the studies of local and long distance revenues and costs which the Commission has required to be furnished prior to the commencement of the hearing. The Commission will expect to treat these documents as public documents unless the party submitting them provides substantial new evidence why their release would not be in the public interest. The Commission would expect to consider such evidence without the necessity for an oral hearing. (emphasis added)

This is the first case in which public disclosure was required on the sole basis of the importance of the proceeding itself.

In the Bell 1978 Rate Case resulting in Telecom Decision CRTC 78-3 dated April 27, 1978, Bell had been ordered by the Commission to respond to certain interrogatories. The Commission stated, at 4 C.R.T. 45, that if Bell proposed to claim confidentiality in any response,

> ...the claim for confidentiality should be accompanied by the reasons therefor, and where it is asserted that specific direct harm would be caused to the Applicant, evidentiary material should be provided to support such assertions, including details of the nature and extent of such harm. The applicant should also indicate why it could not make public an abridged version of the document or information for which confidentiality is claimed. In addition, the applicant should have witnesses available at the commencement of the central hearing to testify on the issue of confidentiality, should the Commission decide that an oral hearing on this issue is required.

The Commission was also asked to make available to intervenors its files with respect to anything filed by Bell since the last rate

case. Bell opposed the motion relying in part on section 335 of the Railway Act which it said contemplated the ongoing regulation of the company and which would be "crippled if every piece of information were to be placed on the public file unless a claim for confidentiality were made by Bell Canada." The Commission concluded, at 4 C.R.T.47, that "the motion extends the principles of openess and informed intervenors beyond the limits within which effective regulation under the statutory provisions can take place". The motion was denied.

In Telecom Decision CRTC 78-7 dated August 10, 1978, and which was the final decision on the Bell 1978 rate case, one of the issues in this case was the material filed by Bell in confidence with the Commission relating to its contract with the kingdom of Saudi Arabia. This information was somewhat unique in that it involved a contract with a customer outside of the country and that had requested confidentiality for the terms of the contract. It was argued that the details of competitive contracts in general are sought after and are of great benefit to competitors in framing future bids.

The Commission concluded, at 4 C.R.T. 315:

> ...on the basis of the evidence presented, there was, in the Commission's view, sufficient risk of harm shown to outweigh the advantages of placing the information in question on the public record. At the same time, the evidence disclosed the relevance and importance of the documents furnished to the issues facing the Commission in this case. The effectiveness of the regulatory process, including the need for participation of informed intervenors on all important issues requires that relevant material be subject to thorough review and examination during public hearings.

The Commission accordingly decided to review the contract on an in-camera basis.

For the TCTS Rate Case, Telecom Decision CRTC 80-3 dated March 28, 1980, dealt with the issue of whether Bell and BC Tel, which were regulated by the CRTC and subject to the rules regarding confidentiality and providing information, were required to provide to the Commission the material relating to the other members of the TCTS who were not regulated by it.

The CRTC concluded that two questions had to be determined with respect to one category of information. The first was whether information in the hands of employees of Bell and BC Tel assigned to TCTS can be said to be information in the hands of Bell and BC Tel. Secondly, if the first question is answered affirmatively, should such information be ordered to be provided in view of the understanding that TCTS employees keep confidential certain information about members.

The CRTC concluded that "in view of the integrality of TCTS business to the business of the applicants, such information as exists within TCTS, including its staff, its clearing house, and its committies, must be deemed to come into the hands of the applicants, either through their employees on loan or their employees on TCTS committee. With regard to the second question, the Commission concluded that the requirement that it obtain all information necessary for the determination of the matter properly before it outweighed any agreement among TCTS members regarding confidentiality.

In the 1981 Bell Rate Case, Telecom Decision CRTC 81-9 dated May 20, 1981, dealt with the issue of whether Bell should be required to make public information relating to competitive terminal equipment.

The Commission noted that the market for terminal equipment had been competitive for only a short period of time as a result of the Commission's interim decision on terminal attachments. The Commission accordingly concluded that the level of aggregation at which information relating to this equipment is publicly disclosed should be governed by the following considerations:

1. cost information should remain confidential to the extent that it would materially assist competitors in their pricing and marketing strategies;
2. forecasts of revenues and in-service quantities should remain confidential to the extent that they would reveal Bell's pricing and marketing strategies; and,
3. historic information regarding revenues and in-service quantities should remain confidential to the extent that it would allow competitors to focus on specific markets and produce forecasts by extrapolation.

The Commission emphasized that it was responding to the unusual situation in which the market for competitive terminal equipment was undergoing rapid evolution and felt that Bell was particularly vulnerable to harm from disclosure of information concerning its competitive offerings at this time. Paradoxically, the Commission concluded that the situation may well be substantially mitigated should the market become established and defined.

The Commission also agreed that the company did not have to disclose cost information which would be likely to jeopardize its relations with its suppliers.

Telecom Decision CRTC 81-21 dated November 2, 1981 (the Terminal Attachment Decision), in the case of one interrogatory, ordered disclosure on the basis of the public interest even though the CRTC found that "while it may fall within the purview of section 331, it would not result in specific direct harm".

The interesting aspect of this case was that the Commission was, in fact, determining whether an area of service should be competitive. The Commission concluded, at 7 C.R.T. 899, "that it should require public disclosure of all information relevant to those issues, except that which is at such a level of disaggregation that it would provide material assistance to competitors either by revealing specific pricing and marketing strategies of the telephone companies or by allowing them to focus on specific markets and to produce forecasts by extrapolation".

In the BC Tel-LongNet case, which is currently before the Commission the Commission ordered BC Tel to disclose the percentage of BC Tel's Canada/U.S. message service billing that originated from the Vancouver/Victoria area in 1983 and the percentage of BC Tel's Canada revenues originating from Vancouver/Victoria to mid and Eastern Canada. It also ordered full disclosure of the current average revenue per minute from Vancouver for all U.S. calls and dollar figures for originating message-toll revenues in 1983 from Vancouver/Victoria and total BC Tel.

BC Tel had filed this information in confidence following which the Commission had asked for comments on the request for confidentiality. Several submissions were made, following which the Commission ordered publication without reasons.

BC Tel brought a section 63 application for review which the Commission denied. Since reasons were not given, one can only summarize the arguments made in support of disclosure and non-disclosure without being able to indicate which arguments carried the day.

In support of disclosure, the interveners stated that BC Tel was requesting extraordinary relief in the nature of a "primary interim order", the effect of which could have been to

put LongNet and the other resellers out of business pending final resolution of the issue. Moreover, they agreed that BC Tel did not claim that disclosure of this information would provide information as to the economic impact on the company. In addition, those favoring disclosure took the position that the issue of economic harm could not be judged without this information and it was, therefore, really the whole case in itself (similar in this respect to the support structure economic evaluation).

In addition, and peculiar to this case, it was argued that the confidential material filed by BC Tel, which it had entitled "Comments", was really new evidence being adduced. Furthermore, there was some suggestion that misleading and inaccurate information was being provided.

BC Tel argued that disclosure of the information would prejudice its potential competitive position and that judgments on economic information should be made by the CRTC and not intervenors. The company also cited section 20(1) of the Access to Information Act, which requires a government institution to refuse to disclose this type of information except in specific circumstances which BC Tel said did not exist. Finally, BC Tel said that the information related to a specific, narrowly defined geographic area, in residence and business markets, and would, if published, provide improved revenue and profit projections for potential competitors and information upon which they could base their pricing decisions.

It may ultimately be that nothing that is relevant is permitted to remain truly confidential, but that more innovative ways of dealing with this information are utilized. In Telecom Decision 81-15 dated September 28, 1981, in dealing with competitive terminal equipment provided by Bell, the Commission stated, at 7 C.R.T. 874:

> As regards evidence provided by the Company on

> demand and related revenue forecasts for competitive terminal equipment, the Commission notes that Bell itself was not prepared to place much reliance on this evidence. In addition, demand forecasts for most individual services were kept confidential and were not, therefore, subject to examination by interveners. In light of this, the Commission has decided not to rely on that evidence in the present proceeding, for the purposes of determining the justness and reasonableness of rates for competitive terminal offerings. (emphasis added).

It is clearly a waste of the carrier's time to propose cost justifications that will be ignored by the CRTC in approving rates. However, if it wishes to have the CRTC rely on the information, it may have to permit limited disclosure. For example, in the current Interexchange proceeding, CNCP has taken the position that the Commission cannot rely on any information submitted to it by Bell or BC Tel in confidence and upon which CNCP is not permitted to cross-examine.

4.1.10 Section 265(1) / System Interconnection

Section 265(1) states:

> All railway companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.

By virtue of section 320(12), "railway companies" in this context means federally regulated telecommunications carriers, and "traffic" means the transmission of and other dealings with telegraphic and telephonic messages. This is the system interconnect section, the principal one relied upon by CNCP (with section 320(7) and (9) in aid) in the 1976 application for

interconnection with Bell Canada's sytem. In this proceeding, the Commission viewed the cumulative effect of sections 265(1), 320(7) and 320(9) in the following light:

> As will be seen from the above provisions, the Commission is given wide jurisdiction upon application to order Bell 'to provide for such use, connection or communication, upon such terms, including compensation if any, as the Commission deems just and expedient...'. Together, the subsections stipulate three statutory tests which the Commission must apply before exercising its discretion to issue such an order: (1) the terms of the 'use, connection or communications' applied for must be 'just and expedient'; (2) 'the standards, as to efficiency and otherwise, of the apparatus and applicances' of the systems or lines affected must be taken account of and interconnection can only be granted where, in view of such standards, it can be 'made or exercised satisfactorily without undue or unreasonable injury to or interference with the telephone business' of Bell; and (3) 'in all the circumstances' it must seem 'just and reasonable to grant the same'. (5 C.R.T. 247)

The Commission also concluded, at 5 C.R.T. 250, that:

> The section was clearly intended to apply to telecommunications carriers as well as railway carriers. The basic obligations respecting the interchange of telecommunications traffic are self-contained, can be read clearly and directly, and in the Commission's view are easily severable from the phrases which are referable only to railway traffic.

The Commission also dealt at some length with the onus which was cast upon applicants and respondents under section 265(1). At 5 C.R.T. 265-266, it concluded:

> In the Commission's view, the question of onus of proof does not depend directly upon the impact of a

successful application would have on the structure and dynamics of the telecommunications industry. At the same time...the statute is not neutral on the question of industry structure. Except in the limited circumstances envisaged by subsection 320(8), the statute nowhere confers a monopoly on any telecommunications carrier in regard to any particular description of traffic... The existence of section 265 and subsection 320(7), in the Commission's view, recognizes the fact that there may be situations where there are telecommunications facilities established for the purpose of providing essential services, the duplication of which would not be in the public interest for any number of reasons. Where such a situation has developed, the purpose of these sections is to afford access to such facilities on reasonable terms to all persons or companies including other carriers. In regard to subsection 320(7), this approach was specifically envisaged in the judgment of Fitzpatrick, C.J. in the Ingersoll case when he stated, 53 S.C.R. 583 at 587:

> 'I quite agree with the late Chief Commissioner Mabee, who said that in most public services competition is desirable in the public interest, but a duplicating of telephone systems is a nuisance. What is required and what the Act contemplates is efficient regulation of the conditions under which the telephone companies are to co-operate in the exchange of business facilities'.

The requirement under Section 265 is essentially the same although it is expressed even nmore strongly. Subsection 265(1), as made applicable to telecommunications by subsection 320(12), read that 'all (telephone and telegraph) companies shall, according to

> their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic...(and) for the interchange of traffic...' . The phrase 'all persons and companies' clearly includes competitors as well as other customers and the evident purpose of the section was, as with subsection 320(7), to afford access to telecommunications facilities where their duplication would not be in the public interest. The use of mandatory phrases throughout section 265 in regard to the affording of facilities by a carrier reinforces this conclusion... In the Commission's view, if there is any persuasive evidence to justify denial of access in the context of section 265 and subsection 320(7), this will be peculiarly within the knowledge of the Respondent rather than the Applicant and the statute makes it clear that it is the Respondent who has the responsibility to come forward with such evidence.

From the foregoing, it is clear that the CRTC has been fully prepared to adapt the language to suit the reality of today's technology. Perhaps more importantly, its interpretation of the shifting onus is so definitely competition oriented that, notwithstanding the CRTC's relatively modest disclaimer in the CNCP 1976 interconnect case (at 5 C.R.T. 333) to the contrary, the continued existence of any portion of the telephone system as a "natural monopoly" appears to have been called into question.

4.2 National Transportation Act (NTA)

This legislation, which was originally designed to deal with various forms of transportation in Canada, has been incorporated into the federal telecommunications scheme by virtue of the CRTC Act.

Section 14(2) of the CRTC Act referred to the applicability of the NTA generally. However, section 14(3) states in part that:

> For greater certainty but without limiting the generality of subsection (2), sections 17 to 19 and 43 to 82 of the National Transportation Act apply, with such modifications as the circumstances require, in the case of every...proceeding to or before the Executive Committee..." (emphasis added).

There is a belief among some that, if only there were a statutory policy regarding telecommunications, analagous to section 3 of the Broadcasting Act, the question of the regulator "making policy" would not arise, at least to the extent that it has.

This is discussed below under Part 8.0 of this Report.

Part IV of the NTA deals with the Commission's general jurisdiction and powers in respect of regulated companies. In summary form, it makes the CRTC initially the court of last resort in telecommunications matters from a legal -- as opposed to political -- perspective.

Section 45(2) of the NTA provides, in part, that:

> ...for the purposes of this Part [IV] and the Railway Act [the CRTC] has full jurisdiction to hear and determine all matters of law or of fact.

Section 56(3) goes on to provide that:

> The finding or determination of the Commission upon any question of fact within its jurisdiction is binding and conclusive.

Furthermore, it is section 321(3) of the Railway Act which, read in this context, shows just how appeal proof the Commission actually is.

> The Commission may determine, as questions of fact, whether or not traffic is or has been carried under substantially similar circumstances and conditions, and whether there has, in any case, been unjust discrimination, or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the company has or has not complied with the provisions of this section or section 320.

The Challenge case, discussed above in part 4.1.9 of this Report provided judicial confirmation of the extent of this authority.

Section 45(1) of the NTA sets out the sweep of the Commission's jurisdiction.

> The Commission has full jurisdiction to inquire into, hear and determine any application by or on

behalf of any party interested,

> (a) in complaining that any company, or person, has failed to do any act, matter or thing required to be done by the Railway Act, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Commission, or any inspecting engineer or other lawful authority, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of the Railway Act, or the Special Act, or any such regulation, order, or direction, or
>
> (b) requesting the Commission to make any order, or give any direction, leave, sanction or approval, that by law it is authorized to make or give, or with respect to any matter, act or thing, that by the Railway Act, or the Special Act, is prohibited, sanctioned or required to be done.

It is to be noted that it is the Commission itself which determines if the applicant for relief is a "party interested" and, therefore, to be accorded status to bring the application, Under section 45(5), this decision "is binding and conclusive upon all companies, municipalities and persons".

Nor is the Commission a prisoner of actual applications in the sense that the traditional superior court is; it can, under seciton 48:

> ...of its own motion...inquire into, hear and determine any matter or thing that, under this Part [IV] or the Railway Act it may inquire into, hear and determine upon application or complaint, and with respect thereto has the same powers as, upon any application or complaint, are vested in it by this Act.

The Commission can also be used as an instrument of the government to act as a commission of inquiry under section 50 of the Act which

states:

> The Governor in Council may at any time refer to the Commission for a report, or other action, any question, matter or thing arising, or required to be done, under the Railway Act, or the Special Act, or any other Act of the Parliament of Canada, and the Commission shall without delay comply with the requirements of such reference.

It was this section which the government employed in 1982 when it directed the CRTC in Order in Council PC 1982-3253 to investigate the corporate reorganization of Bell Canada. Because of the infrequency with which this section is used, it is instructive to review that Order in Council which provided as follows.

> WHEREAS Bell Canada announced on 23 June, 1982, a proposed reorganization of the Bell Canada group of companies pursuant to the Canada Business Corporations Act;
>
> WHEREAS the proposed reorganization may benefit industrial development in the high-technology telecommunications sector in Canada;
>
> WHEREAS, however, the proposed reorganization raises questions regarding, inter alia, the impact it may have upon Bell Canada's subscribers and the ability of the Canadian Radio-television and Telecommunications Commission to regulate Bell Canada's telecommunications services in accordance with the mandate given to it by Parliament;
>
> AND WHEREAS, the Governor General in Council has determined that it is in the public interest that these questions be fully examined by the Canadian Radio-television and Telecommunications Commission.
>
> THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Communications, pursuant to section 50 of the National Transportation Act, hereby refers to the Canadian Radio-television and Telecommunications

Commission for examination the following questions:

1. Will the proposed reorganization result in increased rates for Bell Canada subscribers, and if so, for what reasons and to what extent?

2. Will the proposed reorganization impair the ability of the Canadian Radio-television and Telecommunications Commission to exercise its mandate pursuant to the Railway Act, the National Transportation Act and the Bell Canada Special Act? If so, specify how and to what extent.

3. If any impairment is identified in response to question 2, what modifications would be required to the proposed reorganization to eliminate or mitigate such impairment?

4. If the proposed reorganization is implemented, should there be limitations, such as those set out in section 5 of the Bell Canada special Act (S.C. 1948, c.81, s.5; S.C. 1967-68, c.48, s.6), on the scope of the activities which may be conducted by the Bell group of companies? If so, specify these limitations.

and requires that Canadian Radio-television and Telecommunications Commission to report back its findings to the Governor General in Council on or before 31 March, 1983.

The requirement that the Commission comply "without delay" was emphasized by Order in Council PC 1983-862 which read:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Communications, pursuant to section 50 of the National Transportation Act, is pleased hereby to amend Order in Council P.C. 1982-3253 of 22nd October, 1982 by deleting the words "31 March, 1983" thereof and substituting therefor the words 19 April, 1983".

The Report was transmitted by letter dated April 18, 1983. Of particular interest was the Commission's response to items 3 and 4 of PC 1982-3253, which was a series of specific recommendations for changes to existing legislation concerning the regulation of Bell Canada. The direct result of these recommendations was the introduction February 8, 1984, of Bill C-20, the Bell Canada Reorganization Act. The Bill received first reading only, before the September 4, 1984, election, but was reintroduced as Bill C-19 and given first reading December 20, 1984 by the new government. This new bill was restricted to Bell Canada's reorganization unlike C-20 which had also dealt with amendments to form other statutes and with the exception of two minor alterations was identifical to C-20 as it related to Bell Canada.

The Commission can itself initiate inquiries under section 81(1) of the Act:

> The Commission may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Commission, or upon any matter or thing over which the Commission has jurisdiction under this Act, the Railway Act or the Special Act.

In addition, under section 19(1)(b) of the Act:

> the Commission, or the President, may authorize any one of the commissioners to report to the Commission upon any question or matter arising in connection with the business of the Commission, and when so authorized such commissioner has all the powers of two commissioners sitting together for the purpose of taking evidence or acquiring the necessary information for the purpose of such report, and upon such report being made to the Commission, it may be adopted as the order of the Commission, or otherwise dealt with as to the Commission seems proper.

Specific instances of examples of such appointments are discussed below in the context of the decision making process under the Act.

Finally, the Commission can refer a matter of law or its jurisdiction to the courts, under section 55(1).

The regulatory process, particularly in the case of applications for general rate increases can be very expensive, prohibitively so for the smaller subscribers or interest groups, for whom the costs of intervening in a meaningful way in the process vastly outweighs any personal reduction in increases that they might realize as a consequence.

Section 73 of the Act provides the potential for relief. It states:

> (1) The costs of an incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.
>
> (2) the Commission may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.
>
> (3) The Commission may prescribe a scale under which such costs shall be taxed.

The CTC conducted an investigation, headed by Commissioner John T. Gray, Q.C., into the question of whether or not that Commission should use the section to award costs of interveners in proceedings before it. The Report, which was accepted by the Commission, concluded that it should not.

The Gray Report was dated march 15, 1976; jurisdiction over telecommunications at the federal level was transferred to the CRTC effective April 1, 1976. One of its first major proceedings was the suggestion by Commission that it should utilize the section to award costs on the theory that better funded

interveners produced better examination of an applicant's case (the cost of which was itself an allowable regulatory expense) and a better decision as a result. Telecom Decision CRTC 78-4 concluded, at page 39:

> Accordingly, while the Commission prefers that some form of government or other funding be available to such interveners, and will support all efforts in that regard, it has concluded that in the absence of such funding, it may be necessary in certain cases to provide a partial resolution of the problem through the awarding of costs, which could then be treated as an allowable expense for the regulated company. The expenses incurred by regulated companies in preparing their rate applications are themselves treated as allowable expenses and therefore borne by their subscribers. Costs to interveners, which would only represent a small fraction of such regulatory expenses would, in the Commission's view, contribute to a more effective representation of subscriber interests and to an improved record on which to base decisions. The awarding of costs will in no sense constitute a reflection on the applicant's case, but would simply be a means to ensure that essential points of view can be adequately canvassed in a meaningful way.

The Rules of Procedures provided, in section 44, for the awarding of costs to any intervener who:

> (a) has, or is representative of a group or class of subscribers that has, an interest in the outcome of the proceeding of such a nature that the intervener or group or class of subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding;

(b) has participated in a responsible way; and
(c) has contributed to a better understanding of the issues by the Commission.

The Rules also provided, in section 45, for an interim award of costs of an intervener who:

(a) has, or is representative of a group or class of subscriber that has, an interest in the outcome of the proceeding of such a nature that the intervener or other party will receive a benefit or suffer a detriment as a result of the order or decision made following the proceeding;
(b) can demonstrate to the satisfaction of the Commission that he can contribute to a better understanding of the issues by the Commission;
(c) undertakes to participate in the proceeding in a responsible way; and
(d) can satisfy the Commission that he does not have sufficient financial resources available to participate effectively in the proceeding in the absence of an award of costs under this section.

Sections 17-19 of the NTA provide the framework of rules for sittings by the Commission. It is clearly contemplated that fewer than all of the Executive Committee are required to attend the hearing of every case. What is not clear from the legislation is whether in those circumstances the entire Executive Committee are required to or are prohibited from deciding the case.

The Commission's position on this matter has evolved over the years. In Telecom Decision CRTC 78-4, dated May 23, 1978, dealing with its procedures and practices, the Commission concluded that certain Commissioners would hear an application and report to the Executive Committee for decision pursuant to section 19(1) and 81(1) of the NTA and sections 13 and 14 of the CRTC Act. The Commission did note, however, at 4 CRT109 that "in practice, the Commission has found that the views of the panel of Commissioners involved at the hearing have been given decisive weight."

However, in July, 1979, the Commission, on its own motion, announced that:

> ...decisions following public hearings in which witnesses giving evidence are sworn and are subject to cross-examination, will, as a general rule, be taken by the panel of Commissioners assigned to deal with them....In regard to all other proceedings, decisions will, as a general rule, continue to be made on a collegial basis by the Executive Committee.

Section 45(1) has been cited above. That section refers to a party "complaining" that certain things have or have not been done. Given the Commission's caseload and relatively slow moving public process, section 17(2) of the Act contains a potential time bomb if it is over exploited to its full potential. That section provides, in part, that:

> any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.

Since the CRTC acquired jurisdiction over telecommunications in 1976, this section has been invoked once. In the course of its application for approval of 14/12GHz space segment rates, counsel for Telesat filed a "Complaint of Application" on February 17, 1983, alleging several procedural and substantive deficiencies in the CRTC's handling of the tariff notice filings and formally requested a hearing and determination in "open court" as provided by section 17(2). The Commission determined that this was not a "complaint" within the meaning of the section, but ultimately conducted a public hearing into the proposed rates, making the issue academic. However, if the CRTC is even forced to set out what does constitute a "complaint", it may be flooded with applications for "open court" hearings. If this occurs, its only response may be to discourage such applications through its ability to award costs in favour or against parties appearing before it.

4.2.1 Reviews

The paramountcy of the CRTC with respect to matters of fact and law within its jurisdiction have been discussed. However, review and appeal mechanisms do exist.

In the exercise of its jurisdiction over federally-regulated telecommunications companies, the CRTC has been given much more flexibility than it has when dealing with broadcasting undertakings. Under section 63 of the NTA:

> The Commission may review, rescind, change, alter or vary any order or decision made by it, or may re-hear any application before deciding it.

This is to be contrasted with section 25 of the Broadcasting Act which states that:

> Except as provided in this Part, every decision or order of the Commission is final and conclusive. [The exceptions are an appeal to the Federal Court of Appeal and intervention by the Governor in Council].

It should be noted that this review in the telecommunications sphere may be conducted at any time and, furthermore, a review may be instigated either on the application of an interested party or by the Commission itself.

The phrase "any order or decision" as used in section 63 has been interpreted broadly by the Commission and has in the past included rulings made by the panel of Commission members hearing a telecommunications proceeding during the hearing stage and portions of formal decisions.

To date, the Commission has not re-heard an application before issuing a formal decision, although it has of its own motion varied a decision following publication of the decision. Following the issuance of Telecom Decision CRTC 78-7 dated August 10, 1978 dealing with a Bell Canada rate increase application the Commission issued Public Notice 1979-29 dated July 26, 1979 in which it set out a proposed variation of that part of the Decision which dealt with a comparison of prices paid by Bell to Northern Telecom Ltd. for equipment purchased from it and requested comments from interested parties. Following receipt of those comments, the Commission issued Telecom Decision CRTC 79-19 dated October 16, 1979 confirming the variation in substantially the same form as proposed.

The procedure adopted by the Commission in dealing with an application for review under section 63 was first publicly enunciated in October,1978. Following the public hearing of a Bell Canada application for general rate increases, the Commission issued a decision which made certain findings and determinations with respect to a Saudi Arabian telephone project with which the company was involved. Bell applied under section 63 of the NTA requesting a review of specified portions of the decisions, giving reasons in support of the request.

The Commission responded by way of public notice in which it stated that two issues were involved: The first or preliminary issue being whether it should review the decision and the second being that, if it concluded that a review was in order, whether it should rescind, change, alter or vary the decision itself. The Commission invited comments from interested parties.

Following the receipt of these comments, the Commission appointed a committee composed of members of the Executive Committee, the full-time members appointed under the CRTC Act "who did not participate in the original decision". This Committee reviewed the application and comments and made a report with recommendations to the Commission. As a result of the recommendations of the Committee, the applications for review was denied.

The criteria adopted by the Committee in considering now the Commission should exercise its powers under section 63 were set out in detail in the report appended to the Commission's final decision. The Committee concluded that the applicant should demonstrate on a prima facie basis the existence of one or more of the following:

1. an error in law or in fact;
2. a fundamental change in circumstances or facts since the decision;
3. a failure to consider a basic principle which had been raised in the original proceeding;
4. a new principle which had arisen as a result of the decision.

The Committee also concluded that there was a form of residual discretion within the Commission under that section to determine that there was "substantial doubt as to the correctness of its original decision and that reappraisal was accordingly warranted", even in the event that the applicant was unable to adduce the prima facie evidence noted above.

The procedure for responding to a section 63 application has been streamlined since the original application by Bell Canada described above. The same decision by the commission relating to Bell Canada's application for a general rate increase in 1978 also awarded costs to a number of interveners. Applications for what ultimately proved to be section 63 reviews were made on behalf of two interveners to resolve problems arising out of the order awarding costs. Without elaborating on the internal workings that gave rise to this decision, the Commission concluded that the applications raised, on a prima facie basis, "errors of fact sufficient to warrant review by the Commission pursuant to section 63". The Commission then dealt with the review requested in the same decision.

A party dissatisfied with a Commission decision on a particular matter need not always follow the section 63 route in order to obtain a re-hearing by the Commission. The question of the treament of the revenues arising from the Saudi Arabian telephone project insofar as Bell Canada was concerned continued to be a thorn in the company's side and, in its application for a general increase in rates heard in 1980, the company included in its application a request for a different treatment of the contract for the year in question and thereafter. Rather than simply repeat its proposal that the revenue not be rolled into the company's revenues for regulatory purposes, it proposed a compromise solution of a 50% roll in and 50% exclusion from regulated revenues. While the company was ultimately unsuccessful in this portion of its application, it did succeed in eliciting a dissenting opinion from one of the three Commission members hearing the application.

Since the Commission's initial statement as to the principles by which it is to be guided in the handling of a section 63 review application, it has elaborated on those principles in a decision following an application arising out of the 1980 Bell Canada rate increase application. As well as deciding to reappraise the decision if it considers that there is substantial doubt as to its correctness, the Commission stated that it also considered that its discretion to reappraise should "be exercised if there is substantial doubt as to the fairness of the procedure followed in arriving at a decision".

It should be noted that the section 63 application is not employed in an appeal from a taxation order per se although it is used in the case of a decision dealing with the question of who is entitled to receive costs. An appeal from the decision of a taxing officer is specifically dealt with in the CRTC Telecommunications Rules of Procedure.

4.2.2 Stated Cases

In addition to the review that the Commission may conduct, the CRTC may also invoke the aid of the courts by virtue of section 55(1) of the Act which provides that:

> The Commission may of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor in Council, state a case, in writing, for the opinion of the Federal Court of Appeal upon any question that in the opinion of the Commission is a question of law or of the jurisdiction of the Commission.

From the wording of this subsection, it is apparent that this will be most useful in attempting to obtain a decision dealing with a point of law or jurisdiction during a proceeding before the Commission rather than following a decision being rendered by it. In connection with this section, one should also note the provisions of the CRTC Telecommunications Rules of Procedure and specifically, section 14. While the section appears to be derived from the wording of the NTA, there is a difference that is worth noting. Section 14 provides that:

> If it appears to the Commission at any time that there is a question or issue of law, of jurisdiction or of practice and procedure that should be decided before a proceeding is continued, the Commission may direct the question or issue to be referred to the Federal Court of Appeal for a decision and the Commission may, pending such decision, order the whole or any part of the proceeding to be stayed (emphasis added).

As section 55(1) of the NTA relates to questions of law or jurisdiction of the CRTC and section 14 of the Rules relates to practice or procedure, a reference regarding practice and procedure should not be made under Section 14 of the Rules. In that case one would have to proceed under section 28(4) of the Federal Court

Act which provides that:

> A federal board, commission or other tribunal...may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Since the question of whether the matter will be referred at all is within the CRTC's discretion, the Commission may also be entitled to choose the statute under which a reference relating to law or jurisdiction is made. The significance in the choice of approaches is found in section 28(5) of the Federal Court Act which provides that a reference under section 28(4) "shall be heard and determined without delay and in a summary way", whereas there is no such onus on the Court in a reference under section 55 of the NTA.

4.2.3 Appeals

Section 64 of the NTA provides two routes of appeal from decisions of the CRTC and these routes may be loosely categorized as judicial and political. The rules of procedure involved and the considerations brought to bear by the body reviewing the decision are very different in their scope and the avenue chosen will depend to a very large extent on the nature of the dissatisfaction with the decision. Generally speaking, if a legal issue is involved, the judicial appeal will be taken; whereas, if it is a question of policy, the more appropriate route will be the political one. Subsection 64(2) of the NTA provides that:

> An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made

> within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as the judge of that Court under special circumstances allows, and upon notice to the parties and the Commission, and upon hearing such of them as appear and desire to be heard; and the costs of such application are in the discretion of that Court.

The final and most controversial method of review of a CRTC decision is found in section 64(1) of the NTA which provides that:

> The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon the parties.

An important aspect of this subsection is that there is no time limit specified for this form of appeal to be taken. There is also no time limit within which the Governor in Council must render a decision. In fact, some petitions under this subsection have become irrelevant, having been overtaken by succeeding events.

Case law has determined that the scope of what the Governor in Council is empowered to do under this subsection is somewhat broader than it would first appear. The issue of this scope arose in the petition to Governor in Council arising out of the CRTC's refusal to approve the Telesat Canada application to join TCTS.

Although there were petitions to the Governor in council under section 64(1), the Governor in Council purported to act on his own motion in dealing with the CRTC decision. Whereas the CRTC had refused to approve the application, the Governor in Council purported to "vary" that decision so as to approve it.

In Consumers' Association of Canada v. A.G. Canada [1979] 1 F.C. 433 (T.D.) (appeal dismissed without reasons January 25, 1979) the issue was raised as to whether reversing a Commission decision was a lawful exercise of the power to "vary" such a decision. The Court held at page 440 that:

> The Governor in Council in this case in reversing the decision of the CRTC by substituting his decision for that of the CRTC and thereby causing an entirely different result to obtain, was lawfully exercising his power to vary prescribed in section 64(1) of the National Transportation Act.

The full scope of authority provided under section 64(1) has been dealt with by the Supreme Court of Canada in A.G. Canada v. Inuit Tapirisat of Canada et al (1981), 115 D.L.R.(3d)1. The Court held that:

> There can be found in section 64 nothing to qualify the freedom of action of the Governor in Council,

> or indeed any guidelines, procedural or substantive, for the exercise of its functions under subsection (1).

The Court went on to state:

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the Court can declare that such purported exercise is a nullity. (pages 9 and 11)

While no such failure was alleged in this case, the Court stated that it was still necessary to examine the provision in question in order to determine whether the provision itself makes the decision-maker subject to any rules of procedural fairness. In this regard, the Court concluded, at page 15, that Parliament had not "burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied".

The Court concluded, at page 17:

> In short, the discretion of the Governor in Council is complete provided he observes the jurisdiction boundaries of section 64(1)....There is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowlege the receipt of a petition.

And at page 18:

> The precise terminology employed by Parliament in section 64 does not reveal...any basis for the introduction by implication of the procedural trappings associated with administrative agencies in other areas to which the principle in Nicholson, supra was directed. The roots of that authority do not reach the area of law with which we are concerned in scanning section 64(1).

4.3 Radio Act

This Act is binding upon Her Majesty in Right of Canada and each Province (except insofar as fees for licenses or certificates are concerned) but under Section 2(3) of The Act:

> The Governor in Council, on the recommendation of the Minister may from time to time by order exempt Her Majesty in Right of Canada from this Act, in respect of any radio station or radio apparatus described in the order that is owned or operated on Her behalf.

The Act is essentially a licensing statute that requires anyone wishing to establish a radio station or install, operate or have in his possession a radio apparatus at any place in Canada or on board ships, aircraft or spacecraft as defined in the Act, to obtain a license. However, if the applicant is a broadcasting undertaking as defined, it must obtain a technical construction and operating certificate from the Minister. "Radio station" is defined as "a place wherein radio apparatus is located". The key to the licensing requirements is therefore the definition of "radio apparatus" which is defined in Section 2(1) of The Act as follows:

> "Radio apparatus" means a reasonably complete and sufficient combination of distinct appliances intended for or capable of being used for radio communication.

The Act also defines radio communication or radio as meaning:

> Any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide.

The Act provides a statutory exemption from the licensing requirements for radio apparatus that is capable only of receiving radio communications (other than a broadcasting receiving undertaking) provided the apparatus is intended only for the reception of broadcasting or broadcasting and any class of radio communication other than broadcasting prescribed by the Minister.

Finally, there is a discretionary power in the Minister to grant exemption from licensing requirements by regulation in respect of radio apparatus that is temporarily in Canada and meets certain conditions; is not capable of emitting electromagnetic waves of a field strength greater than that prescribed in the regulations; or is part of a broadcasting receiving undertaking of a class not required to be licensed under The Broadcasting Act. Any such exemption may be subject to terms and conditions set out in the regulations.

Section 4(1) of the Act deals with the licenses which may be issued under the authority of this Act. The power to prescribe classes of licenses and of technical construction and operating certificates is given to the Minister of Communications who is empowered to issue licenses in respect of radio stations and radio apparatus to the extent that they are not broadcasting undertakings and technical construction and operating certificates to the extent that they are broadcasting undertakings. In issuing these documents the Minister may impose "such terms and .... such conditions as he considers appropriate for ensuring the orderly development and operation of radio communication in Canada".

It is instructive to compare the goals of the Radio Act with those of the Boradcasting Act and the provisions of the Railway Act relating to telecommunications. The latter statute is concerned primarily with ensuring that those entities which are regulated

by the CRTC because of their monopoly position do not abuse this power either for their own benefit or to the detriment of others. As the CRTC has developed a regulatory interpretation of the Act, it has become apparent that the rules of natural justice and attempting to hear all sides in an open adversarial type of proceeding have been paramount considerations. It is interesting that the use of public hearings, cross examination under oath and wide public dissemination of information relating to these proceedings have developed in an almost total absence of any statutory requirements relating to procedure.

The Broadcasting Act, as noted in Part 4.4 of this report, is much more concerned with statutory provisions relating to notice and hearings. In part this is due to the fact that the Act contemplates competition among applicants for scarce resources (broadcasting licences using radio frequencies) and a desire to ensure that the best applications are brought to the attention of the Commission. On the other hand, telecommunications concerns have been oriented to modifying the behaviour of the regulated entity, if required, in a context that was originally seen as being very largely monopolistic. It was contemplated that telecommunications regulation would be rate level oriented whereas broadcasting regulation and supervision would be licence oriented and that failure to measure up on the telecom side could lead to reduced rate relief whereas on the broadcast side, it could lead to a loss of licence to a competitor.

The Radio Act is an interesting combination of the two approaches. It is a licensing statute, dealing in the scarce resoure of radio frequencies, but unlike the Broadcasting Act is not concerned with transmissions intended for the reception by the general public or with content (except in the case of actual or apprehended war, rebellion, riot or other emergency). The Act is administrative in outlook, permitting ministerial and Cabinet action by or under regulations that they promulgate. Hearings are not required notwithstanding the fact that it would appear the decision to award or deny a licence application could be as serious to the

applicant under this Act as to the applicant under the Broadcasting Act. The goal of the Radio Act, as noted above, is the orderly development and operation of radio communication in Canada and is not concerned with the types of goals set out in section 3 of the Broadcasting Act.

The licensing of cellular radios in Canada is a recent example of the Radio Act procedures in practice. It is also an interesting contrast to the procedural requirements of the CRTC in discharging its obligations. On October 23, 1982 the Department of Communications issued a call for cellular licence applications. At that stage of the proceeding the Department had designated the areas of operations as being 23 named metropolitan areas in Canada.

It had also established that the market would consist of two providers of service in each such area and that it would license the local telephone company in each area. It also specified that only those applications offering interconnection to the public switched telephone network would be considered.

Following receipt of applications, but without any formal public hearing process, the Department narrowed the field of applicants to those applications offered nation-wide service to all designated metropolitan areas. On December 14, 1983 it announced that Cantel Cellular Radio Group Inc. had been awarded the national licence. It should be noted that while there was no formal public hearing, there was extensive consultation between department officials and the various applicants.

The CRTC subsequently expressed the opinion that Cantel and the telephone company affiliates providing cellular service were "companies" within the meaning of section 320(1) of the Railway Act and therefore presumably subject to the procedural considerations noted above relating to that Act. However, these companies do not need to file tariffs of tolls to be charged, a decision which would indicate greatly reduced regulatory involvement in the operations of these entities. The result however is that the losing competing applicants for the national licence know relatively little about their competitor because the Broadcasting Act type of public involvement did not take place and

customers and the CRTC will probably be less aware of any anti-competitive behaviour on the part of the licensees because of the absence of filing requirements normally imposed on telecommunications carriers.

Under the Radio Act, the Minister is also given the authority to amend the conditions of any licence or certificate and, subject to giving the licensee or certificate holder an opportunity to be heard, the power to revoke or suspend a licence or certificate.

The Minister is given specific authority to deal with matters relating to broadcasting under Section 5 of the Act. Under that section he is responsible to "regulate and control all technical matters relating to the planning for and the construction and operation of broadcasting facilities...". This power is intended chiefly to co-ordinate the power, frequency, call letters, location and operation of radio apparatus used in broadcasting undertakings to prevent interference to radio reception. It should be noted that under Section 4, "the Minister may exercise various powers relating to the issue, amendment and revocation of licences. However, in Section 5, the authority is mandatory in that it provides that "the Minister shall exercise the powers described therein in relation to broadcasting.

As might be expected, the Minister is given broad regulation making power with regards to the form and content of applications for licences.

Section 7(1)(n) gives the Minister perhaps the ultimate authority, which is to make regulations "for the effective carrying out of the provisions of this Act". However, there are some other subsections which are worth noting.

Paragraph 7(1)(c) permits the Minister to make regulations "prescribing the general conditions and restrictions applicable to each class of licence and technical construction and operating certificate prescribed under paragraph 4(a)". Although it is not

specifically stated in the section, it appears from a review of the regulations passed under this section of the Act that their ambit is intended to be restricted in technical matters such as frequency co-ordination and not to extend to programming matters which more properly fall within the jurisdiction of the CRTC.

Section 7(1)(d) provides that the Minister may make regulations "to carry out and make effective the terms of any international agreement, convention or treaty respecting telecommunications to which Canada is a party". Part of this permissive power should be read in light of Section 8(1) of the Act which provides:

> The Minister shall take such action as may be necessary to secure, by international regulation or otherwise, the rights of Her Majesty in Right of Canada in telecommunications matters and shall consult the Canadian Radio-television and Telecommunications Commission with respect to all such matters that, in his opinion, affect or concern broadcasting.

It is unclear why these two portions of the Radio Act, which alone deal with telecommunications, are not found in the Department of Communications Act, R.S.C. 1970, Chapter C-24. That Act under Section 5(1)(f) requires the Minister to:

> Take such action as may be necessary to secure, by international regulation or otherwise, the rights of Canada in communication matters.

It would appear that this latter subsection is broad enough to include the international matters referred to in the sections of the Radio Act noted above and it would also appear that the word "communication" could be taken as the broadest form, of which radiocommunication, telecommunication and broadcasting are all specific parts.

Earth stations fall within the definition of "radio stations" as defined in section 2(1) of the Radio Act and are, accordingly, subject to the licensing requirements of that Act. These requirements are established by the Minister of Communications under his section 7 powers to make regulations and are found in the General Radio Regulations, Part II, as amended.

Earth stations are divided into two main types: transmit and receive. The discussion in this analysis is focussed on transmit and receive earth stations used for commercial purposes in Canada for intra-Canada services; i.e. it excludes the international aspect of these services. This is discussed below.

When the Telesat entry into TCTS was approved by Order-in-Council, the then Minister of Communications indicated that a review would be undertaken in the matter of ownership of satellite earth stations "to identify instances where non Telesat ownership would be in the public interest". At that time, Telesat owned all earth stations in its system.

It is technically not accurate to speak of the issue of earth stations as being one of ownership. The ownership of earth stations has never been restricted as such. Rather it is the licensing requirements imposed by regulations under the Radio Act for the operations of earth stations that is at issue.

The first liberalization of these licensing requirements occurred in February, 1979. As a result of this liberalization, broadcasting undertakings and telecom carriers were permitted to apply for radio licences for television receive only earth stations (TVRO) for signals transmitted by Canadian satellites. In addition, telecom carriers were permitted to apply for licences to operate transmit/receive earth stations operating at 14/12 GHz, again from Canadian domestic satellites. Finally, telecom carriers and users of temporary communications in remote

offshore locations would be permitted on a case by case basis to operate transmit/receive earth stations in either 14/12 GHz or 6/4 GHz frequency, provided the earth station was pointed to a Canadian domestic satellite.

The next liberalization occurred in November, 1980. At that time, the TVRO licensee category was broadened to include provincial educational agencies and authorities, provided reception was from a Canadian domestic satellite of an educational signal originated by a Canadian provincial educational authority or agency. As well, licensed TVRO earth terminals were permitted to include reception of radio program signals transmitted over the same satellite channel as the TV signal. Prior to this time, the TVRO was restricted to the TV signal and its associated audio and did not permit unrelated radio programming to be piggy-backed on the same channel.

Licensing policy was further liberalized in December, 1981, when resource camps were permitted to own and operate earth stations to receive radio and TV programming from Canadian satellites without the necessity of a licence, so long as the CRTC did not require the entity to have a broadcasting licence. In addition, persons or organizations wishing to receive from Canadian satellite signals other than radio and TV programming became eligible to apply for a licence. Finally, carriers, cable companies, television broadcasters, provincial educational communications authorities and radio broadcasters became eligible to apply for a reception from Canadian satellites. This avoided the necessity of having to operate a TVRO in order to receive the radio programming, which had applied to this time.

Further liberalization was announced in March, 1983. At that time it was provided that individuals were exempted from the requirement to obtain a licence to operate a receive only earth station for personal receiption of radio and TV programming from

satellites operating in the fixed satellite service frequency. Entities other than broadcasting undertakings, were similarly exempted provided they did not retransmit or distribute the signals received and did not display them except in a room to which the general public was invited or permitted access and which was used for purposes other than boarding, lodging or accommodation. The distinction between display and distribution is that no specific charge is made to a viewer when programming is displayed but when programming is distributed, the recipient is specifically charged for the service. It is to be noted that there is no restriction on the nationality of the satellite involved in these exemptions.

At the same time, broadcasting undertakings were granted similar exemption from licensing but only in the event that the signals were received from a Canadian satellite and the CRTC had approved the retransmission or distribution of the signals received. This contemplated that the Commission would grant approval where it was satisfied that there would be no serious impact on local cable operators or broadcasters.

The most recent liberalization occurred on April 19, 1984, and involved transmit earth stations. This was actually a two year forward looking liberalization in licencing policy. As a first step, effective immediately, carriers were permitted to apply for 6/4 GHz licences to extend services to locations in Canada not currently served by satellite. However, such earth stations had to operate with Canadian domestic satellites.

Effective April 1, 1985, licence applications would be accepted from business users for one year experimental services. It is contemplated that they would be required to operate with Canadian domestic satellites.

Finally, as of April 1, 1986, carriers would be able to apply for licences to operate 6/4 GHz transmit earth stations anywhere in Canada using the Canadian satellite system. Broadcasters, business users and others would be eligible to apply for licences to operate any transmit earth stations in conjunction with Canadian satellites anywhere in Canada. While reference in the policy to "and others" (found at page 3002 of The Canada Gazette, Part 1 dated April 14, 1982) is unclear, it may well be that, by 1986, virtually any individual will be permitted to obtain a transmit earth station license in either frequency band. It is reasonable to assume that this matter will be clarified when the Radio Standards Procedure (RSP-114) "Licence Application Procedure for Planned Radio Stations in Space Radio Communications Services" is revised effective April 1, 1986.

The history of these licensing requirements has had an impact on Telesat Canada in particular. This is not so much because of the advent of competition in the provision of earth station services as it is due to other factors. Telesat purchased its original earth stations in the early days of satellite services when the earth stations were much more expensive than they subsequently were. At that time only Telesat was licenced to operate these domestic earth stations and the cost was not as great a factor in the monopoly environment as it became when competition was permitted and the new entrants were able to buy earth stations at a considerably lower cost and compete with Telesat which still had unamortized capital invested in its original earth stations.

The other problem was the restriction found in the Telesat Canada Act on Telesat's provision of earth stations which requires a specified amount of Canadian content to be included in any request or proposal for earth station facilities. These restrictions are not imposed on any of Telesat's unregulated competitors in the provision of these facilites.

4.4. Broadcasting Act

As both telecommunications and broadcasting fall under the auspices of the same Commission, it is instructive to review the Broadcasting Act to contrast the differing statutory approaches to these branches of communications.

If one accepts the proposition that there is no federal telecommunications policy in a formal sense, the contrast in the broadcasting sector is complete and immediate. The opening words of the Act are: "An Act to implement a broadcasting policy for Canada". There follows, in section 3 of the Act, a detailed broadcasting policy for Canada which concludes with the statement that:

> ...the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority. (emphasis added)

It is apparent from the policy that Parliament intended the independent public authority (the CRTC) to do more than simply regulate the entities under its jurisdiction and that it should actually supervise the system as a whole. Because of the bifurcated nature of telecommunications regulation, this is not possible in that sector.

It is interesting to note the significance -- or perhaps confusion -- that this added concept caused Parliament when attempts were made in 1977-78 to pass an omnibus Telecommunications Act which would include a telecommunications policy for Canada.

The first attempt was Bill C-43, which concluded its proposed

policy with the following:

> ...the telecommunications policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system and of telecommunication undertakings over which the Parliament of Canada has legislative authority by a single independent public body. (emphasis added)

However, when Bill C-24 was introduced, a decision had been taken that supervision of neither the broadcasting system nor the federal telecommunications sector was required:

> ...the telecommunication policy for Canada enunciated in this section can best be achieved by providing for the regulation of the Canadian broadcasting system and of telecommunication undertakings over which the Parliament of Canada has legislative authority by a single independent public body. (emphasis added)

By the time the last version, Bill C-16, received first reading, there had been some third thoughts and the situation as it existed prior to the introduction of these Bills (and as it exists today) was restored:

> ...the telecommunication policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system and for the regulation of telecommunication undertakings over which the Parliament of Canada has legislative authority, by a single independent public body. (emphasis added).

The status quo remains as set out in the policy section of the Broadcasting Act and in section 15 of the Act, which deals with the objects of the CRTC. That section provides, in part, that

"the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act."

Section 16 of the Act gives the CRTC the power to make regulations, a power it also has in telecommunications by virtue of section 46(1) of the NTA. However, it has made much more extensive use of this power on the broadcasting side, making regulations dealing specifically with AM and FM radio, television and cable TV undertakings.

4.4.1 Decision Making

The decision making process in broadcasting is in many respects quite unlike that under the NTA. Whereas the NTA is silent as to public hearings with the sole exception of the "time bomb" referred to in section 17(2) of that Act and discussed under part 4.2 of this Report, the Broadcasting Act is most explicit in section 19(1) that, in circumstances specified therein, a public hearing "shall" be held by the CRTC. Section 19(2) sets out those matters in which a public hearing shall be held "if the Executive Committee is satisfied that it would be in the public interest...". Finally, section 19(3) requires that a public hearing into matters set out therein shall be held "unless the Commission is satisfied that such a hearing is not required...".

The hearing panel is similar to that under the NTA, namely a panel of less than the full Commission or even the Executive Committee. Section 19(4) permits as few as two members to hear a matter, although at least one must be a member of the Executive Committee.

It is important to bear in mind that it is only in broadcasting matters that the part-time members of the Commission, that is, those members who are not part of the Executive Committee, have

any jurisdiction. In pursuance of their objects of regulations and supervision, the part-timers have two major obligations: (1) the powers as a Commission (that is, including the Executive Committee) on the recommendation of the Executive Committee to exercise those functions set out in section 16(1) of the Act; and, (2) the right, if they are in attendance at the meeting at which the matter is discussed, to be consulted by the Executive Committee regarding matters specified in section 17(1). It is to be emphasized that, in the former case, the part-timers have no power of initiation, but simply of acceptance or rejection and, in the latter case, have no guarantee that their views in the consultation will not be ignored.

For example, it is open to the Commission to assign a member of the Executive Committee and a part-timer to hear a license application who then make a recommendation to a quorum of the Executive Committee. It "consults" with a quorum of the entire Commission, which may not include either member of the hearing panel and which process, on its face, does not even require the Executive Committee to indicate its own thinking on the issue. Following the consultation, a quorum of the Executive Committee makes the decision in a meeting at which a majority of those in attendance might not have presided at the hearing or been in attendance at the receipt of the panel's recommendation or at the meeting of consultation.

4.4.2 Appeals and References Back

Section 25 of the Act provides that:

> Except as provided in this Part, every decision or order of the Commission is final and conclusive.

The two exceptions to this rule are: (1) an appeal to the Federal

Court of Appeal under section 26(1), similar to section 62(2) of the NTA on the telecommunications side; and, (2) intervention under section 23 of the Act by the Governor in Council. The latter is quite different from a variance by the Governor in Council in telecommunications under section 64(1) of the NTA. The latter intervention may come at any time, relate to any aspect of any decision, order, rule or regulation, and the variance can be the final decision.

Under section 23(1) of the Broadcasting Act, the Governor in Council must act within 60 days of the Commission decision, the intervention is restricted to the issue, amendment or renewal of a license and it must either set the decision aside or refer it back to the Commission for reconsideration and hearing. In addition, a reference back must, under section 23(2), set out the matters that the Governor in Council believes are material and that the Commission failed to consider or consider adequately. Once the Commission reconsiders the matter and issues its decision under section 19(3), if it confirms its original decision, the Governor in Council may, within 60 days, set it aside. In this respect, therefore, the Governor in Council has no positive decision making power in braodcast matters.

4.4.3 Public Process

There is more concern in the Broadcasting Act for notification and public process than there is in the NTA and Railway Act, which are virtually silent on the matter. Specific statutory provision has been made for notification through newspapers in sections 20(2) and 24(2)(b); for public hearings in sections 19(1) and (3), 23(1), 24(1)(b) and 24(3); and for publication in the Canada Gazette in sections 16(2), 17(3), 18(2), 20(1), 24(2)(b) and 27(2).

4.4.4 The Canadian Broadcasting Corporation (CBC)

The CBC, which is established by Part III of the Act, is subject to different regulation and supervision by the CRTC than are other licensees. Section 29(1) of the Act specifies that its purpose is that "of providing the national broadcasting service contemplated by section 3...".

4.4.5 Instructions by the Governor in Council

Political intervention is not limited to references back and CBC related matters. Section 27(1) of the Act provides that:

> The Governor in Council may by order from time to time issue directions to the Commission as provided for by subsection 18(2) and paragraph 22(1)(a).

Section 18(2) provides:

> The Executive Committee may from time to time and shall, in accordance with any direction to the Commission issued by the Governor in Council under the authority of this Act, by notice to all licensees throughout Canada or throughout any area of Canada specified in the notice, require such licensees to broadcast any program that the Executive Committee or the Governor in Council, as the case may be, deems to be of urgent importance to Canadians generally or to persons resident in the area to which the notice relates; and a copy of each notice given under this subsection shall, forthwith after the giving thereof, be published in the Canada Gazette.

Section 22(1)(a) provides that:

> No broadcasting licence shall be issued, amended or renewed pursuant to this Part
>
> (a) in contravention of any direction to the Commission issued by the Governor in Council under

the authority of this Act respecting

> (i) the maximum number of channels or frequencies for the use of which broadcasting licences may be issued within a geographical area designated in the direction,
> (ii) the reservation of channels or frequencies for the use of the Corporation or for any special purpose designated in the direction, or
> (iii) the classes of applicants to whom broadcasting licences may not be issued or to whom amendments or renewals thereof may not be granted and any such class may, notwithstanding section 3, be limited so as not to preclude the amendment or renewal of a broadcasting licence that is outstanding on the 1st day of April 1968...

Under this authority, the Governor in Council has issued three directions dealing with the eligibility or non-eligibility of certain entities to hold licences and one regarding reservation of cable channels for provincial authorities as defined in the direction. It should be noted that the restrictions on the ability to hold licences were not concerned with competition as such, but rather with foreign or government ownership or control of licences and with concentration of ownership of electronic and print media.

4.5 OTHER SPECIFIC STATUTES

4.5.1 Bell Canada Act

The Bell Telephone Company of Canada was originally incorporated by Act of Parliament in 1880 which was most recently amended 98 years later on April 6, 1978. Bill C-19, which was the legislative response to the corporate reorganization of the company, has been introduced but was not passed into law. The statutory evolution of the company mirrors the development of regulation of federal telecommunications carriers in this country and a brief review of its history is instructive.

Incorporated with the power, inter alia, to "sell or let any line or lines for the transmission of messages by telephone, in Canada or elsewhere...", the company expanded so rapidly that, in 1882, its charter was amended to permit it specifically to extend its telephone lines from any one province to another and from Canada into the United States and, in order to ensure that it remained subject to federal jurisdiction, was declared to be a work "for the general advantage of Canada".

When Bell was incorporated, its capital stock was set at $500,000, with authority to double that in order "to carry into perfect completion and operation the whole undertaking". The most recent amendment to its charter which dealt with this matter (S.C. 1977 -78 c. 44) stated that its present authorized capital stock was $1.75 billion and that it was authorized to increase that to $5 billion. It was about the turn of the century that Bell began to be regulated. Prior to that time, there had been no federal regulation of telephone companies in any real sense and Bell provided telephone service throughout Canada as it deemed most appropriate. However, in 1892, an amendment was made to its charter stating that existing rates could not be increased without the consent of the Governor in Council.

Part of Bell's policy was to concentrate services in the more

profitable urban areas, leaving the less densely populated areas to shift for themselves. This led to passage in 1902 of a further charter amendment to the effect that, in any area where Bell provided service generally, it would be required to supply that service to anyone willing to pay the lawful rates semi-annually in advance, who wanted the service and who happened to be within 200 feet of a Bell line. This is still the law today.

That amendment also saw the introduction of the following clauses:

> The rates for telephone service in any municipality may be increased or diminshed by order of the Governor in Council upon the appplication of the Company or of any interested municipality, and thereafter the rates so ordered shall be the rates under this Act until again similarly adjusted by the Governor in Council.
>
> In increasing or diminishing said rates due regard shall be had to the principle embodied in section 3 of chapter 67 of the statutes of 1892 and to new conditions which have obtained since.
>
> In the case of any such application the Governor in Council may commission or empower any judge of the Supreme Court or Exchequer Court of Canada, or of any superior court in any province of Canada, to inquire in a summary way into, and report to the Governor in Council whether such increase or diminution should be made, and as to the expenses incurred in and about the application and inquiry.
>
> The Governor in Council may order the whole or any part of such expenses to be borne by the municipality or by the Company.

This is the first tentative step by the Executive to delegate the power to investigate and report on the appropriateness of the company's proposed rates to an arm's length independent party. However, it should be noted that S.C. 1892 c. 67, s. 3, referred to above, provided that: "The existing rates shall not be increased without the consent of the Governor in Council."

The next step in the evolution of the regulation of the company was the 1906 amendment to the Railway Act which gave the Board of Railway Commissioners for Canada jurisdiction to regulate some of the activities of certain telegraph and telephone companies.

The next amendment of historical significance came in 1929, when the sale of the company's capital stock became subject to the prior approval of the Board of Railway Commissioners for Canada of the amount, terms and conditions of such issue, sale or other disposition of such capital stock".

Amendments in 1968 saw the introduction of the prohibition on the company and its subsidiaries from applying for or holding a broadcasting license or a cable TV license and was further required to "act solely as a common carrier, and ...neither control the contents nor influence the meaning or purpose of the message emitted, transmitted or received...".

At that time, the issue of terminal attachments had raised its head in the United States. The Canadian response insofar as Bell Canada was concerned is found in section 5 of S.C. 1967-68 c.48, which provided in part:

> (4) For the protection of the subscribers of the Company and of the public any equipment, apparatus, line, circuit or device not provided by the company shall only be attached to, connected or interconnected with, or used in connection with the facilities of the Company in conformity with such reasonable requirements as may be prescribed by the Company.
>
> (5) the Canadian Transport Commission may determine, as questions of fact, whether or not any requirements prescribed by the Company under sub-section (4) are reasonable and may disallow any such requirements as it considers unreasonable or

> contrary to the public interest and may require the company to substitute requirements satisfactory to the Canadian Transport Commission in lieu thereof or prescribe other requirements in lieu of any requirements so disallowed.
>
> (6) Any person who is affected by any requirements prescribed by the Company under sub-section (4) of this section may apply to the Canadian Transport Commission to determine the reasonableness of such requirement having regard to the public interest and the effect such attachment, connection or interconnection is likely to have on the cost and value of the service to the subscribers.
>
> The decision of the Commission is subject to review and appeal pursuant to the Railway Act.

Although regulation pursuant to these sections has now passed to the CRTC by virtue of section 14(2) of the CRTC Act, the reference in sub-section 6 to review and appeal mechanisms pursuant to the Railway Act has not been amended to reflect the fact that provisions governing the review and appeal of CRTC decisions is now found in the NTA, not the Railway Act.

While the regulator has the power to determine whether or not the requirements prescribed under sub-section 4 are reasonable and may disallow them if it concludes that they are not, this does not respond to the question of jurisdiction if Bell simply refuses to provide any requirements. Is the absence of any requirements in itself an unreasonable requirement?

The Supreme Court of Canada put that issue to rest with the unanimous decision of the full court in the Harding case. Harding had installed a "divert a call" machine in the Bank of Montreal's facilities and Bell had refused to provide couplers to connect it into its system and had threatened disconnection of the bank's service if it did not stop using the Harding equipment. It was conceded by Bell that there was no technological fault with the machine and, in fact, Bell offered to install the same equipment

(owned by Bell) on a lease arrangement. The issue that went to the Supreme Court of Canada was simply whether a superior court had jurisdiction to decide whether that section of the Special Act imposed a legal obligation upon Bell to provide requirements. The Court held that it did.

Although the decision revolved around a portion of Bell's Special Act, it was important because it concluded that, not only did the CRTC have jurisdiction to examine the issue in a regulatory context (that is, under its powers in the Railway Act), but also that it did not exclude a provincial superior court from jurisdiction in matters outside the purview of the Commission (that is, tort liability) and, in fact, that the provincial superior court did have that power. Therefore, not only did Bell lose its contention that the Court had no jurisdiction, but it also weakened the opportunity of later denying that the Commission had jurisdiction in respect of its obligations as it had argued before the civil courts that such jurisdiction, if any, was with the Commission.

The next proposed amendment to its Special Act dealt, in part, with Bell's ability to diversify and alter its share capital without having to resort to an amendment to its charter by Act of Parliament. It is interesting to note that the following sections that formed part of Bill C-1001 did <u>not</u> pass into law:

> 5.2 Section 16 of the Canada Corporations Act shall apply to the Company.
>
> 5.3 Subject to confirmation by letters patent in accordance with this section, the Company may from time to time when authorized by bylaw made by the directors and sanctioned by at least two thirds of the votes cast at a general meeting of the shareholders called for the purpose,
>
> (a) reduce, limit, amend, vary or extend the objects or powers of the Company;

(b) increase or decrease the total amount of capital stock of the Company referred to in subsection 5(4); or

(c) otherwise alter the capital stock of the Company in any manner not provided for in subsection 5(5).

(2) The Minister of Consumer and Corporate Affairs may issue letters patent for the purpose of this section and the letters patent shall be laid before Parliament not later than fifteen days after this issue, or if Parliament is not then sitting in any of the first five days next thereafter that Parliament is sitting; and the letters patent become effective on the thirtieth sitting day of either House of Parliament after they have been laid before Parliament unless before that day either House of Parliament resolves that the letters patent shall be annulled whenever the letters patent are annulled and of no effect.

28 Where a provision of the Canada Corporations Act that applies in respect of the Company makes reference to letters patent the reference shall be construed in relation to the Company as a reference to this Act and all Acts in amendment thereof, and if any such reference to supplementary letters patent, the reference shall be construed in relation to the Company as a reference to letters patent issued pursuant to section 5.3 of the Act.

The failure of these sections to pass and the decision of the company to undertake a major corporate reorganization a few years later, can hardly be viewed as coincidental.

4.5.2 Telegraphs Act

The Telegraphs Act is actually a consolidation of four originally separate areas of legislation. The Act is divided into four distinct Parts: Secrecy, Electric Telegraph Companies, Marine Electric Companies, and External Submarine Cables.

From the point of view of telecommunications policy, the Act is relatively insignificant although, by virtue of section 314(3) of the Railway Act, Part II applies to the telegraphic business of raiway companies "except such portions thereof as are inconsistent" with the Railway Act. The Part, therefore, applies to the telegraphic business of CNCP.

Part II also permits Her Majesty, under section 11(1), to "assume, and for any length of time retain, possession of any such telegraphic line" and may, under section 12(1), "assume the possession and property" of the company upon payment of compensation to be determined by arbitration.

However, the Act, which by virtue of section 44 binds Her Majesty, is more interesting from a regulatory perspective for what it does not contain than for what it does. As is noted below, section 18 of the Teleglobe Canada Act provides that Teleglobe "is deemed to be a company within the meaning of Part III of the Telegraphs Act".

Sections 31 to 33, dealing with the transmission of messages, as found in R.S.C. 1970 c.T-3 as amended, read as follows:

> 31.(1) The company shall transmit all messages
>
> (a) in the order in which they are received or in such order as the Canadian Radio-television and Telecommunications Commission may require or direct, and

(b) at such rates as may be determined from time to time by the Commission for the different classes of messages, or hours of the day or night during which such messages are transmitted, without discrimination within each class.

(2) Every company violating any of the provisions of this section incurs a penalty not exceeding two hundred dollars, and not less than fifty dollars.

(3) the penalty is recoverable on summary conviction with costs, by the person aggrieved.

32. The company may charge for the transmission of messages, and may demand and collect in advance such rates of payment therefor as are fixed by by-law of the company as its tariff rates and approved by the Canadian Radio-television and Telecommunications Commission.

33(1) Notwithstanding anything contained herein arrangements may be made by any such company with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its regular order and at less rates of charge than its regular tariff rates.

(2) Every such arrangement is subject to the approval of the Canadian Radio-television and Telecommunications Commission.

Accordingly, on the face of it, Teleglobe is subject to CRTC jurisdiction essentially as to rates it charges, although in view of the fact that the Railway Act does not apply to Her Majesty generally, (in the absence of a reversal of the AGT v. CRTC et al decision of the Federal Court Trial Division), there are no criteria to assist the Commission in deciding whether or not to approve rates that may be filed. For instance, it is not a requirement either that rates be just and reasonable or that the company not discriminate unjustly in the provision of services to its customers.

However, despite the relatively recent amendments to these sections with the passage of the CRTC Act to reflect the transfer of telecommunications jurisdiction to the CRTC, the sections themselves have never actually been proclaimed in force. They first appeared as amendments to the Telegraphs Act in 1910. Although the statute was given Royal Assent, its proclamation was contingent upon the proclamation of another statute passed that year but which also never came into force. This fact was apparently overlooked in the 1926 consolidation of the Telegraphs Act at which time these sections were incorporated as if they had, in fact, been proclaimed. Even though they have been subsequently "amended", the sections have no legal effect and should be replaced by those sections they allegedly repealed. Those sections read as follows:

> 31. The company shall transmit all messages in the order in which they are received, and at equal and corresponding tariff rates: and every company violating any of the provisions of this section shall incur a penalty not exceeding two hundred dollars, and not less than fifty dollars, which penalty shall be recoverable on summary conviction with costs, by the person aggrieved.
>
> 32. The company may charge for the transmission of messages, and may demand and collect in advance such rates of payment therefor as are fixed by by-law of the company as its tariff rates.
>
> 33. Notwithstanding anything contained herein arrangements may be made by any such company with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its regular order and at less rates of charge than its regular tariff rates.

As there is no reference to a regulator in these original sections, Teleglobe is not subject to any regulatory requirements with regard to the rates it charges and receives no statutory guidance in setting its rates. However, in the event that the appellate courts determine in the AGT v. CRTC et al case that the Railway Act does bind the Crown, it will then become necessary to determine whether Teleglobe is a "company" as defined in section 320(1) of that Act and, therefore, subject to CRTC jurisdiction even in the absence of any applicable legislation in the Telegraphs Act.

4.5.3 CRTC Act and Major Decisions

The Canadian Radio-television and Telecommunications Commission Act (CRTC Act) is essentially legislation transferring existing powers in telecommunications matters from the Canadian Transport Commission to the newly defined and expanded CRTC. It does not, with the possible exception of section 14(3), confer any new powers on the CRTC that were not already granted to its predecessor. Accordingly, an analysis of major decisions discussed elsewhere throughout this report typically refers to other Acts of Parliament such as the Railway Act, the NTA and the various Special Acts of the regulated carriers.

Considerable controversy has arisen since 1976 as to the extent to which the Commission has allegedly made policy in telecommmunications matters. The source of this controversy is a belief frequently held that legislators, who are elected and, therefore, directly accountable representatives of Canadians, should make policy, presumably through validly enacted legislation or instruments promulgated pursuant to that legislation and that non-elected public servants who are independent of the legislature should be restricted to implementation of these policies through neutral regulation.

The difficulty with this approach, of course, in the Canadian telecommunications scene is twofold: (1) there is no "policy" as such for the regulator (the CRTC) to follow despite the attempts in 1977-78 to introduce a comprehensive telecommunications policy, and no statutory mechanism in place to permit the creation of a policy which would be binding on it, although Bill C-20 attempted to come to grips with this vacuum to a degree; and, (2) the regulator has a statutory duty imposed on it under the Railway Act and NTA to hear and decide matters within its jurisdiction and such decisions almost invariably have policy implications of some

sort. With respect to this latter aspect, it is surely one thing to establish fundamental substantive principles in a general context unrelated to any specific proceeding and quite another to exercise jurisdiction already conferred, even if the result is perceived as having policy implications. If the CRTC were to attempt the former, it might well be exceeding its jurisdiction; conversely, if it refused to do the latter, this might also constitute an error of law or jurisdiction on its part.

This is not to say that the CRTC ignores political reality. In Telecom Decision CRTC 78-4 dated May 23, 1978, dealing with its own procedures and practices, the Commission stated at 4 C.R.T. 106-107:

> The Commission's position with respect to government policy can be stated quite clearly. The Commission has a duty to take into consideration all evidence properly before it in reaching its decisions. It is to be expected that such evidence may, in the normal course, include statements of government policy affecting a given case. Such statements would not supersede the Commission's statutory jurisdiction but might, subject to being tested by cross-examination and argument, be helpful in assisting the Commission in exercising its authority. To that extent, 'developing national telecommunications policy objectives' may be and are taken into account.

The issue of the clash between policy and regulation has arisen in several proceedings before the Commission. Perhaps the most celebrated clash occurred in connection with the application by Telesat Canada to join the consortium of major Canadian telephone companies collectively known as TransCanada Telephone System or TCTS (now Telecom Canada), in 1976.

Although there was no legal requirement to do so, because of the apparent policy implications of the application, the federal

Cabinet considered the proposed agreement in early November, 1976. By letter dated November 23, 1976, the Minister of Communications advised that the Government agreed that the association was "acceptable", subject to a number of considerations, the last of which was a statement that acceptance was "without prejudice to the role of the Canadian Radio- television and Telecommunications Commission (CRTC)...". It is fair to say that the Connecting Agreement as filed for approval met all of the considerations as stipulated by the Government.

In Telecom Decision CRTC 77-10 dated August 24, 1977, the CRTC withheld approval for a number of regulatory reasons and also for broader general public policy reasons. By Order in Council PC 1977-3152 dated November 3, 1977 the Cabinet reversed the decision and, in approving the Agreement, said in an accompanying release that it had considered factors that were beyond the Commission's perview. Depending on one's point of view, the process either highlighted the futility of the legislators attempting to give policy direction to the regulator, or the futility of the regulatory process.

The issue of policy versus regulations arose again in the 1976 application by CNCP for system interconnection with Bell Canada for data transmission. Most provincial governments and all provincially regulated telephone companies argued, in that case, that the existing structure -- which was a product of history as much as positive policy -- ought not to be changed by a federal regulator acting alone, but should await policy development by federal and provincial governments.

The CRTC, however, accepted the argument that it "is obliged by statute to reach a decision on the merits of the Application, based on the record of evidence before it...it does not, however, consider that a delay in deciding the Application pending any results of such deliberations would either be desirable in the public interest or indeed lawful". (5 C.R.T. 260-261)

Virtually the same argument was raised in connection with CNCP's 1983 application for system interconnection with Bell and BC Tel for voice transmission. The panel disposed of the argument at volume 5 pages 547-548 of the proceedings as follows:

> As a matter of law it is not open to the Commission to refrain from undertaking its statutory responsibility in a timely manner even where the reason urged upon it is, as proposed here, to await the formulation of a national telecommunications policy by the federal government in conjunction with the provincial governments. The specific applications under consideration in this proceeding have been before the Commission since the fall of 1983 and the Commission is under an obligation to dispose of them, in a timely manner.
>
> Second, the Commission has taken into account the fact that the existing legislation provides opportunity for the federal government to participate directly in CRTC proceedings and to review CRTC decisions after they have been made. Section 64 of the National Transportation Act specifically enables the government of the day to vary or rescind any decision of the Commission.

The panel also pointed out that the Department of Communications was aware of the CRTC's intention to conduct "significant policy hearings concerning...interexchange competition and related issues involving federally regulated carriers", and that even with the change of government, there was no indication of a different approach insofar as the CRTC was concerned.

Although the Commission may have been correct as a practical matter to proceed with the disposition of the applications before it and was undoubtedly correct in law that it could not decline to proceed, the issue of the timeliness of its proceeding is not as clear.

Under existing legislation, it is difficult to conceive of a situation in which a national telecommunications policy could be effected with participation of the provinces in any event. In passing, it should be noted that "national" is interpreted as a much broader concept than purely "federal", as section 64(1) of the NTA now gives an ex post facto relatively heavy-handed mechanism for the implementaiton of federal policy as the Telesat/TCTS decisions illustrates.

A "national" policy assumes some form of concensus among the federal and provincial governments on broad issues, something that has not been readily discernible in recent years. As a very specific example, it is no secret that the B.C. government favours provincial regulation of BC Tel, a company whose Special Act specifically declares, in section 2, that the works authorized therein are for the general advantage of Canada and, accordingly, within federal jurisdiction. Similarly, the recent AGT v.CRTC et al case has indicated, at least at the trial level, that all provincial telephone companies that connect their facilities to other provinces, are potentially under federal jurisdiction, in the absence of a saving provision such as provincial Crown immunity. If judicial evolution of the existing situation increases, the federal jurisdiction at provincial expense, even assuming that the status quo ought to be maintained, might then require some new delegating legislation returning this jurisdiction to the provinces.

Even if concensus as to policy could be reached among the legislators, the method of implementation would remain outstanding. Without a review of all relevant provincial legislation, it is impossible to determine the extent of the power of provincial governments to give binding policy directives to their regulated telecommunications carriers. At the federal level, however, it is clear that no such mechanism exists except as noted through section 64(1) of the NTA.

4.5.4 Teleglobe Canada Act

It is instructive to contrast the status and functioning of this corporation with Telesat, particularly in that both entities are involved in the provision of telecommunications services by one method of transmission, namely satellite facilities. It should be noted, however, that Teleglobe also provides much of its telecommunications services via submarine cables, giving it an added element of flexibility in its operations.

Teleglobe Canada was originally incorporated as the Canadian Overseas Telecommunications Corporation in 1949, essentially to provide telecommunications services to the public "between Canada and any place outside of Canada".

Section 7 of the Act sets out the purposes for which the company was established:

> ...the Corporation is established for the following purposes:
>
> (a) to establish, maintain and operate in Canada and elsewhere external telecommunication services for the conduct of public communications;
> (b) to carry on the business of public communications by cable, radiotelegraph, radiotelephone or any other means of telecommunication between Canada and any other place;
> (c) to make use of all developments in cable and radio transmission or reception for external telecommunication purposes as related to public communication services;
> (d) to conduct investigations and researches with the object of improving the efficiency of telecommunication services generally; and
> (e) to coordinate Canada's external telecommunication services with the telecommunication services of other nations.

The phrase "external telecommunications services" is defined in the Act as "the telecommunications services between Canada and any place outside Canada", and "public communications" is defined as "any telecommunication that is available to the public". Interestingly, subparagraph (3) originally required that co-ordination only be with "other parts of the British Commonwealth of Nations".

From the "purposes" section of the Act, it is apparent that the company is intended to act as a telecommunications carrier offering its services to the public. What is not specified and is discussed elsewhere in this report, under 4.5.2 dealing with the Telegraphs Act, is what principles the company is to follow in setting rates for these services and what, if any, degree of regulation of the company is contemplated (although the discussion of the Telegraph Act in conjunction with section 18 of the Teleglobe Canada Act could be considered an indication of the regulation Parliament thought it had in mind).

Teleglobe is Canada's representative in the International Telecommunications Satellite Organization (Intelsat) arrangement, under which international satellite communications are provided as a single global satellite telecommunications system. Intelsat's main purpose as set out in Article II(a) of the Intelsat Agreement "is to continue and carry forward on a definitive basis the design, development, construction, establishment, operation and maintenance of the space segment of the global commercial telecommunications satellite system ...", as established under interim arrangements. It should be noted that the "commercial" aspect occurs intranationally, that is, when the members of Intelsat (Teleglobe, in Canada's case), sell the services within their jurisdiction. Depending on the country, these members may be operated on a not-for-profit basis by government agencies and, in others, the entity may be profit oriented and publicly or privately owned.

In Canada's case, the ownership is public. By virtue of section 8(1) of the Teleglobe Canada Act:

> The Corporation is for all purposes of this Act an agent of Her Majesty and its powers under this Act may be exercised only as an agent of Her Majesty.

While the company is not regulated as directly or in the manner that Telesat is in the provision of its services, section 3(9) is worth noting. That section states:

> The Corporation shall comply with any directions from time to time given to it by the Governor in Council or the Minister with respect to the exercise of its powers.

There is no qualification restricting the type of directions that either the Governor in Council or the Minister of Communications may give, although the Minister would be constrained by the duties imposed on him in the Department of Communicaitons Act.

Government financial involvement in the company is quite unlike that specified in sections 40 and 41 of the Telesat Canada Act. Section 12 provides that:

> At the request of the Corporation and with the approval of the Governor in Council, the Minister of Finance may, from time to time, authorize the payment
>
> (a) to the Corporation out of the unappropriated moneys in the Consolidated Revenue Fund of amounts not exceeding in the aggregate four and one-half million dollars, and
> (b) in addition to the payments referred to in paragraph (a) of moneys appropriated by Parliament for the capital purposes of the Corporation.

Accordingly, while the initial payments under section 12(1)(a) are relatively low, the additional authority granted under section 12(1)(b) removes any ceiling, subject to Parliamentary approval.

The other involvement of the Executive in Teleglobe's financial operations is found in section 17 which provides:

> The Corporation shall submit annually to the Minister for his consideration and approval an operating budget for the next following financial year of the Corporation.

No such approval is necessary of Telesat's operating budget. In addition, whereas Teleglobe is audited pursuant to section 16 by the Auditor General of Canada, Telesat is permitted to retain its own independent auditors (although the audited annual report must, under section 37 of the Telesat Canada Act, be forwarded to the Minister and laid before Parliament).

It is interesting to note that Teleglobe was originally conceived as operating on a break even basis. It was provided in R.S.C. 1952 c.42 s.19, that:

> (1) Where in any year the Corporation realizes a profit from its operations under this Act, the Corporation shall pay an amount equal to the profit to the Receiver General of Canada.
>
> (2) Where in any year the Corporation suffers a loss from its operations under this Act, an amount equal to the loss shall be paid to the Corporation from moneys appropriated by Parliament for that purpose.

This was repealed in 1953 by virtue of S.C. 1952-53 c.13 s.4. There is, therefore, no express direction as to whether the company should be profit oriented, unlike the sections of the Telesat Canada Act requiring that company to operate "on a commercial basis". As a matter of record, Teleglobe is a profitable operation, although a review of its financial statements must take into account the fact that, as a Crown corporation, it does not pay certain taxes.

4.5.5 Telesat Canada Act

4.5.5(a) Regulation and Ownership of Telesat's Systems

In 1968, the Minister of Industry at the time published "A Domestic Satellite Communication System for Canada", commonly known as the White Paper, which document was the forerunner to the Telesat Canada Act. Although the White Paper was quite explicit as to the necessity for Telesat to be regulated, there is no such reference in the Act. This is in contrast to the B.C. Tel Special Act (S.C. 1916 c.66 as amended) which makes a number of references to a regulator and specifically provides that tolls are subject to regulatory approval. In fact, it is arguable that Telesat, being a domestic satellite communications carrier, does not fall within the definition of "company" found in section 320(1) of the Railway Act.

Telesat has always taken the position that it should own the entire system that it uses to provide telecommunications services. In the debates in Parliament and in the White Paper, it was clearly contemplated that the company would, in fact, own the satellite system. However, this was not incorporated into the Telesat Canada Act. That Act provides in section 5(1) that the "objects of the company are to establish satellite telecommunications systems...".

Section 2 of the Act defines a satellite telecommunications system as follows:

> 'satellite communications system' means a complete telecommunication system consisting of two or more commercial radio stations situated on land, water or aircraft, hereinafter referred to as 'earth stations', and one or more radio stations situated on a satellite in space, hereinafter referred to as 'satellite stations', in which at least one earth

> station is capable of transmitting signs, signals, writing, images or sounds or intelligence of any nature to a satellite station which is in turn capable of receiving and retransmitting those signs, signals, writing, images or sound or intelligence of any nature for reception by one or more earth stations.

As discussed above under part 4.3 Radio Act, the radio stations referred to in the satellite telecommunication system all require licences from the Department of Communications issued under the regulations passed pursuant to the Radio Act for intranational traffic on a commercial basis. The net effect of this is that, while Telesat does not have to own the entire system, anyone else who wishes to own any of the component parts is required to obtain a licence to operate them and cannot do so.

4.5.5(b) Objects and Powers

The Telesat Canada Act itself can be amended by essentially two different methods. The Act itself can be amended by Parliament in the way any other Act would be altered with the exception of clauses relating to capital, objects and powers. By virtue of section 33(1) of the Act, alteration of these clauses must initially be authorized by at least two-thirds of the votes cast at a special general meeting of the shareholders called for the purpose. This is then subject to confirmation by letter patent issued by the Minister of Consumer and Corporate Affairs under section 33(2). These letters patent must be laid before Parliament within specified times and become effective thirty sitting days thereafter unless either House of Parliament resolves that the letters patent shall be annulled.

It is the objects and powers clauses of the Act that deal with Telesat's ability to compete in the Canadian telecommunications scene. They have been amended twice since the company was created.

It is to be noted that all of the amendments to the objects and powers of the company have been driven by a need to make Telesat more competitive. The initial amendment to the objects was intended to permit the company to engage in international operations that it otherwise could not have and the amendments to the powers clauses were to broaden both the geography and the scope within which services could be provided by the company. The 1984 amendments are also clearly designed to permit the company to broaden its base of activities to respond to competitive pressures.

4.5.5(c) The "Commercial Basis" of Operations

One continuing thread throughout all the amendments to its objects clauses is that Telesat is to operate on a commercial basis.

Although the company is not a Crown corporation, (see Section 34) the Government of Canada is the largest single shareholder of the company.

Although it is intended (but not explicitly stated in the Act) that the share structure be ultimately established at approximately one-third ownership by the Government of Canada, one-third by approved telecommunications common carriers and one-third by persons who fulfill the statutory conditions, an offering of shares to this third category has not been undertaken.

Under section 10(2) of the Act, the Board of directors with the approval of the Governor-in-Council may determine the timing, consideration and proportion in which shares are to be issued. However, the only shareholders of the corporation are to be Her Majesty in Right of Canada (or a corporation declared by statute

to be Her agent); approved telecommunications common carriers as set out in Schedule I to the Act; and persons who fulfill the statutory conditions as set out in Schedule II of the Act. In very general terms, the last category of shareholders is the Canadian public.

4.5.5(d) Competitive Positioning

Despite the discussion in the White Paper regarding Telesat's competitive positioning in the Canadian telecommunication scene, the Telesat Canada Act is silent as to this matter. Certain sections would indicate that it was intended that Telesat be a competitive entity. For example, section 5 has provided throughout its various amendments that Telesat operate "on a commercial basis". Also, section 5(2) requires the company to use Canadian research, design and industrial personnel, etcetera, "to the extent practicable and consistent with its commercial nature".

Section 6(1)(e) gives the company almost all the powers provided to corporations under Section 16(1) of the Canada Corporations Act.

Section 6(1)(f) of the Telesat Canada Act provides the company with "the power to enter into arrangements, other than amalgamation arrangements, for sharing of profits...". This section has been judicially interpreted in the CP Ltd. v. Telesat Canada law suit, in which the Ontario court of Appeal held that Telesat could not enter into partnerships. Application for leave to appeal this decision by CP Ltd. to the Supreme Court of Canada was denied by that Court without reasons.

Section 6(1)(g) further provides the company with the power in certain circumstances to hold securities of certain other

companies that are "carrying on any business capable of being conducted so as, directly or indirectly, to benefit the company...".

Against these sections, however, are numerous sections throughout the Act which appear to be inconsistent with the notion of a typical profit oriented business corporation.

Section 8(1) of the Act provides that:

> Each request by the company for a proposal for the construction of a satellite or earth station shall be submitted to the Minister, and no such request shall be issued, within thirty days of the submission thereof to the Minister, to a person qualified to submit a proposal and response thereto unless, within that time, the Minister indicates in writing to the company that he is satisfied that the request, by its terms, will result in proposals that specify a reasonable utilization of Canadian design and engineering skills and the incorporation of an appropriate proportion of Canadian components and materials.

Section 8(2) of the Act provides a similar type of restriction dealing with proposals submitted to Telesat for the construction of a satellite or an earth station.

Any contract entered into in violation of these sections is of no force or effect.

Brief reference may also be added to a couple of other sections which would appear to be inconsistent with a normal business corporation operation. Section 31 of the Telesat Canada Act provides:

> No Act relating to the solvency or winding up of a

> corporation applies to the company and in no case shall the affairs of the company be wound up unless Parliament so provides.

Section 35 gives the company powers of expropriation.

As will be seen from the discussion below, the Governor-in-Council, through various Orders-in-Council, was initially prepared to envisage Telesat in a relatively non-competitive position (namely as a carriers' carrier with sole rights to operate space stations and earth stations), but over the years, this approach has changed in the direction of favouring increased competition by Telesat with the carriers and by Telesat with unregulated competitive suppliers of earth stations.

4.5.5(e) Potential Conflicts

It was seen from the beginning that Telesat would be offering large capacity transmission capability to a select number of users such as the telecom carriers and the CBC. Accordingly, it was envisaged that Telesat would, in general terms, be a wholesaler of bulk capacity to its customers who would, in turn, be retailers on the telecom side and large broadcasters on the broadcasting side. However, it should be apparent that, at least with the carriers, there would be the potential conflict between wanting to use their own transmission facilities, for which they are normally entitled to a rate of return from their regulator, and using Telesat's facilities or services which would be simply regarded as an expense.

There is a pervasive political control over the operations of the company which can be found in the many instances where its powers can only be exercised with the approval of the Governor-in-Council.

Moreover, under section 14(1), the Governor-in-Council annually approves the election of a President by the Board from among its members.

Even the allotment of Telesat's common shares among carriers must, according to section 28 of the Act, "be such as are approved by the Minister after consultation with the approved telecommunications common carriers".

This potential conflict of interest is further emphasized by virtue of the application of sections 29 and 30(2) of the Telesat Canada Act. Section 30(2) sets out the provisions of the Canada Corporations Act which apply to the company with such modifications as circumstances require. One of the sections that does not apply is section 98 of the Act.

Section 98 of the Canada Corporations Act is the section which requires a director who is in any way directly or indirectly interested in a contract proposed contract with the company to declare his interest at a meeting of directors of the company. The section goes on to state at what meeting the declaration is to be made; what is deemed to be a sufficient declaration; that the director in question is prohibited from voting on the issue; and that a director who complies is absolved from any accountability if he has complied with the section. The reason for excluding this section is, of course, that it was contemplated that the carriers would have representatives on the Board of Directors and that one or more of them could conceivably have conflicts on virtually every vote of any consequence.

4.5.5(f) Connecting Agreement

On December 31, 1976, the nine telephone members of TCTS (now Telecom Canada) and Telesat signed a Connecting Agreement to which was attached as Schedule A a Memorandum of Agreement of the same date between Telesat on the one hand and the nine telephone companies on the other. From a competitive perspective, the following are the relevant aspects of these agreements:

(a) Telesat became a full member of TCTS which as an organization competes head on with CNCP in the provision of private line and data transmission on a national basis;

(b) Telesat was specifically granted the rights to own and operate a communications satellite system consisting of both space and earth segments;

(c) Telesat agreed that it would not build, own, operate, maintain or control any terrestrial transmission facilities within the telephone companies' operating territories except those required for the operation and control of the space segment of the system;

(d) Telesat was permitted to provide satellite and earth station facilities separately from the agreement for experimental services or other specialized space activities not related to the business of TCTS as well as consulting services;

(e) Telesat agreed to restrict its marketing to the seventeen Regulated Canadian Telecommunications Common Carriers (RCTCCs) listed in Appendix A of the Memorandum of Agreement;

(f) Telesat agreed to sell only communications capability which

could be provided by one or more complete RF channels and not portions of channels and associated earth station equipment, the RCTCC's having the sole right to market services based on the use of portions of these channels;

(g) After a phasing in period of four years, Telesat would be entitled to an after tax minimum rate of return on its common equity reasonably allocable to commercial telecommunications services equal to the after tax weighted average rate of return on common equity (non consolidated) achieved by Bell and BC Tel in the same year. In the event that Telesat's operating revenues less expenses resulted in a greater rate of return, the excess would be shared 50-50 between Telesat and the other members of TCTS;

(h) The members of TCTS agreed to a program to construct and implement extensions to Telesat's present system which, in effect, amounted to the Anik C and D programs together with requisite earth stations.

The main argument in favour of the Agreement was that it would ensure construction and implementation of the new, higher frequency 14/12 GHz series of satellites with their ability to be located near an end user's premises without interfering with terrestrial microwave frequencies and that the Agreement would also assume the extension of the then existing 6/4 GHz series. Telesat argued that, without this assurance, it would not be able to proceed with the 14/12 GHz series and continuation of 6/4 GHz series would be in jeopardy.

By virtue of section 320(12) of the Railway Act, section 320(11) applies to telecommunications. Under that section, the agreement was required to be submitted by Bell, BC Tel and Telesat to the CRTC for approval. Following a hearing, the CRTC refused to approve the agreement.

Bell, BC Tel and Telesat thereupon petitioned the Governor-in-

Council pursuant to section 64(1) of the National Transportation Act to vary the decision which was done by Order-in-Council PC 1977-3152 dated November 3, 1977. That Order varied the decision of the Commission to read as follows:

> The agreement between Telesat Canada and TransCanada Telephone system, made as of 31 December 1976, is in the public interest and is hereby approved.

4.5.5(g) Decision CRTC 81-13 and PC 1981-3456

This decision dealt with, among other things, proposed rates in Teleat's first general tariff offerings, CRTC 8001. Two of the terms incorporated into the tariff were the limitation on the customer base imposed by the 1976 Connecting Agreement and the restriction to full channel leasing by Telesat.

The Commission disallowed the restriction as to customer base and directed the company to refile the tariff item without limitation to its customer base; that is, in effect, to force Telesat to deal with any prospective customer.

The Commission also disallowed the restriction on channel leasing and ordered Telesat to revise the tariff, permitting a partial RF channel service, with rates based upon rates permitted for full RF channel services.

Once again, the Governor-in-Council was petitioned under section 64(1) of the National Transportation Act to vary decision CRTC 81-13 with respect to the above-noted portions of the decision. By Order-in-Council PC 1981-3456 dated December 8, 1981, the decision was varied but the result was that Telesat's customer base was broadened to include broadcasting undertakings (who were permitted to lease RF channels capable of carrying one colour-TV signal and

its associated audio and control signals) and Telesat was ordered to permit carriers to order partial RF channel services from the company.

The first variation in essence restored Telesat to its position prior to the execution of the Connecting Agreement, namely permitting it to deal directly with broadcasters for whole RF channel services.

The second change forced Telesat to broaden its offerings to include partial channels to carriers, something it had not done even prior to the execution of the Connecting Agreement.

It is clear from PC 1981-3456 that the Government still viewed Telesat largely as a carriers' carrier but was prepared to remove the terrestrial carrier involvement in supplying satellite services to broadcasters on a bulk basis. A statement issued by the then Minister of Communications accompanying the Order-in-Council reiterated this view when it said:

> ...in addition, [the Order-in-Council] is consistent with the Government's policy, established in 1969, that Telesat should be a complement to, rather than a competitor of, the other telecommunications carriers.

That statement also made a number of references to benefits to potential business users of satellites. However, the only improvement was that business users would be able to lease services based on partial satellite channels from RCTCCs in increments suited to their needs according to a filed tariff. Apparently, the Governor-in-Council felt that, if Telesat leased partial channel services to the carriers, they would in turn be able to add appropriate terrestrial improvements and market the same capacity to the business user whereas if the RCTCC was

required to lease a whole channel, it would be much less willing to engage in this service. In this regard, this statement concluded that:

> This approach is expected to foster competition between members of TCTS and CNCP, and thus encourage the increased utilization of satellite technology, thereby making satellite based services available to Canadians at the lowest possible cost. This approach is also consistent with the Government's view that the public interest is well served by an element of competition in the provision of telecommunications services and facilities that clearly fall outside the family of monopoly telephone services.

4.5.5(h) Decision CRTC 84-9

The most recent decision dealing with Telesat's competitive positioning in Canada is Telecom Decision CRTC 84-9 dated February 20, 1984. This involved the application for rates for 14/12 GHz space services and also involved an application by Canadian Satellite Communications Inc. (Cancom) for an order permitting it to sublet unused satellite capacity leased from Telesat.

Item 3.1 of Telesat's Tariff CRTC-8001 provides:

> The customer shall not assign, transfer or sublet any services furnished under this tariff, or any rights and privileges under this tariff, in whole or in part, without the prior written approval of the Company, which approval shall not be unreasonably withheld.

Prior to the application of Cancom, Telesat's position on resale was that the Company was prepared to permit resale of satellite services by RCTCCs but not by broadcasting undertakings except in situations of scarcity or particular instances of national interest.

The Commission concluded in Decision 84-9 that Item 3.1 of the Tariff:

> ...should be construed, on a prima facie basis, as permitting licenced broadcasting undertakings to assign, transfer or sublet excess capacity to such undertakings for broadcast programming purposes.

Accordingly, Telesat is now in direct competition with the broadcasting undertakings for the sale of partial RF channel services. It would appear that Telesat could eleminate this form of competition if it revised its definition of RF channel services so as not to provide for any nominal bandwidth but rather define it in terms of video or audio or other types of service. This would, by definition, eliminate any excess capacity that the broadcaster would then wish to attempt to resell.

4.5.5(i) Decision CRTC 84-18

There has been one further broadening of Telesat's potential competitive environment, namely that resulting from the enhanced services decision, Telecom Decision CRTC 84-18 dated July 12, 1984.

As a result of that Decision, Telesat is required to permit any customer as defined in its tariff to resell and share any basic service (as defined) for the purpose of providing enhanced services (as defined), except such enhanced services which have as their primary function the provision of a basic service. While this does not affect Telesat's position with regard to the RCTCCs, it broadens the range of services that broadcasting undertakings could provide to third parties. Whereas broadcasting undertakings were restricted to subletting excess capacity to other broadcasting undertakings for programming purposes, the enhanced

services decision permits broadcasting undertakings to resell and share basic services for the purpose of providing enhanced services to any third party.

4.5.5(j) International Traffic

Telesat Canada is Canada's domestic telecommunication satellite company and was intended to provide telecommunication services via satellite within Canada. A few years after its incorporation, it became apparent that there were certain instances in which it would be desirable to permit traffic to travel from Canada to the United States or vice versa utilizing Telesat's space segment.

Accordingly, the objects of the company were amended in 1972 as noted above and in November, 1972, appropriate intergovernmental arrangements were concluded between the United States and Canada to permit the two countries' domestic satellite telecommunication systems to provide assistance to one another in specified instances.

The three cases contemplated were as follows: the provisions of support and assistance, subject to the availability of facilities and to the extent it is technically feasible in the case of catastrophic failure of either system; to assist the other country in meeting its domestic telecommunication needs by a satellite either when the other country does not yet have a system in operation or when it may have a temporary shortage of adequate facilities; and the extension of service to a point or points in the other country where such service was incidental and peripheral to the provision of what was clearly and essentially a domestic service.

An addendum to this intergovernmental arrangement was concluded in August, 1982, relating to the joint use of the facilities of the Canadian and U.S. domestic satellite systems in the provision of trans-border fixed satellite services. It was agreed that the trans-border fixed satellite services would be provided jointly between Canada and the U.S. by entities authorized by the Government of Canada and recognized operating entities in the United States, utilizing satellite facilities of each country, as appropriate. These services would be provided pursuant to appropriate arrangements concluded between the entities in accordance with applicable governmental and regulatory approval procedures as required. Earth stations and related terrestrial facilities used in Canada would be owned and operated by authorized Canadian entities and earth station and related terrestrial facilities used in the U.S. would be owned and operated in accordance with U.S. law. In addition, Intelsat approval would be sought (this was obtained October 6, 1982).

As a result of this addendum, Telesat was authorized to enter negotiations with recognized operating entities in the United States to implement the transborder satellite services contemplated.

It should be noted that, while Telesat is to date the only entity authorized to implement the 1982 addendum on behalf of Canada, there is no prohibition against another entity being authorized to become involved. There is no requirement in the addendum that the entity authorized by the Government of Canada be a satellite company and, accordingly, it is conceivable that a terrestrial carrier could be authorized, although at this stage it would be required to use Telesat's facilities.

Reference has been made to the Intelsat system. Generally speaking, the theory behind the Intelsat system is that it is used for international satellite telecommunication traffic. Accordingly, the 1972 and 1982 transborder arrangements can be viewed as exceptions to the general principle.

Article XIV (d) of the Operating Agreement Relating to the International Telecommunication Satellite Organization (Intelsat) provides as follows:

> To the extent that any Party or Signatory or persons within the jurisdiction of the Party intend individually to establish, acquire or utilize space segment facilities separate from the Intelsat space segment facilities to meet international public telecommunications services requirements, such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities, shall furnish all relevant information to and shall consult with the Assembly of Parties, through the Board of Governors, to ensure technical compatibility of such facilities and their operations with the use of the radio frequency spectrum and orbital space by the existing or planned Intelsat space segment and to avoid significant economic harm to the global system of Intelsat. Upon such consultation, the Assembly of Parties, taking into account the advice of the Board of Governors, shall express, in the form of recommendations, its findings regarding the considerations set out in this paragraph, and further regarding the assurance that the provision or utilization of such facilities shall not prejudice the establishment of direct telecommunication links through the Intelsat space segment among all the participants.

It is the avoidance of significant economic harm that is the critical phrase in obtaining approval by Intelsat for the provision of the cross border services contemplated. Teleglobe Canada is Canada's representative in Intelsat and, as Teleglobe is attempting to extend its jurisdiction into intra-Canada telecommunications services at the same time Telesat is attempting to increase its international satellite traffic, it is reasonable

o assume that competition between these two entities will become a greater issue in the very near future. One of the areas in which this competition will be promoted or discouraged is in the licensing policies under the Radio Act of earth stations. At present, only Teleglobe is authorized to operate earth stations for international satellite traffic using foreign or internationally controlled satellites. Conversely, Teleglobe is not authorized to operate earth stations operating with Canadian domestic satellites. It is reasonable to assume that both Telesat and Teleglobe will lobby for changes to this policy to permit each company to access the satellites that are currently non-accessible or alternatively to provide services that are not the exclusive domain of the other carrier.

5.0 COMPETITION LAW AND TELECOMMUNICATIONS

The scope of this Report was mandated to include a brief review of federal legislative instruments of general application that are relevant to telecommunications. Regulation is felt to be required to act as a surrogate for competition. Consequently it is natural that a regulator and the legislator would be concerned about encouraging the perceived benefits of competition such as optimal pricing, product diffusion and innovation.

At the federal level the main legislative instrument used to provide competition in the unregulated sector is the Combines Investigation Act. The legal issue that the existence of this legislation raises is the extent, if any, to which it is relevant or applicable in the regulated sphere. There is judicial, but no statutory support for the proposition that under certain circumstances, the activities of regulated industries are exempt from the provisions of this Act. However, those circumstances must be examined with some care.

A regulated industry is defined in one text (Flavell, C.J.M., Canadian Competition Law, Toronto: McGraw-Hill Ryerson Limited, 1979, as:

> ...one in which there is some degree of intervention by government to set or approve prices, rates, charges or fees, to apportion areas of competition... to establish criteria or standards of behaviour, or to otherwise alter (some might say interfere with) the normal untrammeled forces of the free market.

The Combines Investigation Act has no provision dealing specifically with regulated industries. Accordingly, there is no statutory exemption of such firms and their activities. The concept that has become known as the regulated industry exemption originated, and its extent has been defined, in two major court decisions [Re The Farm Products Marketing Act (1957) S.C.R. 198 and R. v. Canadian Breweries Limited, (1960) 33 C.R. 1 (a decision of the Ontario Supreme Court]. The Farm Products case was concerned with a constitutional issue and only incidentally addressed the issue of exemption.

The basic principle is that regulation and competition law are alternative approaches to dealing with abuse of market power and, therefore, either one or the other should be applied, not both.

In the Canadian Breweries case, the court stated:

> When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the court must assume that the power is exercised in the public interest. (emphasis added).

Therefore, only if the power to regulate a specific kind of conduct has been exercised, would that conduct be exempt. The CRTC regulates the prices charged by Bell Canada and, therefore, Bell's prices to subscribers ought logically to be exempt from scrutiny under competition law.

However, this one case is a slender thread on which to rely for the treatment of an entire industry. For example, the decision speaks of the regulation of "an industry" whereas in Canada, only a portion of the industry is regulated by one regulator. Moreover, with the advent of competition in telecommunications, the definition of the industry itself is becoming less apparent.

Finally, in the Cellular Radio Service proceedings (CRTC Telecom Public Notice 1984-55, October 25, 1984), the Commission allowed "companies" to charge tolls to the public for service for which tariffs have not been filed. This leaves unresolved the question of whether the power to fix prices referred to in the Canadian Breweries case, has been exercised.

The scope of the exemption is also unresolved. Is it the industry and its members that are exempt from competition law or is it only specified aspects of their conduct. In the telecommunications context "does regulation to any extent, however limited, place a total combines shield over all the activities and behaviour of the industry"? (Flavell, page 48).

The Canadian Breweries case concluded that a series of mergers did not violate the Combines Investigation Act at least in part because beer prices were regulated, notwithstanding the fact that mergers were not. At page 20 of the decision, McRuer, C.J.H.C., stated:

> ... it is contended that ... these companies, by force of their economic strength and by the adoption of merchandising policies and extensive advertising, prevent others from entering the market in Ontario or in fact anywhere in Canada. If the market was a free market there might be considerable weight in this argument, but, having regard to the fact that the market is a controlled market, I do not think I can give effect to it.

It is to be noted that the "control" of the market referred to prices charged and not to merger activity. However, at page 33, he stated:

> There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the Provincial body in which restraints on competition may render the operations of the combine illegal.

We conclude that while the preferred view on logical grounds would be that only activity which is regulated ought to be exempt from competition law, what judicial authority exists, leans in both directions but ultimately takes the opposite view. Uncertainty in this area is unlikely to be resolved short of legislative amendment or a clear statement on the matter from the Supreme Court of Canada.

The Supreme Court addressed the issue in A.G. Canada et al v. Law Society of B.C. et al; Jabour v. Law Society of B.C. et al, [1982] 5 W.W.R. 289 (S.C.C.). It adopted with approval the statement of Martin, J.A. (as he then was) in R. v. Cherry, [1983] 1 W.W.R. 12, 69 C.C.C. 219, [1983] 1 D.L.R. 156 (Sask. C.A.) in considering the scope of the Criminal Code R.S.C., 1927, c. 36, s. 498 (the forerunner of s. 32 of the Combines Investigation Act):

> "Moreover, it surely cannot be successfully argued that a board, in exercising the powers conferred upon it by a Legislature and which control the production, processing and distribution of a commodity in the Province 'having regard primarily to the interests of the public and to the continuity and quality of supply' renders itself liable to a prosecution under s. 498; if this were so the Province could not exercise the powers conferred upon it with respect to property and civil rights over which it has exclusive power".

Although the issue was constitutional jurisdiction, the logic applies equally to a federal board exercising powers conferred upon it by Parliament and which are designed to regulate and control works and undertakings that fall within federal jurisdiction by virtue of s. 92(10) of the Constitution Act 1867, having regard primarily to the interests and protection of the public.

The Court stated at page 329:

> "Since all the cases examined above approach the CIA on the basis of a criminal charge, actually or potentially arising under it, the element of public interest was always present ... <u>So long as the CIA, or at least Pt. V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that these cases all conclude can be negated by the authority extended by a valid provincial regulatory statute"</u>. (emphasis added).

Again the logic is equally applicable to a "valid federal regulatory statute". Judging by the court's reasoning it will be particularly difficult to prove conduct contrary to the public interest where the statute in question is "coercive" in nature i.e. obliges the board to fix (or approve) prices charged by a regulated entity.

However, at page 336, Estey, J. stated:

> "The appellant, the Attorney General of Canada, placed the basis of the CIA in constitutional law under the trade and commerce power in part, that is s. 91(2) of the Constitution Act, but made no submission as to how this would advance the position of the appellants with reference to a proceeding under s. 32. The interpretation of s. 32 will of course produce the same answer under Q.1 [does the Act apply to the Law Society of B.C., its governing body or its members] whatever its constitutional base may be. In my view the discussion of the trade and commerce power does not advance the appellant's position? (Emphasis added).

The difficulty with this statement is that, on the basis of Estey, J.'s statement on page 329, if the constitutional underpinning of the CIA is trade and commerce rather than criminal law, its enforcement may not "require a demonstration of some conduct contrary to the public interest". If it requires a demonstration of some other form of conduct this may well change the basis on which that conduct is to be negated. In addition this case does not address - as it was not required to do - the issue of whether the regulator had to exercise its power for the legislation to receive protection, or could simply reserve its right to do so, as the CRTC is starting to do in its forbearance decisions such as the Cellular Radio decision noted above. The uneasy relationship between the Combines Investigation Act and regulated industries continues.

There is some statutory interplay between the regulated and unregulated sectors of the economy. Section 27.1(1) of the Combines Investigation Act provides:

> The Director, at the request of any federal board, commission or other tribunal or upon his own initiative, may, and upon the direction from the Minister shall, make representations to and call evidence before any such board, commission or other tribunal in respect of the maintenance of competition, whenever such representations or evidence are or is relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining such matter.

The Director of Investigation and Research, an office created by the Act, has intervened in many federal regulatory proceedings including all the major telecommunications rate cases, policy hearings and applications involving competition issues, and has tendered a great deal of evidence of expert witnesses supporting competition

Under other provisions of the Act, the Director initiated a lengthy proceeding before the Restrictive Trade Practices Commission involving the vertical integration of the two major federally regulated telephone companies and their telecommunications equipment manufacturing affiliates, alleging that the affiliations closed off markets to other manufacturers.

The Director has appeared before provincial telecommunications regulators, although s. 27(1) does not purport to require the provincial regulators to permit the Director to intervene. Two cases now before the Supreme Court of Canada deal with the Director's power to appear before provincial boards. The Newfoundland Court of Appeal decided that the Combines Investigation Act did not empower the Director to appear before a provincial board while theNew Brunswick Court of Appeal decided that he had the power or capacity to appear. The Supreme Court of Canada granted leave to appeal in both cases on October 1, 1984.

6.0 FEDERAL POLICY OBJECTIVES IN TELECOMMUNICATIONS

In developing an opinion as to the appropriateness of existing legislation in achieving Federal government objectives, it has been necessary to make several assumptions regarding these objectives. It should also be stressed that in providing this opinion we have not restricted ourselves to a legalistic view of the relevant legislation but have examined it in the context of existing decisions of the regulator and the courts that have dealt with the legislation or purported to interpret it. Not only does this have the advantage of permitting an analysis of whether the legislation as it exists is being interpreted (rightly or wrongly) in such a manner as to advance or hinder policy objectives, but it also may draw attention to areas of the legislation that might benefit either from a change or from codification of an existing interpretation. This latter point is particularly relevant in those instances where federal policy objectives may be about to shift direction or emphasis and it is desired both to make this change known and to prevent unnecessary litigation regarding those instances where existing legislation or its interpretation might otherwise be viewed as inconsistent with those objectives.

The three fundamental areas for which policy objectives at the federal level ought to be established are: market entry and ownership; rates and access; and development. Each of these is examined in turn.

6.1 Market Entry and Ownership

The issue in this context is the degree of competition that ought to exist within Canada in the provisions of telecommunications facilities and services, the identity of the participants and the resulting implications in the regulatory sphere.

6.1.1 Market Entry

For purposes of this discussion, it is assumed that the phrase "basic services" means services traditionally regarded as being best provided in a de facto or de jure monopoly environment. These are the services that exhibit the greatest combination of economies of scale and scope in their provision and for reasons of public necessity and convenience, have been provided in any area by only one entity, even if some productivity gains could be achieved with the introduction of some form of competition. The example of the provision of local telephone service is an instance where it is arguable that some gains in productivity might be realized with competition, but public inconvenience would be great enough to offset any such gains.

The concept of basic services could also apply to the sole provider of a particular technology. As an example, it could be argued that satellite and terrestrial microwave technologies are competitive in the broad sense that they are substitutable alternatives exhibiting certain advantages under particular configurations. Nevertheless, as long as a carrier possesses the only facilities capable of a particular type of transmission, the gateway concept can become the bottleneck reality.

It should be noted that any division between basic and non-basic services should be sufficiently flexible that it is capable of responding to technological developments so that services classified as "basic" could become "non-basic" in the future should this be warranted.

The significance of the distinction between basic and non-basic services, of course, is the different rules that will apply to each category. It is assumed that with regard to competition, the

public interest broadly speaking will be advanced if the following policy objectives apply:

a) national competition is permitted in non-basic services;
b) intermodal competition is permitted between satellite and terrestrial services;
c) national competition is permitted in basic public services authorized by the federal government;
d) further competition is not permitted in facilities within the next few years; and
e) the need for and degree of regulation in many situations is permitted to lessen as further competition occurs. While there is a degree of speculation involved in such assumptions, they appear both logical and reasonable in light of the trend of CRTC decisions and Orders in Council which have dealt with those decisions and in light of the new government's emphasis in favour of national competition and away from increased regulation.

6.1.2 Ownership

The issue of ownership arises in two contexts: foreign versus Canadian; and public (government owned) versus private (shareholder owned).

Dealing with the issue of foreign ownership, it is assumed that the public interest is best served and advanced if there is limited foreign ownership of facilities (but not necessarily services). The word "limited" is used in the context of the existing telecommunications infrastructure in Canada, namely the majority ownership of B.C. Tel and Quebec Tel by an American parent with the balance of the major telephone companies in Canada being owned by Canadians. As far as foreign ownership of services is concerned, it would appear to be an unproductive use of resources to attempt to limit this. Where the service is provided by a foreign owned entity using foreign facilities not located in Canada, any such attempt would invite retaliatory measures at worst and would be difficult to enforce in any effective manner at best.

With regard to government ownership, it is assumed that continued federal (not necessarily provincial) ownership of facilities or services is not in the public interest. This implies that existing federal participation will be phased out in an orderly fashion and raises the corollary issue of the identity of the purchasers of such interests. This approach is also consistent, at the policy level, with that taken at the regulatory level, namely to enhance the potential for the private sector to provide increased public welfare by reducing direct government and regulatory oversight and participation.

6.2 Rates and Access

In non-basic service areas where competition is deemed to be in the public interest, it follows that a move away from the traditional value of the service pricing approach towards cost based pricing is inevitable and presumably deemed to be in the public interest as producing a more efficient telecommunications infrastructure.

It is also assumed to be in the public interest that basic local service continues both to be made universally available and to be universally affordable. To date, these concepts have tended to be blurred into one, but with the advent of cost based pricing in competitive sectors and the inevitable pressure to cost base the remaining sectors, availability and affordability on a universal basis become two very distinct issues.

6.3 Development

It is assumed that it is in the public interest that the development of innovative, high quality and diverse facilities and services be encouraged to serve both Canadian and international markets.

7.0 ISSUES

The fundamental question to be addressed in this opinion is the extent to which the existing federal instruments reviewed in Part 4.0 of this report, as interpreted by the regulator and the courts, enhance or hinder the implementation and development of the policy objectives outlined in Part 6.0.

In responding to the policy objectives relating to market entry and ownership the report focuses on the following specific issues:

1. What is a "company" under s. 320(1) of the Railway Act? This issue is becoming important in light of the increasingly competitive environment and the advantages or disadvantages that entities perceive as being associated with regulation.

2. To what extent does the CRTC have jurisdiction to determine what classes of entities are "companies" under s. 320(1)? Can the CRTC thus decide not only how to regulate those under its jurisdiction, but also who falls within it?

3. Can the CRTC permit a "company" as defined in s. 320(1) to charge tolls for which tariffs have not been (and presumably need not be) filed?

Having decided that these entities are "companies" but not required to file tariffs, how can the CRTC then be satisfied that their "tolls" are just and reasonable?

4. To what extent can the CRTC expedite disposal of tariff filings? This is critical in the case of non-basic service offerings for which the CRTC still requires tariffs to be filed. Can it move towards annual aggregate cost/revenue filings; automatic approval if costing criteria are met; automatic approval within 60 days unless adverse comments are received; automatic approval if the service is provided by structurally separated organizations in competition with unregulated entities?

5. To what extent does existing legislation permit innovative responses by the regulator and the government? This issue decreases in importance as the probability of a new omnibus Communications Bill increases.

6. To what extent can or should there be different regulatory treatment based on whether a service offering is basic or non-basic? With technological advances accelerating, the distinction between these categories is becoming increasingly blurred.

7. To what extent is the corporation as a separate legal entity relevant? The CRTC deems certain revenue streams or rates of

return to flow from unregulated entities to "companies" as defined and has recently expressed the opinion that telephone company affiliates licensed to provide cellular radio service are "companies". Is it the relationship to a "company" as defined or the activity carried on by the affiliate that is relevant?

8. To what extent are s. 64(1) Orders in Council actually binding? Tnis issue arose because of decisions of the CRTC and the Governor in Council regarding Telesat's membership in Telecom Canada and tariffs filed subsequently.

9. To what extent are public hearings necessary in the CRTC? The Broadcasting Act is specific on this matter yet in telecommunications there is virtually no guidance and there appears to be little logic to the CRTC's decisions as to when to have a hearing and when to dispense with it.

10. To what extent should Teleglobe be regulated? It is a legislative accident that it is not now regulated under Part III of the Telegraphs Act. Will international competition in communications carriage be sufficient?

11. What is the probable ultimate disposition of the AGT v. CRTC et al case?

12. To what extent is s. 3 of the NTA a policy for telecommunications? If it applies what effect will it have on CRTC regulation?

13. Does Bill C-16, the last comprehensive federal legislative attempt to revise and consolidate the existing telecommunications legislation, address these policy objectives? Although specifically outside the scope of our mandate, the issues of how C-16 addresses these objectives, what amendments would further these stated goals and ultimately an annotated draft successor bill that specifically does incorporate these goals, would all appear appropriate matters for discussion in this context. Both this issue and the question of the relevance of s. 3 of the NTA are actually discussed in the context of all three major policy thrusts as set out in Part 6.0 of this Report.

In the context of rates and access the report examines the following issues:

1. To what extent can the CRTC order a regulated - or unregulated - entity to pay a premium to a "company" as defined for access to its system to provide non-basic services? As competition drives non-basic services towards costs, lost "company" revenues must be retrieved, either from competitors, monopoly subscribers or shareholders. The first option may promote bypass, the second may contravene the public interest and the third may constitute expropriation.

2. What effect will the move of prices towards costs on non-basic services (and basic services permitted to be offered competitively) have upon affordable, universal access to basic local service?

With regard to development the report considers the following:

1. To what extent can Canada insulate itself from international changes in the telecommunications infrastructure?

2. To what extent should regulated entities be permitted directly or indirectly to participate in the increasingly deregulated environment?

8.0 APPROPRIATENESS OF EXISTING LEGISLATION IN ACHIEVING FEDERAL GOVERNMENT OBJECTIVES

8.1 Market Entry and Ownership

The current situation in telecommunications in Canada is one of historic monopoly being challenged on virtually all fronts by competitive forces. These forces have originated in the last decade very largely with CNCP on a system basis, with business users providing support. Although terminal attachments became subject to competition formally as a result of an application by Bell Canada, pressures have been building for some time from equipment manufacturers, competitors such as Challenge Communications Limited and consumers in general.

In each situation in which the CRTC has been asked to approve an application, the effect of which would be to increase competition, it has done so. As a general proposition its actions have been justified by subsequent events, as the ensuing competition has not produced the adverse effects on local subscribers projected by the opposing telcos.

In analysing the question of whether existing legislation as interpreted by the regulator and the courts can advance or hinder federal policy objectives in the area of competition, it is necessary to ask whether these objectives can be satisfactorily promoted by continuing to permit the regulator to make decisions that have the effect of creating policy and which can then be upheld (confirming the appropriateness of the policy) or varied (indicating the government's view of the current policy) on a review after the fact by the government. There are a number of apparent difficulties with this approach at a broad level. Because there appears to be no existing power and direction available to the government (ignoring for the moment the recently introduced Bill C-20 which is discussed below in Part 8.1.1(f) of

this Report) policy can only be enunciated in the first instance by the CRTC and thus by the government on review, as a result either of a specific application or request to the Commission or as a result of the CRTC's acting on its own motion pursuant to Section 48 of the NTA. In either case, the Commission is restricted to the terms of its legislation - essentially the Railway Act and the NTA - which has not been interpreted to date as containing broad statements of general policy.

There is also the issue of the appropriateness of a system which permits a regulator to engage the expensive and time consuming regulatory process and to conduct a full public hearing in which the rights of all participants are of concern and then to have the decision overturned after the fact in a situation where it can be virtually impossible to determine why a reversal occurred and where no one is granted any particular procedural safeguards. This tends to reduce the significance both of the process before the regulator and the relevance of the legislative framework in the instruments within which it operates.

It is our opinion, as discussed in detail throughout this Part of the Report that the existing legislation could be used much more aggressively than it has been by the government to achieve its stated policy objectives. Moreover the uses of the legislation that are discussed, while admittedly aggressive and imaginative, are within both the spirit and the letter of the statutes involved.

8.1.1 Market Entry

8.1.1(a) NTA: Section 50 - Used to Direct Issue Hearings

Section 50 of the NTA has been discussed in Part 4.2 of this Report. However it was reviewed there in the context of a request for the CRTC to report back to the Governor in Council on a specific matter, namely, the Bell Canada re-organization. The issue that has not been addressed is whether the section can be

used to implement government policy rather than simply obtain information and recommendations from the Commission.

Under this Section, the Governor in Council is empowered to refer to the CRTC any matter or thing arising under the Railway Act. A principal matter that arises by virtue of Section 321 of that Act is the issue of whether a carrier's tolls are just and reasonable.

Under Section 321(3) and (4), the Commission is authorized to make this determination and to deal with tariffs of tolls filed by companies that, in its opinion, may be or that it considers are contrary to Sections 320 and 321. In such instances, the Commission may suspend or postpone all or part of any such tariffs that may contravene these sections and may disallow and require the refiling of acceptable tariffs by the offending company or even prescribe tolls of its own where it concludes that the filed tariffs do contravene these sections.

It is to be noted that the Governor in Council's power under Section 50 of the NTA is very broad, extending to "any question, matter or thing, arising, or required to be done ..." (emphasis added) under the various named statutes. It is not restricted to "applications or complaints submitted to the CRTC pursuant" to these statutes.

In the case of the Bell Canada corporate reorganization, the CRTC had in fact commenced its own inquiry into the regulatory implications of the proposal when the Governor in Council issued PC 1982-3253 directing the Commission to look at specific issues set out in the Order in Council. However the Order in Council did not refer to the proceeding the Commission had initiated and the CRTC ultimately incorporated its proceeding into the one referred to it by the Governor in Council.

Accordingly, we are of the opinion that this section is analogous to Section 55 of the Supreme Court Act dealing with references to that Court by the Governor in Council in that it may be made at any time and without the necessity of relating it to an existing

decision or matter pending before the CRTC. We are also of the opinion on the basis of A.G. Ont v. A.G. Canada, [1912] A.C. 571, 3 D.L.R. 509 affirming 43 S.C.R. 536 (sub nom. Re Reference by Governor General in Council), that the answers given by the Commission to the Governor in Council are only advisory and do not bind the latter.

There is some doubt as to whether the answers in this case bind the Commission. In the above noted reference case, the Supreme Court of Canada held that that Court was not bound by the answers "...if it is at any time called upon in its strictly judicial capacity to decide the very questions asked". However, in a similar instance, Rinfret, C.J. concluded in A.G. Canada v. Higbie, [1945] S.C.R. 385, [1945] 3 D.L.R. 1 that "...although this was not a judgment in the true sense of the word ... we should regard an opinion of that kind as binding upon this Court".

We are of the opinion that the preferred view is that answers in a reference case would subsequently be binding on the Court (in this case the CRTC) to the extent that the identical issue arose and there were no conflict of statutory enactments or facts in issue that could materially affect the answers previously given.

On the basis of the foregoing analysis we conclude that it would therefore be open to the Governor in Council to refer the issue to the Commission of whether, for example, the attainment of just and reasonable tolls would be enhanced or hindered by the increased use of competition generally or in specifically designated areas in the provision of telecommunications services. The effect of the use of Section 50 in this way would be to require the CRTC to conduct the issue hearings it frequently conducts of its own motion, but would alter the terms of reference to suit the Governor in Council.

Such a reference could clearly be for the purpose of a report back to the Governor in Council. We are of the further opinion that the reference could include instructions that the CRTC take such

action as would best implement its findings in the course of subsequent proceedings with its regulated carriers. The CRTC has the powers noted in Sections 321(3) - (5) of the Railway Act to take corrective action with regards to tariffs that unduly disadvantage any person or company (by restricting market entry as Bell Canada attempted to do in the Challenge case discussed earlier) and with regard to tolls that unjustly discriminate against any person or company.

This type of instruction will at least require the regulator to address a particular issue from a particular viewpoint. However it does not enable the Governor in Council to state his policy in a binding way nor is there any guarantee that the CRTC will reach the same conclusion that the Governor in Council wishes.

8.1.1(b) NTA: Section 50 - Alone or In Aid of Section 64 (1)

The issue in this context is the significance that is to be attached to the phrase "or other action". The phrase "or other action" as used in the context of Section 50 appears to provide scope for greater input by the Governor in Council than has been employed to date.

Section 50 of the NTA speaks of the Governor in Council referring to the Commission "...for a report, or other action...". The first matter to be determined is whether the phrase "or other action" must be read in the context of the word "report" that is, whether the ejusdem generis rule applies. In our opinion, this rule has no application for several reasons. There is some suggestion in the case law, though it is admittedly not particularly strong, that there must be more than one species mentioned to constitute a genus. In the Section in question, there is only one species, namely "report".

Regardless of the number of species involved, there must be a genus or class or category for the principle to apply.

The dictionary definition of "action", in the non legal sense, means generally the process or condition of acting or doing, the exertion of energy or influence. This would appear to constitute an active undertaking on the part of the Commission rather than the passive submission of a document entitled "Report". Moreover, particularly in view of the fact that there is only one species preceding the phrase in question, it is significant that a comma separates the two. Had it been intended that the rule applied, one would have expected that the phrase would have read "report or other action".

In addition, Section II of the Interpretation Act, R.S.C. 1970, Chapter I-23 provides that:

> Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Accordingly, it is necessary to look at the object of the Act in question. In looking at the Act it is also permissible to look at the preamble to the statuute which in this case is "an Act to define and <u>implement</u> a national transportation <u>policy</u> for Canada". (emphasis added). It is clear from the preamble to the statute that the object is policy oriented and the statute is concerned with implementation of a policy. Policy is, of course, the perogative of Parliament as opposed to the regulator. It is logical to assume that the statute would be drafted in such a way as to emphasize the ability of the government to implement its policy.

It is significant that what the Governor in Council may refer to the Commission is "... any question, matter or thing arising or required to be done ..." under the various statutes named therein.

It is an accepted canon of construction of statutes that attempts are to be made to avoid absurdity in the result and give effect to the intention of the legislators. This Section speaks of matters required to be done. An instance could arise in which the CRTC did not require a "company" as defined in the Railway Act to do something that was required to be done under the various telecommunication statutes. The exemption of the cellular companies from filing tariffs is an example. It is also quite possible that in this context there could be no Commission "order, decision, rule or regulation" upon which the Governor in Council could act under Section 64(1) by way of variance.

In this situation, if Section 50 was interpreted as simply permitting the Governor in Council to require a report or other transmittal of findings or investigation, this would result in inaction and an inability to correct an apparent injustice as the CRTC would submit a report justifying its position and there would be nothing for the Governor in Council to vary or rescind. If the Section was interpreted as requiring the CRTC to deal with the issue, in this example by requiring cellular undertakings to file tariffs this would result in action of a corrective nature. Accordingly, logic and the above noted rules of construction both indicate that the phrase "or other action" should be interpreted in the context suggested.

The above analysis has assumed that there is no Commission decision upon which the Governor in Council can act pursuant to Section 64(1) of the NTA. In the event that such a decision did exist, instead of the Governor in Council substituting his own decision for that of the Commission, he could, if time permitted, simply rescind the Commission's decision under Section 64(1) of of the NTA, state his view with regard to specific issues of concern to the regulator and under Section 50, refer to the CRTC the question of whether or not in light of the above, the Commission should alter its decision.

This approach would restore the regulatory aspect of the decision making process to the regulator, thereby preserving the integrity of the statutory scheme of regulation. It would also give the regulator specific guidance as to policy issue matters perhaps beyond its purview which, would require it to look at the matter in a particular light.

In fact such a reference could be sufficiently finely tuned so as to direct the CRTC to allow the parties before it a specific period of time to reconsider their position so as to take into account the concerns of both the CRTC and the Governor in Council.

It is important to distinguish between this type of government intervention and the use of Section 64(1) to accomplish the same end. The latter Section requires the government to substitute its own view for that of the regulator, which of itself may appear to contradict the intent of creating a regulator in the first place. Because it is viewed as such a Draconian measure, it must be used sparingly if it is not to bring the entire statutory scheme into disrepute.

The advantage of the use of Section 50 either alone or in aid of Section 64(1) is that it leaves regulation to the regulator and policy to the government, but permits an integration of the two to a much greater extent than has been employed to date. It is our view that the good faith utilization of this mechanism would enhance the integrity of the legislative and regulatory system as it currently exists and would reduce the tendency of government and regulator to view each other with the suspicion that can have the potential to colour the decision making process. This clear separation of regulation and policy would also have the advantage of separating these functions in the minds of the public and reduce the fear that one was trying to do the job of the other or

worse, that both were in some form of collusion. Part 8.1.1(f) of this Report addresses a potential problem in this regard that could arise in the event Bill C-20 Section 14.5 is enacted.

8.1.1(c) NTA: - Section 50 in Aid of Section 3

It was noted in Part 4.2 of this report that it is arguable that Section 3 of the NTA applies to telecommunications at the federal level. If it does, the scope for governmental intervention in the regulatory sphere and the guidance given to the CRTC even in the absence of such intervention, will be quite extensive.

An analysis of Section 3 of the NTA involves two stages: the first being a resolution of the question of whether or not the section applies at all to telecommunications and the second being the question of what changes have to be made to the section to put it into context. It is important that these functions be kept separate. The first involves an analysis of Sections other than Section 3 in determining whether it has any relevance whereas the second stage involves an analysis of the words of Section 3 once it is determined that they must somehow apply.

Dealing with the first stage, it is our opinion after considerable deliberation, that Section 3 does apply in the telecommunications context. It will be recalled that Section 14(2) of the CRTC Act provides in part:

> "The Executive Committee and Chairman shall exercise the powers and perform the duties and functions in relation to telecommunication, other than broadcasting, vested by the Railway Act, the National Transportation Act, or any other Act of Parliament in the Canadian Transport Commission and the President thereof respectively,..."

Section 14(3) of the Act then provides "For greater certainty, but without limiting the generality of subsection (2)"... The section then enumerates the specific sections of the NTA that apply to "every inquiry, complaint, application or other proceeding" relating to telecommunications.

One construction that could be placed on this section is that it does not limit the generality of subsection (2) with respect to any relevant statute except the NTA and that in the case of the NTA only the enumerated sections apply to telecom. The weakness of this approach is that if Parliament had intended this construction it could easily have done so by deleting the general reference to the NTA in subsection (2) and inserting the specific sections.

The preferred construction, in our opinion, is to interpret Section 14(2) so as to apply the NTA to the CRTC to the same extent that it applied to its predecessor the CTC in the telecom context from 1967 to 1976; that is, without any limitation. Section 14(3) is then interpreted as providing that Sections 17-19 and 43-82 of the NTA which all deal with procedure and jurisdiction, in connection with CRTC proceedings prevail over any conflicting sections of any other statutes.

We find support for this approach in the NTA as it applied to the CTC when that Commission had jurisdiction in telecommunications. Section 5 of the NTA which was not amended when jurisdiction in telecommunications was transferred to the CRTC in 1976, is analogous to Section 14(3) of the CRTC Act. It provides as follows:

> (1) Except as otherwise expressly provided by this Act, the provisions of Part IV relating to sittings of the Commission and the disposal of business, witnesses and evidence, practice and procedure, orders and decisions of the

> Commission and review thereof and appeals therefrom apply in the case of every inquiry, complaint, application or other proceeding under this Act, the Railway Act, the Aeronautics Act or the Transport Act or any other Act of the Parliament of Canada imposing any duty or function on the Commission; and the Commission shall exercise and enjoys the same jurisdiction and authority in matters under any such Acts as are vested in the Commission under Part IV of this Act.
>
> (2) For greater certainty and the avoidance of doubt, but without limiting the generality of subsection (1), it is declared that the following provisions of Part IV of this Act, namely sections 44 to 82 apply mutatis mutandis in respect of any proceedings before the Commission pursuant to this Act, the Railway Act, the Aeronautics Act or the Transport Act, and in the event of any conflict between the provisions of Part IV and the provisions of the Railway Act, the Aeronautics Act or the Transport Act the provisions of that Part prevail.
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> (3) Section 10 of the Railway Act applies mutatis mutandis in respect of any proceedings before the Commission pursuant to this Act, the Aeronautics Act or the Transport Act, the provisions of that section prevail.

From the foregoing it can be seen that the intent of the Section was to establish the Commission's jurisdiction in its proceedings and to resolve potential conflicts among the various statutes "in respect of any proceedings before the Commission".

There is no suggestion that the Section was intended to oust the applicability of Section 3, being the overall policy section.

Finally, there is no reference to Section 2 of the NTA in Section 14(3) of the CRTC Act. However, when the CRTC acquired Telecom jurisdiction the definition of "Commission" in Section 2 was

changed from:

> "Commission" means the Canadian Transport Commission established by this Act.
>
> to:
>
> "Commission" means the Canadian Transport Commission established by this Act except that in relation to telegraphs or telephones "Commission" means the Canadian Radio-television and Telecommunications Commission. (emphasis added).

If it had been intended that only the enumerated sections of the NTA apply to telecom Section 2 would not have had to be amended as Section 14(3) of the CRTC Act would have sufficed. Moreover if it had been deemed necessary to amend Section 2 out of an abundance of caution, but to restrict the CRTC's involvement to the enumerated sections, the amendment would not have stated "in relation to telegraphs and telephones" but would have read "in sections 17 to 19 and 43 to 82 in relation to telegraphs or telephones".

We are therefore of the opinion that there is nothing in the relevant legislation that either expressly or by necessary implication excludes Section 3 of the NTA from the telecommunications context and in fact the wording of the sections reviewed supports the proposition that it is necessarily included.

The major modification that would be required to Section 3 would be to change the words "transporation" and "transport" to "telecommunications", a type of change similar to that which must be made throughout the Railway Act in applying the provisions listed in Section 320(12) to the telecom context.

However it should be stressed that Section 3 can only apply to the CRTC to the same extent that it applies to the Canadian Transport Commission. This poses a degree of difficulty because there is no clear statement in the NTA that Section 3 applies to the Canadian Transport Commission (CTC) itself. There is no statement at the end of Section 3 analogous to that at the end of Section 3 of the Broadcasting Act, to the effect that the

objectives of the transportation policy for Canada enunciated in this Section can best be achieved by providing for the regulation and supervision of the Canadian transport system at the federal level by a single independent public authority.

Notwithstanding the fact that the Act does not specifically link the policy in Section 3 to the Canadian Transport Commission, since the passage of the Act, the CTC has always interpreted its mandate as being one of giving effect to Section 3 and not rendering decisions that would conflict with the policy stated therein. On this basis, it would appear that even though the Section is not expressly made applicable to the Commission, it is by necessary implication incorporated into its mandate. This interpretation has not been challenged in the courts to date.

Moreover as the object is specifically stated in Section 3 it is consistent with the operations of the Commission to interpret its mandate in a manner that will best ensure the attainment of that object. As noted in Part 8.1.1(b) of this Report, this is also consistent with the statutory requirement of the Interpretation Act.

A revised Section 3 in the telecommunications context would read as follows:

> National <u>telecommunications</u> policy.- It is hereby declared that an economic, efficient and adequate <u>telecommunications</u> system making the best use of all available modes of <u>telecommunications</u> at the lowest total cost is essential to protect the interests of the users of <u>telecommunications</u> and to maintain the economic well-being and growth of Canada, and that these objectives are most likely to be achieved when all modes of <u>telecommunications</u> are able to compete

under conditions ensuring that having due regard to national policy and to legal and constitutional requirements

(a) regulation of all modes of telecommunications will not be of such a nature as to restrict the ability of any mode of telecommunications to compete freely with any other modes of telecommunications.

(b) each mode of telecommunications so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided that mode of telecommunications at public expense;

(c)each mode of telecommunications, so far as practicable, receives compensation for the resources, facilities and services that it is required to provide as an imposed public duty; and

(d) each mode of telecommunications, so far as practicable, carries traffic to or from any point in Canada under tolls and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or

(ii) an undue obstacle to the interchange of commodities between points in Canada or unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities throughout Canadian ports;

and this Act is enacted in accordance with and for the attainment of so much of these objectives as fall within the purview of subject matters under the jurisdiction of Parliament relating to telecommunications. (Emphasis added).

In analysing this revised version of Section 3 of the NTA, a decision must be made as to the interpretation that will be given to the phrase "modes of telecommunications". In the case of the NTA, this was intended to apply to transport by certain railways, by air under certain conditions, by water under certain conditions, by certain types of commodity pipelines and by certain types of motor vehicle undertakings. It it our opinion that a fair reading of the section in the transport context would conclude that the government was concerned that competition in the transport of an article from one point to another be conducted under fair circumstances regardless of the medium chosen to conduct the actual transportation. This is based on the wording of Section 3 itself which states in part that "... an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential" (emphasis added). It is therefore apparent that Parliament contemplated one overall system which was composed of several modes, each capitalizing upon its advantages to produce the lowest cost system in total. It follows that Parliament was concerned not so much with the hardware or technology of transport as it was with the circumstances under which the technology was allowed to operate.

This analysis becomes particularly relevant when viewed in the telecommunications context. It is apparent that there are at least two modes of telecommunications: via terrestrial or satellite facilities. What is not as clear is whether the telecommunication via fiber optics might be considered a different mode from that via microwave or copper wire pair.

An historical fact which must be kept in mind when analysing this Section, is the attempt by the government in overseeing the various modes of transportation to equalize what was perceived to be unfair competition on the part of some by virtue of subsidies granted to one or more modes of transport but not to all. The classic example is the provision of airports by the federal government whereas motor vehicle terminals were not similarly provided.

The application of this Section in the telecommunications context in the broader context of mode, makes this Section relevant at least as between satellite and terrestrial carriers. Moreover, to the extent the focus is on the precise technology employed, the concept would also apply to competition between fibre optic, microwave, copper wire pairs, etc. However, this interpretation would be of limited assistance as it would apply only to the extent that one carrier (Bell) provided one technology (microwave) and competed with another carrier (CNCP) providing another technology (fibre optic). Most carriers provide services using a mix of transmission media. It must be stressed that the Section would still be available to allow and encourage market entry of new technologies such as cellular radio.

It cannot be contended that the phrase "mode of telecommunications" applies to type of telecommunication as opposed to type of transmission. For instance it could not be interpreted as distinguishing between basic and non-basic telecom services.

The reason for this is that Section 4 of the NTA describes the applicability of the Act in the context of modes as follows:

> This Act applies to the following <u>modes of transport</u>:
>
> (a) transport by railways to which the Railway Act applies;
> (b) transport by air to which the Aeronautics Act applies;
> (c) transport by water to which the Transport Act applies and all other transport by water to which the legislative authority of the Parliament of Canada extends;
> (d) transport by a commodity pipeline connecting a province with any other or others of the provinces or extending beyond the limits of the province; and
> (e) transport for hire or reward by a motor vehicle undertaking connecting a province with any other or others of the provinces or extending beyond the limits of a province (emphasis added).

From the above it is apparent that the competition being promoted is between rail and air, for example, and not between transportation of different types of goods. For this reason, we recommend legislative changes at the conclusion of this subsection of this Report.

It should be noted in passing that the fact that Section 3 is not completely and perfectly transferrable from transportation to telecommunications has not been held as an impediment in the past to performing such transferrals, at least insofar as the CRTC is concerned. This issue was specifically raised by Alberta Government Telephones in the CNCP interconnect case in 1976 and the Commission concluded that the basic obligation contained in a particular section could be read clearly and directly and, in the Commission's view, was easily severable from phrases which were referrable only to railway traffic. Just as the section under discussion by the CRTC in the CNCP interconnect case (Section 265 of the Railway Act) was made applicable in the telecommunications context by virtue of Section 320(12) of The Railway Act, so Section 3 of the NTA is, for the reasons noted above, made applicable to the telecommunications context by virtue of Section 14(2) of the CRTC Act.

i) Section 3(a)

The concern of Section 3(a) is that regulation of the various modes not be of such a nature as to restrict the ability of any mode "to compete freely with any other modes of telecommunications".

In the terrestrial - satellite context, there are the obvious restrictions on Telesat's ability to compete freely with terrestrial carriers because of the restriction on its customer base and its minimum capacity requirements. Technically speaking, these are regulatory restrictions, because the various CRTC Decisions which refused to approve the restrictions, were varied by the Governor in Council so as to permit them and the precise wording of Section 64(1) of the NTA indicates that the decision remains that of the regulator. An argument could therefore be made to

the effect that the decisions contravene the statute. If the Commission accepted this argument it could act under Section 63 of the NTA to review and vary the offending decisions. Alternatively, if the CRTC felt bound because of the wording of Section 64(1), the Governor in Council could act again under Section 64(1) and refer the matter back to the CRTC under Section 64(1) in aid of Section 50 for corrective action in light of Section 3.

ii) Section 3(c)

If it is perceived that the various telephone companies are required to provide local service "as an imposed public duty", Section 3(c) of the Act could be applied to justify compensation to those telephone companies from competitors such as CNCP who are permitted access to the resources, facilities and services involved. It is to be noted that this Section does not specify from whom the compensation is to be received. In the transport context, this compensation comes in the form of subsidies awarded by the CTC under Sections of the Railway Act that do not apply to telecommunications. The degree to which the CRTC can order an entity to pay a premium to a regulated company for access to its system to provide competitive services is discussed in this Report in Part 8.2.

In light of the above analysis, it is our opinion that the Governor in Council could invoke Section 50 in a similar manner to that described in Part 8.1.1(b) of this Report to require the Commission to give effect to Section 3 of the NTA. Giving full effect to this could in fact be far more sweeping in scope than what is proposed in Bill C-20 currently before Parliament. For example, the Governor in Council could direct the Commission to take action to give effect to Section 3(a) of the NTA between satellite and terrestrial carriers under its jurisdiction and in so doing to take into consideration factors set out by the Governor in Council in the reference.

Such a reference could include a more flexible directive regarding deregulation or forbearance from regulation than that envisaged in Section 14.6 of Bill C-20. This is discussed further in Part 6.1.1(f) of this Report. Subsection 3(c) could also be used by the Governor in Council to order interconnection of satellite facilities with terrestrial facilities in order that satellite services could be provided to end users. This aspect would of course be most relevant if the Telecom Canada Connecting Agreement as it now stands were to be terminated and Telesat Canada lost the interconnection rights with terrestrial carriers that it now has.

It must be conceded however that our view of Section 3 of the NTA, as it is currently worded, is controversial and might well lead to litigation. If it is felt that applying this section to the telecommunications sector would be beneficial and less difficult than enacting a new policy specifically for this industry, we would recommend that Section 14(3) of the CRTC Act be amended to state categorically those sections of the NTA that are applicable (rather than the current "for greater certainty" approach). Furthermore any such amendment should specify that "modes of telecommunication" as used in Section 3 of the NTA should be defined as meaning "telecommunications services provided by companies within the meaning of the Railway Act" so as not to restrict its application to satellite and terrestrial technologies.

8.1.1(d) NTA: Section 48

This Section is more restrictive in its application in that it relates only to matters under Part IV of the NTA or under the Railway Act that the Commission may inquire into, hear and determine upon application or complaint. This power can be used by the Minister in a way analogous to that of Section 50 to direct

the Commission to look into a particular matter, but the limitation of this Section to "application or complaint" would indicate that the Section is not intended to be used to initiate issue proceedings but is rather confined to more specific matters. For example, the Minister under this Section would be empowered to order the CRTC to inquire into, hear and determine the issue of whether Bell Canada should be required to raise or lower its rates.

This Section suffers from the deficiency of not permitting the government to provide policy direction that is binding on the Commission with regards to the merits of the proceeding itself. It does however set in motion the machinery that will result in a Commission decision, which could then form the basis of government intervention through Section 64(1) by way of variance so as to achieve the desired result. In addition, the mere fact that a Minister refers a specific matter to the Commission for determination might well indicate to the Commission that government policy was moving in a particular direction. For example, if the government had ordered the Commission to initiate a proceeding analogous to that initiated by CNCP for the right to provide competition in the interexchange market, this might well have been interpreted as a clear signal that the government was itself in favour of such competition.

This section could also be used by the government to obtain factual information needed in support of any policy initiative it might be considering. As a specific example, one of the fundamental issues in the recently concluded Interexchange hearing was the effect in the the United States and ultimately, therefore, on Canada of U.S. telecommunications deregulation and competition in the interexchange industry. It was alleged that this was a substantive policy issue that more properly came within the purview of elected representatives than appointed regulators. It was also known that the Department of Communications was conducting a separate policy review in the telecommunications area.

In the transportation field, precisely the same issue is faced in the railway sphere by virtue of the Staggers Rail Act of 1980. This was legislation enacted in the U.S. in October of that year which, by and large, deregulated rail regulation in that country.

In response to changes in the U.S., in 1983, the Minister of Transport, under section 48 of the NTA, requested the Canadian Transport Commission inquire into and report on the implications of the passage of this legislation. Members of the CTC staff were then appointed under Section 81 of the Act to report to the Railway Transport Committee of the CTC.

Their preliminary report produced comments from a number of parties which ultimately led to a public hearing. Following the public hearing, a final report was issued in December, 1984.

The Minister of Communications could have made similar use of this Section to request the CRTC to conduct a virtually identical inquiry into the effects in the U.S. and/or Canada of U.S. telecommunications deregulation. In fact, there is presumably nothing preventing the government from still proceeding in this manner. Such an inquiry could have been set by its terms of reference either to be simply a fact finding inquiry or alternatively to be coupled with a requirement that the Commission make recommendations as a result of its inquiry. The government would then be free to accept, modify or reject these recommendations.

8.1.1.(e) NTA: Section 64(1)

This Section is potentially the most potent of the existing legislative provisions permitting government intervention in the

regulatory process and clearly its ambit is not restricted to issues of market entry. In essence, as long as a Commission decision exists, the government can vary it in such a way as to enunciate and give effect to government policy. The most striking recent example of this was a variance of a number of CTC decisions to reduce drastically the passenger service of VIA Rail. By varying existing regulatory decisions, the government established a policy that those who use the transportation system should pay for it.

Whatever the political ramifications of such action may be, it is clear that the government was within its authority in proceeding as it did. The Section specifically provides that the Governor in Council: 1) may act at any time, unlike the Section 64(2) appellate process which must be instigated within one month of the decision in question; 2) may act in his discretion; that is, subject to the very limited protection of A.G. Canada v. Inuit Tapirisat of Canada et al (1980), 115 DLR (3d) 1 (S.C.C.), his action is not subject to judicial review and there is no implied duty to observe procedural fairness; 3) may act of his own motion and without any petition or application; and 4) may rescind a Commission decision or vary it, which on the basis of Consumers' Association of Canada v. A.G. Canada (1978), 87 D.L.R. (3d) 33, [1979] 1 F.C. 433 (T.D.) (appeal dismissed without reasons) includes the power to reverse the decision and substitute his own. Virtually the only substantive limitation on his power is that any variation must deal with the same subject matter or the same type or kind or order as the order or decision which it purports to vary. See in this regard City of Melville et al v. A.G. Canada et al and one other action (1982), 141 D.L.R. (3d) 191 (Fed. C.A.) reversing 129 D.L.R. (3d) 488, [1982] 2 F.C. 3 (T.D.) and Jasper Park Chamber of Commerce et al v. Governor General in Council et al (1982), 141 D.L.R. (3d) 54, 44 N.R. 243 (Fed. C.A.).

While this Section is powerful indeed, it must also be conceded that it is a relatively clumsy instrument to effect policy pronouncements in that it relies on the vehicle of a Commission decision in order to promulgate the policy and also in many cases is retroactive in nature.

8.1.1(f) Bill C-20

The following discussion is based on the assumption that the Bill as drafted and given First reading on December 20, 1984, passes into law.

It should be noted at the outset that Section 14.1 of the Bill, being the general power of direction, applies in both telecommunications and broadcasting. However, the section can only be invoked by the Governor in Council of his own motion or at the request of the Commission. In other words, interested parties who appear before the Commission from time to time must still use Section 64(1) of the National Transportation Act (NTA) and must still rely on an existing decision in the telecommunications sphere. In the case of market entry, this will force prospective or current entrants to proceed through the normal regulatory process rather than by-passing it in favour of the political process. While this may have been a deliberate decision, the practical result may be a lengthening of the period before the Governor in Council becomes aware of a market entry issue and responds to it.

Section 14.5 is a new section that was not contained in Bill C-20 of the 32nd Parliament. It requires the Minister to consult with the Executive Committee of the Commission with respect to the nature and subject matter of any direction to be issued under 14.1 prior to its issuance.

The matter of the degree and timing of the consultation is not specified. The actual effectiveness of this Section will therefore depend to a large degree upon the good will of the Minister and the Executive Committee and the spirit in which they apply it.

Section 14.6 is also a new provision that was not contained in the previous Bill C-20. Although the marginal notes refer to it as "deregulation" the wording of the actual Section indicates that jurisdiction of the Commission is not lost but merely suspended for a period of what is directed forbearance. We have reached this conclusion on the basis of the reference in Section 14.6(1) to the Governor in Council directing the CRTC:

> ...to refrain from exercising the powers and performing the duties and functions that but for the order, the Commission would perform and exercise..., and while any such order remains in effect, the Commission shall not have any powers, duties or functions in relation to the service or activity in respect of which the order is made. (emphasis added.)

From the foregoing it is clear that the CRTC ceases to exercise jurisdiction but does not lose it and that it can regain jurisdiction by the revocation of the Order in Council in question. Although the Section does not specifically refer to the right of the Governor in Council to revoke the Order in Council, as it is an act of the Crown on the advice of its responsible Ministers, it can always be revoked. In this regard see R. v. Ottawa Elec. Ry. [1933] O.W.N. 219, [1933] 1 D.L.R. 695.

As with Section 14.1 only the Governor in Council of his own motion or on the recommendation of the CRTC can initiate such proceeding and the degree and effectiveness of consultation problem referred to in connection with 14.5 also exists.

It is noteworthy in the context of market entry that the Section applies in cases where the Governor in Council is of the opinion that a service or activity "is or will be subject to a degree of competition" (emphasis added). It is accordingly not necessary for a market entrant to have established a degree of competition, a fact which, if this portion of the Section is used aggressively, should stimulate competition.

Bill C-20 raises the question of what response, if any, the Commission could make to non-"companies" who complain to the CRTC of unfair practices by "companies" in the provision of services covered by a Section 14.6 Order. For example, if an applicant alleged cross subsidization of the service in question by non-competitive services, this is a matter that would normally be within the Commission's jurisdiction and in fact, one of its chief concern. However, Section 14.6(1) provides that, while an Order under this Section remains in effect, "the Commission shall not have any powers, duties or functions in relation to the service or activity in respect of which the Order is made" (empnasis added). It is our opinion that plain reading of this would indicate that the Commission would be powerless to respond to the complaint, except perhaps to re-examine prices charged by "companies" for other services which are still subject to regulatory scrutiny.

It is difficult to appreciate how this Section would work in actual practice. The Commission's legitimate concern is that non-competitive services' subscribers not cross-subsidize competitive services offered by "companies". If an Order under this Section is in effect, it would appear that the Commission would have no authority to require the "company" to provide an aggregate burden test of the type noted earlier in tnis Report indicating that there was no cross-subsidy. It is relatively straight forward to assign all causally related costs to the services involved. In addition, common costs that cannot be

causally linked to any service could, if the Commission deemed it appropriate, be allocated to various services in some arbitrary fashion such as on the basis of revenues generated by each service. Alternatively, the CRTC could require that, instead of allocating these non-causal costs, each service should in its rating methodology provide for a recovery of some portion of these costs.

It must be stressed, however, that these options are only open when the regulator has all of the information available to it. If, under Section 14.6 the CRTC had no right to any information relating to any competitive services offered by a "company", it would not know the revenues of these services and could not allocate an appropriate amount of common costs to them. Similarly, as it would have no authority over rates it could not require that rates for competitive services include recovery of a portion of these costs.

Accordingly, consideration may have to be given to amending the Section to provide that the Commission's powers in relation to any activity or service that is subject to a 14.6 Order is not to be construed as preventing the Commission from requiring such reasonable information as will demonstrate that no such cross subsidy occurs.

Finally, it should be noted that the Section removes the CRTC's powers, duties or functions "in relation to the service or activity in respect of which the order is made". Because it applies to the service or activity and not to a particular company, any such Order would equally affect all "companies". It would therefore be impossible for an Order to provide for no regulation of the provisions of a particular service or activity by CNCP Telecommunications but require continued regulation to some degree of Bell Canada for the same service or activity.

8.1.1.(g) The Ability of the CRTC to Assist in Achieving Federal Government Objectives

The ability of the government to achieve increased service competition of the type proposed is dependent upon the ability of various entities to enter the market (and to be permitted to leave) in such a way that genuine competition is achieved. This necessarily involves a consideration of the role of the regulator which must strive to reach two sometimes conflicting goals: reduce its involvement in the competitive situation so as to permit the benefits of genuine competition to be realized; and increase its involvement in the non-competitive or basic service areas to ensure that those entities providing both basic and non-basic services do not engage in any improper practices that result in unfair competition in the non-basic service categories.

The CRTC, therefore will have to make two fundamental determinations at the outset. Both arise from the fact that its jurisdiction to regulate is restricted to the regulation of "companies" as defined in Section 320(1) of The Railway Act. These decisions are: is the entity in question a "company"; and if it is a "company" how should regulation be exercised with regard to its various service offerings.

Dealing first with the issue of what constitutes a "company", there appears to be virtually universal agreement on the part of all interested parties that unregulated entities who seek to compete with currently regulated "companies" in the provision of non-basic services should not be regulated. This stems from the fundamental belief that regulation is a substitute for competition and if genuine competition does exist, there is no need for regulation. Should the Railway Act remain unamended and the CRTC's views not change, the objective of not regulating currently unregulated entities who provide non-basic services would be achieved.

In the Commission's decision regarding enhanced services, (Telecom Decision CRTC 84-18 dated July 12, 1984) the Commission reiterated the proposition that the definition of "company" should be given a relatively narrow interpretation. Although this Decision dealt only with enhanced services, the rationale underlying the Commission's conclusions was that enhanced services were competitive in nature. Accordingly, the conclusions should apply with equal force to all competitive or non-basic services.

On page 30 of the Decision, the Commission stated that it:

> ...found particularly persuasive the argument put forward by parties that, the market for enhanced services being competitive, the benefits to be derived from competition, especially innovation, market flexibility, competitive pricing and user choice, would be more likely to result from an environment governed, to the maximum extent possible, by market forces rather than by regulation...

On the legal issue of its mandate, the Commission concluded at pages 30-31:

> the Commission agrees with the argument of CICA et al to the effect that the jurisdiction granted to it by the Railway Act may properly be viewed as extending only to those companies within federal jurisdiction that may be considered to be operating a telephone or telegraph system. Accordingly, the Commission has concluded that its statutory mandate does not require it to regulate a potentially wide range of enhanced service providers who make use of underlying basic telecommunications services for the provision of their service offerings.
>
> In arriving at this conclusion, the Commission has taken note of Telesat's submission concerning the ease with which, should a less restrictive reading be given to subsection 320(1), parties other than common carriers providing enhanced services could elude the application of subsection 320(1) merely by altering their corporate objects. In the Commission's view, the practical implications that flow from Telesat's interpretation suggest the appropriateness of a relatively narrow reading of subsection 320(1).

This conclusion leaves unanswered, of course, the issue of the degree and type of regulation to be exercised by the Commission over "companies" who engage in the provision of non-basic or competitive services. The fundamental concern of regulation in this context is to ensure that entities operating in both the basic and non-basic areas do not improperly underprice their non-basic services thereby undercutting their competitors and make up the difference from the basic subscribers.

In order to make a determination as to the appropriateness of the price of a service, it is necessary to have an understanding as to the costs involved in the provision of that service. As the effect of competition is to drive price towards costs, it becomes increasingly relevant to determine what the costs actually are to ensure that no cross-subsidy from basic services occurs.

The Commission is close to issuing a decision in Phase III of the Cost Inquiry which, when in place, should provide a costing mechanism for all existing services (basic and non-basic) offered by regulated companies. This, coupled with Phase II of the Cost Inquiry which relates to new service offerings, should give the Commission the methodologies required in order to establish appropriate costs of services.

Once costing techniques are in place, it must then be determined what use to make of them. As the Commission's jurisdiction relating to tolls of "companies" is to satisfy itself that they are just and reasonable (as opposed to compensatory) the CRTC has some latitude in determining whether a particular service must cover its associated costs.

Within the sphere of regulated basic services, the Commission - at least insofar as federally regulated entities are concerned - nas the jurisdiction to control the rating process and tnus ensure the appropriate degree of cost recovery. In the non-basic or competitive sphere, its influence is not by any means as complete.

For example, the Commission cannot require as a condition of approval of tariffs of tolls for competitive services filed by regulated companies that all such offerings be compensatory in the sense that they recover all causally related costs and a predetermined allocated portion of common costs. The arbitrary allocation of a portion of common costs to a service might result in its being forced to be priced higher than a similar service offered by an unregulated entity which might have lower common costs or might be able to recover a greater portion of its common costs from other service offerings. This would result in the CRTC's impeding the entry of a "company" into a particular non-basic market, as that company would be required as a condition of entry to price its service ast too high a level.

Until recently, the Commission took the approach that each competitive service offering had to be compensatory. However, this attitude appears to be changing. In the enhanced services Decision (Telecom Decision CRTC 84-18 dated July 12, 1984) the Commission concluded at pages 45-46 that it:

> ...is of the view that, in the competitive enhanced services market, market forces will generally serve to ensure that enhanced services offered by regulated common carriers are appropriately priced in relation to one another and that only an aggregate test is therefore required...

The Commission went on to state that once the feasibility of this type of filing was established, it would thereafter require carriers to file such aggregate studies on an annual basis and would "cease requiring the filing of individual rate evaluation studies when new enhanced services are introduced or the rates for existing enhanced services are modified" (page 47). This would give "companies" a greater degree of flexibility in pricing individual services and therefore enhance their ability to enter the market for those services.

Because the Railway Act speaks of justness and reasonableness and not compensativeness in the case of telecommunications carriers, there is little doubt that the Commission is well within its jurisdiction in adopting the aggregate test approach with regard to competitive service offerings. While any specific toll charged for a competitive service might in fact not even be compensatory in that it recovered less than all of the costs attributed or allocated to it, the aggregate test approach would satisfy the regulatory concern that basic subscribers not provide a subsidy to non-basic services. A lighter regulatory approach such as this would not only ease the burden imposed on "companies" currently offering competitive services, it could also be expected to promote market entry, thus strengthening the degree of competition.

8.1.1(h) The Use of the Radio Act to Assist in Achieving Federal Government Objectives

The policy objectives set out in Part 6.1.1 entitled Market Entry can be ultimately controlled by the government to the extent that they relate to radiocommunications. This involvement on the part of the government arises by virtue of the statutory provisions of the Radio Act.

As noted earlier in Part 4.3 of this Report, this Act is essentially a licensing statute. More importantly, however, it is specifically intended to be an instrument of policy as indicated by the extensive involvement both of the Minister of Communications and the Governor in Council and the absence of involvement by either the CRTC or the courts. Operation of the statute is administrative in nature rather than judicial or quasi-judicial, the primary goal, at least insofar as the Minister is concerned, being "the orderly development and operation of radio communication in Canada". That the operation is intended to be administrative in nature is emphasized by Section 4(2) of the Act which only requires licensees be given "a reasonable opportunity to be heard" in instances where licenses or certificates issued under the Act may be subject to revocation or suspension. There is no similar requirement in the case of issuing or amending such licences or certificates.

The Minister may prescribe classes of licences and certificates and the Governor in Council is further empowered to make regulations respecting qualifications of persons to whom licenses may be issued by the Minister. This combined power was used throughout the last 15 years and control the evolution of earth stations and microwave facilities in Canada. It could also be utilized to prevent further competition in facilities within the next five years, a specific policy objective noted in Part 6.1.1 of this Report. As that policy objective related to <u>further</u> competition, the powers granted under this Act could be used to decline to issue new licences and the statutory requirements of providing opportunities to be heard would not arise.

We are of the opinion that the use of the Radio Act in this manner is legally justified. It has previously been held, in <u>A.G. Canada v. Cie de Publication La Presse Ltee.</u>, [1967] S.C.R. 60, 63 D.L.R. (2nd) 396, reversing [1964] Ex. C.R. 627, that there is no contractual link between the Crown and a licensee and that the

latter has no vested or property right in its licence. The court held that what the licensee did have was a privilege granted by the state conferring authority to do something which, without that permission, would be illegal. On this basis there is no obligation in law to permit would be market entrants to duplicate existing facilities in order to compete with current suppliers of those facilities.

Moreover the decisions of the Minister and Governor in Council in carrying out their respective duties under the Radio Act are not subject to judicial review so long as their determinations do not involve the adjudication upon or determination or abrogation of established rights. See Dowhopoluk v. Martin, [1972] 1 O.R. 311, 23 D.L.R. (3d) 42.

It should be noted however that the licensing power would not be available in the event that the holder of an existing licence proposed to provide additional competition of facilities where the facilities exist and no alteration to existing licences is required. To the extent that the offering required an application for approval of tolls from the CRTC, the government would then have the option of utilizing Section 64(1) of the NTA to effect its policy.

8.1.1(i) AGT v. CRTC et al

The ultimate disposition of this action may have a profound effect upon the balance of constitutional power in Canada with regard to the regulation of the telecommunications infrastructure. If the decision of the trial judge on the constitutional question is upheld this will bring the major Maritime telephone companies under federal jursdiction and within the regulatory control of the CRTC. On the Crown immunity question, if the Railway Act is found to bind the Crown, the Prairie telephone companies will also come

under CRTC control. The difficulties in giving binding policy directions to the Commission under existing legislation would remain, but if Bill C-20 becomes law, directions to the CRTC could then be implemented on a truly national basis.

With regard to Crown immunity, we have concluded that the trial judge structured her reasoning so as to permit a higher court to sweep away much of the uncertainty that surrounds this issue. We are further of the opinion that the Supreme Court of Canada, if given the opportunity, has both the opportunity and legal authority to hold that the Railway Act binds the Crown both in right of the Provinces and in right of Canada, notwithstanding the fact that the weight of current judicial authority appears to be against this proposition.

The trial judge began her reasoning on the Crown immunity issue by stating at page 28:

> Prima facie the Crown (both federal and provincial) is a legal person and without special rules respecting crown immunity would fall under the clear wording of the relevant Sections of the Railway Act.

This approach therefore begins with the proposition that all laws bind everyone unless they can bring themselves within some form of exclusionary "special rules". She found that such rules did exist by virtue of Section 16 of the Interpretation Act, R.S.C. 1970 c. I-23 and on the basis of Her Majesty in Right of the Provinces of Alberta v. C.T.C. (the PWA case), [1978] 1 S.C.R. 61.

Section 16 of the Interpretation Act provides:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to (emphasis added).

This section includes both prerogative and subject rights alike and as such alters the common law as it existed in 1561. See in this regard Dickson, J.'s review of the common law in R. v. Eldorado Nuclear Ltd., R. v. Uranium Canada (1983), 50 N.R. 120 (S.C.C.).

The position of the Crown at common law is particularly relevant because it affects an analysis of the Interpretation Act. The Railway Act deals with the rights of subjects and is not concerned with the prerogatives of the Crown and as such is binding on the Crown in the absence of an exclusionary "special rule". The only relevant rule is Section 16 of the Interpretation Act.

That Act applies, according to Section 3(1), "unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act". By virtue of the definitions in Section 2(1) this Act applies to all federal Acts and regulations including the Interpretation Act itself. See Section 3(2). Because Section 16 of the Act reverses the common law with regard statutes not affecting royal prerogatives, it only applies to those statutes if it is itself binding on the Crown.

The common law says that the Interpretation Act is binding on the Crown as it does not involve prerogative rights as such. Section 16 says that no act including the Interpretation Act is binding on the Crown "except only as therein mentioned or referred to". Accordingly, the Interpretation Act is only binding on the Crown if the Crown is mentioned or referred to in various portions of the Act (see Section 38 for example) nowhere in the Act is the Crown mentioned or referred to as being bound by Section 16, in fact by virtue of the operation of Section 3(2) quite the opposite result is obtained. We therefore conclude that section 16 has no application to the Crown provincial or federal.

A more straightforward alternative would be for Parliament to amend the Railway Act. This happened following the decision of the Supreme Court of Canada in the PWA case. That case held that the National Transportation Act did not bind the Province of Alberta. As as result of that decision, Section 2.1 was enacted which provided:

> This Act is binding on Her Majesty, in Right of Canada or a Province and any agent thereof.

8.1.2 Ownership

8.1.2(a) Canadian vs Foreign

Virtually all of the major telecommunications carriers in Canada are at least majority owned by Canadians. Notable exceptions are B.C. Tel and Quebec Tel which are majority owned by an American corporation. It is presumed in this discussion that this status quo is an acceptable level of foreign participation in the telecommunications infrastructure.

In the case of the larger telephone companies such as Bell and B.C. Tel, there is no general legislative outright prohibition on the acquisition of existing shares by foreigners. There is, of course,the Foreign Investment Review Agency legislation (FIRA) which might well have the effect of an outright prohibition in practical terms. In addition, there is legislation governing the issuance of new shares by these companies. Both B.C. Tel's Special Act and the Bell Canada existing series of Special Acts, provide that those companies do not have the power to issue, sell or otherwise dispose of any of their capital stock without first obtaining the approval of the regulator as to the amount, terms and conditions of such issue, sale or other disposition. The regulator can therefore ensure that the stock to be issued is made available only to Canadians or in such proportion as the Commission deems appropriate.

As these companies do not have the power to deal with their capital stock without Commission approval, any such dealing would be ultra vires the Company. Such a finding would make the transaction void, unenforceable and incapable of ratification. See Compagnie du Village du Cap Gilbraltar v. Hugnes (1884), 11 S.C.R. 537 and Central and Eastern Trust Co. v. Irving Oil Ltd. [1980] 2 S.C.R. 29, 110 D.L.R. (3d) 257. Moreover, such a breach of a Special Act would give rise to general liability for damages

on the part of the company, its directors and officers who permitted the breach together with a statutory monetary penalty. See Sections 336 and 395 respectively of the Railway Act. In the event that the company dealt with its stock in a manner that amounted to disobedience of a Commission order, Section 343 of the Railway Act provides for fines and imprisonment of the parties named therein.

Apparently the government views this form of delegation of authority to an independent commission as appropriate, as the Bell Canada Act which is Bill C-19 provides in Section 11(1) that:

> No voting shares of the Company [Bell Canada] held by or on behalf of any person that controls the Company shall be sold or disposed of to any other person without the prior approval of the Commission.

Again, under Section 11(3) of the Bill, the Commission is permitted to grant its approval on such terms and conditions as it deems expedient. However, under the Bill as it now stands there is no prohibition against Bell Canada issuing new voting shares to anyone, subject to the laws of general application such as securities legislation and FIRA and because both Bell Canada and its parent Bell Canada Enterprises Inc. are subject to the Canada Business Corporations Act (CBCA) the doctrine of ultra vires has been abolished. See Section 15(1) of the CBCA.

In addition, because there is no prohibition against Bell Canada issuing new voting shares and because Bell Canada Enterprises Inc. is not a "company" as defined in the Railway Act, it is our opinion that Section 336 and 395 of that Act have no application in the event that Bell Canada issues new voting shares or its parent breaches Section 11(1) of the Bill C-19.

Sections 343(1) and (3) would continue to apply, but only in the event that the CRTC had already issued an order under Section 11(3) of Bill C-19. In other words, as the penalty under Section 343 relates to refusal to obey a CRTC order (and not as refusal to obey Section 11 of Bill C-19), there must be a Commission order in place prior to the breach of Section 11 of Bill C-19. It is our opinion that if Section 11 was breached and the Commission subsequently learned of it, it could not then retroactively issue an order so as to invoke Section 343 of the Railway Act. This conclusion is based on the well established principles that a statutory tribunal has only those powers specifically granted it and that the power to make orders having retroactive effect must be clearly stated. The only legislation that approaches granting retroactive order making power is Section 57(2) of the NTA which provides:

> The Commission may, instead of making an order final in the first instance, make an interim order, and reserve further directions either for an adjourned hearing of the matter, or for further application.

As can be seen from this Section, it is a condition of an order having retroactive effect that there be an interim order already in place.

A solution to this dilemma, other than amending Bill C-19, would be for the CRTC to issue a general approval as to stock issues, as it may under Section 11(3) of Bill C-19, providing that specific approvals will be granted if warranted only upon submission to the CRTC of all particulars as to the proposed terms of sale or disposition.

In the case of Telesat Canada, the share structure and ownership is more rigidly controlled. as seen under part 4.5.5 (c) of this Report.

The provisions of the Radio Act have also been used to respond to the question of ownership and, in fact, Section 5 of the General Radio Regulations, Part I, does precisely that. Section 5(1) provides as follows:

> Subject to subsection (2), the Minister may issue a station licence to
> (a) an individual who is a Canadian citizen
> (b) a corporation incorporated by or pursuant to a law of Canada, a province or a Commonwealth country;
> (c) Her Majesty in right of Canada or a province or an agency of Her Majesty in right of Canada or a province;
> (d) any person who is the registered owner of an aircraft registered in Canada for the establishment and operation on board such aircraft of a radio station for safety and navigational purposes only;
> (e) any person who is the registered or licensed owner of a ship or vessel that is registered or licensed under the Canada Shipping Act for the establishment and operation of a radio station on board such ship or vessel;
> (f) any person for the establishment and operation of a mobile radio station performing a private commercial service for line-of-sight radiotelephone communication through a common carrier radiocommunication system; or
> (g) an individual who is a landed immigrant.

In our opinion it is an appropriate application of Section 6(1)(c) of the Act for the Governor in Council to make regulations such as these which essentially limit licence holders to those individuals or entities that are subject to the laws of Canada. The Radio Reference case, established that Parliament has exclusive legislative power to regulate and control radiocommunication in Canada including the right to determine the character, use and

location of apparatus employed. While the identity of the licensee was not directly dealt with, it is necessarily implied that in order to control these aspects of radio apparatus, it is mandatory that the licensing authority have jurisdiction over the licensee, particularly so as to be able to enforce sanctions for breach of conditions if required.

8.1.2(b) Public versus Private

At present the federal government participates in the Canadian telecommunications infrastructure by way of its direct or indirect ownership of NorthwesTel Inc, Terra Nova Telecommunications Inc, a portion of the CNCP Telecommunications partnership, Teleglobe Canada and Telesat Canada.

As noted in Part 6.1.2 of this report, it has been assumed that this continued ownership is not in the public interest and that this federal participation will be phased out in an orderly fashion. In fact, it has been publicly announced by the federal government that it intends to privatize Teleglobe and bids have been received for both Teleglobe and the federal government's interest in Telesat.

If the government's interest in either or both companies is sold, the respective incorporating statutes would have to be changed. It is our opinion that in that case, there would be little to be gained from attempting to amend either the Teleglobe Canada Act or the Telesat Canada Act to reflect the changed status of those corporations. It would instead be more productive to establish new legislation along the lines of Bill C-19 currently before the House.

The reason for this opinion is that the character of both companies would change completely from what is contemplated in their respective statutes. Teleglobe would cease to be a Crown corporation and Telesat's share structure and rights of Board appointments would be altered substantially. We assume for the

purposes of this opinion that both companies would cease to be instruments of national policy, although they might be subjected to some form of statutory obligation to provide servide, similar to Section 6 of Bill C-19.

However, because both companies provide basic services in the context referred to earlier in this Report, we have assumed that it is in the public interest for the provision of these services to be subject to regulation by the CRTC. This would be particularly so if the two companies were rationalized so that there was only one entity providing inter and intranational satellite services, or if the two companies were permitted to continue to operate in exclusive markets as they do at present as in either instance there would continue to be monopoly provision of satellite services in one or more market areas. It should be noted that if the two were to be allowed to compete in the provision of international satellite services, this would necessarily involve a re-assessment of the nature of Canada's participation in the Intelsat Agreement and in particular Article XIV(d) thereof.

The issue of whether either Telesat or Teleglobe is or ought to be a "company" as defined in Section 320(1) of the Railway Act, has been touched upon earlier in this Report. There is nothing in the Telesat Canada Act which specifically states that Telesat is a "company" or subject to any degree of regulation. While Section 18 of the Teleglobe Canada Act would at first blush indicate that it is subject to regulation by the CRTC, as noted earlier in this Report, through what appears to be a legislative oversight, the relevant sections of the Telegraphs Act referred to in Section 18 of the Teleglobe Canada Act were never enacted. Accordingly there is some confusion as to the role of the regulator with regard to these entities. We would therefore recommend that if Teleglobe or Telesat's enabling legislation is changed in connection with a sale of either entity, specific provisions ought to be included

stating the degree if any, to which the firm is to be regulated. An approach similar to that taken with Bill C-19 in respect of the regulation of Bell would be appropriate.

8.2 Rates and Access

The issue has been raised as to whether the CRTC has the jurisdiction to impose a premium on the use of a competitor's facilities by a competitor as a substitution for cross subsidies which may exist. This very matter is now being considered by the Commission in the context of the Interexchange proceeding. In our opinion, the CRTC does have the jurisdiction to so impose a premium for the following reasons.

On the surface, the law with regard to the CRTC's jurisdiction might appear less than certain because of Section 321(1) of the Railway Act, noted above, which requires similar traffic over similar routes to "be charged equally to all persons at the same rate". This would at first blush appear to constrain the CRTC from offering a competitive service, one price and to charge user B, who proposes to use the same facilities as user A, but to provide a competitive service, a higher price.

In analysing the law relevant to this question, it is assumed that the actual cost associated with the provision of service to the competitor is not materially different from that associated with the provision of service to the non-competitor.

Section 320(4) of the Railway Act provides:

> The Commission may permit the classification of telegraph, telephone and cable messages into

> such classes as it deems just and reasonable, and may permit different rates to be charged for such different classes.

It is not a requirement of the Section that the basis for the different classifications be related to costs.

In addition, the Commission has the open-ended powers granted it by Section 321(5):

> In all other matters not expressly provided for in this Section the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

Given the existence of this type of "basket clause", it will be difficult for anyone who would wish to challenge access charges to convince a court that Parliament did not intend that the regulator should have the widest latitude in its rate regulating function.

Moreover, to the extent that Section 320(7) applies to such a case, the Commission is specifically empowered to dictate the terms of interconnection "including compensation if any, as the Commission deems just and expedient..." (emphasis added). The use of this latter word rather than the more usual "reasonable" can be interpreted as granting the Commission somewhat more latitude in this aspect of its decision making process. See the judgment of Anglin, J. in Ingersoll Telephone Co. v. Bell Telephone Co. (1916), 53 S.C.R. 583 at 603 noted in Part 4.1.5 of this Report.

Turning to the NTA, section 51(1) of that Act reads in part:

> When the Commission, in the exercise of any power vested in it, in and by any order directs or permits any ...equipment...to be provided...operated, used or maintained, it may, except as otherwise expressly provided, order by what company...or person, interested or affected

> by such order...and upon what terms and conditions as to the payment of compensation... the same shall be provided...operated, used and maintained (emphasis added).

There is no express provision to the contrary.

Section 57(1) of the Act provides:

> The Commission may direct in any order that such order or any portion or provision thereof, shall come into force at a future time or upon the happening of any contingency, event or condition in such order specified, or upon the performance to the satisfaction of the Commission, or a person named by it, of any terms which the Commission may impose upon any party interested, and the Commission may direct that the whole, or any portion of such order, shall have force for a limited time, or until the happening of a specified event.

The Commission can rely on this Section to order that the use of a respondent carrier's facilities by as competitor is contingent upon the payment by it of the premium payment.

Finally, Section 58 states:

> Upon any application made to the Commission, the Commission may make an order granting the whole or part only of such application, or may grant such further or other relief, in addition to or in substitution for that applied for, as to the Commission may seem just and proper, as fully in all respects as if such application had been for such partial, other, or further relief.

Accordingly, even if a premium payment were neither offered by an applicant nor requested by a respondent, the Commission could grant this further and other relief as long as the Commission concluded that it was "just and proper".

In addition to these powers in the general context, in the more specific context of the Interexchange proceeding and CNCP's application, both the applicant (CNCP) and respondents (Bell and B.C. Tel) are "companies" within the meaning of section 320(1) of the Railway Act. This makes the following Sections of the Act applicable.

Sections 284 and 285 of that Act deal with regulatory requirements in instances where telecommunications "traffic is to pass over any continuous route in Canada operated by two or more companies". Section 284(1) states:

> Where traffic is to pass over any continuous route in Canada operated by two or more companies, the several companies shall agree upon a joint tariff for such continuous route and the initial company or an agent duly authorized by power of attorney of such company, shall file such tariff with the Commission and the other company or companies shall promptly notify the Commission of its or their concurrence in such joint tariff.

Section 285(1) provides:

> In the event of failure by such companies to agree upon any such joint tariff as provided in section 284, the Commission on the application of any company or person desiring to forward traffic over any such continuous route, which the Commission considers a reasonable and practicable route, or any portion thereof, may require such companies within a prescribed time, to agree upon and file in like manner a joint

> tariff for such continuous route, satisfactory to the Commission, or may, by order, determine the route, fix the toll or tolls and apportion the same among the companies interested, and may determine the date when the toll or tolls so fixed shall come into effect.

Finally, section 265(7) of the Railway Act provides in part that for the purposes of section 265 (the interconnect section) under which CNCP proceeded in 1976 and 1983:

> the Commission may in any such order specify the maximum charges that may be made by the company or companies in respect of any matter as ordered by the Commission.

Having concluded that the Commission has jurisdiction to award contribution by a competitor to the fixed common costs of the system that it seeks to compete with, the question remains whether this jurisdiction can be effectively exercised, that is, to achieve the goals intended.

One of the results of increased competition is to move the prices charged for long distance rates closer towards costs, which inevitably means reduced revenues in aggregate unless the degree of elasticity is great enough that the reduction in prices is more than compensated for by increased revenues flowing from increased calling patterns. If this occurs, the problem of contribution from the competitor is not as critical. For purposes of this discussion we assume that the degree of elasticity is insufficient to achieve this goal.

8.2.1 Bypass

At the outset there is the obvious issue of the appropriate level of contribution to be paid by the competitor. While the Commission has jurisdiction and legal authority to impose contribution mechanisms, there is no guarantee that this will

necessarily resolve as more fundamental issue, namely the bypass of all or part of the regulated telecommunications systems in Canada. As the CRTC's jurisdiction is confined to "companies" it is clear that it has no authority to prohibit bypass by end users that do not happen to be "companies" within the meaning of section 320(1) of the Railway Act.

As noted in the discussion of the Radio Act, the government, acting through the Governor in Council and the Minister of Communications in Sections 6(1)(c) and 4(1)(a) and (b) respectively, could ensure that bypass within Canada did not occur to the extent that <u>new</u> or <u>amended</u> licences thereunder were required to achieve it. Perhaps more importantly, under section 4(1)(c), the Minister could act to amend <u>existing</u> licenses to prohibit their use to bypass all or part of the regulated Canadian telecommunications systems if he considers that the original conditions of those licenses were not intended to permit their use for bypass.

International bypass involves different issues. In this context the would-be bypasser obtains access to a legal environment in which bypass is not prohibited, most notably the United States. To the extent that radiocommunication is involved the Radio Act considerations still apply. To the extent the end user can avoid this, for example by obtaining a dedicated line to a U.S. interface, the relevant regulatory body becomes involved.

There is currently before the CRTC a proceeding involving the provision of a long distance telephone service to residents of British Columbia by American entities. These entities, principally LongNet Telecommunications Inc. (LongNet) and Cam-Net Communications Inc. (Camnet) provide subscribers of B.C. Tel access to certain discount long distance services in the U.S. which take advantage of the fact that long distance rates in the U.S. are substantially below comparable rates in Canada. In its CRTC Telecom Public Notice 1984-71 dated December 5, 1984, the CRTC specifically concluded:

> that the rates charged by Longnet and Camnet to Canadian subscribers with regard to the provision of long distance service in the U.S., accessed through B.C. Tel's MTS network, do not require Commission approval pursuant to Section 320(2) of The Railway Act.

We are of the view that the CRTC correctly interpreted its mandate in this regard. A foreign based entity operating a service whereby end users of "companies" call a predetermined number which is foreign based, is outside the territorial jurisdiction of the CRTC and is therefore not a "company" as defined.

The regulator does however have jurisdiction over the conditions under which this entity obtains access to end users through a

regulated "company". See Re Bell Canada and Challenge Communications Ltd. (1978), 86 D.L.R. (3d) 351, [1979] 1 F.C. 857, 22 N.R. 1 (C.A.). Sections 320(2) and (4) of the Railway Act, discussed above, empower the CRTC to require federally regulated companies to classify international traffic as subject to different rates from intranational traffic. However, as Section 320(2) speaks of "tolls" and Section 320(4) speaks of "rates", these sections of themselves do not apply to permit the CRTC to deal with strictly "tariff" related matters such as general conditions, right of access, etc.

Such authority to deal with non-toll related matters does exist in Section 321(2)(c) which provides in part that "a company shall not, in respect of ... any services or facilites provided ... subject ... any particular description of tariffs to any undue or unreasonable prejudice or disadvantage, in any respect whatever".

It would therefore be open to the CRTC in our opinion to prescribe the terms and conditions as well as the rates that would apply for international traffic. It must be stressed that bypass is a phenomenon which is most likely to occur when rates and costs are most out of line. Accordingly a move of long distance rates towards costs will reduce the incentive for bypass.

As our mandate has not included a review of provincial legislation we are not in a position to comment on the ability of provincial regulators to make similar orders. In light of our conclusions with regard to the AGT case, provincial legislation may become irrelevant - at least for interprovincial and international traffic - in future.

8.2.2 Universality of Service

It remains to be determined whether, with the advent of cost based long distance services, if the result is a net decline in revenues, the shortfall will have to be recovered from basic local service and if so, with what effects on affordable universal access to such service.

It has been assumed for the purposes of this Report that affordable universal access to basic local service is to be maintained notwithstanding any move of inter city rates towards costs.

At the outset, it should be noted in defining this issue that there may well be a distinction to be drawn between universal access and affordable universal access to such service. At present well in excess of 90% of all permanent households within the operating territories of the major telephone companies in each Province subscribe to basic telephone service. Prince Edward Island, for example appears to have the lowest penetration rate of 93 to 94% of all such households and typical penetration rates are closer to 97 to 98%.

The law regarding the obligation of federally regulated "companies" to serve is uneven. Bell Canada has such an obligation to a limited extent, as provided in Chapter 41 of the Statutes of 1902, Section 2, as follows:

> Upon the application of any person, firm or corporation within the city, town or village or other territory within which a general service is given and where a telephone is required for any lawful purpose, the Company shall, with all reasonable despatch, furnish telephones, of the latest improved design then in use by the

> Company in the locality, and telephone service for premises fronting upon any highway, street, lane, or other place along, over, under or upon which the Company has constructed, or may hereafter construct, a main or branch telephone service or system, upon tender or payment of the lawful rates semi-annually in advance, provided that the instrument be not situate further than two hundred feet from such highway, street, lane or other place.

Section 6 of Bill C-19 provides a similar type of requirement.

Even this obligation has been interpreted by a predecessor to the CRTC in a restrictive manner. In Re Lachance and The Bell Telephone Company of Canada (1958), File 29159-703, the Board of Transport Commissioners for Canada held that the section imposed five conditions for servide, all of which had to be met. They were:

(1) that a general service is given within the city, town or village or other territory within which such person, firm or corporation is;

(2) that a telephone is required for any lawful purpose;

(3) the premises is fronting upon a highway, street, lane or other place along, over, under or upon which the Company has constructed or may hereafter construct a main or branch telephone service or system;

(4) that the lawful rates be tendered or paid semi-annually in advance; and

(5) that the instrument is not situated further than 200 feet from such highway, street, lane or other place.

In interpreting conditions 3 and 5 the Deputy Chief Commissioner said:

> In interpreting section 2 of ch. 41 I find that the language is ambiguous and admits of two views - as to the 'fronting' and the '200 feet' therein mentioned. One of these views which I cannot admit because it would lead to inconvenience, injustice and absurdity is that Bell would be under a statutory obligation to give telephone and telephone service to any applicant whose premises would be fronting and less than 200 feet from a road upon which a great distance away Bell would have a main or branch telephone service or system. Such view, carried to the extreme could lead to sheer absurdity. The other view is that the Company is under the statutory obligation to give telephone service to an applicant who meets all the other conditions contained in section 2 and whose premises are fronting upon and less than 200 feet from that portion of the highway upon which Bell has constructed a main or branch telephone service or system. Because a main or branch telephone service or system is not constructed along, over, under or upon that portion of the [road] upon which [the Applicant's] property is fronting, I am of the view that his case does not come within the scope of section 2 of ch. 41, and, consequently, this Board cannot order Bell to give the Applicant the telephone and telephone service applied for.

Having concluded that conditions 3 and 5 were not met the Board then found itself unable to remove a discrimination which it found to exist, namely the provision of service by Bell to the applicant's immediately adjacent neighbour, who was a business competitor of the applicant's. The Board reasoned that even though service was provided to the neighbour, there was no service or system of Bell's on that portion of the road upon which the applicant's premises fronted. Consequently there was no obligation to serve the applicant and accordingly no power to correct what the Board concluded was a discriminatory practice against him.

Eight years later the Supreme Court of Canada considered the same Section in Metcalfe Telephones Ltd. v. McKenna and Bell Telephone Co. of Canada, [1964] S.C.R. 202, 43 D.L.R. (2d) 415. In that case, McKenna lived on the south side of the road which divided two townships. Metcalfe had a telephone line running past his residence on the south side of the road and Bell a similar line running along the north side. Metcalfe was prepared to serve McKenna but the latter wanted service from Bell.

The Supreme Court focussed its attention solely on the first of the five conditions, namely that the territory be one "within which a general service is given" and concluded that the phrase was not intended to impose a requirement on Bell "to extend its services into new areas or to enter a territory already served by another telephone company" (emphasis added).

The Court concluded that the evidence showed general telephone service in McKenna's township and in his area was provided by Metcalfe, "although about its perimeter, portions of the township are served by Bell" and accordingly Bell was under no obligation to provide service.

It is clear from the above decisions that the regulator and the courts are unwilling to view the obligation to serve in a large and liberal sense because of the fear that the result would be a patchwork of telephone systems being obliged to extend services beyond their logically recognized service areas.

Special Acts, other than Bell's, typically speak of authorizations or powers rather than obligations to provide service. While Chapter 66, 6-7, George V, Section 16(1) with regard to BC Tel's powers, expressly subjects that company to CRTC jurisdiction it does not otherwise impose any minimum service obligations on it. The Telesat Canada Act, R.S.C. 1970, Chapter T-4 as amended sets out the company's objects and powers in Sections 5 and 6 respectively but again makes no reference to obligations to provide service.

The issue of a "company's" obligation to serve has been of less relevance in the past due to the non-competitive environment in which it operated. Moreover, regulation by way of rate of return on investment coupled with the evolution of the cross-subsidies noted earlier provided an incentive for a company to serve areas that might not otherwise be attractive.

As competition drives prices towards costs and reduces regulatory discretion in allowing cross-subsidies from lucrative to non-lucrative services, the obligation to serve issue increases in importance. It must be stressed that we are not referring to obligation in the sense imposed by Section 321 of the Railway Act not to discriminate unjustly customers, but in the sense of a requirement to serve currently unserved areas.

While it is a matter of policy as to whether all "companies" should be subjected to some form of minimal statutory obligation, as a matter of law the absence of any such obligation grants a non-obligated "company" more latitude in the provision of service and could, depending on the extent to which prices are driven towards costs, result in a legal challenge to the CRTC's jurisdiction in this area. Such a challenge by B.C. Tel for example, would succeed in our opinion not only because of the absence of any obligation in its Special Act but because of the presence of an obligation in Bell's Special Act which, as noted above was passed in 1902, fourteen years before B.C. Tel's Special Act. In light of the various methods of incorporation used now, most notably Bell Canada's continuance under the Canada Business Corporations Act, any statutory obligation to be imposed upon "companies" should be provided in the Railway Act, so as to ensure that a regulated entity could not be continued under the Canada Business

Corporations Act, for example, without any objects or restrictions imposed on it.

An alternative approach would be to legislate obligations to serve through regulatory initiative, that is, clearly empower through legislation, the regulator to prescribe obligations to serve. This was the approach taken in Section 55(1)(b) of Bill C-16.

The advantage of this approach is that it permits a tailored regulatory response to the issue of obligation to serve, rather than imposing a uniform standard on a case by case basis that may be too stringent or lenient in particular instances. Regulatory action is less cumbersome to alter and may be expected to be less susceptible to political influence.

The disadvantage of this alternative is that it returns an area that may be perceived as having policy obligations, namely the degree to which various "companies" are obligated to provide service, to the regulator. Moreover, Section 55(1)(b) of Bill C-16 did not clearly set out the parameters which would ensure universal access or even that truly universal service was either necessary or desirable.

Section 55(1)(b) provided:

> In furtherance of the telecommunication policy for Canada enunciated in section 3, the Executive Committee may, subject to section 27 and subsection (2), render a decision directing a telecommunication carrier to provide any facilities for services specified by the Executive Committee in any geographical area it determines .

Section 55(2) provided a sixty day delay in the effective date of any such decision and Section 27 dealt with public hearings.

However Section 3 of the Bill provided in part that:

> 3. It is hereby declared that
>
> (a) efficient telecommunication systems are essential to the sovereignty and integrity of Canada, and telecommunication services and production resources should be developed and administered so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
>
> (c) all Canadians are entitled, subject to technological and economic limitations, to reliable telecommunication services making the best use of all available modes, resources and facilities, taking into account regional and provincial needs and priorities;
>
> (d) telecommunication links within and among all parts of Canada should be strengthened, and Canadian facilities should be used to the greatest extent feasible for the carriage of telecommunications within Canada and between Canada and other countries;
>
> (o) the rates charged by telecommunication carriers for telecommunication facilities and services should be just and reasonable and should not unduly discriminate against any person or group;
>
> (r) the regulation of all aspects of telecommunication in Canada should be flexible and readily adaptable to cultural, social and economic change and to scientific and technological advances and should ensure a proper balance between the interests of the public at large and the legitimate revenue requirements of the telecommunications industry;
>
> and that the telecommunication policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system, and for the regulation of telecommunication undertakings over which the Parliament of Canada has legislative authority, by a single independent public body. (emphasis added).

It can be seen that the overriding provisions of Section 3 raise as many questions regarding obligation to serve and the desirability and necessity of "universal" service as imposed by Section 55 as they answer. If there is any sense of priority to the declarations, the most important concern is that the telecommunications systems must be efficient. Efficiency can be measured both in terms of operation and in utilization of economic resources. This raises the issue of whether capital is efficiently utilized when it is expended to provide service to non profitable geographical areas.

This issue is further clouded by the declaration that the right of all Canadians to telecom services is subject to economic limitations. The question of the extent of these limitations and who is to determine this is left unresolved, but the implication is that service is not to be provided at a loss. Subsection 3(f) reinforces this by declaring that the telecommunications industry has legitimate revenue requirements which must be balanced against the interests of the public at large.

Against this "economic entitlement" theory is the "service entitlement" theory set out in Subsections 3(a) and (o) which declare that telecommunications links within and among all parts of Canada should be strengthened and that rates should not discriminate unjustly against any group of Canadians. Accordingly, if a carrier made no efforts to strengthen or establish service in a particular area it could be in violation of the former requirement and if it did establish service and priced it at the actual cost, it could be in violation of the latter requirement in that the Bill speaks of just and reasonable and not necessarily compensatory rates.

An opinion as to the outcome of these issues is not required because the Bill did not proceed. The issues are raised to highlight the litigation that could result from the implementation of an obligation to serve requirement on a regulatory rather than a statutory basis.

Notwithstanding the current statutory regime with its absence of obligation to serve legislation (with the one exception of Bell Canada), the Commission has always been concerned both with the access to and quality of service provided by regulated companies. The basis for this concern has been that:

> ...before the Commission can approve tariffs of tolls which specify the price the Company charges for its services, it is important to know the level and quality of service which is being offered at the price proposed. Only then can it determine whether the price for the service is just and reasonable. (3 CRT 91).

In furtherance of its concern regarding quality of service, the Commission has, in consultation with the carriers and other interested parties, developed what it considers appropriate quality of service measures or indicators which it requires the Company to maintain.

Insofar as universality is concerned, the Commission stated in Telecom Decision CRTC 78-7 dated August 10, 1978 (4 CRT 313 at 323):

> As indicated previously, the Commission considers it a fundamental principle of regulation that basic telephone service be universally accessible. The Commission has also expressed concern that such service may be beyond the reach of some potential subscribers or may constitute an undue burden for subscribers on limited or fixed incomes .

In order to promote universality in respect of these potential and actual subscribers, the Commission determined that two party service with rates set approximately 35% below individual line rates would provide an appropriate universally available "budget" service. In addition, it has also instituted separate construction program reviews for the major carriers in order to review the construction plans both from the perspective of cost and actual program intended to be undertaken.

In Northwestern Utilities Ltd. v. Edmonton [1929] S.C.R. 186, [1929], 2 D.L.R. 4, the court held that the regulator in that case had the power to reduce the allowed rate of return partly on account of elements contained in the rate base upon which the return was allowed. The court concluded that the issue of a fair rate of return was largely one of opinion and a matter that by the statute was entrusted to the judgment of the regulator.

In view of the fact that the CRTC's only guidance as to rates allowed under the Railway Act is that they be "just and reasonable", the approach of the court in the Northwestern case would apply to the Commission, notwithstanding the fact that the two regulators were creatures of different statutes. Accordingly, while the actions of the Commission noted above have not been challenged by the carriers on the basis of jurisdiction, we are of the opinion that the Commission's overall mandate in satisfying itself that rates are just and reasonable is sufficiently broad to encompass these activities.

The Northwestern case also held that the argument that to lower the rate of return would be unfair to shareholders who had invested in the company after the order allowing the higher rate of return, was not a question of law or jurisdiction therefore not open to judicial appeal. As noted elsewhere in this Report,

Section 64(2) of the NTA provides in part:

> An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction .....

Accordingly, in the event that upward pressure is exerted on basic rates because of downward pressure on non-basic rates, we are of the opinion, on the basis of the Northwestern decision that the Commission has the statutory jurisdiction and the regulatory experience to respond either by disallowing rate increase requests or alternatively, by requiring new pricing and service offering approaches such as discounted two party service, local measured service, etc.

Section 3 of the NTA and in particular subparagraph c, would require by law that each mode of telecommunications so far as practicable, receive compensation for services and facilities that it was required to provide as an imposed public duty. Accordingly, if the Commission required as a public duty that a telephone company provide a certain level of service such as 99% availability, it would be required to approve rates that provided compensation for the provision of this service. However as compensation is not defined in the Act, it remains a moot point as to whether this would permit the Commission to prescribe a lower allowable rate of return for these services than it might for other service offerings. On the basis of the Northwestern decision it would have this power and would not be subject to judicial appeal thereon. Moreover, the "just and reasonable" requirement as to individual tolls would in our opinion permit the Commission to approve such tolls at lower rates and approve rates for other services that would generate higher rates of return as a trade-off.

8.3 Development

As noted in Part 6.3 of this Report it has been assumed that the encouragement of development of innovative, high quality and diverse facilities and services to serve Canadian and international markets is in the public interest. It is also assumed that these goals can best be achieved by increased competition, coupled with regulation that is lessened both in breadth and depth. Regulation would be restricted to genuinely non-competitive services and its only concern for competitive services provided by regulated entities would be to ensure that the losses or profits from competitive activities do not affect the non-competitive service subscribers. The issues relating to development are considered largely in the context of the current legislative proposals contained in Bills C-19 and C-20. The issue of the pace and scope of future development can be divided into two principal areas in telecommunications: terminals and transmission.

8.3.1 Terminals

In the case of terminals, the issue of the right of competitors to compete in their provision has been determined, at least at the federal level. In the Challenge case, the Federal Court of Appeal held that the CRTC had jurisdiction to deal with matters of ownership and maintenance of telephone service and connection of customer owned and maintained equipment. The court further held that Section 321 of the Railway Act which deals with discrimination, operated so as to protect suppliers of terminal equipment who compete with the regulated company.

Subsequent to the Challenge case, the CRTC issued Telecom Decision CRTC 82-14 dated November 23, 1982, dealing with the attachment of

subscriber provided equipment. This completed the right of access by competitors in providing terminal equipment except where technical reasons, largely related to two-party and multi-party lines, justified a continued prohibition of such access.

However, as noted earlier in this Report, the rules respecting rights of terminal attachment are not uniform accross the country. While development in terminals may be sufficiently encouraged by the degree of liberalization that has occurred in the most heavily populated areas of Canada, it remains to be decided whether all Canadians are entitled to the same degree of benefits that flow from increased competition and decreased regulation.

For the reasons noted earlier we are of the opinion that the AGT case will ultimately vest telecommunications jurisdiction in the federal government to the same extent as the Radio Reference case conferred jurisdiction in broadcasting. If this occurs, terminal attachment liberalization can be made uniform across Canada - or at least one regulator will have this option - without the necessity of changing the existing legislation.

With regard to the provision of competitive services by regulated "companies", the Commission recently issued CRTC Telecom Public Notice 1984-66 dated November 9, 1984 dealing with structural separation for multi-line and data terminal equipment. The Commission's ultimate stated goal was to seek means to lessen or entirely eliminate the regulation of such equipment offered by Bell and B.C. Tel.

The Commission may come to the conclusion that structural separation of competitive services from non-competitive services by way of a separate legal entity affiliated with the "company" is in the public interest. However, this does not of itself deal with the

question of the status of the affiliated entity, that is, it does not determine that the affiliate is a "company" and should therefore be regulated (a conclusion that would defeat the purpose of the structural separation proceeding). Moreover, the Railway Act speaks of regulation of the "tolls" of "companies". Nowhere does it confer on the CRTC jurisdiction to prescribe the corporate structure through which an activity will be carried on or to regulate the charges of entities that are not "companies". Accordingly, the Commission will not be able to enforce a structural separation order under existing legislation. Section 13 of Bill C-19, currently before Parliament, purports to give the CRTC limited powers with regard to corporate structures insofar as Bell is concerned. However, that section indicates that regulation is to be limited to Bell Canada and not to extend to affiliates providing competitive services.

Section 13(1) allows the CRTC to determine that an activity carried on by an affiliate is not subject to sufficient competition so as to ensure just and reasonable rates. Upon such a determination the Commission may order the "company", that is, Bell itself, to carry on the activity on prescribed terms and conditions. In the event this order is not complied with, the CRTC can refuse to approve any toll of the company "in respect of that activity". We wish to underline the fact that if the violation of the order is that the company refuses to provide the service, there could be no "tolls" for the Commission to refuse to approve. It will then be forced to rely on the general penalty provisions contained in the Railway Act, noted above.

Section 13(2) reinforces the view that the CRTC has no general regulatory jurisdiction over separate legal entities, even if they are affiliates of companies. That Section allows the CRTC to order divestiture of a competitive activity (not necessarily to an affiliate as defined in the Bill). Divestiture is to occur where the CRTC "is satisfied that such action would constitute an

effective means of achieving the purposes of section 321 of the Railway Act in respect of the company... (emphasis added). Failure to comply gives rise to the same remedies as provided in Section 13(1). We conclude from this that it is not intended that the recipient of the divested activity would be regulated, as the penalty for non-compliance applies only to Bell and as the recipient could be both an unregulated and unrelated corporate entity.

A potential legislative conflict in the area of competitive services could arise - at least relating to Bell - if both Bills C-19 and C-20 pass in their current form. Section 3 of C-19 provides that the provisions of that Bill override any other Act in the event of inconsistency. Section 13(1) gives the CRTC the unfettered right to regulate an activity of an affiliate of Bell's by ordering Bell itself to carry on the activity where the Commission is of the view that a sufficient degree of competition does not exist in respect of that activity.

However Section 14.6(1) of C-20 gives the Governor in Council the right to order the CRTC to refrain from exercising the powers and performing the duties and functions it otherwise would in respect of an activity carried on by a company. The possibility therefore exists for the CRTC to act under Section 13(1) of C-19 to order Bell to carry on a particular activity within the company and for the Governor in Council at some subsequent date to act under Section 14.6(1) of C-20 to order the CRTC to refrain from regulating the same activity. If the Commission was still of the view that sufficient competition did not exist, it could assert the supremacy of Section 13(1) of C-19 over Section 14.6(1) of C-20 by virtue of Section 3 of C-19 and continue regulating the activity. The Governor in Council would then have to resort to Section 64(1) of the NTA to vary or rescind the CRTC's decision.

To avoid this possible problem, we recommend that Sections 3 and 13(1) of C-19 be amended to make them subject to orders issued under Section 14.6(1) of C-20.

8.3.2 Transmission

With respect to development in the transmission area, this issue is currently before the CRTC in the form of CNCP's application for system interconnection for the provision of long distance public voice services.

The CRTC previously approved system interconnection of CNCP with Bell and B.C. Tel for private voice and data services in its decisions 79-11 and 81-24. In support of its application CNCP relied upon the same sections of the Railway Act (265 and 320) as it had in the previous proceedings and which delegate to the Commission the jurisdiction to decide whether the relief requested is in the public interest. The CRTC - and ultimately the Governor in Council through Section 64(1) of the NTA - will therefore be able to encourage the development of competition in transmission systems under existing legislation.

It is our opinion that this trend towards increased competition in terminal and transmission areas and reduced regulation is fully consistent with the objectives set out in Section 3 of the NTA and in particular Section 3(a).

It should be pointed out that Sections 48 and 50 of the NTA could be employed by the Minister and the Governor in Council respectively to oblige the Commission to review its own rules of procedure with a view to determining how competitive offerings of regulated companies could be subjected to less regulatory lag and upon such determination, to amend its rules of procedure to give effect

thereto. This would assist in meeting both objectives in development, namely to permit Canadian "companies" to be more competitive in international and intranational markets by reducing the regulatory lag, costs and disclosure requirements. It would also reduce the need to attempt to insulate Canada from developments that would otherwise (and may inevitably) impact upon the Canadian telecommunications infrastructure.

8.4 Does Bill C-16 Address These Issues

Bill C-16, which was given first reading November 9, 1978, was the last attempt by a federal government to introduce omnibus telecommunications legislation. Although Bills C-19 and C-20 deal with telecommunications, they are examples of the piecemeal approach which involves separate pieces of legislation to amend specific existing legislation. As such, they qualitatively differ from the approach taken in C-16 which was intended to review, modernize and consolidate all existing relevant telecommunications legislation at the federal level.

The decision to adopt a piecemeal approach rather than introduce omnibus legislation is a matter of policy. However from a legal perspective we would make the following comments. Communications legislation, particularly as it currently stands with divided jurisdiction, is becoming increasingly and needlessly complex. The discussion of the law and the legal gymnastics required to determine whether provincial telephone companies, Teleglobe and Telesat are legally subject to CRTC jurisdiction demonstrates that. In light of this it is not surprising that it is virtually impossible for the layman to understand the rationale for the jurisdictional division, let alone the division of legislation within the federal level into as many statutes as currently exist.

Moreover, consolidation of existing legislation brings with it the necessary requirement to determine whether existing legislation can be repealed and replaced with more relevant law. It is therefore more likely to result in a unified approach to codification. Finally it reduces the chances of amendments to one part of telecommunications legislation that have effects that were not anticipated or foreseen on other pieces of legislation. The legislative error which resulted in Teleglobe's escaping regulation and the potential conflicts between Section 3 and 13(1) of C-19 with Section 14.6(1) of C-20 are but two instances of this

It is beyond the scope of this Report to examine Bill C-16 in detail and to comment on the specific provisions contained therein. However, some general reactions and comments are useful, particularly in the context of the federal policy objectives which have been dealt with above. It should be noted that our review of this Bill is restricted to telecommunications matters.

In our opinion, one of the fundamental flaws of Bill C-16 is that in the area of telecommunications it continues the concept of regulation of an entity, in this case, a "telecommunication carrier". The trouble with this approach is that, having determined that an entity falls within a definition, full regulatory jurisdiction is brought to bear over all the activities of that undertaking. The undertaking must provide services through "tariffs" which must be filed for approval by the regulator and which tariffs must meet legislative criteria that restrict the ability of the undertaking to respond to competitive forces. While it may be that the Commission which regulates it or the Minister of Communications or Governor in Council can exempt an undertaking in whole or in part from regulation or the application of the Act, this is a much more cumbersome process that needs to be the case. The Bill does not define "telecommunication carrier" with any more precision than the Railway Act defines "company". Accordingly, the issue of what constitutes a regulated entity is still not resolved. This may result in protracted legal battles before the Commission and the courts as to whether or not a particular entity is a "telecommunication carrier" and, therefore, subject to the provisions of the Bill. Having determined that an entity is subject to regulation, the entity might then apply for and receive exemption from the application of the Act. The cellular radio decision of the CRTC is an example of this process.

In our opinion this serves no one. The philosophical underpinning which justifies regulation of broadcasting, radiocommunication and telecommunications is the belief that the radio frequency spectrum is public property and should be administered in the public interest and that certain services, because of existing technology and related facility requirements, ought to be provided by one entity. Accordingly, all those who make use of the radio frequency spectrum or are granted a monopoly franchise ought to be subject to some form of supervision and/or regulation to the extent of and for the duration of the grant.

Given the federal government's policy objectives of encouraging competition in certain areas of telecommunication, it is our opinion that the flaw of Bill C-16 is that it seeks to regulate entities rather than activities.

There is a more technical flaw in Part I of Bill C-16 which goes to the matter of the divisions within the radio frequency spectrum. The way that "telecommunication", "radiocommunication" and "broadcasting" are defined indicate that broadcasting is a particular type of radiocommunication and that radiocommunication is a particular type of telecommunication. However it appears from the policy statement contained in Section 3 of the Bill that an attempt has been made to separate telecommunication activities from broadcasting activities. This confusion can have ramifications in the area of market entry, particularly in view of the statutory restriction on Bell Canada, for example, which prohibits it from holding directly or indirectly a broadcasting license.

Part V of the Bill continues the concept of the regulation of telecommunication carriers as opposed to the regulation of particular services, namely those that make use of the radio frequency spectrum or operate on a monopoly basis.

In light of the federal government's policy of promoting competition, Section 55 of the Bill, in our opinion, grants the Executive Committee of the CRTC excessive power as regards telecommunication carriers. This Part of the Bill continues the concept of tariffs to govern all service and facility offerings of a telecommunication carrier and the combination of Sections 57 and 62 makes it clear that the proposed tariff must be filed with the Executive Committee and receive at least interim approval before any part of the tariff can be applied. As noted earlier in this Report, it is arguable that under the current legislation, the Commission has the potential to grant advance approval to any filing that complies with certain criteria. Moreover, the Commission appears to have interpreted Section 320(3) of the Railway Act as permitting it to allow a "company" to charge tolls for which tariffs have not been filed. The Bill would prohibit this in the absence of an Order in Council issued pursuant to Section 4(2) of the Bill.

The result is that the ability of telecommunication carriers to respond to competitive situations would be greatly hampered.

In addition to this difficulty, Section 55 states that the Commission can order a telecommunication carrier to provide facilities or services under certain conditions and in specified geographical areas. Given the implications of increasing competition with the resultant inevitable move towards costs in many cases, it is reasonable to expect an increasing reluctance on the part of "companies" to provide the full range of competitive services to every area, regardless of how remote or costly, to which it provides non-competitive services. Under Section 55 of the Bill, the Commission could order the telecommunication carrier to be the carrier of last resort and to provide all of its service offerings to all areas in which it provides non-competitive services. This would of course be directly contradictory to the concept of free market entry and exit that is necessarily tied to true competition.

Section 58(3) appears to expand the current legislation by permitting the Executive Committee in effect to make regulations prescribing classes of contracts or agreements that must be filed with it. What is not clear is what the Executive Committee will do with the document once filed. It is not specifically required to be filed for prior approval and there is no direction as to the timeliness of the filing. Moreover it is reasonable to assume that the issue of confidentiality of such filings would become a constant source of aggravation and litigation. It appears from the amendments to the Railway Act set out in the Schedule to the Bill that that Act no longer applies to telecommunications. Consequently there is no guidance as to the issue of confidentiality other than Section 29(3) of the Bill.

The status of Telesat and Teleglobe remains less than certain under the proposed Bill. Under Section 58(6), Teleglobe is not required to file certain contracts and agreements between itself and entities outside Canada relating to the provision of services between Canada and any place outside Canada. As that is essentially what Teleglobe is authorized to do, it would continue to be largely - but apparently not wholly - unregulated.

In addition, Section 2(2) provides that the Telesat Canada Act and Teleglobe Canada Act override the provisions of the Bill to the extent of any inconsistency.

The reason for this convoluted approach to Teleglobe is unclear and in the event that its status changes in the near future, may no longer be warranted. Insofar as Telesat is concerned, a more logical approach would have been to alter the Telesat Canada Act in such a way as to avoid the inconsistencies contemplated and then provide that the Telecommunications Bill takes precedence over all Special Acts in the event of any inconsistency.

9.0 RECOMMENDATIONS AS TO LEGISLATIVE CHANGES TO ACHIEVE GOVERNMENT POLICY OBJECTIVES

For the reasons noted above, we are of the opinion that omnibus legislation is preferable to piecemeal amendments in approaching the task of revising telecommunications legislation.

While it is beyond the scope of this Report to prepare draft legislation, we recommend that in any such legislative revision, the following principles be considered:

1. The concept that the radio frequency spectrum is public property and a limited scarce resource and that monopoly provision of certain services is in the public interest at this time are the paramount philosophical underpinnings behind any legislation in this area. Because of this we recommend that legislation should not be prepared to leave its management of the spectrum or use of monopoly grants solely to the private sector and competitive forces under any circumstances. Rather the legislation should be aimed at promoting competition and efficient use of the radio frequency spectrum and franchise rights while maintaining some residual ultimate control.

   Essentially the concept should be one of supervision by the CRTC of those entities using the radio frequency spectrum in a competitive situation and regulation by the CRTC of those using the spectrum or any franchise rights in non-competitive situations for so long as they remain non-competitive. Furthermore, the CRTC should have the authority to determine whether an activity or service falls into the regulated or supervisory category and it should also have the authority to move a particular activity or service from one category to the other as technology or the competitive situation evolves.

2. Omnibus legislation should apply to all undertakings that require access to the radio frequency spectrum in order to be viable. The implication of this is that all telecommunications activities fall under federal jurisdiction on the same basis as do broadcasting activities. It is our opinion that the Trial Division Decision in AGT v. CRTC et al will be upheld insofar as the constitutional issue is concerned and there is no logic in law for continuing the bifurcated system which now applies. Moreover, appropriate provisions should be made in the legislation that indicate it applies also to the Crown in right of Canada and in right of any Province or agency thereof.

3. The policy section of the legislation should distinguish between telecommunications, broadcasting and radio-communication rather than try to blend them into a unified system. As the concern in the case of telecommunication is largely carriage and in the case of broadcasting is largely content, the goals of government and regulator can reasonably be expected to be different and at times contradictory in these areas. The title of any omnibus legislation should be the Communications Act and the Act should specify that communications is composed of telecommunications, radio-communications and broadcasting.

4. In light of the assumption by the federal level of jurisdiction over all communications matters, substantial delegative powers ought to be considered in which the Governor in Council could be empowered to delegate to a provincial tribunal powers in these areas in respect of

such activities and for periods of time as he may consider appropriate on condition that the provincial regulatory tribunal is prepared to accept such delegation. We are of the opinion that these powers cannot be delegated to provincial ministers as they are ultimately answerable to their provincial governments whereas the tribunal in question could under the terms of delegation be ultimately responsible, insofar as the delegation is concerned, to the Governor in Council.

5. Serious consideration should be given to a drastic revision of the composition of the CRTC. The theory in 1976 was that by combining the regulation of telecommunications and supervision of broadcasting under the aegis of one regulatory agency, both areas would benefit from the blending of two disciplines within one agency. However, because the legislation was not altered to permit this but rather simply transferred existing legislation into one Commission, this cross fertilization has never taken place. Indeed, on a number of occasions the panel members have specifically objected to Broadcasting Act considerations being raised in the context of Railway Act proceedings. Moreover, Commission members and Commission staff are divided into telecommunications and broadcasting areas and while some members of the Executive Committee sit on panels in both areas, there has been little tangible evidence of benefits to either sector from this approach.

6. We are of the opinion that the committee based approach adopted by the CTC has much to recommend it. In the case of the CRTC the basic split would be between carriage and content. Within that split, there could be specific committees to deal with radiocommunication, telecommunication, programming and cable. In

addition, the regulator should have the power to create ad hoc committees to deal with matters involving two or more of the above areas. There should be a specific review committee whose membership might vary in accordance with the matter being reviewed.

7. Regardless of whether the provinces establish regulatory tribunals to accept delegation as noted above, provincial representation on the Commission should be substantially strengthened. At a minimum, it should not be limited to broadcasting matters so that for example a committee representative, from British Columbia, could sit on any telecommunications matter involving regulated activities in that area in that Province.

8. The roles of the Minister of Communications and the Governor in Council should be clearly delineated. Consideration ought to be given to incorporating the functions of the Department of Communications Act into the Communications Act in which event the role of the Minister could be specified and principles governing his intervention in regulatory matters or his regulation making power could be established.

9. The Governor in Council should have the power of advance directive as is contemplated in Section 14.1 of Bill C-20 together with the power of deregulation as contemplated in Section 14.6 of that Bill. Consistent with our above noted recommendations, Section 14.6 would have to be amended to relate to services or activities provided or carried on under the Commission's regulatory or supervisory jurisdiction and eliminate the reference to "companies". The Governor in Council should also have the power to direct the Commission to forbear from regulation of one or more services or parts thereof upon

such terms as the Governor in Council deems just. The distinction between forbearance and deregulation in this context would be that the Commission could under appropriate circumstances resume regulation or supervision in that it would never have lost jurisdiction whereas under an order to deregulate, a strong argument could be made that jurisdiction is thereby lost. The Commission should also have power of its own motion to forbear from regulation or supervision in circumstances specified in the legislation, in particular in instances where use of the radio frequency spectrum is incidental and peripheral to the activity carried on by an entity.

10. If, given the above authority allotted to the Governor in Council, it is still considered necessary to retain a power similar to that of Section 64(1) of the NTA, specific time limits on the use of such authority should be imposed.

11. If Bill C-20 does not become law, Section 50 of the NTA ought to be amended to permit the Governor in Council to give the CRTC binding policy directives. Similarly, Section 320(3) of the Railway Act ought to be amended to remove the doubt as to the CRTC's jurisdiction to allow the absence of filing a tariff by a "company".

12. Consideration should be given to the issue of obligation to serve and whether a statutory minimum ought to be imposed or appropriate Railway Act amendments introduced to delineate more clearly the regulator's jurisdiction to deal with this issue.

10.0 CONCLUSION

The Department has undertaken a comprehensive review of telecommunications policy in Canada in an attempt to come to grips events which threaten to make legislation irrelevant and a hindrance to policy objectives.

It is our opinion that the most productive result of this overall review could be a comprehensive omnibus Communications Act. However, for the reasons noted above, such legislation should not simply be a matter of consolidating existing legislation into one Act but should rather be new legislation dealing with current realities. For obvious reasons however, it should not be made a prisoner of current technology and should not in express terms, attempt to forecast all future developments. It should instead be drafted in sufficiently flexible terms as to permit the legislation itself to evolve and respond to changes which cannot possibly be foreseen at this time. While such legislation should, in our opinion, consider the recommendations noted in Part 9.0 of this Report, it must be stressed that these are simply some of the more fundamental recommendations in terms of approach to legislation.