

SUBMISSION

IN RESPONSE TO

NOTICE NO. TIPB-002-2019

PETITION TO THE GOVERNOR IN COUNCIL CONCERNING

TELECOM REGULATORY POLICY

CRTC 2019-288, 14 FEBRUARY 2020

BY

VMEDIA INC.

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Table of Contents

Introduction	1
The Petitioners	2
The Petitions	4
i. Impair the Ability of the Incumbents to Upgrade Facilities in Rural and Remote communities	4
ii. ISPs are even at current wholesale pricing levels thriving, and any further reduction in tariffs would severely damage the Incumbents' business	8
a) Bell Petition	9
b) Cable Carriers' Petition	12
Conclusion	14

Introduction

1. VMedia is pleased to submit its comments respecting the Petitions to the Governor in Council concerning Telecom Order CRTC 2019-288 (“Order” or “TO 2019-288”), pursuant to the instructions provided in Gazette Notice TIPB-002-2019, published in the Canada Gazette Part I, on December 14, 2019.
2. VMedia is a competitive provider of internet, TV and phone services in Canada.¹ As an independent internet service provider, VMedia competes with the incumbent telephone companies (telcos) and cable companies (cablecos) (collectively the “Incumbents”) in providing Canadian consumers with the high-speed internet-based services they increasingly demand. Today, VMedia is the only independent service provider that holds CRTC licences to offer TV services throughout Canada.
3. Our responses are directed primarily at the petitions submitted by Bell Canada (the “Bell Petition”) and the group of cable carriers comprised of Bragg Communications Incorporated (Eastlink), Cogeco Communications Inc., Rogers Communications Canada Inc., Shaw Communications Inc., and Videotron Ltd.(the “Cable Carriers’ Petition”).
4. VMedia was one of the first companies to be licensed by the CRTC as a non-incumbent broadcasting distribution undertaking (BDU) to deliver TV signals to Canadian consumers. Since then, VMedia has pioneered a number of important innovations, including:
 - the first “skinny basic” TV offering,
 - its proprietary VBox which combines the functionality of a set-top box capable of receiving conventional TV services and a media payer which can access apps and over the top video and other media content over the internet, and
 - its VCloud personal video recording function which allows consumers to scroll back up to 7 days to view TV programs they missed, or may want to revisit.

¹ For more information on VMedia, see www.vmedia.ca

5. VMedia launched its TV service, together with its high-speed internet service, in March 2013. Since then, VMedia has grown substantially as it offers Canadians attractive packages of internet, TV and phone services in competition with the Incumbents. This growth, which has been driven primarily by word of mouth, is a response both to the demand by Canadians for a compelling alternative to the Incumbents which dominate the market, and to the quality and price-competitiveness of VMedia's services. VMedia currently serves over 40,000 predominantly middle class homes, which enjoy savings of up to 30% on their service packages as compared to the prices charged by the Incumbents.
6. The core of VMedia's business remains the provision of residential internet services. Its ability to offer competitive services which provide affordable alternatives for Canadians is entirely dependent upon the efficient functioning of the regulatory framework for telecommunications services administered by the CRTC. In this regard VMedia, like other similar independent internet service providers ("ISPs"), depends on its ability to have access to telecommunications infrastructure and facilities owned and operated by the Incumbents, which have been built by the Incumbents, in the case of the telcos, over more than century, and in the case of the cablecos, over the last fifty years.
7. In each category those investments were made with the benefit of exclusive monopoly licences and government subsidies and benefits, which virtually eliminated the risks in building those facilities. Through consolidation, those investments now generate over \$50 billion per year in revenues to just seven² companies across Canada.

The Petitioners

8. Those companies represent a level of concentration almost unmatched in the industrialized world, and currently offer internet services - truly an essential service growing in importance every day - under a duopoly framework in each market, with typically one local telco competing with one local cableco. In the context of these unmatched privileges, the ability to provide virtually exclusive access to these services

² The petitioners named in paragraph 3, and Telus Communications Inc.

is in effect a public trust, imposing a duty on the Incumbents to, if not operate under a fiduciary duty to Canadians, at least conduct its dealings with those that regulate its affairs, including the CRTC and the Federal Cabinet, in good faith, assisting them in carrying out their deliberations.

9. This should be especially the case where they have the privilege of submitting their cost estimates, in the Phase II costing processes which are the central elements in those proceedings, on a privileged and confidential basis, without the opportunity for ISPs to critique, based on their own industry experience, the legitimacy of those submission.
10. Instead, the Phase II costing process has been marked by inputs that are absurdly inaccurate at best, and deliberately misleading at worst. Over and over, in regulatory proceeding after regulatory proceeding, the Incumbents have sought to obfuscate the true costs they incur in building and managing their networks.
11. To illustrate, in 2011, as a means of resolving the usage based billing controversy, the CRTC set tariffs for wholesale access which included a usage component, in addition to fixed access charges.³ The usage component measured the capacity needs of ISPs, and resulted in a capacity based billing element, measured in megabits, which was added to the fixed access portion.
12. What was remarkable about the tariffs was that the cost per megabit awarded to each Incumbent varied wildly, not just between telecom and cable facilities providers, but between Incumbents within those verticals as well. For example, Bell was granted \$22.13 per Mb while MTS Allstream was awarded \$2.81. Rogers was granted \$12.51 while Cogeco was given \$26.95.
13. The wide range cast doubt on the validity and accuracy of the cost data provided by the Incumbents. As a senior Rogers executive commented at that time on the rates⁴:

³ Telecom Regulatory Policy CRTC 2011-703

⁴ business.financialpost.com/technology/small-internet-providers-seek-crtc-decision-reversal

The executive said Rogers was “puzzled” by the disparity between its rates and those at other cable companies.

“Normally, rates would be within a dollar or so of each other, which kind of makes sense,” he said. “We have very similar networks, very similar customers and we operate in very similar territories.” ’

14. These outcomes reflect the arbitrary, inconsistent and self-serving inputs of the Incumbents in a process which is intended to result in the determination of just and reasonable pricing for ISPs’ wholesale access to Incumbent facilities. Access which decades of policy has determined is essential to ensuring Canadians are not abused by the market dominance of duopolies.

The Petitions

15. The central arguments of the Incumbents in their Petitions are that (i) the combined effect of lower tariffs going forward, and the payment of the retroactive amounts ordered by the CRTC, would have a negative impact on rural and remote communities, and impair, if not render impossible, the ability of the Incumbents to extend high-speed internet service into rural and less populated areas of Canada and (ii) ISPs are even at current wholesale pricing levels thriving⁵, and any further reduction in tariffs would severely damage the Incumbents’ business.
16. These arguments are in turn disappointing and deliberately misleading, or worse, and have no place in a submission for review submitted to the Governor in Council.

i. Impair the Ability of the Incumbents to Upgrade Facilities in Rural and Remote communities

17. This is a tired canard which incumbents from regulatory times immemorial have hauled out to excuse their exorbitant prices, and forestall the encroachment of competitive services on their monopoly or duopoly markets. There is no evidence that has ever been

⁵ The Cable Carriers’ Petition, p. 19, subsection (iv), from para. 39; the Bell Petition, p. 13, subsection 3.1, from para. 36.

presented to the CRTC that any actual investments were constrained due to any regulatory measures mandating more competition.

18. Indeed, as VMedia submitted to the Governor In Council in responding to the petition by Bell Canada in 2016 regarding the CRTC's Telecommunications Regulatory Policy 2015-326 (the "FTTH Decision"), issued on July 22, 2015, where the CRTC mandated wholesale access to fibre to the home ("FTTH") facilities being rolled out by Bell Canada, the opposite was the case.
19. Bell's own statements shortly after the FTTH Decision was rendered underscores our argument, and the CRTC's conclusion that Bell and other Incumbents will continue to invest to provide enhanced services where profitable.
20. In his August 6, 2015 conference call with investment analysts, which took place shortly after Bell announced a \$1.14 billion FTTH upgrade in Toronto, Mr. Cope responded to a question on the return from Bell's investment on its FTTH-enabled Gigabit Fibe service as follows: ⁶

Yes, so, look, the—first of all we are really excited about the launch of it in the marketplace on Monday in some of our footprint. It is very clear to us as we look out over the next five, 10 years the market is going to demand these type of speeds and so we have to start it now so that as broad a footprint as we possibly have when we complete it as those demands grow. So it is not a matter of market share, frankly it is a matter of table stakes from our perspective. That will be the business for broadband. One of the differences certainly we are seeing in North America is Canadian telco market share gains versus cable is different than other countries and we think that is because of the hard investment we are making and our peer competitor in Western Canada to make sure Canada has the leading broadband services in the country. (underlining added)

21. In the same conference call, Mr. Cope also explained other advantages from FTTH and how Bell Canada can comfortably afford the investment needs:

We believe that the cost to delivering these services through the technology evolution to fibre and through the work—that the great work that John Watson's team is doing on the service metrics, will over time take cost out of our business in the competitive market that we are in and we clearly think that is where we have to go. That is, I do not want to make a forecast on margins but our results over the last eight years probably—you know, is an

⁶ Transcript available at <http://www.bce.ca/investors/investorevents/all/show/BCE-Q2-2015-Results-conference-call>

example of our focus on margins. So we have the free cash flow to invest. We are unique in a wireline sense on a North American basis that we can take the capex we got and still generate the free cash flow on the Wireline business to make the investment in broadband. We think it gives a very unique opportunity to be one of the broadband leaders in our markets and that is relative to other players across the world there, our telco versus cable. (underlining added)

22. Other telcos, likewise, committed substantial investment dollars in FTTH. On October 2, 2015, Telus announced a \$1 billion project to bring FTTH to Vancouver.⁷
23. The commitments to FTTH by Bell and Telus are a strong endorsement of the CRTC's finding that the Incumbents will continue to invest notwithstanding reductions of tariffs to just and reasonable levels, and despite the payment of the retroactive amount.
24. In the case of lucrative urban markets, ongoing investment is "table stakes", to use Mr. Cope's language, in their competitive rivalry with the cablecos, and vice versa, and their desire to capture the home of the future. To Mr. Cope, the independent competitors that are its wholesale customers have nothing at all to do with these "table stakes" – it was and remains the cablecos that mattered to its FTTH roll-out plans.
25. And this makes sense when the reduced tariff impact, in particular the retroactive payment that the Incumbents are so exercised about, is barely a rounding error as a negative impact on the income statements of the Incumbents.
26. Specifically, the retroactive payment in question amounts to about \$320 million in the aggregate, shared among the Incumbents. The CRTC found this to be fair recompense for ISPs who have been subjected to those "unjust and unreasonable" wholesale prices for at least three years⁸. This comes to just over \$100 million per year for the period beginning in March, 2016. This will be shared by about 100 ISPs.

⁷ See

<http://www.vancouversun.com/news/telus+rolling+billion+fibre+optic+network+across+vancouver/11409326/story.html>

⁸ TRP 2019-288, paragraph 329.

27. However, in those three years, the six publicly reporting incumbents(excluding Eastlink) have generated nearly \$60 billion – billion – in operating profit or EBITDA, making the retro payments just 0.5% of EBITDA.
28. And lest anyone think Canadian companies are faring poorly compared to international players, owing to the fact we have less densely populated regions including those darned rural communities to reach, in fact Canadian margins are better than their US counterparts, despite that market’s far greater density.
29. For example, Rogers’ 46% adjusted EBITDA percentage in wireline services compares very favourably to Comcast’s 41%. Bell’s 44% margin also handily beats Verizon’s 38%. And Canadian margins are rising.
30. This also discredits the scorched earth arguments of one of the lead bankers to the Incumbents, TD Securities⁹, which argued that the new tariffs would require the Incumbents to give access to their facilities below their cost, and that these reduced returns on their investments would cause their investments to decline by approximately \$1.68 billion if the Order is not reversed.¹⁰
31. This is passing strange, when one considers that broadband services are virtually all margin. This was acknowledged by a senior executive of the Incumbents before the Commission itself, at a hearing in 2014, where he said about internet services “the customer pays us \$60, and there is no cost of goods sold. That is all margined to drive the network”¹¹.
32. In other words, other than the amortization of the investment in the facilities there are no costs related to providing services. Investment is of course substantial, but so are

⁹ *We See Good Odds of the CRTC Decision Being Revised/Overtuned*, TD Securities Inc., Industry Insights – Equity Research, 4 September 2019 [TD Securities Report],

¹⁰ TD Securities Report, page 1.

¹¹ *Review of Wholesale Service and Associated Policies*, Transcription of Proceedings Before The CRTC, Volume 7, December 2, 104, Review of Wholesale Service and Associated Policies

rates, which allow infrastructure investments to be recovered very quickly, leaving revenues after that point to generate margins unmatched by any other industry.

33. For example, referring back to the FTTH rollout in the GTA, it was calculated at the time that hooking up a home would cost about \$1,000. However, the services are marketed to those homes, based on current posted rates, at prices starting at \$94.95 per month and going up to \$124.95 per month¹². One can quickly calculate the velocity of the cost recovery, nearly as fast as the download speeds boasted by the packages.

34. In that context, in view of the real margins and real profits generated by the Incumbents, the threats of cutting off investment in new facilities¹³, and especially in rural and remote areas, rings not only hollow, but given their position of privilege, downright shameful.

ii. ISPs are even at current wholesale pricing levels thriving, and any further reduction in tariffs would severely damage the Incumbents' business

35. This is the most disturbing contention in the Petitions, and serves to illuminate the core issue that led the CRTC to find that the tariffs in question were indeed unjust and unreasonable. That issue is the credibility, indeed the honesty and truthfulness, of the Incumbents in their dealings with CRTC in the course of the Phase II costing processes over the years, and in the instant case, in their submissions to the Governor in Council.

36. The CRTC chose words carefully in coming to its findings, concluding that the tariffs in effect prior to its orders setting interim rates in October and November, 2016¹⁴ were “based on inappropriate costs and assumptions”, and that certain of the Incumbents “had not conducted their studies in accordance with costing principles detailed in their respective Regulatory Economic Studies Manuals, and had not justified departure from the principles and methodologies set out in the Manual”.

¹² https://www.bell.ca/Bell_Internet/Internet_access, as at February 14, 2020.

¹³ <https://www.theglobeandmail.com/business/article-rogers-falls-short-of-revenue-forecasts-as-more-customers-switch-to/>

¹⁴ Telecom Orders 2016-396 and 2016-448.

37. In addition, it stated that revisions were required to ensure that the interim rates themselves were not based on overstated costs. On that basis it requested the revised cost studies that were the foundation of the Order.
38. In view of the submissions in the Petitions, VMedia suggests that stronger judgments ought to be made regarding the credibility of the Incumbents as reflected in the Petitions, their motivations, and whether factual shortcomings in their cost studies, as determined by the CRTC, were the result of innocent errors and oversight, or deliberate intentions to mislead the CRTC, and the Canadian people.
39. Specifically, both Petitions attempt to characterize the participation of ISPs in the internet business as robust, growing in market share, and indeed significantly reducing the Incumbents' business, at current tariff levels. They argue that reducing tariffs further would make their penetration even greater, significantly harming the Incumbents' business, leading to less investment, and so on.
40. In doing so, both Petitions contain inaccuracies so egregious as to leave no other conclusion than that they seek to mislead the Governor in Council itself.
- a) Bell Petition*
41. Starting at paragraph 3.1, Bell makes statements regarding the market share of "Resellers". That term is defined in paragraph 2 of the Bell Petition as those who "purchase wholesale access and then re- sell that access and network capacity to retail customers." This would limit the term to the target of its submission, ISPs like VMedia.
42. It then proceeds to make statements about the market share of Resellers, how it is growing, how it accounts for 13% of market share as of 2017, how it has grown from 9% in 2013, and that between 2013 and 2017 Resellers accounted on average for 41% of all net subscriber additions.
43. First and foremost, in a deliberate sleight of hand, or inexcusable inadvertent mistake (one which also was perpetrated in the Cable Carriers' Petition), Bell has overstated and

inflated the Resellers market share. In doing so it renders all of its analysis regarding the state of the ISP business worthless.

44. Specifically, in calculating a 13% market share for “Resellers” as of 2017, it has included in that number the market share of a category tracked by the CRTC as “Other facilities-based providers”. This category does not have the same business model as ISPs, as is evident in their name. They offer internet by satellite, by fixed wireless installation, or by laying their own fibre networks.
45. This category moreover does not – repeat does not – “purchase wholesale access and then resell that access and network capacity to retail customers”. That category does not, in other words, carry on a wholesale access relationship with Bell, or the Cable Carriers for that matter. They may purchase other forborne services carried on by the Incumbents, such as backhaul, but that is not the subject matter of these submissions, and is utterly irrelevant to these proceedings.
46. In fact, when the market share of the other facilities-based providers is extracted, ISPs, or Resellers as it is put, had 8.3% market share in 2017. Below is the extract from the Communications Monitoring Report 2019 back-up data which proves our point.

Infographic 9.3			
Points of interest in residential Internet service subscriptions, 2018			
	2016	2017	2018
Residential Internet service subscriptions with speeds of 50 Mbps + (%):	26.2	38.6	52.0
Residential Internet subscriptions by technology type:			
DSL (%):	35.2	26.4	
Cable (%):	55.5	53.3	
Dial-up (%):	0.4	0.1	
Fibre (%):	5.0	14.5	
Fixed wireless & satellite (%):	3.9	5.7	
Percentage of residential Internet subscriptions by service provider type:			
Incumbent TSPs (%):	38.5	38.1	
Cable-based carriers (%):	48.5	47.4	
Independent ISPs (%):	13.0	14.5	
Other facilities-based carriers (%):	4.7	5.6	
Wholesale-based service providers (%):	8.3	8.9	
Source: CRTC data collection			
Independent ISPs are defined as ISPs that are not cable-based carriers or incumbent TSPs and include other facilities-based carriers as well as wholesale-based service providers.			
Other facilities-based carriers are facilities-based providers that are not incumbent TSPs or cable-based carriers, mainly consisting of fixed-wireless and satellite-based service providers.			
Wholesale-based service providers or non-facilities-based service carriers refers to companies that generally acquire telecommunications services from other providers and either resell those services or create their own network from which to provide services to their customers			

47. Moreover, the growth rate for ISPs has been steady but virtually unchanged since 2013, increasing at an average rate of .5% per year including 2017, when the interim rates set in TRO 2016-396 first took effect.
48. The entire argument in the Petition regarding the increasing encroachment of ISPs on Incumbent market share is incontrovertibly false.
49. The margin analysis in Figure 3 under paragraph 41 of the Bell Petition is equally incomprehensible. Bell does indeed know exactly what ISP margins are, because it knows what we pay, and by looking at our websites, they know what we charge. We challenge Bell, with this submission, to prove its claims in this regard. VMedia has never charged over \$60 for a 50/10 Mbps service, and neither has any of our ISP competitors, to our quite informed knowledge. This is either a fabrication, or based on deliberate or negligent miscalculations, just like the calculation of ISP market share.

50. While not specifically reflecting a 50/10 Mbps plan, the extract below¹⁵ shows average revenues per user(ARPU) across the clearly defined categories:

Infographic 9.5		
Points of interest related to average revenue per user (ARPU), 2018		
Average revenue per user by service provider type:	2018	Growth 2017-2018 (%)
Incumbent TSPs (\$):	59.64	0.2
Cable-based carriers (\$):	61.06	5.0
Other facilities-based carriers (\$):	81.09	15.8
Wholesale-based service providers (\$):	47.60	-2.1
Total (\$):	60.39	3.2
Source: CRTC data collection		

51. It should be noted that it also reflects that among all providers, ISP ARPU actually went down, largely due to competitive pressures from Incumbent flanker brands like Rogers’ Fido, which in fact have directly targeted ISPs by offering packages at prices below the costs they actually charge ISPs.

52. Figure 3 also does not seem to take into account the data points in Figure 9.9¹⁶ which show that in 2018 the industry ARPU for speeds between 50 and 100 Mbps was \$65.49. If ISPs were charging \$82.05 for a 50/10 plan in 2016 – or ever – the Incumbents’ problems would all be solved, as we would all be out of business.

53. These misrepresentations are headshaking in any context, but in a Petition to the Governor in Council the highest standards of candour and accuracy should prevail.

b) Cable Carriers’ Petition

54. The Cable Carriers’ Petition also adopts the “ISP business is booming and threatening the Incumbents” stance, in its case selectively citing data from The Competition Bureau to completely mislead the reader. In paragraph 5 the Cable Carriers define “Resellers” a

¹⁵ Communications Monitoring Report 2019, Infographic 9.5

¹⁶ Ibid.

third parties who “effectively resell to consumers high-speed internet access provided by the Cable Carriers”.

55. But then starting with paragraph 39, the Petition offers details of Reseller growth and market share mirroring the data provided in the Bell petition. Again it mentions a 13% market share, and concludes that “the competitive position of Resellers in the markets on which they have chosen to focus is strong and growing, without the benefit of the dramatic reduction in rates that the CRTC Order would impose.” It states that this is clear from a chart that is reproduced from a recent comprehensive report on the broadband industry.¹⁷

56. The reproduced chart does indeed show a 13% market share. But the Petition does not reproduce the caveat of the Bureau regarding the interpretation of the chart, which appears immediately below the chart in the Report. That reads:

However, these market share figures may not represent the actual competitive reality in Canada for two reasons. First, these figures include subscribers of some smaller facilities-based competitors, including a nation-wide ISP that offers satellite and fixed wireless services, and not just those of wholesale-based competitors.

57. In other words, the chart clearly includes the other facilities-based carriers referred to in the CMI, making the assertion of a 13% market share inadvertently misleading at best, and mendacious at worst.

58. The same reduction applies to the purported size of ISP subscriber concentrations in urban areas like the GTA.

¹⁷ *Competition Bureau Canada, Delivering Choice*, <[https://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/vwapj/CSBP-BR-Main-Eng.pdf/\\$file/CSBP-BR-Main-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/vwapj/CSBP-BR-Main-Eng.pdf/$file/CSBP-BR-Main-Eng.pdf)>.

Conclusion

59. The central concern of the CRTC which compelled it to conclude that tariffs in force prior to 2016 were unjust and unreasonable was the quality of information provided by the Incumbents in the course of the Phase II costing processes, over the years. This conclusion cannot be arrived at without considering the credibility of the Incumbents. This credibility problem is greatly reinforced by the contents of the Petitions, and the shortage of accurate information described in this response.
60. Whether the information was inaccurate as a result of an aggressive interpretation of the requirements of the Phase II process, or negligence, or worse, Canadians are entitled to deserve better from custodians of this public trust that is our telecommunications infrastructure.
61. In this regard Incumbents are not businesses like any other and should be held to a higher standard, due to the strategic and essential nature of the assets and services that they manage.
62. After a years-long process, VMedia is confident that the conclusions of the CRTC were arrived at with all the due consideration of fair treatment of all the parties, including Incumbents, ISPs, and Canadians who crave fair prices and world-leading quality telecommunications services. For this reason alone, the Governor in Council should reject the Petitions.
63. However, in view of the disappointing quality of the Petitions, serious consideration should be given to the entitlement of the Incumbents to continue to be the trusted custodians of these assets.
64. The retroactive payment is fair within the confines of the rules that govern the CRTC, but it should be kept in mind that these years-long processes have been very costly to ISPs, who continue to labour under the paradox where their suppliers are also their fierce competitors.

65. Notwithstanding the comically exaggerated illustration of the margins purportedly enjoyed by ISPs, ours is a very skinny margin business at current tariff levels as we strive to continue to provide the lowest prices to Canadians. The implementation of the tariffs ordered in TRP 2019-288 will not significantly expand our margins, but rather will allow us, given market forces among ISPs, to offer even lower prices to Canadian, who will, as they should be, be the ultimate beneficiaries of the regulatory framework.
66. But at the same time as the Petitions are rejected, the Governor in Council should take into account the delays of these proceedings, the costs to Canadians in the higher prices they pay as they wait for the outcomes, the behavior of the Incumbents as they compete with their ISP customers, the candour and transparency of their communications with regulators and the Federal Cabinet itself, and determine whether a profound reconsideration of our telecommunications framework ought to be considered.
67. It would be timely, given the delivery of the Broadcasting and Telecommunications Legislative Review Panel's report, to consider whether the status quo, or even the status quo with the measures recommended in the report, are appropriate given the state of competition and corporate concentration in Canada, or whether a full reconsideration of all options be assessed to achieve real and lasting change. Real change that will ensure competition and fair prices and excellent facilities that will lift Canadians from among the lowest ranks of industrialized nations to the highest, which the residents of the home of the telephone deserve.
68. But first and foremost, given the grievous deficiencies of the Petitions, we ask that they be rejected, and rejected expeditiously, to allow Canadians to benefit from the competitive services to which they are entitled.

