

**IN THE MATTER OF  
CANADA GAZETTE, PART I, 4 APRIL 2009  
NOTICE NO. DGTP-004-09**

**A PETITION TO THE GOVERNOR IN COUNCIL  
BY MTS ALLSTREAM INC. CONCERNING THE  
CRTC'S REGULATORY TREATMENT OF  
WHOLESALE AGGREGATED ADSL ACCESS SERVICES  
AND WHOLESALE LOCAL ETHERNET SERVICES IN  
TELECOM REGULATORY POLICY CRTC 2009-34 AND  
TELECOM DECISION CRTC 2008-118**

**COMMENTS OF  
THE COMPETITOR COALITION**

**4 May 2009**

1. These comments are submitted by a coalition of competitive telecommunications service providers (the “Competitors”) in support of a petition filed by MTS Allstream Inc. (MTS Allstream) on 11 March 2009 (the “MTS Allstream Petition”), in which MTS Allstream seeks the variance of two decisions of the Canadian Radio-television and Telecommunications Commission (“CRTC” or the “Commission”), namely Decision 2008-118<sup>1</sup> and Policy 2009-34.<sup>2</sup> These decisions relate to two distinct “wholesale” services, namely, wholesale local Ethernet (“Ethernet”) services and wholesale aggregated ADSL access (“WAA”) services, respectively.
2. The Competitors believe that MTS Allstream’s Petition in relation to these two critical wholesale services is well founded. Through its failure to act, the Commission has fully adopted the anti-competitive vision of the large incumbent local exchange carriers (phone companies) such as Bell Canada, Bell Aliant Regional Communications, Limited Partnership (collectively “Bell”) and Telus Communications Company (“Telus”). Ethernet and WAA services are critical to competition in the provision of converged telecommunications services in both business and residential markets, today and for the foreseeable future. For the reasons highlighted below, the Competitors ask that the Government grant MTS Allstream’s Petition and make a clear choice for the benefit of Canadians in favour of greater competition, investment and innovation in telecommunications markets.

## **I. THE COMPETITOR COALITION**

3. The Competitors represent a broad swath of the competitive telecommunications services industry in Canada. The coalition includes facilities-based competitive local exchange carriers (CLECs), and independent Internet service providers (ISPs).

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<sup>1</sup> Telecom Decision CRTC 2008-118, *MTS Allstream Inc. – Application to review and vary certain determinations in Telecom Decision 2008-17 regarding the classification of wholesale Ethernet services*, 11 December 2008.

<sup>2</sup> Telecom Regulatory Policy 2009-34, *Requests to review and vary directives in Telecom Decision 2008-17 related to the provision of central-office-based wholesale ADSL access service and aggregated ADSL access service*, 26 January 2009.

4. The Competitors provide a wide variety of telecommunications services, primarily to the residential and small- and medium-sized business (SMB) markets. Among the services provided by the Competitors to their customers are local and long distance voice services, Internet access services, wireless services, and feature-rich broadband services such as remote LAN access services and streaming audio and video services.
5. Many of the services that are offered by the Competitors are provisioned using services and facilities leased from the large phone companies. In particular, because local telecommunications networks, *i.e.* the portions closest to end-customer premises, are not economically or practically duplicable by competitors, competitors must lease “last mile” facilities and services from the large phone companies in order to provide downstream retail services to their own end-customers. Without this kind of last mile access and irrespective of technological innovation and the investments that a competitor may have made in its own network, a competitor will not be able to “reach” the consumer or business customer.
6. The Competitors have joined together in order to support MTS Allstream’s Petition and to oppose petitions also filed on 11 March 2009 by Bell and by Telus, in which these large phone companies seek to avoid the Commission’s directive that they provide access to higher-speed ADSL service speeds.<sup>3</sup>

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<sup>3</sup> See Telecom Decision CRTC 2008-117, *Cybersurf Corp.’s application related to matching service speed requirements for wholesale Internet services*, dated 11 December 2008 and Telecom Order CRTC 2009-111, *Cybersurf’s application related to the implementation of Telecom Decision 2008-117 regarding the matching speed requirement*, dated 3 March 2009. See also Bell Canada, *Petition to the Governor in Council to vary Telecom Decision CRTC 2008-117, Cybersurf Corp.’s application related to matching service speed requirements for wholesale Internet services, and to rescind Telecom Order CRTC 2009-111, Cybersurf’s application related to the implementation of Telecom Decision 2008-117 regarding the matching speed requirement by Bell Aliant and Bell Canada* (dated 11 March 2009) and Telus Communications Company, *Petition to the Governor in Council to Vary Telecom Decision CRTC 2008-117 and to Rescind Telecom Order CRTC 2009-111* (dated 11 March 2009), collectively referred to herein as the “Bell and Telus petitions”.

7. The Competitors' comments in support of MTS Allstream's Petition are provided herein. The Competitors' comments opposing Bell's and Telus' Petitions are being filed in concurrently filed submissions.

## **II. WHOLESALE LOCAL ETHERNET AND AGGREGATED ADSL ACCESS SERVICES**

8. The Ethernet services that are the subject of Decision 2008-118 are wholesale, local Ethernet services that would provide last mile "local access"<sup>4</sup> and "local transport"<sup>5</sup> to small, medium and large or enterprise business customers using the industry's current broadband standard for this market. As such, these Ethernet services are viewed by competitors as being absolutely essential to their ability to provision competitive and increasingly feature-rich telecommunications services to the business telecommunications market.
9. Like Ethernet, WAA or wholesale DSL services provide similar access to the local access and local transport portions of the phone companies' networks using ADSL transmission technology. Because of the inherent efficiencies of the shared network architecture of IP-based transmission technologies like ADSL, all of the large phone companies have chosen to bundle the inter-city transport portions of the phone companies' networks into WAA services as well.<sup>6</sup> WAA services enable competitors to compete for residential as well as SMB customers to provide high speed Internet and other broadband services.

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<sup>4</sup> "Local access" is generally understood to refer to the portion of a telecommunications network between the end-customer's premises and the serving wire centre or central office, which contains switching, routing and transmission equipment.

<sup>5</sup> "Local transport" is generally understood to refer to the portion of a telecommunications network between the serving wire centre (of any given end-customer's premise) and other wire centres within the local calling area (city or town).

<sup>6</sup> Although competitors have asked for the unbundling of ADSL services so that competitors can provision their own or competitive sources of supply of local and inter-city transport, this request has been pending before the CRTC since 2002. No working, unbundled ADSL access service currently exists on the phone companies' tariff books and it is pure and open conjecture as to when or if such a service will ever become available. Policy 2009-34 has opened a proceeding to reconsider the unbundling of the telephone companies' WAA services. However, this proceeding has been suspended by the CRTC as a result of objections raised by the Bell and Telus. See Commission staff letter dated 1 April 2009 suspending the Follow-up proceeding to Policy 2009-34, online: <http://www.crtc.gc.ca/eng/archive/2009/lt090401.htm>.

With the evolution of technical standards and new equipment built to such standards, higher-speed DSL services are being rolled out on a continuous basis. Currently, in markets like Japan and Korea, access speeds of up to 100 Mbps are available to residential subscribers using DSL technology.

10. In the telecommunications context, “wholesale” services typically refer to services that provide competitive telecommunications service providers (TSPs) with the ability to use their own and leased access over the “last mile” portions of the phone company’s ubiquitous networks that connect directly to the many thousands of residential and business customers. This combination of owned and leased facilities allows competitive TSPs to then use such wholesale services in order to reach the same residential and business customers that phone companies ubiquitously reach in order to provide competitive service offerings in the retail market.
11. At root, both the Ethernet and WAA services that are the subject of Decision 2008-118 and Policy 2009-34 provide the critical last mile access to customers that is the *sine qua non* of competition. Without this piece, competitors cannot compete in the retail market and offer Canadians and Canadian businesses choice and innovation.

### **III. OVERVIEW OF COMPETITORS’ POSITION**

12. In the decisions that MTS Allstream is appealing, the CRTC refused to mandate cost-based access to local Ethernet and WAA services.
13. In Policy 2009-34, the Commission determined that notwithstanding a finding that competitive TSPs could not economically duplicate the local components of the phone companies’ WAA services or serve all customers that the phone company is able to serve using DSL technology by any other means, it would maintain the *status quo* by permitting phone companies to charge supra-compensatory rates to competitive TSPs for WAA services.
14. Moreover, in the case of a Ethernet services, in Decision 2008-118 the CRTC determined that Bell, Telus and other former monopoly phone companies

would not have to unbundle Ethernet services<sup>7</sup> so as to maximise efficient and effective use of these facilities and that they would be permitted to withdraw wholesale local Ethernet capacity entirely in the near future.

15. The Commission appears to have refused to mandate cost-based rates for WAA services based on the expectation that an unbundled ADSL service could and would be made available. The Commission's consideration of this issue has been pending before the Commission for at least seven years, the phone companies are clearly intent on blocking this initiative and more importantly, no such service currently exists.
16. The mere possibility of competition, "around-the-bend" or "almost-in-sight," does and will not offer choice, lower prices or innovation to Canadian consumers and businesses. These benefits are only available once competition actually takes hold.
17. With respect to Ethernet services, the Commission's refusal to unbundle and mandate cost-based rates for these services as well as its decision to allow the large phone companies to withdraw these services appears to have been based on a seriously flawed view that these local services could be duplicated by reasonably efficient competitors.
18. Most importantly, with Decision 2008-118 and Policy 2009-34, the Commission has fully subscribed to the phone companies' vision of re-monopolising local broadband services in the business market and has rejected increased competition in broadband services in the residential market.
19. It has been over six years since MTS Allstream first asked that the Commission mandate the phone companies to provide unbundled local

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<sup>7</sup> Currently, the phone companies' wholesale Ethernet services are only available on an end-to-end basis. It is not possible for competitors to lease Ethernet access facilities separately from Ethernet transport. This aspect of the Phone companies' current offering discourages competitors investment in local transport facilities as well as the use of alternative sources of supply for local transport facilities, should such supply exist.

Ethernet services at cost-based rates to competitors. In addition, more than ten years have passed since competitors first asked the Commission to provide WAA services to competitors. Throughout this entire period, competitors have not had reasonable access to Ethernet services and have had to pay supra-compensatory rates to phone companies for WAA services.

20. During all this time, phone companies have been operating in exactly the manner that they seek to preserve – by withholding wholesale access to their unduplicable Ethernet and WAA assets at reasonable prices. The phone companies have had their chance, over almost ten years, to demonstrate just how well their market model serves the public interest – it hasn't. Canadian consumers and businesses are being left behind and are paying higher and higher prices. The trend is the opposite of what the phone companies are promising will happen as a result of allowing them to be a monopoly provider of business services and to be faced with competition that is limited to the cable companies in the residential market.
21. Competitors are asking that the Government grant MTS Allstream's petition and mandate reasonable access to wholesale Ethernet and ADSL access services. It is inconceivable that competitors can duplicate these network elements on a scale that would allow robust competition for residential and business Internet and other broadband services.
22. Neither this Government nor municipal governments would wish to see the kind of activity that would be involved in the enormously capital-intensive but wasteful and inefficient effort to duplicate the phone companies' local networks. This Government said as much when it ordered the Big 3 wireless providers to share antenna towers and sites and to provide mandatory roaming and resale services to new entrants in the wireless market.
23. Competitors will never have the advantages that phone companies have had and that to this day enable them to make incremental upgrades to their local network assets in order to provide broadband services to Canadian consumers and businesses. Each and every phone company in this country

has built its wireline networks as a protected monopoly and as recently as 1998 under the assurance of guaranteed rates of return, on the backs of local basic telephony subscribers. To this day, the phone companies have access to multi-million dollar “deferral account” funds, contribution payments from TSPs as well as ear-marked funds from the public purse to fund their expansion of rural wireline broadband networks.<sup>8</sup>

24. Despite this reality, competitors are not asking for anything “for free.” Competitors are willing to pay for Ethernet and WAA services in proportion to all of the actual costs that would be involved in providing mandated access to these facilities, plus a mark-up. The costs of providing these services necessarily include the costs of any incremental network investments that are related to the provision of these services. If anything, the contribution of competitors to these costs plus a mark-up should facilitate the making of these investments, contrary to the empty threats of the phone companies.
25. In a converged IP world, Ethernet and ADSL capabilities are essential not only for retail “Internet access” services, but also local and long distance voice services (delivered via VoIP), video and other feature-rich services, that will all be delivered via local broadband access lines. Thus, the phone companies’ vision will ensure that Canadians will have only one (perhaps two in the case of residential consumers) provider of local and long distance voice, and on-ramps to the World Wide Web, the larger Internet, video and other feature-rich services.
26. The Competitors submit that the Commission’s decision to do nothing and to accept the phone companies’ vision of reduced competition in telecommunications markets is wrong-headed and detrimental to the productivity, prosperity and cultural vigour of Canadian society.

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<sup>8</sup> See *Bell Canada – Application to increase the capital cost range of its service improvement plan, and to extend the period of its roll-out plan*, Telecom Decision CRTC 2004-75, dated 16 November 2004. See also *Use of deferral account funds to improve access to telecommunications services for persons with disabilities and to expand broadband services to rural and remote communities*, Telecom Decision CRTC 2008-1, dated 17 January 2008.



#### **IV. LOCAL NETWORKS ARE NOT EFFICIENTLY DUPLICABLE**

27. The technological phenomenon of “convergence” has not overcome the single biggest barrier to entry faced by competitors, namely their inability to duplicate the local network facilities that the telephone companies built when they were monopolies and that to this day enable them to incrementally upgrade these assets as technology evolves in order to provide broadband telecommunications services.
28. While competitors have invested extensively and at great risk to build a national backbone, or inter-city network facilities and even to establish a point of presence (POP) in major cities and towns, it remains inconceivable that competitors will be able to build the local network facilities that are required to reach every household or every business premise in the areas that they serve. Quite literally, in order for competitors to be able to serve every household or every business premise, a competitor would have to wire every commercial building, install a line from every household and every commercial building to the serving “wire centre”, then rip up the roads and install lines between each such serving “wire centre”, and then back to every metropolitan POP. These “local” network facilities have nowhere in any Canadian city (or for that matter anywhere in the world) been duplicated by competitors despite over twenty years of competition in telecommunications markets.
29. The phone companies already own facilities, conduit and pole infrastructure into every commercial building or premise in their serving territories as a result of their legacies as monopoly telcos. Technology has evolved, but the imperative of a physical connection to each and every end-customer premise has not yet been overcome. As a result, phone companies are able to add additional facilities with incremental, as opposed to greenfields, investments. Not only do they have the physical infrastructure upon which to make incremental upgrades in the local portion of the network, the phone

companies have the scale required to justify building or upgrading their existing facilities in order to maintain a service level according to market demand. As significant as these incremental investments may be, on a per subscriber basis and given the legacy of ubiquitous network paths and customer relationships, such investments are not impossible for an incumbent phone company.

30. In fact, incumbent phone companies the world over have already completed in many cases, the incremental investments that Canadian phone companies are in the midst of making.
31. The fact of the matter is that Bell and Telus have been deploying fibre throughout their networks for well over two decades. Historical fibre deployment, of which there are records in CRTC proceedings dating as far back as the mid 1980s, have been paid for by local telephone subscribers when the telephone companies were monopolies or were guaranteed rates of returns. Any additional investment made in the future still leverages all of the telephone poles and underground conduit networks through and upon which Bell and Telus will run their fibre deployment.
32. More pointedly, if Bell and Telus justify their Petitions on grounds of the "risks" of making these *incremental* investments, then how is it at all fair to expect competitors, who have none of the advantages of incumbency, to build these networks from scratch as greenfields investments?
33. The competitor does not have the luxury of assuming that all of the customers in a building will generate revenues. The new entrant must make money on the first and likely only customer that it has in a building. Therefore, if the cost to build out facilities is too high (because it cannot gain access to conduit, pole or other physical infrastructure from the phone company at all or at just and reasonable rates) in comparison to the revenue generated from the new entrants customer, then it will not have a rational business case to build out facilities. Without a rational business case, the markets would never, least of all under current economic markets, fund a

discrete build and certainly not the replication of the incumbent network. In addition, replication of something that already exists would be inefficient and a waste of scarce capital resources, taking out of the markets monies that should be spent on innovation.

34. It is not conceivable that any competitor could duplicate this infrastructure. No competitor anywhere has. The local access and transport facilities within Bell's and Telus' last mile networks represent natural monopolies that cannot be practically duplicated by any competitor. In the absence of any meaningful competitive alternatives to these facilities, fairness and the public interest in competition in telecommunications markets dictate that access be granted to the phone companies' local Ethernet and WAA services.
35. As indicated in the Towerhouse Report attached to the MTS Allstream Petition, local access facilities in the UK, such as copper loops and fibre-based Ethernet access and transport facilities, are treated as an "enduring" or "economic bottleneck" because they are considered to be natural monopolies.<sup>9</sup> In particular, these facilities are not generally capable of being economically duplicated because they require large, upfront, sunk investments in copper, fibre, underground ducts and above-ground telephone poles.<sup>10</sup>
36. For these reasons, the UK regulatory authority has determined that last mile access and transport facilities must be made available by the incumbent telephone company to competitors.
37. The Canadian economy is almost half the size of the economy of the UK,<sup>11</sup> yet Bell and Telus are advocating a regulatory model that has been rejected by the telecommunications regulatory authority of a much larger economy.

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<sup>9</sup> See Towerhouse Consulting LLP, *Ethernet and Other Next Generation Access; Lessons from the UK Example*, 9 March 2009, attached as Appendix 1 to the MTS Allstream Petition, page 7.

<sup>10</sup> *Ibid*, page 7.

<sup>11</sup> In 2008, the International Monetary Fund ("IMF") estimated Canada's GDP to be \$1.3 trillion. By contrast, the GDP of the UK was estimated by the IMF to be \$2.2 trillion.

In fact, it should be noted in this regard that, at one time, British Telecom's last mile access facilities were subject to a set of rules that were not unlike the deregulatory framework adopted by the FCC in relation to the RBOCs in the US. However, this approach to regulation did not result in an increase in the number of service providers in the wholesale market. In fact, BT continued to exercise significant market power throughout this period of time. Consequently, Ofcom decided that BT's last mile facilities should be subject to specific price controls that require that the prices of those facilities to be based on their underlying costs, rather than a "market price" determined by the incumbent.<sup>12</sup>

## **V. CRTC'S REASONING IS FLAWED**

38. For purposes of providing broadband services to the residential market, the Commission has already determined as a question of fact that it is not economically or practically feasible for competitors to duplicate local access facilities of any type. Notwithstanding that the Commission has found that WAA services are the only feasible and practical way for competitors to provide broadband services using DSL technology,<sup>13</sup> the Commission has refused to provide cost-based access to WAA services on the hope that the phone companies will be willing and able at some unspecified point in the future to unbundle the aggregation portions of the service from the local access and transport portions of the service. As noted above, the proceedings before the CRTC in relation to the further unbundling of WAA services, something that the phone companies are resistant to doing, is more than seven years old.
39. It is perverse to find on the one hand that WAA services (along with cable-provided TPIA services) are the only feasible way for competitors to be able to provide broadband telecommunications services and at the same time, to allow phone companies to charge supra-compensatory rates for such

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<sup>12</sup> *Supra*, note 9 at page 8.

<sup>13</sup> Telecom Decision 2008-17, *Revised regulatory framework for wholesale services and definition of essential service*, 3 March 2008, paragraph 85.

services. Such a decision does not further the interests of Canadians in competition or more precisely the benefits of lower prices and flexible and innovative service offerings that Canadians deserve.

40. And Decision 2008-118 is even more blinkered in that the Commission has ignored the reality that after more than twenty years of competition, competitors are probably in less than five per cent of commercial buildings in even the most densely populated cities in Canada.<sup>14</sup>
41. Furthermore, by refusing to unbundle the access and transport portions of Ethernet services and in permitting telephone companies to withdraw wholesale Ethernet services, beginning with Ethernet transport services in March 2011, the Commission has overlooked the fact that it has single-handedly effectively stranded any investments that competitors have made in core network infrastructure on the assumption that they would obtain cost-based access to the local Ethernet facilities of the phone companies.
42. Aside from these important considerations, Decision 2008-118 is clearly based on a misunderstanding of the extent and feasibility of duplication of Ethernet services. Although for purposes of providing broadband services to the business market, the CRTC recognised that end-to-end duplication of existing Ethernet facilities was not a reasonable goal,<sup>15</sup> its decision was clearly based on the view that competitor self-supply or alternative supply was a viable means for competitors to compete in retail broadband markets. At paragraph 16 of Decision 2008-118, the Commission states as follows:

Data provided by parties in confidence to the Commission [in the PN 2006-14 Essential Facilities proceeding] indicated that in metropolitan areas, for high-speed access and transport services, including Ethernet access and transport services, ***a large proportion of these services were either self-provided or obtained from parties other than the ILECs. The Commission notes that the record of this proceeding does not raise doubt as to the accuracy or***

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<sup>14</sup> MTSAllstream(The Bureau)12Apr07-2 PN 2006-14 Supplemental Abridged, at page 3 of 3.

<sup>15</sup> Decision 2008-118, paragraph 17.

***reliability of that data.*** Based on that information, the Commission considers that ILEC Ethernet access and transport networks have been duplicated by competitors. (emphasis added)

43. The highlighted portion of this paragraph refers to an unspecified but allegedly “large proportion” of self-supply or alternative supply. The question is, competitor or alternative self-supply in proportion to what?
44. The only data on the record of the PN 2006-14 proceeding that the Commission could have been referring to in the foregoing paragraph is the data provided by parties in response to \_\_\_(CRTC)19Jul07-2001 PN2006-14. It is abundantly clear from the face of this Commission interrogatory that the Commission:
  - (a) elicited no data from the phone companies regarding the extent to which they self-supplied Ethernet services to themselves in their incumbent territories;
  - (b) even with respect to the limited data that was actually solicited and collected by the Commission in \_\_\_(CRTC)19Jul07-2001 PN2006-14, the Commission did not ask for the actual numbers or locations of such Ethernet services and facilities; and
  - (c) did not guard against the possibility that the same competitive facilities were being counted multiple times, thereby artificially inflating the extent of competitive supply.
45. To compare competitor self-supply to itself, which is all that (CRTC)19Jul07-2001 PN2006-14 accomplished in seeking the percentage of competitor self-supply and third party supply of Ethernet services, does not elicit any information regarding perhaps the most relevant consideration, which is competitive supply as a proportion of total phone company self-supply. The Commission was obliged to take into account phone company self-supply of Ethernet services. It failed to do so. Consequently, the data was wholly insufficient for the Commission to conclude that there was evidence of duplication of Ethernet facilities on a scale sufficient to protect the interests of customers.

46. The Commission's finding of duplicability is deeply flawed because it is based on a misapprehension of the proper question or comparison to be made (competitor v. phone company self-supply) and because it appears to be a wholly theoretical determination that is divorced from geographic or any other considerations relating to the scale and scope of duplicability.

## **VI. WHOLESALE ETHERNET AND ADSL ARE ESSENTIAL TO COMPETITION**

47. Given that it is infeasible from both an economic and practical point of view for competitors to duplicate the necessary local access and transport facilities required in order for competitors to ubiquitously serve the business and residential sectors of the telecommunications market, competitors have asked for wholesale Ethernet and WAA at cost-based rates. Without access to these wholesale services, competitors do not have the means to access residential and small, medium and large business customers to offer these customers a choice of broadband service providers and services.
48. Competitors have been asking for cost-based rates for WAA services for more than ten years. Similarly, competitors first requested access to Ethernet-based local services in early 2003.<sup>16</sup>
49. There is nothing "next gen" about ADSL and Ethernet services today. These services represent the current standard for the delivery of services that meet current customer expectations of converged broadband services.
50. In a converged broadband world, Ethernet and ADSL capabilities are essential not only for retail "Internet access" services, but also local and long distance voice services (delivered via VoIP), video and a plethora of other feature-rich services, that will all be delivered via local broadband access lines.

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<sup>16</sup> AT&T Canada, *Part VII Application seeking a number of interim and final orders directing the Respondents to file tariffs for a variety of "next generation" telecommunications services and facilities*, 15 April 2003.

51. If Decision 2008-118 and Policy 2009-34 are left unchanged, competitors will be reduced to serving a shrinking footprint of end-customers in both the business and residential sectors of the market and the phone companies will have succeeded in achieving their vision of re-monopolising telecommunications services markets for the business market and limiting broadband or Internet competition to only the cable companies in the market for residential customers.
52. Thus, without access to Ethernet and WAA services at cost-based rates, competitors will no longer be relevant and will be forced to exit the market.

## **VII. RETAIL DEREGULATION WITHOUT COMPETITION IS CONTRARY TO THE PUBLIC INTEREST**

53. The Competitors support the MTS Allstream Petition and the relief requested therein. Fundamentally speaking, the Competitors believe that de-regulation in the retail markets without competition is a recipe for re-monopolisation and will ironically, ultimately lead to the need for extreme government intervention in the form of heavy-handed retail regulation and micromanagement at the retail level or even measures such as the formal or structural separation of the wholesale operations of the phone companies.
54. Retail deregulation without a clear understanding of the existing conditions (or barriers) for competitive entry is not smart regulation. Nor is it efficient and effective regulation that will ultimately promote maximum reliance on market forces, within the meaning of the Canadian telecommunications policy objectives set out in section 7 of the *Telecommunications Act* and the Government's Policy Direction. In the Competitors' view, the Commission's inaction in Decision 2008-118 and Policy 2009-34 in respect of two critically important wholesale inputs to retail competition in broadband telecommunications markets misconstrues the purpose and import of wholesale regulation in a wholly deregulated retail context.



55. It does not represent efficient and effective regulation to mandate wholesale services and then price them out of range or assorted with unreasonable terms and conditions that do not allow competitors to offer varied and differentiated service offerings. It does not represent efficient and effective regulation to fail to consider the effects on the public interest of allowing phone companies to maintain inflated rates for wholesale services or to withdraw wholesale services altogether.
56. The issues raised in the MTS Allstream Petition are vitally important to a future of accessible and high-quality broadband telecommunications for Canadian consumers and businesses. Broadband is about high-capacity and highly efficient, converged telecommunications. It is a key enabler of economic growth and, at a time when so many Canadians are looking for new job and business opportunities, Canada should be taking steps to ensure that the regulatory framework for broadband is one that provides Canadians with a multiplicity of choices among services providers, service features and service pricing.
57. For the past twenty years, telecommunications markets in Canada, which operated as monopolies for over 100 years, have gradually been opened to competition. This trend has been accompanied by deregulation of the former monopoly telephone companies at the retail level and by rapid technological development. Where previously, a separate telephone line was required to provide voice services and data services, with the development of IP-based switching and routing equipment which was attached to the ubiquitous networks of the phone companies, traffic of all types can now be carried over shared network facilities in a much more efficient way. Often referred to as the phenomenon of convergence, which the Government first identified and studied as far back as the early 1990s, this phenomenon permits the efficient, simultaneous, "converged" transport of voice, video, data and other feature-rich telecommunications over a single facility.

58. Over time, , the incumbent services and revenues have been subject to less and less regulation. However, more and more retail deregulation will only work for Canadian customers so long as there continues to be real competition.
59. Competition will diminish or not materialise in an economically and technologically feasible manner in the IP-based telecommunications services markets of today if wholesale Ethernet and DSL access services are not made available to competitors, simply because no competitor has the ability to reach each and every customer that the phone company is able to serve using its own network facilities.
60. It is important to note that over the past ten years, the CRTC has afforded to the phone companies the freedom from mandated access at cost-based rates that they seek. The phone companies are fighting to hang on to this *status quo*. Given that the phone companies have basically had ten years to operate in precisely the manner that they seek to preserve, it is worth looking at the state of competition in retail telecommunications markets.
61. The trend towards re-monopolisation is already clear. In Internet access services markets, where competitor ISPs in 1997 held a 64 per cent market share,<sup>17</sup> the competitors' share of the market has been reduced to 7.7 per cent at the end of 2007.<sup>18</sup>
62. Today, only 3.9 per cent of the residential market for high speed Internet services is served by independent TSPs such as the Competitors.<sup>19</sup> The remainder of the market is essentially occupied by a duopoly composed of the incumbent telephone companies and the incumbent cable companies.
63. In the business market, there is no significant cable company presence, so the market is entirely dominated by the incumbent phone companies.

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<sup>17</sup> Ekos Research Associates, *Rethinking the Information Highway: The ISP Marketplace*, September 2002.

<sup>18</sup> CRTC, *Communications Monitoring Report 2008, Internet Revenues*, Table 5.3.1.

<sup>19</sup> CRTC, *Communications Monitoring Report 2008, Internet Revenues*, Table 5.3.1.

64. While during the 1990s, a number of competitors, including utilities and certain cable companies attempted to contest business telecommunications markets, the elimination or market exit of such players is now well documented.<sup>20</sup> Ironically, competitors that had the most ambitious build-out plans to duplicate the local access networks of the telephone companies were the companies that have been forced out of the market.
65. Despite their claims that the market is “vigorously competitive”, the phone companies continue to control over 85% of the residential telephone market in Canada, and between 70 per cent and 85 per cent of various business market segments.<sup>21</sup>
66. Another prime example of the consequence of failing to take adequate steps to ensure the robustness of the wholesale market is the current furor over Net Neutrality. As a result of lack of choice and true rivalry in retail Internet access markets, the Commission has placed Canadians in a situation where it may have no choice but to regulate in a detailed and specific way the provision of retail Internet access services in order ensure that the privacy rights and the right of Canadians to access the lawful content of their choice are adequately protected.
67. The Government must also take notice of the record of broadband advancement in Canada over the past ten years, which proves that the phone companies’ market model delivers neither exceptional investments, leading-edge services nor lower prices and responsiveness to consumers and businesses.
68. The Competitors have noted in their concurrent submissions in response to the Bell and Telus Petitions the relatively flat level of investments engaged in by the phone companies in augmenting the capacity of their networks and

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<sup>20</sup> See Lemay-Yates Associates Inc., “Next Generation Network Access: A Canadian and international perspective on why wholesale services should be regulated as essential facilities”, Report presented to MTS Allstream, 11 March 2009, pages 21-46.

<sup>21</sup> CRTC, *Communications Monitoring Report for 2008*, pages 197, 202, 210 and 222.

have placed these “investments” into perspective, given their historical and incremental nature.

69. Furthermore, the competitors notes that as recently as June 2002, broadband penetration rates for Canada’s residential Internet access services ranked only second to Korea among the thirty countries in the OECD.<sup>22</sup> By 2008, Canada ranked tenth<sup>23</sup> in the world. In only 6 years, Canada’s penetration rate rankings have slipped eight positions.
70. Also, in comparative terms and by way of an example, Canadians pay nearly 10 times as much per Mb of broadband capacity for connections that are almost 10 times as slow as those of consumers in Japan.<sup>24</sup>
71. Over the past six years and at least in part as a result of policies and decisions adopted by the CRTC in relation to the market for wholesale services, Canada has slipped from a country with one of the most advanced broadband telecommunications infrastructures, with the lowest prices, to one that has lost significant ground and with disturbingly high prices.
72. Canada’s broadband market exhibits all of the telltale characteristics of a market that is controlled by a monopoly or duopoly of service providers, including lagging penetration rates, low levels of product and service innovation, increasing prices, and supra-competitive profits earned by the incumbent operators.
73. These are precisely the same problems that the Government of Canada recently took steps to address in Canada’s mobile wireless market – a market that has been dominated for a number of years by three very large mobile wireless carriers. After several years of rising consumer prices, anaemic

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<sup>22</sup> High-speed on the information Highway: Broadband in Canada, online: Statistics Canada, <http://www.statcan.gc.ca/pub/56f0004m/56f0004m2003010-eng.pdf>.

<sup>23</sup> Broadband subscribers per 100 inhabitants (June 2008), online: OECD, <http://www.oecd.org/dataoecd/21/35/39574709.xls>.

<sup>24</sup> See “Average broadband monthly price per advertised Mbit/s,” USD PPP, October 2007, online: OECD, <http://www.oecd.org/dataoecd/22/45/39575011.xls> and “Average advertised broadband download speed, by country”, Oct. 2007, online: OECD, <http://www.oecd.org/dataoecd/10/53/39575086.xls>.

growth in subscriber penetration levels and much higher returns on investment than one would expect in a vigorously competitive market, the Government made a policy decision to conduct an auction of advanced wireless spectrum that was specifically designed to encourage new entry into the mobile wireless market.

74. Ironically, at the same time that the Government of Canada was taking steps to increase the level of competition in Canada's mobile wireless market, the CRTC was taking steps to eliminate a set of rules that had been established to promote competition in Canada's broadband markets. And the consequences of those actions can now be seen in the numerous market research reports showing that Canada's international rankings in broadband are declining at an alarming rate and that it has squandered its early lead in expanding and promoting this key component of its economic infrastructure.
75. In fact, if these rules are left intact, Canada's broadband sector will look very much like its mobile wireless sector – a sector that is controlled by a handful of incumbent providers that have enraged consumers right across Canada with their duopolistic pricing practices, their failure to introduce new products and services in a timely manner and their bloated bottom lines.
76. The phone companies other than MTS Allstream, argue that it is sufficient in a country of Canada's size and population density, for Canadian businesses to have access to have a single "on-ramp" to the Internet and to the suite of converged broadband telecommunications services, comprised of voice, data, video and other feature-rich services. Likewise, in the residential market, the phone companies claim that it is sufficient for Canadian consumers to have a single (or at best two in the case of more densely populated urban and suburban centres) on-ramp to the Internet and other converged broadband telecommunications services.
77. Let there be no mistake – the phone companies are not truly interested in the Government's policy objective of promoting competition and customer choice through the operation of "market forces" – they are interested in

control of broadband competition and the pace and extent of investment in network infrastructure in Canada.<sup>25</sup> They know that their control of the ubiquitous regional networks, the inability of potential broadband competitors to replicate these networks and Canada's telecom foreign ownership rules already insulate them from true competitive market forces. Their goal is very simple: it is to foreclose any further entry into the market by preventing competitors from gaining access to critical last mile network facilities and by blocking regulation whenever and wherever possible in order to preserve and enhance their dominant market positions.

## **VI. CONCLUSION**

78. MTS Allstream's Petition asks that the Government intervene to vary Decision 2008-118 and Policy 2009-34 by ordering Bell, Telus and other phone companies to provide local broadband services like Ethernet and ADSL so that competitors can use these in conjunction with their own network facilities to offer Canadian residential and business customers choice, lower prices and innovation in the way that broadband services are delivered to them. Competitors are asking for mandated access because they cannot conceivably duplicate this network infrastructure. It goes without saying that without mandated access, the large phone companies will not unbundle or price Ethernet or WAA services within a reasonable range. However, at the same time, MTS Allstream's proposal is not that competitors gain access to Ethernet and WAA services for free. Competitors would pay wholesale rates

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<sup>25</sup> This can be seen from the position taken by Bell and Telus in their petitions to the Governor in Council, also filed on 11 March 2009, in which Bell and Telus threaten to cease to invest in next generation networks if they are forced to offer their wholesale ISP customers WAA to the extent that these services ride on any portion of the so-called next generation or fibre network. In essence Bell and Telus are arguing that they will no longer invest if they are mandated to provide higher speeds of wholesale ADSL access services to their competitors. As submitted in the concurrent Competitor submission on the Bell' and Telus' Petitions are premised on the highly misleading account of the nature and extent of the NGN investment, the degree of competition in the Canadian broadband Internet market, the drivers of investment in NGN and the real implications for the economy and Canadian productivity growth if the Bell and Telus petitions are granted.

for these services that would fully compensate the phone companies for all costs related to the provision of these services.

79. Notwithstanding the foregoing, the Commission has fully subscribed to the phone companies' vision of re-monopolising business broadband services and has rejected increased competition in the residential broadband services markets.
80. The Competitors submit that the Commission's decision to do nothing in the face of a clear choice between a reduction of competition and greater competition is wrong-headed and detrimental to the public interest. As a result, the Competitors ask that the Governor in Council, pursuant to the powers vested in it by section 12 of the *Telecommunications Act*,
- (a) Vary the Ethernet decision by classifying both Ethernet and WAA services as "conditional essential" services to be provided on an unbundled basis at cost-based rates;
  - (b) In the alternative, that the Governor in Council refer the matter back to the CRTC with specific instructions to reverse the classification of Ethernet and WAA services by classifying both Ethernet and WAA as "conditional essential"; and
  - (c) In the further alternative, should the Governor in Council refer the matter back to the CRTC with specific instructions to hold a further proceeding examining the appropriate classification of Ethernet and WAA services, that
    - (i) the Commission do so taking into consideration the fact that the Ethernet and WAA facilities and services of the phone companies are not economically or feasibly duplicable by competitors and that the unavailability of these services on an unbundled basis at cost-based rates will lead to a substantial lessening of competition in downstream telecommunications markets; and
    - (ii) pending the CRTC's final determination in such proceeding, the phone companies are required to provide Ethernet and WAA services to competitors on a conditional essential basis.

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