

**IN THE MATTER OF PETITIONS TO THE GOVERNOR GENERAL IN
COUNCIL**

AND

TELUS COMMUNICATIONS COMPANY

AND

BELL CANADA and BELL ALIANT REGIONAL PARTNERSHIP

TO RESCIND OR VARY

TELECOM DECISION CRTC 2008-117

And

TELECOM ORDER 2009-111

BY

CYBERSURF CORP

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Introduction

1. "Canada was one of the first countries to implement a connectivity agenda geared toward facilitating Internet access to all of its citizens. To this day, Canada remains one of the most connected nations in the world, with the highest broadband connection rate among the G7 countries. However, gaps in access to broadband remain, particularly in rural and remote communities. The Government is committed to closing the broadband gap in Canada by encouraging the private development of rural broadband infrastructure. Budget 2009 provides \$225 million over three years to Industry Canada to develop and implement a strategy on extending broadband coverage to all currently unserved communities beginning in 2009-10."¹
2. "Canada is at a crossroads. This country, along with others globally, is facing its most serious economic crisis in many decades. Clearly, the number one priority of the government is to restore economic confidence and promote growth. One of the most important means to achieve this is by stimulating new capital investment. Government and the private sector can work together to ensure that investments are made in such critical areas as Canada's lagging infrastructure. In fact, the government has recently announced that it will fund significant investments in Canada's infrastructure as part of Canada's Economic Action Plan: Budget 2009. "
3. So begins Bell Canada's (Bell) and Telus Communications Company's (Telus) Petition to the Governor in Council. Both petitioners use a quote from the Finance Minister's January 27th Economic Action Plan to bolster their requested relief. An application based on the idea that a deregulation of networks in the future will address the immediate economic crisis of today..
4. Both, Bell and Telus (collectively the petitioners) use the argument that there is a pressing need for private equity investment into broadband networks as an economic stimulus for the greater good of the economy. This, they say is the catalyst for an urgent intervention by the Governor in Council into Canadian Radio Television and Telecommunications Commission's (CRTC's) recent determination to allow competitor access to what they call next generation networks (NGN).

¹ *Canada's Economic Action Plan, 2009 Budget*, tabled in the House of Commons by the Honourable James M. Flaherty, Minister of Finance, on 27 January 2009.

5. The petitioners claim that, the best way to achieve the government's objective to build broadband infrastructure into rural and underserved communities is to ensure that NGNs are not regulated; to this end the point south to the United States and the regulatory policies created by the Federal Communication Commission (FCC) under the Bush administration.
6. The petitioners also claim that that the FCC's deregulation of fiber networks is superior to Canada's regulatory regime and has clearly encouraged private investment in broadband networks by that nation's ILECs (also called Regional Bell Operating Companies (RBOCs)). That the FCC in dispensing with network unbundling rules has led to huge capital investments in fiber or next generation networks (NGNs) in the United States. Telus claims at paragraph 9 of its petition that the United States is poised to reclaim its position as a global leader in broadband access and information technology development, because of the FCC's foresight. Telus also states at paragraph 32 of its petition that the United States has avoided the problems facing many European Economic Union Countries who have continued to regulate NGNs and thus their deployments have been slow in coming; presumably the citizens of these countries have suffered the consequences.
7. Cybersurf thanks the Governor in Council for this opportunity to comment on the petitions of Bell and Telus. These petitions if granted have far reaching consequences and change the face of CRTC policy since Section 7 of the Telecommunications Act (Telecommunications Policy Objectives) was passed into law. Telus and Bell's petitions are predicated on a premise that the FCC's policy decisions have worked and that they are suitable for an application in Canada. That these policies will have the desired effect of further broadband penetration and lower costs to Canadians.
8. The FCC began deregulation broadband networks in the U.S. in 2004.² The petitioner's claim that since then the benefits from this deregulation are clearly evident. There have been huge capital expenditures by ILECs in the U.S. that are seeing the deployment of faster and better networks than in the rest of the industrialized world. Thus there must be incontrovertible evidence of this realization of this benefit to the citizens of America.

² FCC Press Release October 14 2004; FCC REMOVES MORE ROADBLOCKS TO BROADBAND DEPLOYMENT IN RESIDENTIAL NEIGHBORHOODS. FCC Order 04-254

9. Canada is indeed at a crossroads as Telus states; however the Government has the experiences of regulators from around the world to draw upon to make an informed determination on the petitioner's claims. Cybersurf encourages the Government to closely examine these policies and experiences from around the world in making a determination that will effect competition in telecommunications for years to come.
10. Moreover, if the petitioner's claims are true then surely the FCC's polices must have become, (or are becoming) a standard and hallmark of regulators worldwide. Meaning, industrialized countries around the world must be following suit and must be abandoning network unbundling rules. Or, conversely countries that have continued unbundling regimes must be floundering in comparison to the United States in offering their citizens high quality low cost broadband access and the services that ride over those networks.
11. Lastly for the Government to accept that the CRTC's policies have affected, or can potentially network deployment then an examination inward of the CRTC's policies should be reviewed to determine if there really is the threat to investment and return to the petitioners as they claim.

The Petitions Must Fail By Law

12. Of grave concern to the Governor in Council is the far reaching impact that rescinding or varying the CRTC determinations can have.
13. Cybersurf submits that what the petitioners are really asking the Governor in Council to do is in fact a policy determination that would see the creation of a new forbearance criteria not contemplated by the Commission, and is contrary to the December 14 2006, Policy Direction issued to the CRTC by the current Government 1 b) iii) and iv) requiring the CRTC to implement regulation that is symmetrical and technologically neutral.
14. The petitioners are requesting the inclusion of forbearance criteria based on network attributes (NGN or Fibre) that will supersede the objectives of the Policy Objectives of the

Telecommunications Act (*Act*), and in practice would be technologically biased and asymmetrical in regulation. For this reason alone this is not a petition that the Governor in Council can grant the petitioners.

15. Their petition would be far reaching and neglects to recognize that virtually all telecommunications and broadcast services will be delivered over NGNs in the near future, and the impact of such a determination is not confined to the rescinding or a variance of CRCT Telecom Decision 2008-117 and CRTC Telecom Order 2009-111.

16. It is indeed a variance of the Commission's regulatory wholesale framework determined after much deliberation and specific consideration of the petitioners NGN arguments. The Commission's essentiality test found at paragraph 37 of CRTC Telecom Decision 2008-17³ which is sound and in accordance with the Act and policy objectives.

17. The Commission upheld its mandate and created a forbearance test that is in adherence with section 7 of the *Act*; it requires forbearance from regulation not based on the technology in use, the time that a network was deployed, or even the market position of a facility owner. It requires evidence of viable alternatives and the presences of a healthy wholesale market dynamic.

Next Gen Networks; Copper Fiber and In-between

18. The petitioners have made grandiose claims in respect to the benefits of exempting what they call "NGNs" from regulation. A seemingly broadband utopia will fall upon Canada and there will be endless capital investments in urban and rural areas to the benefit of all Canadians. The course the government must take is to completely forbear from regulation these builds or, they argue, they will be inhibited from development.

³ CRTC Telecom Decision 2008-17 paragraph 37: With regard to future applications to consider the essentiality of a non-mandated service, the definition will read as follows: To be essential, a facility, function, or service must satisfy all of the following conditions:

(i) The facility is required as an input by competitors to provide telecommunications services in a relevant downstream market; (ii) The facility is controlled by a firm that possesses upstream market power such that denying access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market; and

(iii) It is not practical or feasible for competitors to duplicate the functionality of the facility.

19. Interesting to note, neither petitioner actually claims that the development won't happen; they simply claim that the development could be retarded by regulation. Indeed both claim they have committed to billions in expenditures already for the next two years.

20. So then what's really at issue does expedience in delivery of these NGNs outweigh the benefits of mandatory sharing.

21. The first issue to present itself is that the petitioners do not agree exactly on what needs to be forborne. In comparing their petitions it isn't exactly clear what an NGN is supposed to be, Bell identifies these networks as being fibre, and Telus entirely rejects the idea of forbearance based on fibre content.

22. Paragraph 12 of Bell's March 11 2009 Petition:

- “While the legacy copper networks were financed and constructed as a single technology monopoly, ILECs, including the Companies, face the prospect of constructing NGNs in a highly competitive environment in which some, but not all (some are yet to be developed) services are available to support the financing and construction. NGNs are sometimes referred to by more specific terminologies such as fibre-to-the-node (FTTN) and fibre-to-the-premises (FTTP). These more detailed descriptions describe the proximity to the customers' premises in the construction of the NGN. Once constructed, NGNs allow the Companies to offer their customers higher speed Internet services (higher than existing services) as well as other services such as IPTV. “

23. Telus claims a regime based on forbearance based on the existence of fibre components would be biased and would abandon the technological neutrality mandated of the CRTC.

24. Paragraph 16 and 17 of Telus' petition:

- “The CRTC’s misguided policy appears to be based on a distinction between services that make some use of copper facilities and those that run entirely over fibre optic facilities. According to the CRTC’s current policy, while the former are and will be subject to mandated access, the latter may, one day, be free from regulation. Under the CRTC’s skewed logic, mandated access is supposedly justified if a service makes any use of copper facilities.”
- “Rather than being technology neutral, the CRTC policy is technology biased. It reflects a profound misunderstanding of the technical requirements of next generation networks and how these networks in Canada must develop going forward.”

25. Yet most perplexing is that in asking for a FCC-type regulation (or deregulation), this is exactly what Telus is advocating of the Governor in Council adopt; a forbearance by fibre regulation.

26. FCC October 27th 2004 Order (FCC 04-254):

- “In this Order, we forbear from enforcing the requirements of section 271, for all four petitioners (the Bell Operating Companies (BOCs)), with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent reconsideration orders (collectively, the “*Triennial Review proceeding*”). ***These elements are fiber-to-the-home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops)***, the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements). We therefore grant the Verizon Petition and BellSouth Petition, and grant in part the SBC Petition and Qwest Petition.” (Emphasis Added)

27. The reason for Telus’ motivations to exclude the fiber ingredient from forbearance criteria, even though the fiber ingredient is specifically what U.S. deregulation turns upon, is that Telus has not invested in fibre as much as Bell, but rather has invested more in higher throughput over its copper network, through the deployment of newer hardware and remotes (outdoor cabinets) to bring the transmission equipment closer to the customer premise.

28. However, as Telus rightly concludes its network, is in fact an NGN, regardless of the presence or absence of fiber.
29. The ITU defines NGS like this: “A *Next Generation Network (NGN)* is a packet-based network able to provide services including Telecommunication Services and able to make use of multiple broadband, QoS-enabled transport technologies and in which service-related functions are independent from underlying transport-related technologies. It offers unrestricted access by users to different service providers. It supports generalized mobility which will allow consistent and ubiquitous provision of services to users.” There’s no mention of the word fibre, anywhere.
30. The petitioners have in their concurrent submissions have illustrated the conundrum in attempting to deregulate (or regulate) a class of networks or networks by its attributes.
31. A real life example is found in cable networks. Cable companies have been deploying fiber hybrid networks for two decades. Cable coaxial networks almost all bring copper to a fibre aggregation point or “node”. By Bell’s definition of “NGN” being simply “FTTN” would mean cable networks would virtually all be deregulated.
32. Therefore Bell in claiming competitors will continue to have access arrangements on legacy networks, is stating that Cable FTTN deployed years ago should continue to be regulated, but the FTTN Bell deploys tomorrow should not be.⁴ This regulation would not be conducive to the CRTC’s mandate to apply regulation symmetrically and with technological neutrality. A regulation such as this only benefits Bell.
33. Networks are also not installed in a single construction. Networks evolve over a series of upgrades. The ILEC’s copper voice-network was upgraded to the current IP network. The current copper IP network is being recast, as evidenced by Bell’s submission, in a series of fiber builds. Telus’ expert Dr. Aron states in a whitepaper submitted by Telus in a July 2008 CRTC

⁴ Bell Petition to Governor In Council; 11 March 2009 paragraph 36

proceeding that Telus has replaced 50% the entirety of its network assets just through maintenance and upgrades over the last ten years.⁵

34. The question becomes, at what point is a network a “legacy network” subject to regulation and what point does it become an NGN ready for deregulation?

35. Telus’ expert Dr. Aron concludes there is no “brightline” between old and new networks. They are inextricable and a comprehensive regulatory policy separating old and new networks is impracticable. A regulator must regulate, or not regulate.⁶ This is exactly what the Commission has chosen to do; in finding market failure in the delivery of broadband services to Canadians, the Commission adhered to its mandate and continued to regulate. The type of network that the broadband is delivered over should be of no consequence.

36. Thus the wisdom in employing a network neutrality ingredient in regulation is evident. The petitioners themselves demonstrate how a regulator can influence the adoption of technologies and investment by creating a regulatory bias. This would be intrusive regulation and would undoubtedly skew technological development in Canada.

37. This would undoubtedly create market winners and market losers. As an example, say for instance the Governor in Council was to adopt a policy that FTTNs are to be deregulated. Bell’s the winner; Telus chose unwisely in investing in copper technologies, and becomes the loser, the cable companies lose because they were deployed too soon. There is absolutely no evidence to suggest that the deployment decisions Telus made were inferior or incorrect to those made by Bell. There is no reason to restrict or encumber the Cable Companies because they were first.

⁵ Telus July 07 2008 Reply- Cybersurf Part VII Request to Reconsider ILECs Obligation to Provide Service Parity to competitors when introducing new ADSL throughput speeds. Appendix A Dr Debra Aron THE EFFECT OF EXPANDED UNBUNDLING OBLIGATIONS ON INVESTMENT IN BROADBAND INFRASTRUCTURE AND ECONOMIC WELFARE IN CANADA paragraph 7.

⁶ Telus July 07 2008 Reply- Cybersurf Part VII Request to Reconsider ILECs Obligation to Provide Service Parity to competitors when introducing new ADSL throughput speeds. Appendix A Dr Debra Aron THE EFFECT OF EXPANDED UNBUNDLING OBLIGATIONS ON INVESTMENT IN BROADBAND INFRASTRUCTURE AND ECONOMIC WELFARE IN CANADA paragraph 8: “The idea that one could quarantine unbundling obligations on broadband services to those that ride on “old” infrastructure rather than “new” infrastructure would therefore be flawed in its inception. Higher speeds of ADSL require some new capital investment. Even the copper loop upon which it rides requires ongoing maintenance and may require replacement if it exhausts its useful life. An unbundling obligation defined by whether the facility is “old” or “new” would therefore be intractable.”

38. There's no telling what technology biased regulatory policy will have on investment either as the "anointed" technology becomes the technology of choice for regulatory rather than business or market considerations.

39. However the petitioners still state that this approach to regulation is working in the United States, so it behooves the Government to examine if this in fact is the case.

Our American Cousins

The United States of Information Services

40. Bell and Telus have largely adopted the arguments of U.S. ILECs and have repeatedly argued them before the Commission in several proceedings. Particularly in the proceeding leading to CRTC Telecom Decision 2008-17 whereby the Commission completed its review of wholesale services regulation and established the continuation of mandated access of Broadband facilities of both Cable Companies and ILECS.

41. The Minister should also take note that FTTNs are not deregulated in the United States, particularly as something called an "NGN"s. Indeed what the petitioners are proposing are measures that far exceed the policy taken by the FCC in the United States. They would be deregulation measures found nowhere in industrialized nations with deregulated telecommunications.

42. In order for one to assess whether or not American regulation is suited to the Canadian market, one must look at the evolution of the regulation; the causes and motivations, and of course the market conditions in the United States at the time they were enacted.

43. First it must be stated that at the time the FCC chose to deregulate the ILECs in the United States, many of them had deep financial problems. American ILECs unlike their Canadian counterparts faced not only Federal regulation but also State and Municipal regulation. They were subject to far more intrusive unbundling and reselling rules, taxes and complicated

Interstate and State to State long distance rules and tariffs. Some were even prohibited from offering long distance services at all.

44. The motivations for the American regulators to de-regulate fibre networks were the same; increased broadband penetration and competition. However there was clear evidence that such deployments were being inhibited by over regulation. American ILECs clearly needed relief.
45. During the CRTC Public Notice 2006-14 (PN 2006-14) which was a review of the wholesale regulatory framework Telus' own expert witness Dr. Crandall, while being cross examined by Cybersurf, explained the regulatory environment in the United States and Canada were not comparable "*I do point out in my evidence that the regulatory regime here,(Canada) however much TELUS might have disliked it, was not nearly as invasive and interventionist as the U.S. until the courts had their way in the United States*".⁷
46. The CRTC Monitoring Reports in fact have demonstrated year after year that both ILECs and Cable Companies have seen increases in revenue year after year.⁸ The CRTC monitoring report also documents healthy year after year investment in networks by ILECs and competitors alike.

⁷ Telus' Expert Witness cross examination by Cybersurf (transcripts) CRTC Public Notice PN 2006-14; **16251** MR. TACIT: So when we look at the fact that TELUS' behaviour is actually quite similar to that of the U.S. ILECs, despite the fact that what was going on here is quite different from what was going on in the U.S., could it not be the case that the TRRO and the subsequent increase in investment by the U.S. ILECs could be more of a correlative relationship rather than a causal relationship?

16252 MR. CRANDALL: Well, it could be driven by other factors, but I think it is almost indisputable that the regulatory environment the U.S. had in effect on both Verizon and AT&T -- AT&T's predecessor, SPC, had been trying to roll out more fibre in states like Illinois and Minnesota. But the competitors were trying to stop them or change their network architecture through state regulatory commissions, and at that point SPC simply said they were going to stop that fibre rollout until they got much better regulatory treatment on next generation networks, essentially fibre-to-the-curb, fibre-to-the-pedestal. And when they did get that treatment, they started rolling out the new networks.

16253 So I think there are other factors going on there. I mean, the economy is growing. The bubble is a thing of the past. I'm not saying it's the only thing, but I would argue it was certainly a major cause of the surge that we are now seeing in Capex.

16254 MR. TACIT: And the fact that TELUS was behaving the same way under a different regime is merely coincidental, in your view.

16255 MR. CRANDALL: Well, I'm not certain that TELUS was affected by the U.S. regulatory regime. However, it is useful to point out that TELUS was never subject to the UNE-P.

16256 *I do point out in my evidence that the regulatory regime here, however much TELUS might have disliked it, was not nearly as invasive and interventionist as the U.S. until the courts had their way in the United States.(emphasis added)*

⁸ CRTC Monitoring Report 2008 Total broadcasting and telecommunications revenues increased 5.7% from \$48 billion in 2006 to \$51 billion in 2007. Broadcasting revenues increased 6.7% from \$12 billion in 2006 to \$13 billion in 2007; whereas telecommunications revenues increased 5.3%, from \$36 billion to \$38 billion.

47. As stated Telus and Bell have both made these very same (God Bless America) arguments during PN 2006-14 the public preceding that lead to CRTC Telecom Decision 2008-17. However at that time it was under some different pretenses, that didn't include the current economic downturn. The Commission rightly found there was no evidence to suggest the regulation in Canada was adversely affecting investment. The monitoring reported pointed to healthy network investment by international standards.
48. The catalyst for U.S. deregulation of fiber networks also came on the heels of a FCC determination that retail Internet services provided by Cable Companies, in competition to ILECs Asymmetrical Digital Subscriber Line (ADSL) offerings was not a telecommunication service, but rather "information services" and was therefore not regulated under the FCC authority. The decision was appealed by ISPs in the United States, and the FCC determination was upheld by the Ninth Circuit Court of Appeals.⁹ The end result was that Cable Companies shed any obligation to provide competitive access to their networks, whilst ILECS continued to have to provide mandated unbundled access arrangements, and ADSL access.
49. This of course was not the case in Canada; the Canadian Radio Television and Telecommunications Commission (CRTC) found that Cable operators were operating telecommunications services on their bi-directional networks and thus, came under the common carrier obligations under the Telecommunications Act. By way of CRTC Telecom Order 2000-789 Cable Operators were mandated to provide access to their networks for competitor use.
50. Considering the advancement of IP "Internet" networks that are widely used to provide voice, data and video services, in retrospect no one can argue that the CRTC was incorrect in its determination that "Internet" networks were, and are telecommunications networks.

⁹ The Supreme Court of The United States; NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION ET AL. v. BRAND X INTERNET SERVICES ET AL.

51. In this assessment the CRTC is in the majority of regulators worldwide, whilst the FCC is in the minority. The OECD Communications Outlook 2007: Policy Issues and Market Structure page 19 states:

- “Broadband is quickly becoming the basic medium for service delivery on both fixed and wireless networks. This has been made possible though the dismantling of service specific network architectures. The telecommunication industry has long been segmented, with different networks delivering different services. The transition from circuit-switched telecommunications to packet-based networking on the Internet has broken down these segment barriers. What is left is a broadband data platform that is able to carry a wide range of telecommunication services.”

52. Cable Companies across Canada and the United States are using their networks to provide telecommunications services to residential and business users since the beginning of the decade. Access independent Voice over IP (VoIP) providers are providing local and long distance voice services to Americans at one of the highest penetration rates in the world, over these so called “information services”.

53. Meaning the FCC, which also has a policy mandate to regulate symmetrically created a regulatory imbalance between the Cable Companies,¹⁰ CLECs using unbundled ILEC facilities and ILECs. Cable Companies had a clear advantage in not having to provide mandated access to their networks and also in being able to challenge telecommunications tax assessments and regulation at the State and Municipal levels.

54. Furthermore the retail Internet market make-up in the United States was entirely different than that in Canada. Dial up Internet was still a dominant means of access. This market was dominated by independent private firms such as America On Line (AOL), Net Zero and EarthLink with subscribers in the millions and revenue in the billions. The Highspeed market in

¹⁰ Telecommunications Act 1996 SEC. 254. UNIVERSAL SERVICE. Universal Service Principles b 7) ADDITIONAL PRINCIPLES: FCC 97-157 COMPETITIVE NEUTRALITY -- Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.

the United States was split 2 to 1 in favor of the cable companies; cable modem access as opposed to ILEC ADSL offers.

55. It would have been fairly difficult for American regulators to ignore these facts as they made determinations in their “Triennial Review” on the ongoing regulation of telecommunication services to continue to regulate ILECs.

56. However, the FCC failed to recognize that Internet, Voice and Video services are not discrete markets and was rapidly converging. Each dominate network operator could deliver all of these services over Internet Protocol (IP) Networks and thus regulatory symmetry was in order.

57. Thus, the FCC made three critical errors in neglecting to consider the convergence of technologies and advent of IP networks blurred the line between traditional broadcast undertakings and telecommunications services. That what it defined as an “information services” could, would and are used to provide telecommunications services.

58. The first mistake was that it forbore from regulation the Cable Companies which share the same monopoly heritage from regulation as the ILECS, but continued to regulate the Telecoms who were not dominant providers of these “information services”.

59. Put another way, the FCC did not recognizing Internet, Voice and Video as converging IP technologies; it completely ignored its technological neutrality mandate, and took a more market approach to regulation. In this it decided Internet was an “Information Services” and shouldn’t be regulated. It then unfettered the largest highspeed Internet providers in the United States from any mandated access arrangements, but continued to regulate the ILECs.

60. The US regulators also took a leap of faith in that what the ILECs south of the border was advising them in respect to disruptive technologies was inevitable going to come true any day. Specifically, that there was a series of “disruptive technologies” on the horizon that would discipline the market and separate the service provider from the traditional copper network and

create new access platforms. These included unlicensed spectrum (WiFi and WiMAX), satellite and broadband offerings over copper power lines.

FCC October 27th 2004 Order (FCC 04-254) paragraph 22:

- “Further, in the *Triennial Review Order*, the Commission observed that “[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for . . . wireline broadband service.”¹¹[1] The Commission recognized in the *Triennial Review Order* the “important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.” Ku-band satellite service and fixed wireless service are available to provide high-speed Internet access across large parts of the country, and the Commission has a pending proceeding addressing broadband over power lines and has also created a task force on wireless broadband. The record here likewise demonstrates the existence of numerous emerging broadband competitors.”

61. Because the United States already had a very rigid unbundling regime, even more so than and most of Europe and Canada, often referred to as Unbundled Network Element Platform or UNE-P, it had developed over 900 Competitive Local Exchange Providers (CLECs) using unbundled network components. Some of these CLECs such as CoVAD, Cavalier and BroadWing (Level 3) have revenues in the hundreds of millions.

62. American regulators had every reason to believe that private firms could and would develop their own networks. There were dominant independent ISPs and large well financed CLECs with established large user bases.

63. The U.S. policies were predicated on the development, acceptance and deployment of the “next best technological advancement”, or nascent disruptive technologies that promised to changed the industry. ILECs south of the boarder successfully argued and convinced policy makers they

would see an end to Baby Bell market dominance through market forces and these new technologies.

64. Also unlike the CRTC regulation¹², the FCC felt no need to wait for these technologies to actually develop before deregulating; it believed there was enough evidence to predict the advent of new access arrangements and evidence of their existence was not required.

FCC October 27th 2004 Order (FCC 04-254) paragraph 17:

- “We reject the arguments of competitive LECs that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied, regardless of the state of intermodal competition in the retail market and the effects on incumbent LEC investments. Forbearance need not await the development of a fully competitive market when the section 10 criteria are otherwise satisfied. Furthermore, the competitive LECs’ reading of section 10 conflicts with the D.C. Circuit’s USTA II decision which held, in the section 251 context, that “the Commission cannot ignore intermodal alternatives” when evaluating wholesale unbundling obligations.[3] The D.C. Circuit likewise required a “confrontation of the issue [of investment disincentives and some effort to make reasonable trade-offs” when considering unbundling pursuant to section 251. We disagree with commenters who argue that the Commission is precluded under our forbearance authority from considering factors relating to unbundling policy pursuant to section 271 that we are required to consider pursuant to section 251. If section 10(a)(1) were read as the competitive LECs propose, no amount of intermodal retail competition or investment disincentives could ever warrant forbearance if there was not also a fully competitive wholesale market that would continue in the absence of unbundling.”

65. Thus, the FCC began a regime of forbearance largely buying into arguments made by ILECs in the United States that there was disincentive to invest in networks that would be utilized by

¹² CRTC Telecom Decision 2008-17 paragraph 77; “Accordingly, and for reasons similar to those provided regarding ULLs, the Commission determines that ADSL access service is to be classified as a conditional essential service. This classification will continue until it is demonstrated that wholesale alternatives functionally equivalent to the ILECs’ ADSL access services are sufficiently present such that withdrawing mandated access would not likely result in a substantial lessening or prevention of competition in the retail high-speed Internet access services market.”

competitors; as long as competitors could rely on ILECs to build networks they wouldn't build their own. Furthermore there were a number of disruptive technologies just around the corner that would bring the competition the FCC desired without having to regulate. That regulation, ILECs argued, would actually see the retardation of the development of these technologies because competitors would prefer to use the networks supplied by the ILECs on a no risk, no investment basis than take the risk involved in network deployment or the use of new technologies.

66. The result of the deregulation of ILEC ADSL was irrefutable. According to the FCC's reporting, from 1999 to 2004, ADSL has been encroaching on other access technologies so that the change of market share has been dramatic. While a market share of coaxial cable access has slightly increased from 51.3% to 56.4%, ADSL share increased from 13.4% to 36.5% during the same period of time, to the current 46%. However, as the ILECs recaptured their market share, competitors were left in the dust. Other wireline technologies including symmetric DSL and fiber, wireless and powerline have been rapidly decreasing (from 22.1% to 3.9% and from 11.3% to 1.8%, respectively). Incumbent local exchange carriers (ILECs) still represent about 96% of facilities-based ADSL high-speed lines in service as of Dec. 31, 2004. When all technologies are considered, ILECs in the U.S. provide about 38% of high-speed connections to end users (FCC, July 2005). The most recent OECD data demonstrates that also in the United States competitive offerings over other technologies are now less than 3% in total and ILECs market share is around 42%.¹³

67. Undoubtedly and unfortunately to date these emerging technologies have yet to challenge traditional wireline service in the form of ADSL and Cable Modem offerings. The large dial ISPs are in decline (or gone) and the CLECs regardless of their size are not (or cannot) build last mile networks. In fact around the world non-Incumbent Carrier (including cable company) last mile facilities construction is extremely rare. Even widespread fixed wireless deployments are typically done by ILECs or in partnership with ILECS. Even with the hourglass tipped and

¹³ OECD Broadband Statistics- Penetration: Subscribers by 100 inhabitants
http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_37441,00.html

access to Incumbent networks becoming increasingly restricted, there has been no ILEC-free last mile construction in the United States in any meaningful way.¹⁴

68. Furthermore, the ILECs added, there would be no incentive to deny wholesale access to competitors and there would be “market or commercial arrangements” entered into willingly between ILEC and competitor. Cable companies were taking customers and creating network inventory (capacity) that ILECs would have to sell. It all made perfect sense. This was the FCC’s third mistake.

FCC October 27th 2004 Order (FCC 04-254) paragraph 26:

- “With regard to the potential impact of forbearance specifically on the wholesale broadband market, as raised by certain competitive LEC commenters, the evidence currently before us, taken as a whole, leads us to conclude that competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, *will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business. Verizon plausibly claims that because the BOCs face intense intermodal competition, even in the absence of section 271 unbundling they will need to find ways to keep traffic “on-net,” which we conclude would likely include the provision of wholesale offerings.* Although we acknowledge that the question is not entirely susceptible to resolution with evidentiary proof, and a degree of informed prediction is required, we conclude in light of the evidence before us that even if the BOCs were not required to provide competitors unbundled access to the broadband elements at issue under section 271, competitive LECs would still be able to access other network elements to compete in the broadband market or take.” (Emphasis added)

69. This doesn’t sound eerily familiar without good reason. Bell’s petition Governor In Council March 11 2009 paragraph 36;

¹⁴ Clearwire an independent fixed wireless provider has deployed network in some secondary markets in he US, in conjunction with Sprint.

- “Further, the Companies envision partnering with some competitors to resell their NGN access service on commercial terms. The Companies note that the wholesale business makes a valuable contribution to the Companies' business. But there is a material difference between selecting appropriate partners on commercial terms and having a regulated mandated access obligation for all competitors provided at regulated rates.”

70. In the United States, cable companies and ILECs have generally refused to wholesale broadband access; when those wholesale access arrangements are made they are generally made at prices and terms that make them marginally viable or entirely unviable.

71. In addition to that, the ILECs in the United States have begun to apply to the FCC to start “retiring” the copper facilities used by competitors as they invest in fibre networks. The ILECs are now claiming that they should not be forced to pay the costs associated to maintain the “old copper” networks for competitors while at the same time pay to roll out fibre networks.

72. Mark McGuinness Vice President of Business Development for Expedient;

- “I’m sure the RBOCs are trying to avoid competition over the copper for IP telephony, because they’re making an investment in fiber-to-the-home and they would prefer not to have competition from the copper,” says Mark McGuinness, vice president of business development for Expedient, a Penn.-based data center and disaster recovery company. It offers affordable Ethernet services with speeds up to 40 megs, something the LECs can’t touch, he says. If Expedient’s copper access gets cut off, the company will have to bond special-access T1s. This is an expensive alternative and services will slow dramatically, he says. “Essentially, my costs would go up tenfold,” says McGuinness. “And the irony is, I’m still using copper to get to the end user. The only difference is I’m being forced, for a portion of that circuit, to go through the RBOCs’ fiber.”¹⁵

Marty Clift, Vice President of Regulatory Affairs for Cavalier Telephone LLC;

¹⁵ Copper Retirement Notices Stack Up; CLECs Ask FCC for Formal Review; <http://www.xchangemag.com/articles/07julfeat06.html>

- “They’ve seen our petitions at the FCC. They know this is a hot item,” says Marty Clift, vice president of regulatory affairs for Cavalier Telephone LLC. “The quicker they can get some retirements off the books, the better.” Copper decommissioning threatens to hurt Cavalier. The company provides triple-play services, including IPTV, over copper in direct competition with Verizon’s FiOS product. If Cavalier loses direct copper access, prices will soar and technological innovation will suffer.

73. Notably, Bell claims at paragraph 17 of its petition that Cybersurf has made commercial arrangements in the United States. This is true, but viable is the keyword. Cybersurf’s experience in the United States was that ILECs would only sell accesses at the same price as their regular retail highspeed service, or an ISP could sell the ILEC offering for a “bounty”- a onetime commission on subscribing a highspeed customer.¹⁶ Cybersurf thus, has never sold broadband access in the United States. There was no business case to do so. Even CLECs such as CoVAD and IKANO that have access ADSL arrangements through unbundling copper, or resale arrangements cannot sell wholesale access for less than then ILECs are retailing.

74. Also notable in making the determination to mandate access to Bell’s higher speed ADSL service offering the CRTC stated; *“In the Commission’s view, the ILECs have little incentive, if any, to negotiate matching aggregated ADSL service speeds with competitors. The Commission notes, for example, Cybersurf’s unchallenged statement in its application that Bell Canada had rejected its request to upgrade the wholesale service to a higher throughput speed that would have matched a Bell Canada retail speed.”*¹⁷ Meaning, Bell refused to negotiate access to its higher speed service; at all, there wasn’t even a discussion.

75. Indeed, Bell’s comments are contradictory if not facetious, at paragraph 27 through 29 of its petition it states it cannot possibly offer wholesale access to competitors on the CRTC’s terms of cost plus appropriate mark-up, because this does not take into consideration its upfront costs and

¹⁶ Verizon Wholesale Advantage ADSL ; Verizon pays you a one-time bounty for selling residential 3.0M service to subscribers who maintain the service for a minimum of 60 consecutive days <http://www22.verizon.com/wholesale/solutions/solution/Wholesale%2BAvantage%2BDSL.html>

¹⁷ CRTC Telecom Decision 2008-117 paragraph 18.

“risk” associated the significant capital outlay. Furthermore it would “technically” interfere with its IPTV deployment. However, at paragraph 36 it claims that it envisions that it will create commercial arrangements for access to these networks. This it qualifies with “the right partner”.

76. These of course are the same platitudes ILECs in the United States made to the FCC; “trust us” and we will create commercial access arrangements. Those commercial access arrangements have been few and they are coupled to the “retiring” of the competitor copper facilities and increased unbundling fees.

77. What is clear is that the FCC policy has been extremely beneficial to the ILECs; moving ADSL from just 13% of the market to 38% of the broadband market in just over 3 years and 96% of ADSL access being provided directly to the end customer. It’s little wonder then that the ILECs found the capital to upgrade their networks to fibre. However, that was after as Dr. Crandall states ‘the courts had their way’ and much of the regulation that was restricting ILECs in the US was lifted. The U.S.’ current ADSL penetration rate (46%) and ILEC provided ADSL rate to the end user (96%) are similar in Canada; but they always have been. Bell and Telus did not have to “catch up” to cable, and they were never inhibited in construction, deployment by any province, and they have never been inhibited in investment and network deployment decisions by competitors.

78. Their petitions are based on Nostradamus style prognostications of apocalyptical demise of investment, based on the current competitor revenue share ratio of about 12% of the total market.¹⁸ Whereas almost no residential broadband is provided over an unbundled service, but rather aggregated ADSL services more akin to resale arrangements with significant mark-up far exceeding cost recovery.

¹⁸ CRTC Monitoring Report 2008 5.3 “The market share of the incumbent TSPs when operating outside their traditional territories, resellers, utility telcos and other carriers declined from 14% in 2006 to 12% in 2007. This decline is especially acute considering that the revenue share of this group of TSPs was 23% in 2003.”

79. Still to be fair the question is; has Joe American benefited from this increased capital expenditure by the ILECs in the U.S.? Perhaps this investment and deployment has accelerated broadband deployment in the United States and perhaps it has in fact benefited the American Public.

Our European Cousins

80. Considering that Bell and Telus have both pointed south as the best example of progressive telecom policy, it only makes sense to examine what the US telecom policy has wrought in comparison to other industrialized nations, particularly in the context of unbundling and mandated sharing.

81. Perhaps the United States place in the world, when it comes to broadband competitiveness and availability its best articulated by FCC Commissioners themselves.

FCC 08-88: Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 June 12 2008;

COMMISSIONER MICHAEL J. COPPS

- “America’s competitors around the world are implementing comprehensive broadband plans. Countries like Japan, Korea, and Canada have left us far behind. This is unacceptable. Broadband is our central infrastructure challenge. High-capacity networks are to the Twenty-first century what roads, canals and railroads were to the Nineteenth and highways and basic telecommunications were to the Twentieth. Our economy and our future will be driven by how quickly and completely we deploy broadband.”
- “Still, one glaring fact stands out: the United States is ranked eleventh in the world in broadband penetration! [Note: we’ve fallen to 15th in the interim.] This Report somehow finds that this is acceptable, and that our efforts are resulting in timely deployment.”

- “Just consider the fact that our international competitors deploy 25, 50 and 100 mbps broadband speeds at fractions of what it costs here in the United States. If consumers in Los Angeles or Washington pay \$40 per month for a 6 mbps connection while those in London or Tokyo pay multiples less for 50 or 100 mbps, just think of the costs and competition burdens this puts on American consumers and businesses.”
- “So we should not be watching from the sidelines, letting the marketplace—still largely a cable telco duopoly in most places—take its course. A national broadband strategy should include government and the private sector working together as it has always done to meet the great infrastructure challenges of the day.”

COMMISSIONER JONATHAN S. ADELSTEIN

- “Even as consumers are increasingly empowered to use broadband in newer, more creative ways, we are competing on a global stage. So, it is troubling that the warning signs I raised four years ago now flash only brighter. We face real challenges of availability, affordability, and competition. Similarly, while I am glad that this report begins to address broadband in an international context, it is too dismissive of the considerable evidence suggesting that we are behind the global leaders in broadband and have continued to fall. “
- “The report unconvincingly attempts to dismiss the international broadband penetration rankings. The fact is the U.S. has dropped year-after-year. This downward trend and the lack of broadband value illustrate the sobering point that when it comes to giving our citizens affordable access to state-of the-art communications, the U.S. has fallen behind its global competitors. We do not wrestle with the question of broadband value, or price per megabit, for which our citizens pay far more than those in many other countries.”¹⁹

¹⁹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996; GN Docket No. 07-45 FIFTH REPORT Adopted: March 19, 2008 Released: June 12, 2008 http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.txt

82. Indeed, the Organization for Economic Co-Operation and Development (OECD) most recent data ranks the United States 14th in broadband penetration (number of households in 100) and 18th in price (price per megabit)²⁰.

83. The question then, is if relieving ILECs in the U.S. of their sharing responsibility hasn't had the outcome the regulators had hoped for: competitive technologies haven't developed, broadband penetration has lagged and prices are higher relative to other countries, what about the converse? Has network unbundling fared any better in areas where ILEC unbundling is still required?

The OECD 2009 Broadband Policy Report States at Page 41;

- **“Unbundling of copper telephone lines itself seems to be a factor in reducing the price of broadband subscriptions, as they introduce more competition at the telecommunication exchange.** Evidence points to lower ‘per Mbit/s’ charges in countries with unbundling rules. Prices per Mbit/s were significantly higher in the least expensive of the four countries, with limited or no unbundling compared with other leading broadband economies. The price per Mbit/s in Japan was USD 0.22 per Mbit/s while the least expensive Mbit/s in the United States was 14 times more expensive (see Figure 1.15). Switzerland adopted local loop unbundling in 2007 and is among the top five OECD countries in terms of penetration. However, **in 2006 before unbundling, Switzerland’s price per Mbit/s, even in PPP terms, was 19 times more expensive than in Japan and five times more expensive than in neighbouring France.**”(emphasis added)

84. Considering then, that the petitioners argue that they must be able to achieve a certain amount of return on investment in order to bear the cost of deploying NGN networks, and then it only makes sense that when competition is reduced by abandoning unbundling rules, ILEC prices go up, and thus the cost to the consumer goes up.

²⁰ http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_37441,00.html

85. It then can behooves a government to ensure that the benefit to society in restricting access to a network outweighs the social welfare benefits in reduced prices, and the benefit the economic spin-off better access arrangements and lower prices afford.

86. Secondly, a government must be sure that if it accepts the notion that a decrease in competition will have a lasting benefit by way of increased capital expenditure that promised expenditure is actually going to develop. Once competitors are driven from the market, they don't come back.

The OECD 2009 Broadband Policy Report States at Page 41.

- “Competition is a key to lowering prices but it also has a significant effect on the services and speeds available to businesses and consumers. Broadband quality tends to increase over time even as prices decline. This is a common feature in the ICT sector but broadband changes have been particularly rapid. At the end of 2004 the average DSL speed across the OECD was less than 2 Mbit/s. The average advertised broadband speed had more than quadrupled to nearly 9 Mbit/s over a period of less than three years.¹⁷ *The trend continues as operators upgrade their networks.*” (emphasis added)

The OECD 2009 Broadband Policy Report States at Page 49;

- “The fastest connections, lowest prices and most innovative services are in areas where there is a range of consumer choices for broadband.”

87. While the OECD concedes that there is conflicting information and much debate in respect to the notion that unbundling prevents investment, the most recent data²¹ demonstrates that capital investment in OECD countries with unbundling regimes is not suffering. As stated, there is a clear correlation to consumer benefit and unbundling and service attribute improvement, when there are numerous providers rather than few providers.

²¹ OECD Directorate for Science Technology and Industry: The Influence of Market Development and Policies on Telecommunications and Investment (2007)

88. Meaning that with increased competition comes increased innovation, with the proper unbundling regime competitors have to invest in their service offerings in order to compete with each other. The OECD 2009 Broadband Policy Report names some examples of this; IPTV next generation VoIP deployments and fiber deployments by non-incumbent operators.²²

89. (The OECD data does not report on the investment of competitors, ISPs and the spin-off economic benefit from having multiple providers in market rather than few.)

90. Both Bell and Telus only speak to their own spending and their own return on investment in deploying NGN networks, and are silent in respect to the economic impact of higher prices and less competitors.

91. ILECs north and south of the border have also put much emphasis on the presences of facilities based competition by way of the cable companies and that these competitors alone can discipline the market to the extent required to ensure the benefits of a dynamic competitive market.

The OECD 2009 Broadband Policy Report, Page 51;

- “Certain countries with infrastructure-based competition and unbundling rules have competition from not only the cable operator and incumbent telephone company, but also additional market players who rely on unbundling. This has reduced the danger of a duopoly market structure. As an example, the Netherlands has strong infrastructure-based competition between cable and DSL (see Figure 1.14) but also leads in ECTA’s analysis of main distribution frames upgraded with competitive DSL equipment. Countries such as the United States have chosen to focus on infrastructure based competition in broadband markets due to the manner in which intermodal competition arose in the marketplace, as well as concerns that unbundling could create investment disincentives and limit the rollout of new networks. Policy makers in the United States are looking to power-line communications and wireless technologies as important competition to existing fixed line and cable providers.

²² The OECD 2009 Broadband Policy Report pg 96 Recent analysis, however, shows that IPTV subscriber numbers have grown fast in the last year, effectively doubling during the 12 months to 30 June 2006. Fibre, high definition IPTV, three-dimensional TV, video applications for tele-work and tele-medicine will push demand for highbandwidth further. Eventually this demand for heavy video files will put pressure on the existing capacity of the Internet.

92. Its most interesting to note that the Netherlands scores amongst the highest amongst OECD countries, for penetration, service attributes (choice) and competitive prices to consumers; and the United States scores around the middle.
93. As stated earlier the U.S. regulators depended on the development and deployment of promised technologies. To date, these technologies haven't developed, haven't developed fast enough, or haven't achieved wide spread consumer acceptance.
94. Given the information provided by the OECD on the performance of industrialized countries in relation to unbundling policy, one cannot draw any other conclusion that rigorous unbundling of networks creates competition, lowers prices to consumers, creates the necessary incentive to invest by way of matching competitor's offerings, and creates more and better service offerings.
95. What is not clear is that unbundling policies effect capital investment at all; there are in fact too many variables. The OECD points for example to the dot.com bubble as the greatest single effect on telecom investment in recent years and not regulation, or lack thereof.²³ The overall regulatory policy in any given country, customer acceptance of new technologies the overall economic health of a region and access to capital markets all plays a role.
96. The evidence compiled by the OECD indicates increased competition; even by way of unbundling is an incentive, not a disincentive to network development and deployment. The OECD's top performing countries all have open network regulations in varying degrees. There is conversely no evidence that the petitioners pledged spend will have the same long lasting benefits, or that in the face of decreased competition it will develop.

²³ OECD Directorate for Science Technology and Industry: The Influence of Market Development and Policies on Telecommunications and Investment (2007) "Any examination of the relationship between policies and investment needs to factor in the impact of the "dot-com bubble", including companies" acquisition of bankrupt carriers preceding it: although there is sufficient data since the "dot-com bubble" burst 7 years ago."

97. There actually isn't any clear evidence that the premise that regulation dampens investment is true. The OECD data suggests the exact opposite; that increased competition leads to increased spending as service providers invest in order to compete with the best offerings. That the more service providers there are, the better off the consumer is in respect to choice, differences in offers and network deployment.

Look at all that Fiber

98. Telus and Bell both argue that the investor friendly regulatory regime of the FCC has seen the United States retaking its place as a leader in information technology sector. ILECs in the United States have spent billions in fibre construction fully confident that they will not have to share these facilities with competitors. Telus goes on to state that the United States has avoided the problems EUC have faced in network deployments. Telus' however doesn't cite from what information it draws this conclusion.

99. The OECD most recent reports also shows the countries with the fastest growth in penetration is coupled to the appearance to fibre service offerings.

The OECD 2009 Broadband Policy Report, page 31;

- “The largest growth in broadband penetration in per capita terms was in the Netherlands, Norway, Denmark and Finland – countries that now lead the OECD in penetration overall. The Netherlands added over 20 subscribers per 100 inhabitants in a three-year period to its total broadband subscribership, helping push it to the top two countries of the OECD, alongside Denmark. The penetration rate increase in the Netherlands over those three years, by itself, was higher than the total penetration of 16 OECD countries in December 2006. Policy makers should focus attention on what has helped propel these leading countries over the previous three years. Clearly the blossoming of competition among providers in the Netherlands and Denmark has been a key factor in their strong penetration gains during the period and may also explain their leading places in the OECD as a whole. Both the Netherlands and Denmark benefit from infrastructure based competition and same-line

competition over DSL. In addition, fibre to-the-home networks are appearing in both countries, often with the partnership of local municipality or utility company.”

100. These countries all have unbundling regimes, and fibre deployments have come through cooperation between local government’s utilities and competitors. A marked example is Sweden;

The OECD 2009 Broadband Policy Report page 52

- “The strongest new infrastructure-based competition has come from fibre networks built by new entrants who can attract consumers by offering speeds greater than cable or DSL. Competitive providers, municipalities and power companies have installed these networks. The areas where they have had the most significant positive impact on competition have been where networks have been run on “open access” principles. One example is the STOKAB fibre network in Stockholm, Sweden, which has approximately 60 telecommunication companies as clients serving subscribers using STOKAB’s fibre lines. Open access networks separate the provision of bandwidth from the delivery of services. Operators of open access networks typically allow any operator to sell their services over the network for a standard rate.”

101. Clearly, these countries have found the correct unbundling regime, coupled to facilities construction in partnership with municipal governments and utilities. As the Municipal Utilities upgrade the power line infrastructure, they run fibre to the premises and telecom providers buy capacity for their service offerings. For this arrangement to work there needs to be telecommunications providers willing to buy the Utilities’ fibre offerings.

Regulation @ Home

102. Just last year the Industry Minister of the current government created a set aside of spectrum in order to facilitate more competition in the cellular phone industry, noting that Canadian were paying more for cellular service (particularly data) than their American and European counter

parts. Among the findings of the Minister was that three providers were not enough to discipline the market, and secondary markets had not developed.

103. It would make little sense then that this government would adopt a policy that would marginalize the little bit of competition that exists in broadband markets by regulating competitors to older slower networks, and encourage the development of a duopoly.

104. In CRTC Telecom Decision 2008-117 the Commission found that the inability to provide higher speed access would indeed affect competitors' ability to compete.

105. In this Telus agrees, stating at paragraph 18; "The Commission found that the enhanced functionality of higher speed technology results in fundamentally different services and applications becoming available. Put simply, there is a change in the market and the change is so significant that the market is re-defined. That analysis clearly should apply to the impending advances in Canadian networks. A 500 Kbs ADSL service will simply not be comparable to a 15 Mbs or 30 Mbs access service. They are as different as a stagecoach and an airplane. The market is re-defined by such a technological advance."

106. However Telus goes on to agree with Bell, and argue competitors can still ride the stagecoach while they take the plane.

107. Canada indeed is at cross-road the development and deployment of these networks offer the ability to offer a host of new services that (unlike the FCC's leap of faith) are today providing competitive contention in telecommunications and broadcast services around the world. The petitioners requested relief will ensure that Canadian's will not benefit from multiple providers of broadcast, voice and internet services.^{24,25} It will ensure competitors are marginalized to slower speed offerings and the inability to bundle; in short unable to compete.

²⁴ OECD Communications Outlook Pg 137 "VoIP has become an essential part of the so-called "triple play" of voice, data and video, with competition driving all parties to add VoIP and video (e.g. Video on Demand or IP-TV) to their broadband services to attract and retain customers. As a result, VoIP has emerged from its role as an alternative system for large businesses to an increasingly viable alternative for some 225 million broadband subscribers worldwide, whether small businesses or households".

108. Of note, just this year the CRTC determined in an effort to facilitate and encourage regional development in broadcast; that broadcast distribution undertakings with fewer than 20,000 subscribers did not require broadcast licenses. Access to higher speed broadband networks with enough capacity to deliver IPTV provides the very opportunity for entrepreneurs to utilize this new regulation to provide competitive regional and ethnic offerings and fulfill that mandate. That is provided the petitioners are denied their requested relief.

109. On one end of the regulatory forefront, around the world today, telecom regulators are wrestling with the very question posed by the petitioners, should new investments in networks be deregulated for fear of inhibiting investment. However, on the other end of the issues of competition some regulators are determining if access arrangements go far enough;

The OECD 2009 Broadband Policy Report page 50

- “Debates on the future of unbundling have been heated, and these will likely continue. However, more recent debates have focused on the role of functional and structural separation of the local loop from the incumbent’s retail activities. These are likely to be key issues in future policy debates. The reason the VDSL debates are so important is that a number of OECD countries have relied on unbundling for broadband competition.”
- “While there has been significant progress with unbundling in many of these countries, more progress is needed to make markets fully competitive. Data from the European Competitive Telecommunications Association (ECTA) show that the number of exchanges hosting competitive equipment remains low in many OECD countries. This could have implications for the competitiveness of the broadband connections in OECD markets which rely on unbundling. This does not preclude unbundling, however, as unbundling rules in many OECD countries still allow subscribers to access broadband from competitive operators via wholesale arrangements.”

²⁵ CRTC 2008 Monitoring Report; Competition In 2007, over 25% of residential accounts included service bundles that consisted of two or more of the following services: local, Internet, video, and wireless. This is up from 15% in 2006. The extent to which residential customer accounts contained service bundles varied by TSP, ranging from a low of 15% of residential accounts to a high in excess of 55%.

110. Indeed, in Canada hosted the instance of equipment inside ILEC central office remains low, particularly in the case of hardware suited to provide broadband services. Currently there are no hosted access arrangements for cable networks whatsoever. It is highly unlikely if the Governor General were to accept the petitioners requested relief such co-location will ever develop, as potential competitors are faced with reduced access arrangements over older copper networks and stranded investment unable to reach fibre last mile facilities.

111. Furthermore some regulators, like those in the UK and Australia have created regulatory regime whereby the ILEC operators have had to separate their wholesale activities from their retail activities and provided access on a non-discriminatory basis to all competitors. The new wholesale entities are then motivated to invest and upgrade their networks in order to sell new services and create new revenue streams from the retailers.

The OECD 2009 Broadband Policy Report page 55

- Ofcom promoted the separation as a way to allow all communications providers equal access to critical BT infrastructure on fair terms. Additionally, Ofcom announced that the separation would encourage investment in infrastructure, enable innovations through multiple services, and increase deployment of next-generation technology

112. Canada has yet to develop a comprehensive broadband unbundling regulatory platform, as a result and evidenced by the experiences of other OECD countries, Canada like the United States is lagging in broadband penetration, service choices and price.

Conclusion

113. A rescinding Decision 2008-117 and Order 2009-111 is in essence a policy change that would be contrary to the December 14th Policy Direction requiring regulation to be symmetrical and technologically neutral.

114. Bell attempted this very change through an appeal application to a Federal Court and was rejected. These petitions if granted will have the very same effect as if Bell's appeal was successful and undue the findings of the Commission and a Federal Court.²⁶

115. The petitioners are attempting to affectively make changes to policy by overturning two determinations by the CRTC that would see competitive access arrangements for competitors to developing broadband networks for the opportunity to deliver a host of bundled services, in voice, video and Internet. The Government has a choice, to develop a multiple competitor industry, or an industry that will see competitors marginalized and "legacy competitors out" of the market, as ILECs upgrade the networks and make less and less of them available.

116. The petitioners "trust us" pledge to make commercial arrangements with competitors are the very same platitudes regulators in the United States bought into that saw the stagnation and decline of competition from the residential markets in the U.S. Most interesting to note is that the petitioner's petition is based upon a determination by the CRTC to provide access to Telus and Bell's higher speed services, exactly because Bell refused to negotiate access. These are hollow platitudes and the Government will not find endorsement, or "trust" from competitors.

117. The petitioners have proposed a policy change by the Government on a completely unproven premise; that network unbundling will dampen investment. Evidence from around the world indicates that the petitioner's argument is flawed. Increased competition through network unbundling increases broadband growth, (even when there are alternate facilities providers) diversifies offers, and lowers prices to consumers. The right mix of unbundling and cooperation between local governments, competitors and utilities has seen large fibre deployments in some OECD countries. This approach is superior to the FCC's approach which has reduced competition, increased investment from the tax payer and has not benefited the consumer.

²⁶ Federal Court of Appeal June 20, 2008 08-A-33 Bell Canada et all v. Bragg Communications et all.

118. Telus and Bell's proposals benefit Telus and Bell and do not demonstrate there will be long term benefits to the Canadian public. Cybersurf encourages the Government to uphold the determinations of the CRTC as being the correct approach.

119. Cybersurf also encourages the Government, through Industry Canada to look closer at the Scandinavian model and to develop programs that facilitate cooperation between municipal governments, utilities and telecommunications providers to bring open access fiber facilities to the homes of Canadians.

All Of Which is Respectfully Submitted

Marcel Mercia
Chief Operations Officer
Cybersurf Corp.

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