

**Comments on Canada Gazette Part I, 4 April  
2009, Notice No. DGTP-004-09 – Petitions to  
the Governor in Council concerning Telecom  
Decisions CRTC 2008-117 and CRTC 2008-  
118, Telecom Regulatory Policy CRTC 2009-  
34, and Telecom Order CRTC 2009-111**

**By**

**The Public Interest Advocacy Centre, Canada Without  
Poverty (formally, National Anti-Poverty Organization) and  
Consumers' Association of Canada (collectively the  
“Consumer Groups”)**

**May 8, 2009**

## Contents

Introduction.....	2
The subject matter of these Petitions .....	3
Argument .....	9
a) The Bell companies’ central contention, namely, that they will reconsider their investments in new fibre facilities unless they are permitted to prevent competitors from having access to them lacks plausibility and, in any event should be rejected by the Governor-in-Council.....	9
b) The Governor-in-Council should also reject threats regarding the “rural-urban divide” .....	14
c) The Commission’s directives in the Decision and Order are consistent with the Commission’s duties as set out in the <i>Telecommunications Act</i> .....	17
i) Canada’s telecommunications policy objectives .....	17
ii) Section 27 of the <i>Telecommunications Act</i> .....	24
Conclusion .....	34

### Introduction

1. The parties making comments on the petitions (the “Consumer Groups”) are the following organizations:

- (a) The Public Interest Advocacy Centre (PIAC), a national non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services;

- (b) Canada Without Poverty (CWP) (formally, the National Anti-Poverty Organization (NAPO)), is a national non-profit, non-partisan organization that represents the interests of low-income people in Canada;
  - (c) The Consumers' Association of Canada (CAC), founded in 1947, is an independent, not-for-profit, volunteer-based, charitable organization. CAC's mandate is to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems.
2. The comments below are regarding Petitions filed, respectively, by Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and Bell Canada (collectively, "the Bell companies"), and by Telus Communications Company ("TELUS") on 11 March 2009 and published in Part I of the Canada Gazette on 4 April 2009.

**The subject matter of these Petitions**

3. The Petitioners are telecommunications companies subject to the jurisdiction of the Canadian Radio-television and Telecommunications Commission ("CRTC" or "the Commission") under the *Telecommunications Act*.
4. In Decision 2008-117, the CRTC directed the Petitioners to make available to their wholesale customers aggregated ADSL Internet

access services at service speeds that matched the Internet service speeds the Petitioners provide to their retail customers. What this meant was that as a Bell company or TELUS made available to retail consumers an Internet service at a new (and greater) transmission speed, say 10 Mbps, the Bell company could not refuse a request from a wholesale customer for a wholesale ADSL service offering the same speed, at a wholesale cost-based rate set by the CRTC.

5. Soon after Decision 2008-117 was issued, the Bell companies (and TELUS) took the position that when the Commission stated in Decision 2008-117 that: “this proceeding is limited to addressing the issue of matching service speeds of the ILECs' aggregated ADSL access services, which are provided over copper facilities”<sup>1</sup> the Commission meant that the only new Internet access service speeds that were covered by the Commission’s direction were those that were provided over access lines that were entirely made up of copper facilities. TELUS also argued that any requirement imposed by the Commission to provide aggregated ADSL service applies only to previously existing transmission speeds – not to new (and higher) speeds implemented by the ILEC.
6. The result of the interpretation of Decision 2008-117 put forward by the Petitioners was that whenever a Petitioner had upgraded its network between its central office and its retail customers’ premises by installing fibre optic lines,<sup>2</sup> such Petitioner would not be required

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<sup>1</sup> Telecom Decision CRTC 2008-117, *Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services* (11 December 2008) at paragraph 22.

<sup>2</sup> Namely, the facilities between the ILEC’s central office and the retail customer’s premises.

to make any new higher broadband Internet service speeds available to wholesale customers at regulated cost based rates – or indeed at any rate if the Petitioner did not wish to make competitive Internet speeds available to its wholesale customers. The Petitioners’ position also meant that wherever they deployed fibre optic facilities in their local network, competitive ISPs would be limited to offering Internet access services at lower speeds than they offer, if at all. TELUS’s interpretation also meant that new higher speeds offered by the ILEC need not be made available to wholesale customers.

7. In response to a complaint by Cybersurf Corp. (“Cybersurf”) regarding Bell Canada’s interpretation of Decision 2008-117, the Commission, on 3 March 2009, issued Order 2009-111. In this Order, the Commission confirmed that the Bell companies’ and TELUS interpretations of Decision 2008-117 were incorrect. The Commission found that the Bell companies’ interpretation of its directive in Decision 2008-117 was “unduly narrow and would render the requirements of that decision virtually meaningless.”<sup>3</sup> The Commission confirmed that “to the extent that the [Internet] service is provided over a path that includes copper facilities, the service is subject to the requirements of the decision.”<sup>4</sup> The Commission also rejected TELUS’ contention that it need not match for its wholesale customers new higher speeds offered to retail customers.

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<sup>3</sup> Order 2009-111, paragraph 12.

<sup>4</sup> Order 2009-111, paragraph 12.

8. The Petitioners are now asking the GiC to overturn the Commission's findings. The crux of the Bell companies' argument is set out in a footnote in their Petition:

The CRTC did not give any recognition to the notion of the NGN [so called Next Generation Network] and the considerable investment required to push fibre optic cable deep into neighbourhoods, for example, through FTTN [Fibre To The Node] networks. Rather, describing the NGN as simply the provision of Internet access to retail customers at a new speed, the CRTC decided that this was not the provision of a new service but rather the provision of the same service, Internet access, at a different bandwidth.

9. For its part, TELUS states that:

TELUS has made extraordinary efforts to minimize risk and protect shareholder wealth. Government must do its part as well, fostering a climate in which private enterprise is rewarded for taking such risks. The recent federal budget contains many strong measures that should help in this respect.

Unfortunately, in the communications sector, much of the government's good work is being recklessly undone by the CRTC. By mandating access to TELUS' next generation broadband services, the Commission has created conditions that are inconsistent with promoting needed investments in new infrastructure.<sup>5</sup>

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<sup>5</sup> TELUS Petition, paragraphs 23-24.

10. The Bell companies argue that unless they succeed, "the remarkable effect will be a slow-down in investment in a sector crucial to all Canadians, the likely perpetuation of the urban/rural digital divide and, importantly, the creation of a new broadband gap in urban areas of Canada – an urban digital divide."<sup>6</sup> More specifically, the Bell companies state that:

...the business case for investing in NGN facilities [i.e. fibre optic facilities] is founded on the potential retail revenues from the Companies "winning the broadband home". If the Companies are required to cede access to these facilities at regulated rates, then there will be an inadequate return to warrant the investment risk (based on wholesale rather than retail revenues). Although Bell Canada (Bell) has already started to invest in NGN facilities in Toronto and Montréal, and will complete those investments, being required through the CRTC Decisions to provide access to those facilities at wholesale rates will cause a substantial review by Bell of its investment programs in other locations. The same is true for Bell Aliant.<sup>7</sup>

11. TELUS is more restrained than the Bell companies. It states that:

With such a change in policy [TELUS is seeking], Canada will see significant investment in next generation broadband

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<sup>6</sup> Bell Aliant and Bell Canada Petition, paragraph 2.

<sup>7</sup> Bell Aliant and Bell Canada Petition, paragraph 18.

networks, with all the benefits that we have witnessed in our major trading partners. Absent such a change, Canada will fall further behind at the very time when the stimulative benefits of such investments are most needed.<sup>8</sup>

12. The relief sought by TELUS, however, appears to be even broader than that sought by the Bell companies. TELUS requests that:

Using its authority under the *Telecommunications Act* (section 12), the Governor in Council should rescind Telecom Order CRTC 2009-111 and vary Telecom Decision CRTC 2008-117 to stipulate that no increased speed or functionality of internet service added to the TELUS network after the date of Telecom Decision 2008-17 *Revised Regulatory Framework for Wholesale Services and Definition of Essential Service* is required by regulation to be made available on a wholesale basis to TELUS' competitors.<sup>9</sup>

13. Under TELUS' requested relief, whenever TELUS increases the transmission speed offered to retail Internet access service customers, it would be under no obligation to make such speed available to its wholesale customers. In apparent contrast to the relief sought by the Bell companies, the relief sought by TELUS would apply, regardless of the facilities used to deliver such service. The relief sought by

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<sup>8</sup> TELUS Petition, paragraph 40.

<sup>9</sup> TELUS Petition, paragraph 38.



TELUS would be retroactive to the date of issuance of Decision 2008-17 (3 March 2008).

14. The Consumer Groups believe that the outcome of the Petitions is of exceptional importance for Canadian consumers of Internet services. Granting the relief sought by the Petitioners would substantially harm Canadian Internet service users. The Consumer Groups submit that the Governor-in-Council should reject the relief sought by the Petitioners, as further discussed below.

### **Argument**

a) The Bell companies' central contention, namely, that they will reconsider their investments in new fibre facilities unless they are permitted to prevent competitors from having access to them lacks plausibility and, in any event should be rejected by the Governor-in-Council

15. The Bell companies contend that unless they are permitted to, in effect, prevent their wholesale customers from offering Internet services that compete with their own where the Bell companies are installing fibre optic lines, they will conduct a "substantial review ... of [their] investment programs in locations other than in those parts of Montreal and Toronto where Bell Canada has already constructed such facilities. The Consumer Groups submit that the Governor-in-Council should reject such idle threats.

16. The Consumer Groups note that the Commission has already repeatedly considered the Bell companies' threats and, more

generally, the Petitioners arguments against making aggregated ADSL service available on a mandated basis in three proceedings and it found them to be unjustified.

17. The Consumer Groups submit that there is no substance to such threats. The ILECs have been losing the race for broadband customers to the cable companies and they need to upgrade their networks in order to catch up. The contention that they will hold up upgrading their networks if they are required to offer aggregated ADSL service at speeds that allow their wholesale customers to offer their own competitive Internet services is simply not correct.

18. In its Petition, TELUS admits this:

Cable companies are clearly the dominant providers of high-speed network services in Canada. Unless companies like TELUS are able to provide comparable services through next generation networks, the lead already enjoyed by cable providers will only grow.<sup>10</sup>

19. In its *CRTC Communications Monitoring Report – 2008*, the Commission has identified that the ILECs have remained behind the cable companies in terms of broadband market share for several years. The cable companies' lead has also been growing in the most recent years surveyed by the Commission:

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<sup>10</sup> TELUS Petition, paragraph 25.

In 2003, cable modem subscriptions were approximately 1.29 times that of DSL. The gap or difference between the number of cable modem subscriptions and the number of DSL subscriptions was steadily narrowing to the point where by 2004 the gap was 1.2 cable modem subscriptions per DSL subscription. However, by 2006, this trend had stopped and the gap had started to widen, to the point where by year end 2007 cable modem subscriptions were 1.30 times that of DSL subscriptions.<sup>11</sup>

20. In order to stem the growth of the gap between it and the cable companies in the broadband Internet services marketplace, Bell Canada must upgrade its network and, in particular, the lines between its central offices and its customers' premises. The same is also true for the other Petitioners. The Bell companies' contention in their Petition that they are prepared to reconsider the modernization of their local network if they are not granted the relief they are seeking is not consistent with marketplace reality.

21. BCE is conveying a very different message to its shareholders than it appears to be putting forward in its Petition. Regarding its plans for the deployment of fibre optic facilities in the lines between its central offices and its end-customer premises, in its most recent annual report

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<sup>11</sup> *CRTC Communications Monitoring Report*, section 5.3: Sector Analysis: Residential subscribers and the shift to high-speed.

to its shareholders ,<sup>12</sup> Bell has identified “INVEST[MENT] IN BROADBAND NETWORKS AND SERVICES”<sup>13</sup> as one of 5 strategic “imperatives” the Company is “executing on ... as quickly and efficiently as possible.”<sup>14</sup> Bell states that it is:

greatly accelerating the rollout of our high-speed Fibre to the Node (FTTN) network, with about 2.4 million homes covered today and 5 million expected to be passed by 2012. FTTN is a key driver of improved product performance, decreasing customer churn and increasing average revenue per user.<sup>15</sup>

22. There is no suggestion here that Bell is reconsidering the deployment of FTTN facilities. Indeed, Bell acknowledges that the deployment of such facilities is essential because:

We compete with cable companies and Internet service providers (ISPs) to provide high-speed and dial-up Internet access and related services. In particular, cable companies have focused on increased bandwidth and discounted pricing on bundles to compete against us, which could directly affect our ability to maintain ARPU [Average Revenue per User] performance and could adversely affect our results of operations.

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<sup>12</sup> Issued 17 March 2009 ([http://www.bce.ca/annual\\_report/index.php?page\\_id=112](http://www.bce.ca/annual_report/index.php?page_id=112))

<sup>13</sup> Bell Canada Enterprises – 2008 Annual Report : Imperatives: Imperative 4: Invest in Broadband Network and Services ( [http://www.bce.ca/annual\\_report/index.php?page\\_id=118&lang=en](http://www.bce.ca/annual_report/index.php?page_id=118&lang=en))

<sup>14</sup> *Op. cit.*: Letter to shareholders: George A Cope ([http://www.bce.ca/annual\\_report/index.php?page\\_id=114&lang=en](http://www.bce.ca/annual_report/index.php?page_id=114&lang=en))

<sup>15</sup> Bell Canada Enterprises – 2008 Annual Report : Imperatives: Imperative 4: Invest in Broadband Network and Services ( [http://www.bce.ca/annual\\_report/index.php?page\\_id=118&lang=en](http://www.bce.ca/annual_report/index.php?page_id=118&lang=en)).

Cable companies have aggressively rolled out Internet networks offering higher speeds to their customers, forcing us to incur significant capital expenditures in order to also be able to offer higher speeds on our networks. The failure to make continued investments in our Internet networks enabling us to offer Internet services at higher speeds to our customers as well as our inability to offer a different range of products and services compared to our competitors could adversely affect the pricing of our products and services and our results of operations.

Furthermore, as the penetration of the Canadian broadband Internet market reaches higher levels, the possibility to acquire new customers increasingly depends on our ability to win customers away from our competitors. However, as customers increasingly choose to bundle services, it also adversely affects our ability to acquire customers from our competitors.<sup>16</sup>

[emphasis added]

23. In order to remain competitive and to meet their often reiterated commitments to improve their customers' experience, the Bell companies (and TELUS) must deploy fibre optic facilities in the local network and offer transmission speeds that are competitive. As Bell's own management confirms in BCE's 2008 annual report, the deployment of such facilities is a key component of the company's strategy. Indeed, in its latest financial results, reported 7 May 2009,

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<sup>16</sup> *Op. cit.* ; Management's Discussion and Analysis: Our competitive Environment ([http://www.bce.ca/annual\\_report/index.php?page\\_id=95&lang=en](http://www.bce.ca/annual_report/index.php?page_id=95&lang=en))

for the first quarter of 2009, Bell reiterated its commitment to “the continuing expansion of the Fibre-to-the-node (FTTN) program.”<sup>17</sup>  
The Governor-in-Council should reject the Bell companies’ threats.

b) The Governor-in-Council should also reject threats regarding the “rural-urban divide”

24. The Bell companies and TELUS have also stated in their Petitions that unless they are granted the relief they seek, their rural customers will suffer. While it has not directly threatened to withdraw its plans to invest in its network, TELUS states in its Petition, that:

Inexcusably, the people who will suffer the most are the millions of ordinary Canadians living in non-urban areas. Rural Canadians have tremendous cultural and economic contributions to make. But, unless the long-standing goal of complete broadband access is realized, these Canadians risk becoming further isolated. To ensure this does not happen, incentives to improve network access in remote areas should be created. The costs of providing access in these areas far exceed the costs in densely inhabited cities. Yet, TELUS believes in the value of broadband and is prepared to invest. It merely asks that government remove the CRTC barriers that frustrate this goal from being realized.<sup>18</sup>

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<sup>17</sup> BCE news release, 7 May 2009 BCE reports 2009 first quarter results (<http://www.bce.ca/en/news/releases/corp/2009/05/07/75138.html>)

<sup>18</sup> TELUS Petition, paragraph 27.

25. In their Petition, the Bell companies state that unless they obtain their requested relief, the result would be the “likely perpetuation of the urban/rural digital divide.”<sup>19</sup>

26. The Governor-in-Council should reject these threats as well.

27. The Petitioners have over the years been the beneficiaries of a variety of provincial and federal governmental programs and initiatives that have provided them, directly or indirectly, considerable assistance in the deployment of network facilities to provide high-speed Internet connectivity to rural locations.<sup>20</sup> The Consumer Groups also note that Telecom Decision CRTC 2006-9 *Disposition of funds in the deferral accounts*<sup>21</sup> would, if upheld by the Supreme Court of Canada, provide the Bell Canada substantial subsidies for the purpose of upgrading its network to offer broadband services in rural areas.

28. Recently, as the Bell companies pointed out in their Petition, the Government of Canada, in its 2009 Budget, stated that:

The Government is committed to closing the broadband gap in Canada by encouraging the private development of rural

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<sup>19</sup> Bell companies’ Petition, paragraph 2.

<sup>20</sup> For example, among many programs: Quebec’s *Villages Branches* program announced in November 2001; in Ontario, the *Connect Ontario Broadband for Regional Access (COBRA)* program announced in April 2003 by Ontario’s Ministry of Enterprise, Opportunity and Innovation and which operated in 2003-4; the Broadband for Rural and Northern Development (BRAND) announced by Industry Canada in 2002.

<sup>21</sup> Which the Consumer Groups and Bell Canada have challenged for different reasons before the courts and which is currently subject to a stay regarding *inter alia*, the use of deferral account funds for broadband expansion, ordered by the Federal Court of Appeal and extended by the Supreme Court of Canada, pending the decision of the Supreme Court of Canada.

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.<sup>22</sup>

29. Even more recently, the Bell companies benefited from tax harmonization changes in Ontario which, by the companies' own account, will assist them in their deployment of broadband facilities.<sup>23</sup> At the time these tax changes were announced, the Bell companies reiterated their commitment to invest in their "broadband networks and [their] service operations in order to deliver a better Bell customer experience at every level".

30. In the Consumer Groups' view, it is inappropriate for the Petitioners to now threaten to suspend, delay or cease funding the development of their networks unless they receive the relief they are seeking. The Petitioners have benefited over the years from a variety of programs designed to assist them towards the deployment of broadband networks. It is also clear that in both rural and urban environments, the Petitioners must upgrade their networks if they are to have any hope of bridging the growing market share gap between their services and those of the cable companies.

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<sup>22</sup> *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.

<sup>23</sup> See, for example, Bell and BCE press release titled "Ontario tax harmonization will enable Bell to further accelerate service and network investment in the province" issued 30 March 2009, in which Bell and BCE President and CEO George Cope reiterated his company's commitment to accelerate its investments in its network specifically to improve the company's customers' experience: "Even in the midst of current economic conditions, we're making these multi-billion investments in our team, our broadband networks and our service operations in order to deliver a better Bell customer experience at every level" (<http://www.bce.ca/en/news/releases/corp/2009/03/30/75117.html>).



c) The Commission's directives in the Decision and Order are consistent with the Commission's duties as set out in the *Telecommunications Act*

31. The Consumer Groups submit that the Commission's determinations in Decisions 2008-17 and 2008-117 and in Order 2009-111 were consistent with the Commission's duties and responsibilities set out in the *Telecommunications Act* as well as with Canada's telecommunications policy set out in the Act.

32. Section 47 of the *Telecommunications Act* (the Act) states that:

The Commission shall exercise its powers and perform its duties under this Act and any special Act

(a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27;

**i) Canada's telecommunications policy objectives**

33. The objectives of Canada's telecommunications policy are set out in section 7 of the Act. These objectives include the following:

b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

...

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services

34. The Commission's determination in the Decision and Order that the ILECs should make available to their wholesale customers, at cost-based rates, the same transmission speeds for Internet access services as they offer to their own retail customers is consistent with the objectives set out in section 7 (b), (c), (f), (g) and (h) of the *Act*.

35. A requirement that the incumbent telephone companies make the same transmission speeds available to their wholesale Internet service customers as they do to their retail Internet service customers would promote the availability to Canadians of reliable and affordable telecommunications services of high quality and would enhance the

efficiency and competitiveness of Canadian telecommunications by providing to Internet service providers who compete with the incumbent telephone companies – other than the cable companies—the opportunity to offer to retail customers Internet services that are realistic alternatives to the services offered by the telephone and cable companies. The Consumer Groups submit that without the availability of such wholesale services, competitors would not have the ability to offer broadband services. This is indeed the finding reached by the Commission in Decision 2008-17:

In order for competitors to offer retail high-speed Internet access service, in most instances they have no option other than to buy the wholesale aggregated ADSL access or TPIA services. To withdraw mandated access to aggregated ADSL access service - that is, access and transport - at this time would likely result in a substantial lessening or prevention of competition in retail high-speed Internet access services. The Commission therefore finds that aggregated ADSL access service must be mandated, given that it is the only cost-effective means to provide transport to, and access from, an ILEC's central office to the competitor's customer.<sup>24</sup>

36. In Decision 2008-117, the Commission reiterated this finding and added that such aggregated service often:

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<sup>24</sup> Decision 2008-17 at para. 85.

is the only cost-effective means to provide transport to, and access from, an ILEC's central office to a competitor's end-customer. Service speed is an important competitive attribute, with rates differing significantly by speed and speed often being a major differentiation point from a marketing standpoint.<sup>25</sup>

37. In doing so, the Commission confirmed again (and it did so, as well, in Order 2009-111) that the availability of broadband Internet services from suppliers other than the incumbent cable and telephone companies would enhance the efficiency and competitiveness of Canadian telecommunications (consistent with section 7c) of the Act), that it would enhance the affordability of telecommunications services for the wholesale customers of the ILECs and, in turn, for their retail customers (section 7 a) of the Act), that it would foster increased reliance on market forces for the provision of telecommunications services by providing alternatives to the services of incumbent cable and telephone companies (section 7 f)), that it would encourage innovation in the provision of telecommunications services by making underlying facilities available to Internet service providers other than the incumbent telephone and cable companies (section 7 g)) and, finally, that it would respond to the economic and social requirements of users of telecommunications services by enabling these users to have access to broadband services from suppliers other than the incumbent telephone and cable companies (section 7 h)).

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<sup>25</sup> Decision 2008-117 at para. 19.

38. The Consumer Groups submit that without wholesale access to credible service offerings such as aggregated ADSL Internet access services, alternative service providers will not be able to compete and will likely be forced to exit the market. This is largely what has been happening over the last few years as the market share of Internet service providers that are not affiliated with the incumbent cable and telephone companies has dramatically fallen. The result of the disappearance of alternative Internet service providers is that Canadian Internet service retail customers would be left at the mercy of a duopoly comprised of the incumbent telephone companies and the incumbent cable companies.

39. The extent to which independent Internet service providers are threatened by their inability to obtain wholesale services that enable them to offer services that can rival those offered by the telephone companies is amply demonstrated in the Commission's 2008 *CRTC Communications Monitoring Report* (the Monitoring Report). The Commission's Monitoring Report tells a harrowing tale of diminishing choice for Canadian residential and small business retail Internet service consumers.

40. In the latest Monitoring Report (published in July 2008) the CRTC noted that the 5 biggest broadband Internet service providers (Bell, TELUS, Rogers, Shaw and Quebecor) accounted for 77% of Internet revenues for 2007 (the latest year for which the CRTC reported results). In the residential market space, these incumbents' dominance

was even more complete. In the Monitoring Report, the CRTC thus reported that:

...over the 2003 to 2007 period, the subscriber based residential market share of the other TSPs (i.e., excluding incumbent TSPs and cable BDUs) declined from 20.7% in 2003 to 7.8% in 2007. The decline in market share is largely explained by the fact that these competitors have a very small share of the growing residential high-speed access market.<sup>26</sup>

41. In the Monitoring Report, the Commission also noted that there are approximately 500 such smaller TSPs.<sup>27</sup> These are for the most part independent service providers unaffiliated with either the ILECs or the 5 major cable companies. Many of these businesses are local in nature and they maintain a close relationship with the communities in which they operate. Most importantly, however, these businesses provide alternatives to the ILECs and major cable companies.

42. The Consumer Groups submit that a significant reason for the loss of market share by the smaller TSPs has been their inability to offer transmission speeds that match those offered by the incumbent telephone companies to their retail customers because of their inability to obtain wholesale services and facilities from these incumbents.

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<sup>26</sup> CRTC 2008 *Communications Monitoring Report*, section 5.3.

<sup>27</sup> *Ibid.*

43. These small entities do not have the benefit of access to large long established telecommunications networks and in particular, local lines serving virtually every community as do the Bell companies, Telus and the cable companies. Indeed, in the Consumer Groups' view, if the Governor-in-Council grants the Bell companies and TELUS the relief they are seeking in their applications, these small service providers are doomed to disappear.

44. It is unrealistic, in the Consumer Groups' view, to expect telecommunications service providers who have not had the benefit of the long standing monopolies enjoyed by the incumbent telephone and cable companies during which these incumbents constructed their ubiquitous networks, to build networks that would enable them to reach residential customers in any but the most densely populated urban centres. The Consumer Groups submit that the Commission recognized this in Decision 2008-17 (and again in Decision 2008-117 and Order 2009-111) and that it rendered its directions in those Decisions and Order on the basis of this understanding. The Governor-in-Council should be extremely reluctant to reverse the Commission's findings.

45. The Consumer Groups submit that the Governor-in-Council should also be very concerned by the prospect of creating local duopolies in the marketplace for broadband Internet services comprised of the incumbent telephone and cable companies. The Consumer Groups submit that Canadian residential and small business consumers need more – not fewer—competitors to serve their needs in the Internet

access services marketplace. In the Consumer Groups' view, the experience in the wireless telephony marketplace provides a good example of the detrimental impacts on consumers that reliance on a limited number of incumbent service providers can have.<sup>28</sup>

**ii) Section 27 of the *Telecommunications Act***

46. Section 27(2) of the *Act* provides that:

No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

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See for example, Industry Canada's *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*. Issued November 2007 (<http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08833.html>) in which the Department acknowledged the findings of the Telecom Policy Review Panel and stated that:

The current wireless market includes a mix of national, regional and local providers. Three national network operators that are integrated with wireline telecommunications carriers account for 94% of the national wireless market. A contributing factor in this market distribution was the acquisition of wireless-only new entrants by integrated carriers. There are two regionally based wireless network operators also integrated with local wireline carriers and a few local network operators. There are also Mobile Virtual Network Operators (MVNOs) which lease capacity from facilities-based wireless carriers on terms negotiated with those carriers. Many, but not all, Canadians have access to a choice of three facilities-based providers.

In considering the wireless market in Canada, the Telecom Panel expressed the view that: "The smaller number of mobile providers in Canada - and the fact that all three national wireless service providers are also owned by large telecommunications service providers that also provide wireline services - may mean that there is less competition in the Canadian wireless market than in the U.S. market, which consequently has resulted in higher prices, less innovation, lower uptake and lower rates of usage."



47. The Consumer Groups submit that the Commission acted in a manner that is entirely consistent with the Petitioners' obligations under section 27(2) when it directed them to make available to their wholesale customers on a mandated basis aggregated ADSL service at transmission speeds that match the Internet service speeds the Petitioners provide to their retail customers. The Consumer Groups also submit that, in sharp contrast, the relief sought by the Petitioners, which would enable them to provide to their wholesale customers services of an inferior quality and functionality, would be unjustly discriminatory. The relief the Petitioners seek would also enable them to give themselves an undue or unreasonable preference and to subject their wholesale customers and the end-customers of these wholesale customers to an undue or unreasonable disadvantage.

48. The Bell companies have clearly stated that it is their intention to make use of the discretion they are seeking to "win the broadband home" by rendering the services of any competitor that utilizes their fibre facilities uncompetitive. This also appears to be the objective pursued by TELUS. The Consumer Groups submit that it is difficult to imagine a more obvious example of an undue or unreasonable preference or an undue or unreasonable disadvantage than the outcomes sought by the Petitioners. The Consumer Groups reiterate in this respect that no wholesale service provider that depends upon facilities supplied by the Petitioners to serve end-customers can expect to attract and retain consumers if it cannot offer Internet transmission speeds that match those offered by the Petitioners.

49. Parliament has stated in section 27(4) of the Act that:

The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

50. The Petitioners have had several opportunities to demonstrate that the discrimination they are seeking is not undue and they failed to do so. In Decision 2008-117, the Commission found that:

wholesale service that the Commission found in Telecom Decision 2008-117 must be mandated because, among other things, it is the only cost-effective means to provide transport to, and access from, an ILEC's central office to a competitor's end-customer. Service speed is an important competitive attribute, with rates differing significantly by speed and speed often being a major differentiation point from a marketing standpoint. The Commission considers that absent a matching service speed requirement, the ability of competitors that rely on the mandated aggregated ADSL service to compete in the retail market would be significantly restricted, which would likely result in a substantial lessening or prevention of competition in the retail high-speed Internet services market.<sup>29</sup>

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<sup>29</sup> Decision 2008-117 at para. 19.

51. The Commission has considered in detail in several proceedings the issue whether the Petitioners (and the other ILECs) should be permitted to impose lower transmission speeds on their wholesale customers.

52. Their Petitions are only the latest in a stream of unsuccessful attempts by the Bell companies and TELUS to obtain the Commission's authorization to restrict the availability of aggregated ADSL Internet services that would virtually ensure that their wholesale customers could not compete in the Internet access services market place – this is indeed the stated objective of the Petitioners. The outcomes sought by the Petitioners are inconsistent with the obligations set out for them by Parliament in section 27(2) of the Act. The Commission has refused to grant the Petitioners the ability they are seeking to unjustly discriminate against their wholesale customers and to grant themselves an undue preference. The Governor-in-Council should not second guess the Commission in this instance.

**d) The Commission's determinations in the Decision and the Order were consistent with the Policy Direction**

53. The Consumer Groups submit that the determinations the Commission made in Decision 2008-117 and order 2009-111 and, more specifically the Commission's directions to the Petitioners regarding aggregated ADSL Internet services, were consistent with the Policy Direction to the CRTC the Governor-in-Council issued in December 2006.

54. In the Policy Direction, the Governor-in-Council directed that, in the exercise of its powers and performance of its duties under the *Telecommunications Act*,

a) the Commission should

(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and

(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

(b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that

(i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with this Order,

(ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,

(iii) if they are not of an economic nature, to the greatest extent possible, are implemented in a symmetrical and competitively neutral manner, and

(iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive

neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers.

55. In Decision 2008-117, the Commission found that there was a need for it to require the ILECs to offer to their wholesale customers (when requested to do so by those wholesale customers) aggregated ADSL services that provide the same transmission speeds as the ILECs offer to their retail customers.

56. The Commission's found in Decision 2008-117 (and confirmed again in Order 2009-111) that market forces "cannot be relied on to address the relief sought by Cybersurf". The Commission also found that "the ILECs have little incentive, if any, to negotiate matching aggregated ADSL service speeds with competitors." The Bell companies have explicitly admitted in their Petition that the reason they want the GiC to overturn the Commission's determinations in the Decision and Order is that they want to "win the broadband home", presumably by eliminating all the potential competitors who would rely upon the Petitioners' facilities to serve these end-customers. It should be evident, therefore, that market forces cannot be relied upon to ensure that the Petitioners will refrain from giving themselves an undue preference to the detriment of their wholesale customers or subjecting those wholesale customers to an undue or unreasonable disadvantage by denying these customers aggregate ADSL services that offer the same transmission speeds that they offer to their own retail customers.

The Consumer Groups submit that the Commission's determinations in Decision 2008-117 and Order 2009-111 were consistent with paragraph a) (i) of the Policy Direction which directs the Commission, in the exercise of its powers and performance of its duties, to rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives.

57. The Consumer Groups also submit that the directives issued by the Commission in Decision 2008-117 and Order 2009-111 were consistent with paragraph a) (ii) of the Policy Direction which requires the Commission, when relying on regulation, to use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives. The Consumer Groups reiterate, in this respect, the Commission's finding –confirmed by the Bell companies and TELUS in their respective Petitions that market forces were not going to be sufficient to ensure the availability of aggregated ADSL Internet service at adequate transmission speeds. In the Consumer Groups' view, the measures confirmed by the Commission in Order 2009-111 are efficient and proportionate to their purpose and interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives set out in the Act and discussed in the previous section of these comments.

58. The Consumer Groups further submit that it has also become evident, over ten years after the Commission forbore from regulating retail prices for Internet access services and after it established facilities-

based local telephony competition, that market forces in most locations are unlikely to be sufficient to enable competitors other than the incumbent telephone and cable companies to offer residential (and small business) customers high speed Internet services. The Consumer Groups note in this respect that there are few if any alternative Internet service providers that have established their own local network facilities to serve residential and small business customers in the wireline voice telephony and high speed Internet market places. As noted earlier, in Decision 2008-117, the Commission found that “for competitors to offer retail high-speed Internet access service, in most instances they have no option other than to buy the wholesale aggregated ADSL access or TPIA services”. The Petitioners have provided no evidence that the Commission was incorrect when it reached this finding.

59. The Consumer Groups further submit that granting the relief sought by the Petitioners would virtually ensure that Canadian Internet service users will be denied the benefits of a healthy competitive marketplace for such services. The relief sought by the Bell companies and by TELUS would effectively create a duopoly in the Canadian residential and small business Internet services marketplace. The result would be an Internet services marketplace for Canadian residential and small business customers characterized by the same kind of harmful static competition between a small number of large incumbent service providers that we have seen for the last several years in wireless telephony. The Governor-in-Council has the opportunity in this proceeding to avoid the pitfalls which

characterized for many years the evolution of the wireless telephony marketplace in Canada --until the Government intervened.

60.Regarding paragraph b) i) of the Policy Direction, the Consumer Groups note that in Decisions 2008-17, 2008-117 and in Order 2009-111, the Commission clearly identified the Canadian policy objectives that are advanced by its direction concerning aggregated ADSL Internet services. The Consumer Groups enumerated these objectives earlier in these comments.

61.With specific reference to paragraphs b) iii) and iv) of the Policy Direction, the Consumer Groups submit that also wish to add that, contrary to the assertions of the Petitioners, the Commission's directives regarding the availability of Aggregated ADSL Internet service are symmetrical and competitively neutral. The Consumer Groups note in this respect that the cable companies wholesale Third Party Internet Access (TPIA) services are already subject to a requirement regarding the availability of transmission speeds that are consistent with those offered to the cable companies' retail customers. The Petitioners have attempted to draw a distinction between this requirement, as it applies to the cable companies, and their own situation. The Bell companies assert that:

Presently, as a result of the history of how the CRTC has imposed Internet wholesale regulation there is virtually no use of cable company wholesale tariffs in most of the country notwithstanding the fact that they have – unlike the ILECs -



ubiquitous NGNs (funded, until recently, through monopoly-based cable revenues). Resellers largely rely on the ILECs for providing their Internet service.<sup>30</sup>

The Governor-in-Council should reject the comparison the Bell companies are attempting to make. The fact that more Internet service providers use the Petitioners' wholesale services in comparison with those of the cable companies' is irrelevant to this proceeding. While the Consumer Groups would agree that the Commission should investigate the relative lack of wholesale demand for the cable companies' services and, if necessary, could direct the cable companies to make changes to those services, this matter is completely outside the scope of the current proceeding.<sup>31</sup>

62. The Consumer Groups submit that in contrast to the directives issued by the Commission regarding Aggregated ADSL Internet service, it is difficult to see how a regulatory environment in which the cable companies are required to provide wholesale Internet service at competitive speeds but the telephone companies are not would be competitively neutral. Yet, this is precisely what the Petitioners are asking for in this proceeding.

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<sup>30</sup> Bell companies, Petition, paragraph 38.

<sup>31</sup> Wholesale access by competitors to cable company network services and facilities is currently before the Commission in a proceeding initiated by Cybersurf in an application filed 2 March 2009. This proceeding has been suspended pending further directions on procedure by the Commission. In the Consumer Groups' view, this proceeding could provide an appropriate forum in which to consider the grievances raised by the Petitioners regarding the cable companies' wholesale service offerings.

63. With further reference to paragraphs b) iii) and iv) of the Policy Direction, the Consumer groups draw the Governor-in-Council's attention to the requirement set out therein that network interconnection arrangements or regimes for access to networks should be "implemented in a symmetrical and competitively neutral manner" and "to the greatest extent possible ... enable competition from new technologies and not to artificially favour Canadian carriers or resellers". The Consumer Groups submit that the Commission has achieved this balance. In contrast, however, the relief sought by the Petitioners would clearly favour Canadian carriers in their incumbent serving territories to the detriment of Internet service providers who require aggregated ADSL Internet service in order to offer high speed Internet service to their customers. This would not be symmetrical or competitively neutral regulation nor would it be regulation that enables competition from new technologies.

64. The Consumer Groups submit that the objectives set out in the Policy Direction should govern the Governor-in-Council's disposition of this Petition. In the Consumer Groups' view, the Commission's directives to the ILECs regarding their Aggregated ADSL Internet services are consistent with the Policy Direction. The relief sought by the Petitioners, however, would not be.

## **Conclusion**

65. For some years now, the ILECs have been deploying fibre optic lines further and further out towards their end-customers' premises to

enhance the ILECs' ability to offer more powerful video (and other) services and greater Internet access service transmission speeds. These fibre optic lines are a key component in the ILECs' efforts to match (or potentially exceed) the transmission speeds for Internet access services offered by the cable companies over their own fibre optic and coaxial cable network installations. The threats put forward in the Petitions that the deployment of such facilities may be jeopardized by the Commission's directions regarding Aggregated ADSL Internet services are unwarranted.

66. The Commission's directions regarding the availability of Aggregated ADSL Internet services are consistent with objectives of Canada's telecommunications policy and, more generally, with the Commission's duties under the Telecommunications Act. The Commission's determinations are consistent with the Policy Direction.

67. In contrast, the relief sought by the Petitioners would significantly undermine the ability of current and potential competitors to the incumbent telephone and cable companies in the residential and small business high speed Internet services marketplace to offer attractive alternatives to the services of the incumbent telephone and cable companies. This would be inconsistent with the objectives of Canada's telecommunications policy. The relief sought by the Petitioners would also enable them to grant themselves an undue preference and subject their competitors to an unreasonable disadvantage.

68. Canada's experience in the wireless telephony services marketplace underscores the dangers inherent in the harmful static competition that is likely to develop if rivalry in the marketplace is reduced to competition between a small number of large incumbent service providers. The relief sought by the Petitioners is clearly intended to restrict participation in the marketplace for retail residential and small business high speed Internet services to incumbent telephone and cable companies. The Consumer Groups submit that the relief sought by the Petitioners would harm Canadian residential and small business Internet services consumers.

69. The Consumer Groups submit that for the reasons above the Governor-in-Council should reject the Petitions filed by the Bell companies and by TELUS.

Submitted this 8<sup>th</sup> day of May, 2009

*Original Signed*

John Lawford  
Counsel for the Consumer Groups

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