

**MTS Allstream Inc. Petition to the Governor in Council**

**In the Matter of**

**Telecom Decision CRTC 2008-118, *MTS Allstream Inc. – Application to Review and Vary Certain Determinations in Telecom Decision CRTC 2008-17 Regarding the Classification of Wholesale Ethernet Services***

**and**

**Telecom Regulatory Policy CRTC 2009-34, *Request to Review and Vary Directives in Telecom Decision CRGC 2008-10 Related to the Provision of Central-Office-Based Wholesale ADSL Access Service and Aggregated ADSL Access Service***

**COMMENTS OF TELUS COMMUNICATIONS COMPANY**

**May 4, 2009**

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## **Executive Summary:**

MTS Allstream's petition to the Governor in Council is an extremely lengthy attempt to obscure a central fallacy in its argument that its competitors must be forced by the CRTC to share their investments in next generation networks with MTS even though it refuses to make similar investments itself. The fallacy is simply this. You cannot expect carriers to make risky investments if they are forced to share new infrastructure at artificially low rates in order to benefit competitors that won't invest. Even if MTS had added another hundred pages to its Appeal it cannot hide the incontrovertible fact that mandatory and forced unbundling at non-commercial prices will undermine investment, particularly in a recession. MTS Allstream's petition is supported by little evidence, much speculation and hypothesis, and a staggering recapitulation of failed theory and policy, in the face of incontrovertible fact.

Contrary to its assertions, the MTS Allstream approach will result in less competition, investment and innovation. Such an approach would harm the Canadian economy by reducing investment incentives at this important juncture, if granted.

MTS Allstream adduces no new evidence or arguments that would lead the Governor in Council overturn the Commission's determinations in order to grant its requested relief. The Petition relies upon evidence and arguments substantially similar to that provided during previous appeals, the Telecommunications Policy Review consultations, and most recently, the CRTC's review of the wholesale services regulatory framework. These arguments have been previously considered and rejected the Governor in Council, the CRTC and the Telecommunications Policy Review Panel and should be rejected again in the present circumstances by the Governor in Council

In TELUS' response, it rebuts each and every one of MTS Allstream's assertions showing the petition to be a call for the Government to go back to failed policies of the past and turn away from policies that will provide the greatest benefit to Canada and all Canadians today and going forward.

Key messages from TELUS' response to MTS Allstream's petition are as follows:

- MTS Allstream has serially appealed any decision where it did not get virtually full access to others' networks.
- Getting access to TELUS' next generation networks at below commercial rates and leveraging TELUS' investments rather than investing itself is precisely at the core of MTS Allstream's application.
- Government policy, the CRTC and the best economic evidence supports policies that encourage and not discourage investment and innovation.
- Granting MTS Allstream's petition would send the wrong signals around investment at the worst possible time, increasing risk at precisely the time

- government needs the private sector to accelerate their plans for deploying advanced communications services to Canadians.
- MTS Allstream's petition misrepresents and seeks to rewrite history in the U.S., the U.K. and the EU in order to justify a free ride on the investment its competitors remain prepared to make even in a riskier climate.
  - At the end of the current global economic crisis, Canada will reap the benefit of those investments made by carriers who are looking forward to the future rather than those who don't invest and wish to confiscate the investments of others.
  - MTS Allstream's petition should be denied.

## 1.0 Introduction

1. These comments are being filed on behalf TELUS Communications Company (“TELUS” or the “Company”) in response to a petition (the “Petition”) to the Governor in Council filed by MTS Allstream Inc. (“MTS Allstream”) dated March 11, 2009. In the Petition, MTS Allstream seeks to vary determinations made by the Canadian Radio-television and Telecommunications Commission (the “CRTC” or the “Commission”) in Telecom Decision CRTC 2008-118, *MTS Allstream Inc. – Application to Review and Vary Certain Determinations in Telecom Decision CRTC 2008-17 Regarding the Classification of Wholesale Ethernet Services* (“Decision 2008-118”) and Telecom Regulatory Policy CRTC 2009-34, *Request to Review and Vary Directives in Telecom Decision CRTC 2008-10 Related to the Provision of Central-Office-Based Wholesale ADSL Access Service and Aggregated ADSL Access Service* (“Telecom Policy 2009-34”).

2. Specifically, MTS Allstream requests that the Governor in Council

Exercise its powers under section 12 of the *Telecommunications Act* direct (*sic.*) the Commission to categorize both Ethernet and DSL facilities as “conditional essential” which are to be unbundled and provided by incumbents to competitors at cost-based rates.<sup>1</sup>

In the alternative, MTS Allstream requests that the Governor in Council

Refer the matter back to the CRTC with specific instructions to reverse its classification of wholesale Ethernet and ADSL services.<sup>2</sup>

3. More specifically, MTS Allstream is requesting that the Governor in Council classify Ethernet access and transport services, and Aggregated Asymmetric Digital Subscriber Line (“ADSL”) Access service and ADSL-Central Office (“CO”) service as conditional essential services, which would be unbundled at the

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<sup>1</sup> Petition, para. 109.

<sup>2</sup> Petition, para. 109.

highest possible discount to retail (Phase II costs plus a regulatorily-mandated 15 percent mark-up).

4. The MTS Allstream petition should be rejected. Currently, the Ethernet and ADSL services in question are priced at above the Phase II cost plus 15% mark-up level,<sup>3</sup> in light of the fact that they are not essential, and are in fact subject to competitive supply. Because of this fact, there is no need to grant the Petition. The Petition, filed under the guise of the need to access “next-generation networks” (a term which is nowhere defined by MTS Allstream) and that the business broadband market is underserved (in particular, the small and medium sized business segment), is, in fact, merely the latest in a series of petitions filed by this party and its predecessors seeking an ever-expanding range of services from the incumbent local exchange carriers (“ILECs”) at the lowest possible cost-based rates. The Petition is the latest manifestation of the MTS Allstream resale-based, stepping stone approach to competition, that has demonstrably failed and which is directly at odds with the facilities-based model of competition supported by the CRTC and the Federal Government. Contrary to its assertions, the MTS Allstream approach will result in less competition, investment and innovation. Such an approach would harm the Canadian economy by reducing investment incentives at this important juncture, if granted.
5. As justification for its request, MTS Allstream alleges that the CRTC failed to gather sufficient evidence to support its decision that cost-based rates are not required for the facilities it seeks. Such an allegation is unsupportable. The fact of the matter is that the CRTC did have sufficient evidence before it to reach the conclusion it did. In light of this fact, MTS Allstream seeks to change the test developed by the CRTC to determine an essential facility in order to obtain lower pricing in order to leverage other carriers’ investments rather than investing capital in facilities itself.

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<sup>3</sup> As explained in further detail below, the regulatory classification of ADSL-CO service is currently under review by the CRTC.

6. MTS Allstream adduces no new evidence or arguments that would lead the Governor in Council overturn the Commission's determinations in order to grant its requested relief. The Petition relies upon evidence and arguments substantially similar to those provided during previous appeals, the Telecommunications Policy Review consultations, and most recently, the CRTC's review of the wholesale services regulatory framework. These arguments have been previously considered and rejected by the Governor in Council, the CRTC and the Telecommunications Policy Review Panel and should be rejected again in the present circumstances by the Governor in Council. In the light of these facts, and that the status of ADSL-CO service is currently under review by the CRTC, there is no reason whatsoever for the Governor in Council to intervene and act on the MTS Allstream Petition. As such, it should be rejected outright.
7. MTS Allstream's Petition belies its strong standing in the market-place, at least according to its own statements. In recent remarks to the investment community, MTS Allstream states its Enterprise Solutions Division is delivering strong growth in next generation services and solid cost reductions through process redesign.<sup>4</sup> MTS Allstream also notes strong growth in its Ethernet and ADSL services:

Solid growth in our next generation data services, which include converged IP and unified communications services, was demonstrated with an increase of 15.6% in 2008, as compared to last year. New customer growth along with higher year-over-year volume usage from business IP domestic MPLS, network resident IP telephony, switched Ethernet, wavelength, IP trunking and consumer high-speed Internet services and higher sales of unified communications contributed to our solid performance in the year.<sup>5</sup>

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<sup>4</sup> MTS Allstream 2009 Guidance Call: Slide 12 – Focus on Profitability - Sharpening Our Focus, available at:

<http://www.mts.ca/portal/site/mts/menuitem.6f9fb034dcee352a909714d1408021a0/?vgnextoid=1eb4b5502c7d5110VgnVCM1000000408120aRCRD>.

<sup>5</sup> MTS Allstream Annual Report 2008, page 20.

Yet despite these statements, MTS Allstream now comes before the Governor in Council seeking a regulatory bail-out in the form of greater discounts for services it insists it must lease from others rather than building itself with its own capital.

8. TELUS' Comments are organized as follows. In section 2, TELUS provides a brief background section highlighting salient aspects of the CRTC's revised regulatory framework for wholesale services determined in Telecom Decision 2008-17, *Regulatory Policy: Revised regulatory framework for wholesale services and definition of essential service* ("Decision 2008-17"), including the CRTC's revised definition of an essential facility. In section 3, TELUS refutes arguments raised by MTS Allstream specific to Ethernet and ADSL services, demonstrating that these services are not essential facilities that should be provided to competitors at cost-based rates. In section 4, TELUS rebuts MTS Allstream's principal arguments, demonstrating that the Petition is, in fact, anti-innovation and anti-investment, that MTS Allstream misrepresents the state of competition in the Canadian business segment, that the UK/EU experience has been misrepresented by MTS Allstream and has practical application Canada where there are significantly different market conditions, that MTS Allstream has misrepresented the United States regulatory experience, and that there are no lessons to be learned from the Advanced Wireless Services ("AWS") auction model. In section 5, TELUS explains how the MTS Allstream Petition runs contrary to the Policy Direction and the Canadian telecommunications policy objectives and that overturning the CRTC's decision would not be consistent with the Governor in Council's supervisory role. In section 6, TELUS raises a procedural objection to the Petition, demonstrating that it is too late to overturn the essential facilities test as requested by MTS Allstream. In section 7, TELUS provides its concluding comments as to why the MTS Allstream Petition should be rejected.



## 2.0 Background

### 2.1 Revised Regulatory Framework for Wholesale Services

9. In March 2008, the Commission issued Telecom Decision CRTC 2008-17, *Regulatory policy: Revised regulatory framework for wholesale services and definition of essential service* (“Decision 2008-17”) outlining what services should continue to be mandated for provision to competitors (wholesale services), and under what terms and conditions. Under the revised regulatory framework for wholesale services, the Commission classified then existing wholesale services into six categories, including essential, conditional essential, conditional mandated non-essential, public good, interconnection, and non-essential subject to phase-out.
10. The central determination in Decision 2008-17 is the CRTC’s definition of an essential facility, *i.e.*, facilities that are required by competitors to compete with the incumbent local exchange carriers. The CRTC defined an essential facility 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.<sup>6</sup>  
[italics in original, footnote omitted]

11. Notably, facilities classified as essential facilities are mandated by the CRTC to be priced at company-specific Phase II costs plus a mark-up of 15 percent.<sup>7</sup>

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<sup>6</sup> Decision 2008-17, para. 37.

Phase II costing is the CRTC's proxy for economic incremental costs. Phase II costs plus a 15 percent mark-up and represents the lowest cost at which competitors can obtain services from incumbent suppliers.

12. Services classified as conditional essential, the classification that MTS Allstream is seeking for Ethernet and ADSL services, are services very similar to those that meet the CRTC's test for an essential service.<sup>8</sup> Unlike the case with essential services, the CRTC considered that changes in market conditions in the future could result in any or all of these services no longer being considered as essential.<sup>9</sup> Given the similarity of conditional essential services to essential services, they are also priced at Phase II costs plus a 15 percent mark-up.
13. Ethernet services are classified as non-essential subject to phase-out because they are facilities that the CRTC has determined do not meet the definition of an essential facility.<sup>10</sup> The term "phase-out" refers to the phasing out of mandated access at the end of transition period of three or five years, depending upon the facility in question.<sup>11</sup>
14. Aggregated ADSL Access services are classified as conditional mandated non-essential services which are those that the CRTC has determined do not meet the criteria for essential services but must be continue to be mandated for various reasons. Classification of these services will continue until it is demonstrated that the reasons for mandating these services are no longer present.<sup>12</sup> The regulatory classification of ADSL-CO service is presently under review.

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<sup>7</sup> Decision 2008-17, para. 133. In the case of Télébec and TELUS in its operating territory of Quebec, essential services are priced at Phase II costs plus 25 percent.

<sup>8</sup> Decision 2008-17, para. 57.

<sup>9</sup> Decision 2008-17, para. 57.

<sup>10</sup> Decision 2008-17, para. 111.

<sup>11</sup> Decision 2008-17, para. 156.

<sup>12</sup> Decision 2008-17, para. 78.

### **3.0 MTS Allstream's Request for Regulatory Reclassification of Ethernet and ADSL Services Is Unwarranted**

15. In its Petition, MTS Allstream states that the CRTC has lost its way by reversing itself from an earlier decision where it mandated access to broadband facilities,<sup>13</sup> and accuses the CRTC of favouring the interests of the largest telephone companies over the public interest.<sup>14</sup> According to MTS Allstream, now only government action will ensure that Canadian businesses of all sizes have competitive alternatives for telecommunications<sup>15</sup> by granting its requested relief.
16. MTS Allstream relies heavily on the fact that in Telecom Order CRTC 2007-20, *Ethernet Services*, the CRTC ordered mandated access to Ethernet access and transport services. However, this determination was not taken in the full light of the Policy Direction. Notably, the CRTC did not mandate the lowest possible cost-based pricing for these services in that order. In Decision 2008-17, upon subsequent re-examination of the facts in light of the Policy Direction, the CRTC determined that these facilities are not essential or conditional essential, and should be phased-out from regulation.

#### **3.1 Ethernet Services Are Not Essential Facilities**

17. Ethernet Access Service provides network access facilities for customer wide area network ("WAN") services. Ethernet Transport Service provides transport for Ethernet traffic from a Company wire centre in which an Ethernet Access terminates. Ethernet services are digital telecommunications facilities for the transmission of information and are available from a number of alternative providers besides the incumbent local exchange carriers.

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<sup>13</sup> Petition, para. 6-7.

<sup>14</sup> Petition, para. 47.

<sup>15</sup> Petition, para. 4.

18. In Decision 2008-17, the CRTC classified Ethernet services as non-essential subject to phase-out<sup>16</sup> for the following reasons:
- 117. The Commission notes that fibre-based access and transport services include CDN DS-3, OC-3, OC-12 and Ethernet services.
  - 118. The Commission notes that the record indicates a high incidence of competitor self-supply or alternative supply of fibre-based access and transport facilities. The Commission considers that the reported level of alternative supply demonstrates the existence of competition in the upstream market for these facilities.
  - 119. Accordingly, the Commission determines that high-speed fibre-based access and transport facilities and related services are to be classified as non-essential subject to phase-out.<sup>17</sup>
19. Given the non-essential nature of these services, borne out by extensive fact finding conducted by the CRTC, Ethernet services are currently not priced at the lowest possible cost-based level (Phase II cost plus a 15 percent mark-up) given that they are subject to competitive market forces.<sup>18</sup>
20. The CRTC subsequently upheld its classification of Ethernet services as non-essential subject to phase-out after an appeal by MTS Allstream in Decision 2008-118. Notably, the Commission found that MTS Allstream had failed to demonstrate that there was substantial doubt as to the correctness of the CRTC's determinations in Decision 2008-17 regarding the classification of Ethernet services as non-essential subject to phase-out.
21. At the heart of the MTS Allstream Petition, the latest serial attempt to have these determinations of fact reviewed, is the allegation that the CRTC's classification of Ethernet services as non-essential subject to phase-out was based on "a lack of evidentiary foundation for its conclusion that the facilities in question are

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<sup>16</sup> Decision 2008-17, para. 117-119.

<sup>17</sup> Decision 2008-17, para. 117-119.

<sup>18</sup> Decision 2008-17, para. 149.

- duplicable by competitors.<sup>19</sup> According to MTS Allstream, the CRTC reached a faulty conclusion by relying on an interrogatory that provided percentages, rather than absolute numbers of Ethernet circuits.
22. This allegation is false. It is unnecessary to gather information on the absolute number of Ethernet circuits as suggested by MTS Allstream since the data gathered on the percentages of Ethernet services clearly demonstrate that these services are provided by competitors (either by self—supply or on the basis of facilities provisioned by a provider other than an incumbent – these facilities are also made available by competitors to other competitors on a wholesale basis). In other words, the facilities in question are capable of duplication and are being duplicated. This fact alone provides sufficient evidence that the third limb of the CRTC’s test for an essential facility has been met. As the CRTC noted in Decision 2008-118:
16. The Commission notes that in the course of the proceeding that led to Telecom Decision 2008-17, it sought information from facilities-based competitors regarding their dependence on ILECs for a number of competitor services, including Ethernet access and transport services. Data provided by parties in confidence to the Commission indicated that in metropolitan areas, for high-speed access and transport services, including Ethernet access and transport services, a large proportion of these services were either self-provided or obtained from parties other than the ILECs. The Commission notes that the record of this proceeding does not raise doubt as to the accuracy or reliability of that data. Based on that information, the Commission considers that ILEC Ethernet access and transport networks have been duplicated by competitors.<sup>20</sup>
23. From the above, it is apparent that there is no need for the Governor in Council to overturn the CRTC’s findings with respect to Ethernet services. Clearly Ethernet services are not essential services and do not warrant cost-based pricing. As such, the Petition should be rejected.

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<sup>19</sup> Petition, para. 7.

<sup>20</sup> Decision 2008-118, para. 16.

### **3.1.1 Ethernet Services Will Continue to Be Available and Will Not Be “Withdrawn” as Alleged by MTS Allstream**

24. In the Petition, MTS Allstream states that the “imminent withdrawal”<sup>21</sup> of Ethernet services will discourage further MTS Allstream investment in its network and will strand existing investment in Ethernet switches and transport facilities.”<sup>22</sup> Furthermore, MTS Allstream also states that continued high prices for Ethernet services will see higher prices for business, dampening innovation and harming Canadian economic competitiveness.<sup>23</sup>
25. These assertions are false and utterly presumptuous and self-serving. These services are currently available at regulated rates for the duration of the phase-out period and will continue to be available after the phase-out period at market rates. The CRTC determined that mandated access to Ethernet services will no longer be required after a transition period (phase-out period) in light of the competitive provision of these services.<sup>24</sup> In order to help competitors prepare for this eventuality, the CRTC deemed a phase-out period to be necessary to provide competitors with a reasonable period and incentives to review their provisioning arrangements, capital spending plans and to restructure them as required, taking into account the changes made in the revised wholesale regulatory framework established in Decision 2008-17. Only after the phase-out period will these services be forborne from rate regulation.<sup>25</sup>
26. To further assist competitors to the transition to non-regulated markets, the CRTC determined that competitor agreements involving non-essential services subject to phase-out should be permitted during the phase-out period, and that its approval of such agreements would not be required.<sup>26</sup> In allowing such agreements, the CRTC noted that such an option gives competitors greater opportunity to

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<sup>21</sup> Petition, para. 10.

<sup>22</sup> Petition, para. 10.

<sup>23</sup> Petition, para. 10.

<sup>24</sup> A phase-out period of three years from the date of Decision 2008-17 was established for most services, with the exception of access facilities and certain other facilities, in which case a period of five years was established (Decision 2008-17, para. 156).

<sup>25</sup> Decision 2008-17, para. 145.

<sup>26</sup> Decision 2008-17, para. 162.

rearrange their current provisioning arrangements during the phase-out period and is in keeping with reliance on market forces to the maximum extent feasible as required by the Policy Direction.<sup>27</sup>

27. Significantly, the CRTC indicated that it was its expectation that prior to the end of the phase-out period, many competitors would enter into negotiated agreements with the incumbent local exchange carriers for services such as Ethernet services. Notably, the CRTC also noted that where such agreements are not put in place, the functionality provided by services subject to phase-out would continue to be available to competitors through retail service offerings.
28. MTS Allstream is not being singled out in the CRTC's regulatory environment. All telecommunications service providers, including the other incumbents local exchange carriers besides MTS Allstream, are in the same position as MTS Allstream. As competitors outside of their incumbent serving territories, all will have to negotiate commercial arrangements with the other incumbents for their respective competitor out-of-territory operations. MTS Allstream is not unique and should not be treated as such by the Governor in Council.
29. In summary, contrary to MTS Allstream's statements, Ethernet and ADSL services will not be withdrawn, but will continue to be available to competitors in the future at market-based rates. All suppliers will have incentives to sell these services in the unregulated (forborne) environment. Service will not be cut-off. Competitors, including MTS Allstream, are being provided sufficient time to build their own facilities, negotiate competitor agreements during the transition period, or simply lease these facilities at current tariffed rates during the transition period, or at commercially-negotiated rates from either the incumbent local exchange carriers or other competitors after the transition period. As such, innovation and competitiveness will not be harmed, as alleged by MTS Allstream – to the contrary, incentives for investment and innovation will be increased in a forborne environment.

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<sup>27</sup> Decision 2008-17, para. 162.

### **3.2 ADSL Services Are Not Essential Facilities**

30. MTS Allstream seeks cost-based pricing for two types of ADSL services, namely Aggregated ADSL Access service and ADSL-CO service. However, this request is unwarranted as Aggregated ADSL Access services are not essential facilities and because the regulatory status of ADSL-CO service is under review.

#### **3.2.1 Aggregated ADSL Access Services Are Not Essential**

31. Aggregated ADSL Access service is the generic description for broadband access services based on ADSL technology. TELUS currently offers two variations of this type of service, namely Wholesale Internet ADSL service and Wide Area Network (“WAN”) ADSL service. Wholesale Internet ADSL service enables competitors to offer retail Internet access service to their customers using the incumbent local exchange carriers’ local loops.<sup>28</sup> WAN ADSL service allows for the use of a dedicated data channel from the end-user’s location to a Company wire centre, rather than a shared channel as in the case of Wholesale Internet ADSL service.<sup>29</sup> Aggregated ADSL services are one alternative that allow competitors to provide Internet access for end users, and there are other alternative services available for this purpose including Third Party Internet Access (“TPIA”) service offered by the cable carriers.
32. In Decision 2008-17, the CRTC classified Aggregated ADSL Access service as conditional mandated non-essential.<sup>30</sup> Notably, these services were determined by the CRTC not to meet the definition of an essential service, because of the existence of alternative facilities, including TPIA facilities.

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<sup>28</sup> This service will enable a service provider to establish a high speed data access path between its End-user’s premises and a Company serving wire centre. Wholesale Internet ADSL Service uses available bandwidth above the voice-band on the same local loop used by the Company or a CLEC to provide residential or business Primary Exchange Service to the End-user on Dry Loops.

<sup>29</sup> This service is offered by TELUS in TELUS Tariff 21462, Item 227, Wide Area Network ADSL Service (Alberta and British Columbia), and in TELUS Tariff 25082, Item 4.07, ADSL Wide Area Network Service (TELUS Quebec).

<sup>30</sup> Decision 2008-17, para. 83-86.



33. Aggregated ADSL Access services are currently priced above the lowest cost-based level (Phase II cost plus a 15% mark-up) in light of the competitive market forces to which they are subject.<sup>31</sup>
34. The CRTC upheld its classification of Aggregated ADSL Access service as conditional mandated non-essential in Telecom Policy 2009-34.<sup>32</sup> Notably, the CRTC found that MTS Allstream had failed to demonstrate that there was substantial doubt as to the correctness of the CRTC's determinations in Telecom Policy 2009-34 regarding the classification of Aggregated ADSL Access services.
35. MTS Allstream spends very little time in its Petition arguing why Aggregated ADSL Access facilities should be considered as essential. This is because of the fact that substitutes in the form of the cable companies' TPIA service and other alternatives are available in the marketplace. In short, there is simply no case to be made for essential service pricing for these services because they have been duplicated all across the country. As such, MTS Allstream's request for the lowest cost-based pricing for these services should be rejected.
36. As the Governor in Council is aware, TELUS filed a petition<sup>33</sup> to the Federal Cabinet on the same date as the MTS Allstream Petition. TELUS' Petition, which also concerns Aggregated ADSL Access services, TELUS is seeking a very different outcome than MTS Allstream. Rather than requesting further, unwarranted and harmful regulation of Aggregated ADSL Access services, TELUS is requesting that the Governor in Council overturn the CRTC's determination to require the unbundling of new higher speeds for these services on a going forward basis. TELUS requests that the Governor in Council deny the MTS Allstream Petition which will impede investment and innovation, and grant

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<sup>31</sup> Decision 2008-17, para. 149.

<sup>32</sup> Telecom Policy 2009-34, para. 36, 42.

<sup>33</sup> Petition to the Governor in Council Regarding Telecom Decision CRTC 2008-117, *Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services* and Telecom Order CRTC 2009-111, *Cybersurf's application related to the implementation of Telecom Decision CRTC 2008-117 regarding the matching speed requirement*, March 11, 2009.

the TELUS' petition request which will further investment in these facilities and services by competing suppliers.

### **3.2.2 Regulatory Status of ADSL-CO Services Is Under Review**

37. MTS Allstream also seeks cost-based pricing for ADSL-CO service. This service enables competitors to establish a high-speed data access path, for delivery of retail high-speed Internet access services only, between the end-users' premises, including premises served off the Company's remotes, and the Company's serving central office (CO). This service is similar to Aggregated ADSL Access service except that ADSL-CO service requires further unbundling of the incumbent local exchange carriers' networks in order to allow competitors to co-locate their facilities at the incumbents' remotes (satellite switches serving outlying areas from a Central Office switch) with incumbent facilities to offer retail Internet access service.<sup>34</sup>
38. In Telecom Policy 2009-34, the CRTC found that it had, in fact, erred in requiring the incumbent local exchange carriers to configure and provide ADSL-CO service in Decision 2008-17, since this requirement went beyond the scope of the proceeding leading to that decision. As a result, the CRTC initiated a follow-up process to consider the feasibility and regulatory status of the proposed ADSL-CO service in Telecom Policy 2009-34. MTS Allstream conveniently neglects to mention that such a proceeding is necessary to consider "the appropriate configuration, classification, and feasibility of an unbundled ADSL access service for competitor use."<sup>35</sup> Clearly it would be premature to classify this service as conditional essential, as requested by MTS Allstream, without a thorough review of the facts which, needless to say, might lead to a different regulatory treatment than that requested by MTS Allstream. In this regard, TELUS is already on

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<sup>34</sup> A more detailed technical description of the proposed ADSL-CO service is available in Appendix A of TELUS' Comments in the Follow-up proceeding to Policy 2009-34, March 12, 2009.

<sup>35</sup> Telecom Policy 2009-34, para. 25.

record as suggesting that ADSL-CO service is, in fact, non-essential, and should not be subject to mandatory unbundling and cost-based pricing.<sup>36</sup>

39. Regardless, TELUS notes that at the time of the filing of the MTS Allstream Petition, the regulatory status of ADSL-CO service was to be examined in proceeding initiated by Telecom Policy 2009-34. By way of letter dated April 1, 2009, Telecom Policy 2009-34 was suspended pending the disposition of an application filed by the Bell Canada dated March 19, 2009, to consider the regulatory treatment of ADSL-CO service in parallel with the unbundling of cable plant networks.
40. It is clear from the above that one way or another, the CRTC will be examining the regulatory status of ADSL-CO service again in the near future. As a result, there is no requirement for the Governor to intervene with respect to this service. In fact, it would be totally inappropriate for the Governor in Council to classify this service as conditional essential without the CRTC first having had the opportunity to conduct a full public proceeding to examine the appropriate regulatory treatment for this service. As such, MTS Allstream's demand for the immediate classification of this service as conditional essential should be denied.

## **4.0 Rebuttal of MTS Allstream's Principal Arguments**

41. In this section, TELUS rebuts MTS Allstream's principal arguments. TELUS does so by demonstrating that the course of action suggested in the Petition is anti-innovation and anti-investment, the United Kingdom/European Union experience has been misrepresented and is of little or no relevance to Canada, the United States regulatory experience is misrepresented, and the AWS model provides no lessons to draw on in the present context.

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<sup>36</sup> See TELUS' Comments in the Follow-up proceeding to Policy 2009-34, March 12, 2009.

#### **4.1 MTS Allstream's Petition Is Anti-Innovation and Anti-Investment**

42. In its Petition, MTS Allstream claims that it is “committed to investing in the provision of advanced telecommunications facilities in Canada,”<sup>37</sup> and that it is “committed to a regime that spurs competitive market forces.”<sup>38</sup> Of course, the truth of the matter is exactly the opposite of that claimed by MTS Allstream – the Petition is, in fact, all about non-investment. The very purpose of MTS Allstream’s Petition is to obtain Ethernet and ADSL services at the lowest possible cost-based rates *precisely in order to avoid having to invest in its own facilities*. It is clear from the Petition that MTS Allstream has no interest whatsoever in investing for the benefit of Canada and Canadians and, instead, is seeking to secure a regime of mandatory access to other people’s investments so that they can minimize investing in their own facilities.
43. Of course, such a prescription is nothing new for MTS Allstream and its predecessor companies. This is not the first time that MTS Allstream has pursued its anti-innovation and anti-investment platform before the Governor in Council and elsewhere.
44. In the proceeding leading to the CRTC’s second price cap decision,<sup>39</sup> the former AT&T Canada, which was subsequently acquired by the former MTS, proposed that a new category of services should be created comprising all wholesale services used by competitors, as well as other retail services used by competitors. The former AT&T Canada also proposed that competitors be entitled to a “Facilities Based Carrier” (“FBC”) rate which would grant competitors a staggering 70% aggregate discount from existing tariff rates for these services.<sup>40</sup>
45. TELUS responded to this proposal by stating, in part, that in reality, networks are not free, and that no party would invest any capital to build facilities if they could

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<sup>37</sup> Petition, para. 25.

<sup>38</sup> Petition, para. 25.

<sup>39</sup> Telecom Public Notice CRTC 2001-37, *Price cap review and related issues*, leading to Telecom Decision CRTC 2002-34, *Regulatory framework for second price cap period*.

<sup>40</sup> Decision 2002-34, para. 114-5.

be obtained at prices significantly below the incumbents' costs of providing them.<sup>41</sup> In response to arguments from TELUS and other parties, the CRTC rejected the former AT&T Canada proposal noting that it was problematic for a number of reasons, most notably because it could introduce a significant disincentive to the construction of new facilities and thereby impair the development of facilities-based competition. The CRTC elaborated on this point stating:

157. The Commission notes that both AT&T Canada and Call-Net stated their intent to continue to build facilities even if their proposals were granted. However, competitors would almost certainly prefer to use and resell ILEC facilities and services if the margins were comparable to or better than those achievable through self-provisioning. There would be little, if any, incentive to take the risk of constructing facilities in such a case.<sup>42</sup>

In rejecting what is arguably the most profound attack on facilities-based competition ever proposed to the CRTC, the Commission correctly concluded that it “would introduce disincentives for the construction of facilities”<sup>43</sup> and “would also undermine the development of a wholesale market and likely lead to significant distortions in the retail market.”<sup>44</sup>

46. The former AT&T Canada subsequently appealed Decision 2002-34 to the Governor in Council in August 2002.<sup>45</sup> In that petition, the former AT&T Canada essentially repurposed its second price caps proposal requesting “competitively neutral” pricing for the long list of services it desired at deep discount rates. Significantly, the Governor in Council rejected this petition noting that “the Governor in Council supports the regulatory approach adopted by the CRTC in

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<sup>41</sup> Decision 2002-34, para. 124.

<sup>42</sup> Decision 2002-34, para. 157.

<sup>43</sup> Decision 2002-34, para. 161.

<sup>44</sup> Decision 2002-34, para. 161.

<sup>45</sup> Petition to Her Excellency the Governor in Council, Pursuant to Section 12(1) of the Telecommunications Act in the matter of Telecom Decision CRTC 2002-34, Regulatory Framework for the Second Price Cap Period, 30 May 2002, AT&T Canada Corp., 27 August 2002.

Telecom Decision CRTC 2002-34.”<sup>46</sup> Notably, the Minister of Industry commented at the time that this decision was taken “not wanting to complicate an already difficult investment climate.”<sup>47</sup> Needless to say, the current investment climate is even more difficult today than in 2003, which makes it all the more imperative to reject the MTS Allstream Petition.

47. Subsequently, the former AT&T Canada filed yet another application with the CRTC seeking wide ranging discounts on the incumbent local exchange carriers’ “next generation network” services and facilities.<sup>48</sup> Having failed, in the proceeding leading to Decision 2002-34 to convince the Commission that it should abandon facilities-based competition in favour of mandatory discounts on any services that it wanted to purchase from the incumbent local exchange carriers, and having failed to convince the Governor in Council to overturn Decision 2002-34, the former AT&T Canada recast yet again its failed proposal to reclassify every service it wished to purchase as essential services that must be made available at cost-based rates, including Ethernet and ADSL services. Notably, in responding to this proposal, TELUS pointed out that the former AT&T Canada petition was based on the strategy of utilizing capital deployed by others, a fact expressly acknowledged as a core business strategy by the former AT&T Canada in an investor presentation at the time.<sup>49</sup>
48. After acquiring the former AT&T Canada, MTS Allstream yet again took up the call for deeply discount access to other providers’ networks in its August 15, 2005 Submission to the Telecommunications Policy Review Panel. In that Submission, MTS Allstream called for the elimination of the “Byzantine system of

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<sup>46</sup> Order in Council P.C. 2003-0385, March 25, 2003.

<sup>47</sup> Speaking Notes, Allan Rock, Minister of Industry, Keynote for the Canadian Wireless Telecommunications Association Awards Dinner, Ottawa, Ontario, March 26, 2003.

<sup>48</sup> AT&T Part VII Application Seeking A Number of Interim and Final Orders Directing the Respondents to File Tariffs for a Variety of “Next Generation” Telecommunications Services and Facilities, April 15, 2003.

<sup>49</sup> AT&T Part VII Application Seeking a Number of Interim and Final Orders Directing the Respondents to File Tariffs for a Variety of “Next Generation Network” Telecommunications Services and Facilities, Answer of TELUS Communications Inc., May 22, 2003, para. 58.

categorization and pricing of competitor services,”<sup>50</sup> calling instead for provision of “wholesale access to all local access and transport facilities...including...next-generation networks and facilities, not just legacy bottlenecks labelled ‘essential’ and ‘near-essential.’”<sup>51</sup> TELUS described the MTS Allstream, and similar proposals filed by other parties, as belonging to the “Go Back” camp, which embraced more regulation, instead of reliance on market forces to the maximum extent feasible, as required by the Policy Direction.<sup>52</sup> In its Discussion Paper filed in response to the Telecommunications Policy Review consultation, the CRTC itself observed that the more competitors rely on the facilities and services of the incumbent, the fewer opportunities there are to compete successfully.<sup>53</sup> The MTS Allstream approach was also opposed by customers, such as the Association of Canadian Manufacturers and Exporters and the Coalition for Competitive Telecommunications and the Canadian Chamber of Commerce, the latter who speaks for Small and Medium-sized Enterprises, the interests of whom MTS Allstream purports to represent in its Petition.<sup>54</sup>

49. Significantly, the Telecommunications Policy Review Panel (te “Panel”) took the opposite view to the MTS Allstream proposal in the Telecommunications Policy Review Panel Final Report 2006 (the “Final Report”) stating that the unbundling of the incumbents’ facilities had already gone too far. In this regard, the Final Report states that a central objective of the telecommunications regulatory framework should be to maximize incentives for network efficiency, innovation and investment, a fundamental determinant of which is the scope of mandated access to wholesale services.<sup>55</sup> Notably, the Panel concluded that the “scope of wholesale access currently required by the CRTC is too broad and that it

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<sup>50</sup> MTS Allstream Submission to the Telecommunications Policy Review Panel, 15 August 2005, Executive Summary, page 5.

<sup>51</sup> MTS Allstream Submission to the Telecommunications Policy Review Panel, 15 August 2005, Executive Summary, page 5.

<sup>52</sup> Reply Comments of TELUS, Telecommunications Policy Review, September 15, 2005, Executive Summary, page iii.

<sup>53</sup> CRTC Discussion Paper, Telecommunications Policy Review, para. 147.

<sup>54</sup> Reply Comments of TELUS, Telecommunications Policy Review, September 15, 2005, para. 48ff.

<sup>55</sup> Final Report, page 3-31.

undermines incentives for competitive entry, investment and innovation.<sup>56</sup> In light of this conclusion, the Panel stated that the “scope of such mandated wholesale access should be narrowed.”<sup>57</sup> While the CRTC originally encouraged competition by resale, the Commission introduced facilities-based competition in the 1990s, recognizing that the construction of network facilities by entrants was necessary to realize the full benefits of competition.”<sup>58</sup>

50. The Panel also noted that the Commission had departed from this approach by mandating that a wide-range of non-essential facilities be made available to competitors.<sup>59</sup> The Panel concluded that continuing to require that incumbents make non-essential facilities available to competitors undermines their incentives to build alternative facilities, to the detriment of efficiency, innovation and investment.<sup>60</sup>
51. Significantly, the Panel considered the argument raised by MTS Allstream that mandating the availability of non-essential facilities actually facilitates, rather than hampers, the construction of facilities by entrants by providing them with a “stepping-stone” until they can build their own facilities.<sup>61</sup> However, the Panel concluded that “there is no evidence in Canada that the CRTC’s “stepping-stone strategy resulted in greater reliance by entrants on their own facilities” and in fact, there was “reason to believe these policies have distorted the behaviour and incentives of new entrants in Canadian telecommunications markets.”<sup>62</sup> The Panel also noted the deleterious effects of unwarranted mandated wholesale access on the incumbents. In this regard, the Panel stated that “because ILECs are forced to share network innovations with competitors, those innovations do not advance the ILECs’ competitive position,”<sup>63</sup> which, “in turn reduces the ILECs’

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<sup>56</sup> Final Report, page 3-31.

<sup>57</sup> Final Report, page 3-31.

<sup>58</sup> Final Report, page 3-32.

<sup>59</sup> Final Report, pages 3-32-3.

<sup>60</sup> Final Report, page 3-33.

<sup>61</sup> See, for example, Petition, para. 12.

<sup>62</sup> Final Report, page 3-35.

<sup>63</sup> Final Report, page 3-35.



- incentives to innovate in those areas,”<sup>64</sup> noting that “the broader the scope of mandated wholesale access, the broader the scope of network components for which incentives to innovate may potentially be reduced.”<sup>65</sup>
52. The Panel also considered another argument advanced by MTS Allstream that a very broad scope of mandated wholesale access promotes all forms of competition.<sup>66</sup> However, the Panel was of the view that “a broader scope makes the distortion of entry and investment decisions more pervasive.”<sup>67</sup> In fact, rather than promoting all forms of competition, a broad scope of unbundling promotes only the resale form of entry that perpetuates disincentives for new entrants to build facilities.<sup>68</sup>
53. Not only would granting the MTS Allstream Petition undermine the Commission’s revised regulatory framework for wholesale services, it would also undermine the findings of the Panel’s Final Report and this Government’s own Policy Direction which substantially adopted the Panel’s findings and recommendations with respect to facilities-based competition and the need to phase-out unnecessary wholesale regulation by turning the clock back to the unwarranted and harmful practice of unbundling of non-essential facilities. The purpose of mandatory unbundling is to facilitate entry allowing entrants to make maximum use of their own facilities they control by allowing them to lease only those facilities from the incumbent that are essential, not merely those that they want and do not feel like duplicating.

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<sup>64</sup> Final Report, page 3-35.

<sup>65</sup> Final Report, page 3-35.

<sup>66</sup> See, for example, Petition, para. 5 where MTS Allstream touts “hybrid” telecommunications service providers who lease essential components and combined them with elements of their own networks. However, it is clear that in the present case that MTS Allstream unjustifiably seeks to lease non-essential components at cost-based rates, thus clearly emphasising resale, rather than facilities-based competition where it would construct its own facilities.

<sup>67</sup> Final Report, page 3-35.

<sup>68</sup> Final Report, page 3-35.

54. MTS Allstream states that it has invested more than \$2.5 billion in competitive network infrastructure since 2001.<sup>69</sup> However, data provided by Lemay-Yates Associates Inc. in support of the Petition show that MTS Allstream has invested only approximately \$1.5 billion in its national network since that time over an 8 year period<sup>70</sup> – which represents a relatively small annual commitment to investment and innovation (as will be shown below). Notably, MTS Allstream has significantly reduced its capital spending on its national network since 2002, after the bursting of the telecom stock bubble, spending \$422 million for the period 2002-2006. TELUS notes that this is significantly less than the \$710 million that TELUS invested in out-of-territory capital expenditures over the same period, which represents a significant commitment to facilities-based competition for a relative new comer to the national scene as compared to the long-established national network operations of MTS Allstream.
55. Regrettably, MTS Allstream omits the reporting of any out-of-territory investment figures for Bell Canada, merely asserting that “Bell is not investing significant capital to serve business markets out of their ILEC territory.”<sup>71</sup> Of course, Bell Canada has committed significant capital expenditures on its Western network in Alberta, as part of the Alberta SuperNet build. MTS Allstream also omits detailing capital expenditures of other facilities-based incumbents, as well non-incumbent facilities-based providers. While this information is not available to TELUS, it is fair to say that TELUS and Bell Canada’s combined capital spending alone has been and continues to be significantly higher than MTS Allstream’s capital spending commitment to national competition.<sup>72</sup>

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<sup>69</sup> Petition, para. 22. See also Lemay-Yates Associates Inc., Next Generation Access: A Canadian and international perspective on why wholesale services should be regulated as essential services, Report presented to MTS Allstream, March 11, 2009, (Lemay-Yates Report), page 38, 42.

<sup>70</sup> Lemay-Yates Report, Table 2, page 39.

<sup>71</sup> Lemay-Yates Report, page 42.

<sup>72</sup> Despite the CRTC’s determination in Decision 2002-34 to create competitor digital network access service, which diminished TELUS’ incentives to invest in facilities out-of-territory, as explained in interrogatory response TELUS(MTS Allstream)12Apr07-106 filed during the PN 2006-14 proceeding. See also Transcripts, Volume 7, para. 13730-34, page 1932ff of the PN 2006-14 proceeding.

56. TELUS' total multi-year investment program, including capital expenditures both in-territory and out of territory (and similar plans by Bell Canada and Bell Aliant) represent some of the largest private capital programs planned in Canada across all industries. The combined capital expenditures of TELUS and Bell Canada constitute the largest private investments in Canada outside of the energy sector. In TELUS' case, the Company had the highest capital intensity (a ratio of capital expenditures to revenue) in 2008 of any peer North American telephone company.
57. TELUS has committed to maintaining significant capital spending in 2009 and going forward to upgrade both its wireline and wireless networks. In this regard, TELUS' capital expenditures in 2009 are forecast to be approximately \$2.05 billion.<sup>73</sup> This compares to MTS Allstream's forecast capital expenditures of approximately \$300 million for 2009.<sup>74</sup> TELUS, for the 2001-2008 time period, has invested approximately \$8.5 billion in its domestic national wireline networks alone. TELUS remains committed to facilities-based competition and to significant capital expenditures to upgrade all of its networks, even despite the current economic climate. Now is not the time for the Governor in Council to accede to MTS Allstream's latest effort to implement a resale-based model of competition that will ruin incentives for future investment and innovation in the telecommunications sector in Canada.
58. Canada is falling behind in productivity and needs new advanced networks to effectively compete on the international stage. But the MTS Allstream Petition will do nothing to improve Canadian productivity. Extensive investment will not occur by competitors if they are able to obtain the non-essential facilities they require at deeply discounted rates. The Petition is a regulatory bail-out and a *disinvestment* scheme that will diminish incentives for facilities-based players to invest in their own facilities. As such, the Petition is about confiscation, not investment.

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<sup>73</sup> TELUS 2008 Financial Review, page 19.

<sup>74</sup> MTS Allstream 2009 Guidance Call.

59. MTS Allstream continues to champion resale and the stepping stone model of competition and its longstanding quest for regulatory and policy bail-outs. The Canadian experience, and international experience, clearly indicate that this is the wrong approach, as explained later in these Comments. The Governor in Council should resist taking the step backwards and should deny the MTS Allstream Petition.

#### **4.2 Competition in the Canadian Business Market**

60. MTS Allstream bemoans the state of competition in the business market. In this regard, a major argument put forward by MTS Allstream is that the cable companies “have focused on a quick retreat from the business markets...”<sup>75</sup> According to Lemay-Yates Associates Inc., “[w]hat has happened since 2005 is essentially a retrench of the business telecommunications activities of cablecos as they have increasingly focused on providing services leveraging their current, residential market, network footprint and technologies...”<sup>76</sup> As an example, MTS Allstream cites Rogers Business Solutions (“RBS”), which it describes is “essentially an evolution of the business telecommunications operations acquired from Call Net in 2005”<sup>77</sup> (Call-Net has been integrated with the prior activities of RBS). Citing declining revenues, lines and capital expenditures at RBS, MTS Allstream states that “RBS has decided to retreat from the medium business and enterprise markets...”<sup>78</sup> pointing to this development as somehow proving a weak state of competition in the business segment.
61. In response, TELUS notes that the Call-Net business acquired by RBS was predicated upon a loop resale model business strategy. While it was in the business interests of RBS to acquire the customers of the former Call-Net, it was an obvious business decision for RBS to migrate these customers over to its own

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<sup>75</sup> Petition, page 21.

<sup>76</sup> Lemay-Yates Report, page 21.

<sup>77</sup> Lemay-Yates Report, page 22.

<sup>78</sup> Lemay-Yates Report, page 24.

cable networks from loops leased from the incumbents wherever possible, given the significantly improved economics of doing so.

62. Such a strategy is obvious. This transition is improving the economics of RBS' business by migrating customers from leased facilities to RBS' own networks. As indicated in Lemay-Yates quotations of RBS at page 24 of its report, RBS "continues to focus on managing the profitability of its existing customer base and evaluate profitable opportunities within the medium and large enterprise and carrier segments," in addition to having RBS cable "increase its sales efforts on the smaller business portion of the market within its traditional cable television footprint." In other words, these statements indicate that RBS continues to pursue new customers in *all* segments of the business market. As such, these statements hardly evidence a "retreat" from the business segment as alleged by MTS Allstream, but rather indicate a prudent and sober reconsideration of its business strategy to more effectively compete for business customers in the future. Notably, as Lemay-Yates acknowledges, Rogers' cable network covers "some of the best business cities in Canada,"<sup>79</sup> which should enable RBS to compete effectively in the business segment in the future.
63. Regardless of the state of competition in the business market, the most important fact is that Ethernet and ADSL services have been duplicated and therefore are not essential facilities. As such, they should not be made available at deep mandated discounts that would only create further disincentives for MTS Allstream to invest in its own networks. Notably, as indicated in the CRTC's Communications Monitoring Report 2008, the incumbent telecommunications service providers' revenue market share (excluding out of territory operations) for new protocol services, including Ethernet services, has been declining from 2003 to 2007 from 68% to 51%. Declining incumbent local exchange carrier share of a growth market is evidence of superior growth of competitors for services in these markets. This is further evidenced by the fact that alternative telecommunications service providers' revenue market share (excluding out of territory), has been

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<sup>79</sup> Lemay-Yates Report, page 24.

growing from 2003-2007, increasing from 13% to 20%. It is also notable that incumbent telecommunications service providers' market revenue share (out of territory) has increased from 2003 to 2007 from 19% to 29%.<sup>80</sup> While not necessarily providing conclusive evidence, these statistics indicate that competitors, such as MTS Allstream are gaining market share for Ethernet services from the incumbent providers, which is consistent with the CRTC's finding that "a large proportion of these [Ethernet] services were either self-provided or obtained from parties other than the ILECs."<sup>81</sup>

### **4.3 MTS Allstream Misrepresents the UK/EU Experience**

64. In support of its Petition, MTS Allstream has commissioned expert evidence from Towerhouse Consulting LLP<sup>82</sup> and Lemay-Yates Associates Inc.<sup>83</sup> purporting to show that the United Kingdom and European Union experience has resulted in greater investment and competition and is somehow an example for Canada.<sup>84</sup> However, MTS Allstream misrepresents the United Kingdom/European Union experience that has resulted in significantly lower levels of investment than in Canada and the United States and which has no practical application to domestic policy due to widespread facilities-based competition which has not occurred in the United Kingdom or elsewhere in the European Union.
65. According to MTS Allstream, "carefully tailored regulation that provides cost-based access to leading-edge telecommunications facilities does not deter investment on the part of the former providers."<sup>85</sup> Instead, according to MTS Allstream, "regulating where necessary on a wholesale level, as has been done in the United Kingdom, enables competitive market forces to bring the benefits of

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<sup>80</sup> Communications Monitoring Report 2008, Table 5.4.3.

<sup>81</sup> Decision 2008-118, para. 16. The Communications Monitoring Report 2008 data are not necessarily conclusive because telecommunications service provider revenues include reseller revenues.

<sup>82</sup> Petition, Ethernet and Other Next Generation Access: Lessons from the UK Example, Towerhouse Consulting LLP, 9<sup>th</sup> March 2009 ("Towerhouse Report").

<sup>83</sup> Lemay-Yates Report.

<sup>84</sup> As indicated by example, in the Petition, para. 74-76.

<sup>85</sup> Petition, para. 4.

price and innovation to consumers and businesses in a deregulated retail environment.”<sup>86</sup>

66. In response to these reports, TELUS has commissioned expert evidence from Dr. Robert Crandall, Senior Fellow in Economic Studies, the Brookings Institution, which refutes these claims. In his report entitled “Response to ETI, Lemay-Yates, and Towerhouse Reports,” attached to these Comments, Dr. Crandall states:

The Lemay-Yates and Towerhouse Reports also contain a favorable view of the United Kingdom regulator’s (Ofcom’s) aggressive policy of requiring unbundling and functional separation of British Telecom. Neither Report provides empirical substantiation for such views. In fact, since Ofcom’s new policy was launched in 2005, the United Kingdom has suffered a much greater slowdown in broadband growth than have the rest of the EU-15. Moreover, although British Telecom has been investing somewhat more aggressively in its fixed-wire operations than has the average EU-15 incumbent, it invests far less than the four major North American incumbents, TELUS, Bell Canada, AT&T, and Verizon.

67. As Dr. Crandall explains, the United Kingdom’s telecommunications policy changed substantially when a new regulatory agency, Ofcom, replaced the old regulatory regime in 2002. Ofcom became much more aggressive in forcing the incumbent carrier, British Telecom (“BT”), to pursue a non-discriminatory wholesale access policy, even requiring BT to undertake a functional separation of its wholesale and retail operations. Notably, Ofcom pursued these policies because it concluded that there was little likelihood of meaningful broadband competition from the United Kingdom cable sector. In the United Kingdom, the cable television companies had lagged badly in deploying network facilities and accounted for only about one-quarter of broadband connections by late 2005.
68. Functional separation is a regulatory remedy that is being considered in the United Kingdom and other countries that see no prospect of facilities-based competition. Of course, these circumstances do not prevail in Canada. Obviously,

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<sup>86</sup> Petition, para. 4.

- the broadband market is very different in Canada; virtually ubiquitous cable television facilities are responsible for more than half of Canada's broadband connections. This fact alone makes functional separation a remedy that is inapplicable to Canada because, unlike the United Kingdom, the incumbent telephone network faces widespread facilities-based competition from cable companies and other facilities-based providers.
69. In any event, the new United Kingdom policy has not worked. The new Ofcom policy has resulted in a deceleration of the growth of broadband in the United Kingdom. While the Lemay-Yates report shows that BT's capital expenditures have remained at about 16 percent of revenues for several fiscal years,<sup>87</sup> Dr. Crandall notes that it fails to mention that this is far less than the capital spending by the major U.S. and Canadian carriers. BT lags substantially behind the two large U.S. incumbent carriers and the two major Canadian carriers.<sup>88</sup>
70. The Towerhouse Report claims that the United Kingdom approach has been received enthusiastically elsewhere in "Europe and the wider world,"<sup>89</sup> but provides no support for this statement. Indeed, functional separation, which is a centre-piece of the new UK approach, has not received widespread acceptance elsewhere in Europe, having only been adopted in Italy and Sweden, and having been opposed Germany and Spain and rejected in the Netherlands. Not surprisingly, Towerhouse omits mentioning the difficulties in implementing functional separation which have proven more complicated than originally anticipated.<sup>90</sup>
71. Towerhouse's comments with respect to wholesale DSL service are particularly unconvincing. Incredibly, Towerhouse acknowledges that Ofcom has not directly regulated the prices for these services,<sup>91</sup> which is what MTS Allstream is calling

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<sup>87</sup> Lemay-Yates Report, p. 74.

<sup>88</sup> Crandall Report, page 14.

<sup>89</sup> Towerhouse Report, para. 3.

<sup>90</sup> See, for example, *Is Functional Separation BT-Style the Answer?*, Jason Whalley & Peter Curwen, *Communications and Strategies*, No. 71, 3<sup>rd</sup> quarter 2008, p. 145ff.

<sup>91</sup> Towerhouse Report, page 13.



for from the Governor in Council. In fact, Ofcom rejected the case for price controls because, as Ofcom noted “in a developing market characterised by growth and innovation, such as broadband, it is difficult for a regulator to predict with sufficient accuracy how the market will develop and thus there is a risk that any price regulation could turn out to be inappropriate and result in reduced levels of investment, which would ultimately be to the detriment of consumers both residential and business.”<sup>92</sup> Of course, MTS Allstream is asking the Governor in Council to do the very opposite of what Ofcom has done – they want the CRTC to wade into a market characterised by growth and innovation and impose heavy-handed price controls in the form of highly discounted access to investments made by other companies.

72. The Lemay-Yates Report and Towerhouse Report also point to the European Union experience in support of its unbundling proposal. However, as noted by Dr. Crandall, these reports contain no empirical support for the proposition that EU policies have resulted in greater investment and broadband penetration than in the United States and Canada. In fact, as Dr. Crandall states, while there is no evidence that these unbundling policies have had a favourable effect on broadband penetration, there is ample evidence that investment in telecommunications is much lower in the European Union than in the United States and Canada. Dr. Crandall concludes that the evidence suggests that the EU lags behind North America rather badly in telecom capital spending, demonstrating that North American companies invested two-thirds more than the EU-25 telecom companies per capita in 2006.<sup>93</sup> Notably, the EU-15 remain behind the United States and Canada in broadband penetration despite these policies.<sup>94</sup>
73. Dr. Crandall’s Report clearly shows that the aggressive unbundling regimes in the United Kingdom and the European Union depress investment levels. Significantly, as noted by Dr. Crandall, there is a growing literature demonstrating

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<sup>92</sup> Ofcom, Review of the wholesale broadband access markets, on May 21, 2008, para. 5.30.

<sup>93</sup> Crandall Report, page 10.

<sup>94</sup> Crandall Report, page 9.

the ineffectiveness of unbundling in promoting broadband diffusion and the negative effect of unbundling on network investments which is not refuted by the three reports submitted by MTS Allstream that he reviews. Surprisingly, this literature is not even addressed or acknowledged in the reports filed by MTS Allstream.<sup>95</sup>

#### **4.4 MTS Allstream Misrepresents the US Regulatory Experience**

74. In support of its Petition, MTS Allstream has also commissioned expert evidence from ETI Economics and Technology Inc<sup>96</sup> purporting to show that in the United States, “deregulation of access has led to less competition, less investment and higher prices,”<sup>97</sup> and that this conclusion somehow supports its request for further unbundling on non-essential facilities. However, Dr. Crandall has also reviewed the ETI submission and demonstrates that ETI’s analysis misrepresents the United States regulatory experience and is significantly flawed in many respects.
75. Based on the ETI Report, MTS Allstream states that United States deregulation of access in 2001 resulted in a decline in competition and investment since that time.<sup>98</sup> However, Dr. Crandall points out that ETI misleadingly argues that United States deregulation of network unbundling began in 2001 that resulted in a downturn in network investment since there was, in fact, no such deregulation until after the Federal Communications Commission (“FCC”) was reversed by the Federal courts in 2004 for the third time.<sup>99</sup> The decline in network investment in 2001—in the United States and throughout the world –was caused by the bursting of the telecom stock bubble, not by any alleged deregulation.<sup>100</sup> Dr. Crandall also notes that the collapse of the United States local entrants began in 2000-01, not

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<sup>95</sup> Crandall Report, page 4.

<sup>96</sup> Petition, The Role of Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition, ETI Economics and Technology Inc., March 2009.

<sup>97</sup> Petition, para. 74.

<sup>98</sup> Petition, para. 77.

<sup>99</sup> Crandall Report, pages 6, 15.

<sup>100</sup> Crandall Report, page 7.

- because of deregulation, but because investors began to understand at that time that these entrants did not have sound business plans.<sup>101</sup>
76. Notably, the degree of network unbundling was not reduced until 2005-06, and even then the FCC only acted when required to do so by a third federal court reversal of its liberal unbundling rules.<sup>102</sup> Dr. Crandall concludes that United States telecommunications capital spending only began to rebound in 2005, *after* the 2004 Federal Court decision that upheld the FCC's decision not to require unbundling of new fiber-optic access lines and the court's instruction to the FCC to scale back its unbundling regime.<sup>103</sup> Dr. Crandall states that it was at this time that Verizon and AT&T (the "new" AT&T) began to deploy fiber to the premises (or to the curb, in AT&T's case), suggesting that "deregulation" in the United States led to a *rise* in capital spending, not to a reduction as the ETI Report claims.<sup>104</sup>
77. The United States experience, properly interpreted, is instructive. When the FCC relaxed unbundling rules, investment went up, and investment remains up at a much higher per capita level than in the European Union where there are more invasive wholesale regimes in place. Widespread unbundling, including of "next generation network" facilities, is not the appropriate policy prescription for Canada going forward. Such an approach, as suggested by MTS Allstream, should be rejected.

#### **4.5 No Lessons to Be Learned from the AWS Model**

78. In its Petition, MTS Allstream suggests that the Government of Canada should follow the AWS model which, according to MTS Allstream, recognized that regulation was required to foster competition where market forces are insufficient and to mandate sharing of facilities rather than force competitors to engage in

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<sup>101</sup> Crandall Report, page 15.

<sup>102</sup> Crandall Report, page 7.

<sup>103</sup> Crandall Report, page 8.

<sup>104</sup> Crandall Report, page 8.

- unnecessary duplication or costly access measures that would inevitably be detrimental to consumers.<sup>105</sup>
79. The Government' of Canada's AWS policy is of no assistance or relevance to MTS Allstream in the context of Ethernet and DSL services.
80. Wireless services are very different from services delivered over a terrestrial network (such as Ethernet and DSL services). Wireless services use a finite resource – radio spectrum – to which access is carefully controlled by governments the world over (including the Canadian government). Strict control over market entry and the terms and conditions for market entry is a central feature of spectrum management policies. Therefore, the Canadian Government has historically determined the market structure in the wireless industry by determining who can enter, what spectrum they may use, and on what terms and conditions.
81. Wireline telecommunications is, however, vastly different. There are no entry controls in Canada for the provision of Ethernet and DSL services. Anyone can enter into the market and begin providing those services (or services that are substitutes) provided they comply with foreign ownership requirements and any applicable CRTC rules. Accordingly, it makes no sense to point to actions which the Canadian government took to allow for additional wireless entry. Wireless services are subject to strict entry controls and policy decisions taken in that area offer no precedent or analogy for suitable policy actions concerning wireline telecommunications. Contrary to MTS Allstream's view, there are many providers of Ethernet and DSL services, or their substitutes, across Canada. There is no need for the Federal Government to take actions to artificially create or sustain entry in respect of these services.
82. MTS Allstream points to the roaming rights that new entrants acquire under the AWS policy and suggests, by analogy, that the government should take action to grant MTS Allstream access to Ethernet and DSL facilities of the incumbent

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<sup>105</sup> Petition, para 13, 41ff.

telephone companies. This analogy is of no assistance. MTS Allstream is not a new entrant in the wireline segment. It is the incumbent of incumbents: it has been operating in Canada since the 1840s through its various predecessor companies including the telegraph operations of CP Rail. As a result, MTS Allstream has no moral claim to any policy relief that might be afforded to an entrant. In any event, the facilities at issue are demonstrably duplicable and, as a result, the government should not be establishing discounted, preferential access for anyone, including entrants.

83. The analogy with roaming rights fails for three other reasons. First, the roaming rights established under the AWS policy are time-bounded, whereas the access that MTS Allstream is seeking to Ethernet and ADSL facilities would be perpetual. Second, the Federal Government signalled that roaming rates would be set through commercial negotiations, with arbitration as a fallback mechanism. However, MTS Allstream, is not seeking that rates for access to Ethernet and ADSL facilities be set commercially - rather, it wants the rates for these facilities to be established by Cabinet intervention, at the lowest cost-based rates. Third, roaming is the use of a “slice” of an incumbent’s network capacity by the end customer of another carrier on a temporary, transient, mobile basis while using their own terminal equipment. Provisioning capacity for another carrier at discount rates for an indefinite period of time is not roaming and, therefore, the analogy again fails.
84. What MTS Allstream is really seeking is resale. Notably, provision of mandated resale for new entrants by incumbents was specifically rejected by Industry Canada in their AWS policy. It was recognized by Industry Canada during the policy formulation stage that mandated resale acts as a strong disincentive to durable, facilities-based competition and thus they chose to reject it as should the Governor in Council in the present instance.
85. MTS Allstream also points to the tower sharing rules established under the AWS policy and suggests, by analogy, that the Governor in Council should take actions

to grant MTS Allstream access to Ethernet and ADSL facilities of the incumbent telephone companies. Again, this analogy is of no assistance to MTS Allstream. Towers are demonstrably duplicable. The primary rationale for sharing them is an aesthetic and environmental one: municipalities are increasingly objecting to a proliferation of support structures. So, from this perspective, forced sharing of tower assets makes some practical sense. It is for this reason that such facilities were classified as public good services in Decision 2008-17. However, no such issues obtain with Ethernet and ADSL facilities and their substitutes. Most of this plant is buried and not seen by anyone. Thus, the aesthetic and environmental concerns that motivate forced tower sharing do not obtain.

86. Finally, the invocation of the set-aside dimension of the AWS policy offers no precedent that the Government should embrace and extend to wireline telecommunications. The market for the provision of such services is completely open. The facilities at issue are demonstrably duplicable. And, in any event, auction set-asides are a form of preferential treatment that does not represent best practice and has, accordingly, fallen out of favour with regulators outside of Canada and have been condemned in the academic literature.<sup>106</sup> The set-aside dimension of the AWS policy does not offer a policy that ought to be repeated in Canada, by analogy, or otherwise.
87. In short, MTS Allstream's appeal to the Government of Canada's AWS policy is of no assistance or relevance to MTS Allstream in the context of Ethernet and DSL services. The AWS model provides no reasons whatsoever for the Governor in Council to grant the relief requested.

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<sup>106</sup> See, for example, Crandall, Robert W. and Ingraham, Allan T., The Adverse Economic Effects of Spectrum Set-Asides. Canadian Journal of Law & Technology, Vol. 6, pp. 131-140, November 2007. Available at SSRN: <http://ssrn.com/abstract=992865>.

## 5.0 The Petition Runs Contrary to the Policy Direction and the Canadian Telecommunications Policy Objectives

88. In the Petition, MTS Allstream pays mere lip service to Order in Council 2006-1534, *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, issued in December 2006 (the “Policy Direction”). MTS Allstream refers to section 1(c)(ii) of the Policy Direction emphasizing the “potential for incumbents to exercise market power in the wholesale and retail markets...in the absence of mandated access to wholesale facilities.”<sup>107</sup> However, MTS Allstream fails to elaborate upon this point, except to state that the Policy Direction does not mandate deregulation which would impede the development of competition,<sup>108</sup> and that the CRTC “confuses smart regulation with deregulation.”<sup>109</sup>
89. These vague and meaningless comments evidence the fact that MTS Allstream has failed to engage the requirements of the Policy Direction in any serious manner. The Policy Direction requires the CRTC to rely more heavily on market forces than regulation.<sup>110</sup> Section 1(c)(ii) of the Policy referred to by MTS Allstream required the CRTC re-examine and *phase out* an extensive system of rules mandating the sharing of telephone company networks in light of the central command to rely on market forces to the maximum extent feasible as the means of achieving the Canadian telecommunications policy objectives. The CRTC undertook a review of the wholesale regulatory regime in the proceeding to Decision 2008-17, as required by section 1(c)(ii) of the Policy. After an examination of the facts, the CRTC determined that Ethernet and ADSL services are not essential, and that in the case of Ethernet services, they should be subject to phase out in light of the prevalence of competitive alternatives.

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<sup>107</sup> Petition, para. 40.

<sup>108</sup> Petition, para. 41.

<sup>109</sup> Petition, para. 46.

<sup>110</sup> Policy Direction, section 1(a)(i).

90. Not surprisingly, MTS Allstream conveniently chooses to ignore these facts. Instead of heeding the Policy Direction's command to phase out regulation, MTS Allstream continues to apply to the CRTC and petition the Governor in Council calling for the expansion of wholesale regulation by mandating perpetual, deeply discounted pricing for Ethernet and ADSL services. Such a request also clearly runs counter to the central requirement of the Policy Direction for greater reliance on market forces.
91. MTS Allstream also ignores section 1(b)(ii) of the Policy Direction that requires the Commission, when relying on regulation, to use measures that, if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry. MTS Allstream's requested relief violates section 1(b)(ii) of the Policy Direction by calling for the artificial lowering of the price of Ethernet and ADSL services, which would deter economically efficient competitive entry into the market on the part of other facilities-based providers besides the incumbents.
92. The MTS Allstream Petition runs contrary to certain key Canadian telecommunications policy objectives. By requesting more regulation, not less, MTS Allstream's Petition is contrary to section 7(f) of the *Telecommunications Act* which is to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective. The Petition is also contrary to the policy objective of enhancing the efficiency and effectiveness, at the national and international levels, of Canadian telecommunications, by deterring the economically efficient competitive entry of competitors as noted above. Most fundamentally, the Petition runs contrary to policy objective 7(g) which is to stimulate research and development and to encourage innovation in the provision of telecommunications. In promoting a resale model of competition, the MTS Allstream Petition works against this objective.



93. MTS Allstream boldly states that the “Government must reclaim its agenda”<sup>111</sup> since “the CRTC has lost its way.”<sup>112</sup> According to MTS Allstream, the CRTC’s recent actions are “rooted in the outdated and failed notion that the way to encourage investment is to permit incumbents with a dominant market position to charge competitors monopolistic rates for access.”<sup>113</sup> Such hyperbole should be ignored. The Governor in Council should stay the course and uphold the CRTC’s determinations by denying MTS Allstream’s latest resale-based Petition that clearly runs contrary to the Policy Direction and the Canadian telecommunications policy objectives.
94. The CRTC’s determinations are compliant with the Policy Direction and the policy objectives of the *Telecommunications Act*. As such, the Commission has carried out its mandated role of implementing the Government of Canada’s policy framework. MTS Allstream is, in effect, appealing a finding of fact on the part of the CRTC. As noted earlier in these comments, MTS Allstream alleges that the classification of Ethernet services as non-essential subject to phase-out was based on “a lack of evidentiary foundation for its conclusion that the facilities in question are duplicable by competitors.”<sup>114</sup> According to MTS Allstream, the CRTC reached a faulty conclusion by relying on an interrogatory that provided percentages, rather than absolute numbers of Ethernet circuits.
95. Notably, section 52 of the *Telecommunications Act* states that the Commission may, in exercising its powers and performing its duties under the *Telecommunications Act* (or any special act), determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.<sup>115</sup> As a result of this power, CRTC findings of fact are not reviewable by the courts.<sup>116</sup>

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<sup>111</sup> Petition, heading prior to para. 1.

<sup>112</sup> Petition, para. 6.

<sup>113</sup> Petition, para. 7.

<sup>114</sup> Petition, para. 7.

<sup>115</sup> *Telecommunications Act*, section 52(1).

<sup>116</sup> *Telecommunications Act*, sections 52(2), 64.

96. Section 52 sends a strong legislative signal that Commission’s findings of fact are not to be interfered with. Even if not binding upon the Governor in Council, there is merit to show deference to the CRTC within the Commission’s areas on institutional expertise. While the Governor in Council has a very broad discretion to intervene and clearly has the authority to review narrow, detailed findings of fact, the Governor in Council does not normally take on such a role. Rather, the Governor in Council normally assumes a supervisory role,<sup>117</sup> looking into broad lines of policy.<sup>118</sup> Given its broader supervisory role, the Governor in Council should decline to “put on the green shade” as requested by MTS Allstream and deny MTS Allstream’s request to reclassify Ethernet (and ADSL) services. The CRTC’s actions are consistent with the Policy Direction and the Canadian telecommunications policy objectives and as a result, the Governor in Council’s supervisory role with respect to policy errors is not engaged. The Governor in Council should decline to interfere with findings of fact that are squarely within the Commission’s domain of institutional expertise.

## **6.0 Procedural Objections to the MTS Allstream Petition**

97. The MTS Allstream Petition should be rejected by the Governor Council on procedural grounds. It is now beyond the permitted time to overturn the definition of an essential facility outlined in Telecom Decision 2008-17 as suggested by MTS Allstream. TELUS elaborates upon this point below.
98. In its Petition, MTS Allstream states that “the CRTC’s Ethernet Decision was based on an erroneous application of its test for where access to a facility should be mandated (the “essential facility test”).<sup>119</sup> However, this is not the case.

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<sup>117</sup> *CSP Foods Ltd. and Canbra Foods Ltd.* [1979] 1 F.C. 3.

<sup>118</sup> As noted by former Minister of Industry Rock “the government’s role is to establish the policy environment. As much as possible, we must leave implementation to the CRTC, which has unique competence to render judgments on the technical matters at stake” (Speaking Notes for Allan Rock, Minister of Industry, Keynote for the Canadian Wireless Telecommunications Association Award Dinner, Ottawa, Ontario, March 26, 2003).

<sup>119</sup> Petition, para. 7.

99. As noted above, the Commission’s test for an essential facility is 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.<sup>120</sup>  
[italics in original, footnote omitted]

100. Although originally endorsing the CRTC’s broadened definition of an essential facility,<sup>121</sup> MTS Allstream now alleges that the CRTC misapplied its own essential facilities test in determining that Ethernet facilities are duplicable in Decision 2008-17.<sup>122</sup> According to MTS Allstream, the third limb of the test does not specify evidence of self-supply is *some* locations, or a high incidence of self-supply, rather, duplicability must be everywhere on a national scale, to a “large proportion” of locations.<sup>123</sup>

101. In this regard, MTS Allstream states that it “would have to spend billions to duplicate existing networks in Toronto and other major Canadian cities, just to serve the customers it already has, let alone to compete for new ones.”<sup>124</sup> MTS Allstream refers to the “overbuilding of the former monopolies’ networks,”<sup>125</sup> stating that “[i]t is important to recognize that there is no scenario under which complete competitor self-supply is a reality”<sup>126</sup> [underlining in original].

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<sup>120</sup> Decision 2008-17, para. 37.

<sup>121</sup> MTS Allstream Annual Report 2008, page 6.

<sup>122</sup> Petition, para. 60.

<sup>123</sup> Lemay-Yates Report, page 15.

<sup>124</sup> Petition, para. 8.

<sup>125</sup> Petition, para. 73.

<sup>126</sup> Petition, para. 74.

102. In response, MTS Allstream's national scale argument, as it applies to the third limb of the essential facilities test, is without merit as it has no theoretical justification. This argument has already been considered and dismissed by the CRTC in Decision 2008-118 where the Commission dismissed it as follows:

The Commission notes that according to MTS Allstream's argument, the test for essentiality would consider whether competitors can duplicate the functionality of the facility on a national scale. The Commission also notes that the third condition for essentiality is that it is not practical or feasible for competitors to duplicate the functionality of the facility in question; however, it does not require that duplication by competitors be on a national scale. The Commission considers that such a requirement would amount to a condition that facilities-based competition must occur nationally on a complete end-to-end basis before ILEC services could be deemed to be non-essential. In Telecom Decision 2008-17, the Commission noted that no expert witness or party submitted evidence or argument that national facilities-based competition on a complete end-to-end basis is a reasonable goal.<sup>127</sup>

103. MTS Allstream's argument for national scale is also refuted by the fact that it is able to effectively serve its customers across Canada without achieving national scale, including bank customers it purportedly finds so difficult to serve.<sup>128</sup> In this regard, MTS Allstream recently noted with respect to its Enterprise Solutions Division that "[t]he division's advanced services, combined with the impressive reach of a state-of-the-art network and continued leadership in technological innovation, have allowed the company to forge strong relationships with top national business customers across the country."<sup>129</sup> It is also notable that MTS Allstream's Enterprise Solutions division set a record for contract wins in 2008, including many new contracts across the country.<sup>130</sup> These facts alone cast serious doubt on the MTS Allstream Petition.

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<sup>127</sup> Decision 2008-118, para. 17.

<sup>128</sup> Petition, para 83.

<sup>129</sup> MTS Allstream Fourth Quarter 2008 Management's Discussion and Analysis, page 2.

<sup>130</sup> MTS Allstream News Release: Manitoba Telecom Services Inc. Reports Solid 2008 Results, Achieves Annual Guidance, page 2-3.

104. For all of the above reasons, it is apparent that the CRTC did not misapply its own essential facilities test. Rather, the Commission has applied its test for an essential facility properly, thus providing no grounds for Governor in Council to intervene.
105. By granting the Petition, the Governor in Council would in effect be changing the third limb of the test for an essential facility by requiring it to be applied on a national basis. However, the time has past to overturn the definition of an essential facility. Section 12 of the *Telecommunications Act* states

12(1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council with ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.<sup>131</sup>

Decision 2008-17 was issued over a year ago, on March 3, 2008. An appeal to change the definition of an essential facility would have had to been made within ninety days of Decision 2008-17, the deadline for which has long passed.<sup>132</sup> This is an absolute bar to the granting of the relief requested by MTS Allstream.

## 7.0 Conclusion

106. The MTS Petition should be rejected. MTS Allstream claims that it is “committed to investing in the provision of advanced telecommunications facilities in Canada,”<sup>133</sup> and that it is “committed to a regime that spurs

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<sup>131</sup> *Telecommunications Act*, section 12(1).

<sup>132</sup> MTS Allstream also suggests replacing the essential facilities test altogether with an alternative test based on a market coverage criterion utilized in the CRTC's test for local forbearance (Petition, Lemay-Yates Associates Inc., Next Generation Network Access: A Canadian and international perspective on why wholesale services should be regulated as essential facilities, Report presented to MTS Allstream, March 11, 2009, page 6).. The local forbearance test requires, among other things, the presence of independent facilities-based carriers capable of serving 75% of the number of lines in a local exchange. Ironically, MTS Allstream condemns this very test for raising prices for business customers elsewhere in its Petition (para. 89). Of course, the time to replace the essential facilities test with a different one has also expired.

<sup>133</sup> Petition, para. 25.

competitive market forces.”<sup>134</sup> Of course, the truth of the matter is exactly the opposite claimed by MTS Allstream – the Petition is, in fact, all about non-investment. The very purpose of the Petition is to obtain Ethernet and ADSL services at the lowest possible rates *precisely in order to avoid having to invest in its own facilities*. It is clear from the Petition that MTS Allstream has no interest whatsoever in investing for the benefit of Canada and Canadians and is, instead, seeking to enlist the Governor in Council to secure a regime of mandatory access to other people’s investments so that they can minimize investing in their own facilities.

107. The Petition, at bottom, is a reincarnation of similar applications, petitions and submissions filed by MTS Allstream and its predecessor companies that been rejected by Governor in Council, rejected by the Telecommunications Policy Review Panel, and rejected serially by CRTC in its second price caps ruling, its recent wholesale regulatory framework ruling and subsequently again on appeal. It should be rejected again now by the Governor in Council.
108. The MTS Allstream Petition is objectionable procedurally as it seeks to change the CRTC’s test for what facilities should be mandated at cost-based rates when the time to do so has past. The Petition also runs contrary to Government’s own Policy Direction and the Canadian telecommunications policy objectives passed by Parliament since it calls for greater government intervention rather than a greater reliance on market forces. The CRTC’s actions are consistent with the Policy Direction and the Canadian telecommunications policy objectives and a result, the Governor in Council’s supervisory role with respect to policy errors is not engaged. The Governor in Council should decline to interfere with findings of fact that are squarely within the Commission’s domain of institutional expertise.
109. The MTS Petition puts forward evidence that purports to show that the regulatory policies in the United Kingdom and European Union that call for aggressive

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<sup>134</sup> Petition, para. 25.

unbundling of the incumbents' networks should be adopted in Canada. However, these policies have resulted in less per capita investment than in Canada and the United States and have not resulted in higher broadband penetration rates. The United Kingdom and Europe continue to lag behind Canada and the United States where there is much more widespread competition from cable networks and other competitors. MTS Allstream's attempts to show that deregulatory policies invoked in the United States have resulted in declining capital investment are also flatly contradicted by the facts – it is only after the FCC was forced to abandon its aggressive unbundling policies by the Courts that capital investment has rebounded in the United States.

110. As the Governor in Council is aware, TELUS filed a petition<sup>135</sup> to the Federal Cabinet on the same date as the MTS Allstream Petition. In this Petition, which also concerns Aggregated ADSL Access services, TELUS is seeking a very different outcome than MTS Allstream. Rather than requesting further, unwarranted and harmful regulation of Aggregated ADSL Access services, TELUS is requesting that the Governor in Council overturn the CRTC's determination to require the unbundling of new higher speeds for these services on a going forward basis. TELUS requests that the Governor in Council deny the MTS Allstream Petition which will impede investment and innovation, and grant the TELUS' petition request which will further investment in these facilities.
111. Given the current economic climate, now is not the time to consider the anti-innovation and anti-investment proposal that has been put forward by MTS Allstream. The Petition will not restore economic confidence and growth, but in fact achieve the opposite result. In the current circumstances, the Governor in Council should be pursuing policies that encourage private sector investment in lagging Canadian communications infrastructure, not policies that discourage it. The MTS Allstream Petition puts TELUS' investments at risk by requiring

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<sup>135</sup> Petition to the Governor in Council Regarding Telecom Decision CRTC 2008-117, *Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services* and Telecom Order CRTC 2009-111, *Cybersurf's application related to the implementation of Telecom Decision CRTC 2008-117 regarding the matching speed requirement*, March 11, 2009.

sharing of new investment with arbitragers such as itself at low cost-based regulated rates, a policy prescription that has failed both in Canada and in other countries.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4<sup>TH</sup> DAY OF MAY, 2009.