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 2008-117 regarding the matching speed requirement

by:

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1.0 A CRITICAL JUNCTURE FOR CANADA

1. TELUS's capital program for 2009 will see it invest $2.05 billion dollars in its networks. Hundreds of millions of dollars have been spent in a multi-year investment in advanced wireline infrastructure to support next generation broadband services. Rather than encourage our willingness to risk investment in uncertain times the CRTC has declared that we will be required to share this new investment with arbitragers at regulated rates.

2. TELUS is requesting that the Government overturn this decision and reinforce its commitment to encouraging private sector investment in critical infrastructure

3. Canada is at a crossroads. This country, along with others globally, is facing its most serious economic crisis in many decades. Clearly, the number one priority of the government is to restore economic confidence and promote growth. One of the most important means to achieve this is by stimulating new capital investment. Government and the private sector can work together to ensure that investments are made in such critical areas as Canada's lagging infrastructure. In fact, the government has recently announced that it will fund significant investments in Canada's infrastructure as part of Canada's Economic Action Plan: Budget 2009[1].

4. TELUS is prepared to help the government achieve its goal but its efforts are being frustrated by policies and determinations of the CRTC that are inconsistent with promoting investment in Canada's communications infrastructure.

5. At a time when private investment is contracting and markets are putting downward pressure on our market capitalization due to uncertainty, TELUS has followed through on a multi-year investment program based on our view of where our company needs to be to grow into the future. We have assumed the risk of investing in the longer term. The CRTC decision increases that risk in a punitive, unfair and unnecessary fashion.

6. These new networks are being funded 100% through internal resources. As Internet access facilities, they are open to consumers and application providers alike. They are not

[1] http://www.fin.gc.ca/n08/09-011-eng.asp#Back

monopoly facilities. In fact, TELUS is not the market leader in terms of market share or network speed today.

7. These new networks are not similar to old monopoly-era copper investments. The idea that new facilities built through private investment and critical to Canada's competitiveness must be subject to arbitrage at our risk is irrational on many levels.

8. Broadband Internet is recognized around the world as critical infrastructure for 21st century economic and regional development. Without advanced broadband, there can be no platform to drive economic growth. Yet in a decision recently released, the CRTC has ordered that all such investments must be shared with TELUS' competitors. Such intervention, in some cases even before we have deployed the services, is hostile to investment, unfair, and unprecedented in North America.

9. The CRTC's approach is a totally inconsistent with the goal of creating new investment without government assistance. In the U.S., the FCC chose almost four years ago not to impose sharing of these advanced broadband networks because it wants to create the right incentives to ensure that the United States regains its leadership in high technology. As a result, the most advanced next generation networks in North America are now being built in the United States. By contrast, because of misguided CRTC regulation, Canada is now behind and may fall even further behind at this critical juncture.

2.0 HOW GOVERNMENTS ARE RESPONDING TO THE ECONOMIC CRISIS

10. Many of Canada's major trading partners are taking broadly similar measures to address the current economic challenges. Apart from dealing with the problems of the capital markets, many are stimulating their economies with substantial expenditure programs by government. In particular, public investment in infrastructure modernization is being pursued in Canada, the U.S., and other countries.

11. There is a broad consensus that investment in next generation broadband infrastructure will pay both short-term and long-term dividends. Such networks enhance the availability, quality, and efficiency of services, and benefit the whole economy. They provide the platform for faster economic growth and enhanced productivity, an area in which Canada has been weak compared to others, such as the U.S. The economic and

social benefits of greater investment in broadband networks have been recognized in Canada for many years. In 2001, the Report of the Canadian National Broadband Task Force stated:

> "The impact of broadband communications on Canadian life will be at least as great as the impact of railways, highways, airlines, traditional telecommunications and broadcasting."

12. In the U.S., the new administration has enacted a broad stimulus package that includes $7.2 billion (U.S.) in funding for investment in broadband network expansion. In Canada, the government has recently announced a $225 million plan to support investment in expanded broadband infrastructure. Both governments recognize the economic and social benefits of investment in broadband.

13. The public sector cannot and should not be expected to bear sole responsibility for modernizing Canada's broadband networks. The public funding announced by the government for broadband expansion should be supplemented by even larger private sector investments in next generation networks. TELUS, and other telecommunications carriers such as Bell Canada and Bell Aliant, have stepped forward with commitments to invest hundreds of millions in such networks over the next several years. These commitments are not trivial and are not without risk, particularly in the current economic climate. TELUS is increasing its capital expenditures at a time when other firms in every sector of the economy are contracting their capital spending programs. In the short term, TELUS' calculated and focused investments have led to lower valuations relative to carriers who are investing less. In this context, any reasonable observer would expect Canadian regulatory policy to be supportive of such enlightened investments.

14. Regrettably, the CRTC has adopted a policy regarding these advanced networks that is extremely investor-hostile. The contrast with the policy in the United States is striking. In the U.S., companies that take the risk and invest in next generation networks get the benefit of their own investments. Companies that do not invest do not get to ride on the investments made by others. By contrast, the CRTC has decided that, whenever TELUS invests in high-speed, next generation networks, it must let its competitors ride on and use such networks. This business-as-usual approach to regulatory policy, which has

decidedly failed to encourage investment in the past, is precisely what is not needed in these extraordinary economic times.

15. Not surprisingly, under the investor-friendly policy applied in the U.S., companies such as Verizon and AT&T are now investing billions of private capital in next generation networks. In Canada, the CRTC has decided that any similar investments by Canadian companies must be shared with competitors. Those that take no investment risk still get to ride on the new facilities funded by others.

16. The CRTC's misguided policy appears to be based on a distinction between services that make some use of copper facilities and those that run entirely over fibre optic facilities. According to the CRTC's current policy, while the former are and will be subject to mandated access, the latter may, one day, be free from regulation. Under the CRTC's skewed logic, mandated access is supposedly justified if a service makes any use of copper facilities.

17. Rather than being technology neutral, the CRTC policy is technology biased. It reflects a profound misunderstanding of the technical requirements of next generation networks and how these networks in Canada must develop going forward. From a technical and pragmatic perspective, it will make sense in many locations to make some use of existing copper facilities. Yet, this increasingly insignificant copper component cannot, as the CRTC would have it, be said to define the network as a whole. In order to offer customers an array of new advanced, high-speed services, capital investments must be made to transform most of the network. To group these new services together with older services like basic ADSL or dial-up access simply because there may be some use of copper is inconceivable. This is like saying a stagecoach and a jetliner are more or less the same service in the same market because they both have wheels and take people from one place to another.

18. Indeed, Telecom Order 2009-111 (at paragraph 13) expressly states that substantial increases in speed and functionality of the new networks do not change the nature of the service or create a different kind of service. This astonishing, naive perspective conflicts with market reality and the Commission's own long-standing policy on this very point. Over ten years ago (in Telecom Decision 98-9), the Commission correctly recognized

that a substantial change in the speed of access services results in different services which are not substitutes. The Commission found that the enhanced functionality of higher speed technology results in fundamentally different services and applications becoming available. Put simply, there is a change in the market and the change is so significant that the market is re-defined. That analysis clearly should apply to the impending advances in Canadian networks. A 500 Kbs ADSL service will simply not be comparable to a 15 Mbs or 30 Mbs access service. They are as different as a stagecoach and an airplane. The market is re-defined by such a technological advance. Yet by the Commission's current analysis (contrary to its own 1998 analysis of this issue), all these advancements in technology result in no real change to the nature of services. The Commission has been locked in a static, rigidly blind view of telecommunications evolution, ignoring the profound shifts in the market that technology and investment are delivering.

19. The CRTC regulatory policy is not only hostile to investment by increasing risk and uncertainty but also clashes with the Federal Government's own Policy Direction on telecommunications policy issued in 2006. That Policy Direction clearly required the CRTC to rely more heavily on market forces rather than regulation. It also required the CRTC to re-examine and phase out an extensive system of rules mandating the sharing of telephone company networks. Despite this clear and legally binding Direction, the CRTC maintains its business-as-usual, heavy-handed regulatory approach to next generation broadband networks and services. The CRTC has already decided that next generation broadband networks—including networks not yet built or imagined—will be regulated and shared with others. And, instead of heeding the Policy Direction's command to *phase out* regulation, the CRTC is marching in the other direction by *expanding* wholesale regulation to new networks and services that have not even been built or provided.

20. In the current climate private plans for new capital investments should be welcomed. TELUS' multi-year investment program (and similar plans by Bell Canada and Bell Aliant) represent some of the largest private capital programs planned in Canada. The combined capital expenditures of TELUS and Bell Canada constitute the largest private investments in Canada outside of the energy sector. In TELUS' case, it has the highest capital intensity (a ratio of capital expenditures to revenue) of any North American

telephone company. These investments are crucial to Canada's economic recovery and should be encouraged.

3.0 THE ADVERSE EFFECTS OF THE CRTC'S POLICY

21. The collapse of global markets has put a chill on capital investment in Canada. Unfortunately, projects planned during boom times are being cancelled as credit has become harder to obtain and projected returns are revised. With each cancelled project, the harm to the economy is magnified. Jobs that would have been created are lost. Contracts for building supplies are cancelled. The economy contracts further.

22. To break this circle requires initiative. Strong companies must see through the pessimism of the markets and seize any opportunities that are open. TELUS proposes to do just this. Confident that the future of the Canadian economy depends upon access to more advanced communications services, TELUS intends to invest in upgrading its technology. It is TELUS' hope that, when conditions improve, the company and the country will be strongly positioned to be leaders in the new economy.

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

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

25. Consumers will suffer the most from this policy. Cable companies are clearly the dominant providers of high-speed network services in Canada. Unless companies like TELUS are able to provide comparable services through next generation networks, the lead already enjoyed by cable providers will only grow. At the same time, slower development and deployment of advanced networks by TELUS harms society and the economy and robs the country of the benefits that flow from ICT investment.

26. Consumers will be hurt in other ways by lower investment in better networks. The growth of bandwidth intensive sites such as YouTube and new applications like network gaming have resulted in greatly increased traffic loads on existing broadband networks. Resulting traffic congestion leads to a poorer end-user experience. Consumer groups have argued strongly in other proceedings currently before the CRTC that networks should be expanded to address these problems. Remarkably, the CRTC seems to have turned a blind eye to this issue. Instead of creating incentives to invest in network expansion, the Commission continues to create disincentives.

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

28. We truly are at a transitional moment in our economic history. Capital invested stimulating the economy today will shape Canada’s future place in the world. If we spend wisely, we stand to be leaders. Otherwise, we will be destined to follow the lead of others. Facilitating telecommunications infrastructure investment has enormous benefits. TELUS is willing to help by investing hundreds of millions of private capital in network upgrades. This investment could help to fuel economic recovery and ensure economic opportunity for a new generation of Canadians. It would also help by allowing government to better target its own spending on broadband, secure in the fact that private industry is meeting most of Canada’s broadband communications needs.

29. Even more importantly, new fibre-based networks are a bridge to the economy of tomorrow. Like the railroad before it, Canada’s telecommunications backbone will open up new opportunities across the country. Companies and individual citizens will be able to conduct business via high-quality video conferencing, saving needless travel expenses. Retailers can expand into new geographic markets, using the best of the new technology

to provide unparalleled on-line shopping experiences. Engineers who have lost jobs with the demise of some of the larger high-tech companies will be able to start new companies that capitalize on the applications that ride over top of faster networks. The productivity gains to be realized from enhanced networks will be essential in the new economic environment that will emerge from these difficult days. As noted in the attached White Paper (at pages 8-14) by Drs. Aron and Crandall, renowned experts in telecommunications economics, higher levels of investment in IT infrastructure contributes to higher productivity and stronger economic growth.

30. To appreciate this, one need only look to our neighbour to the south. The United States, our biggest trading partner and our biggest competitor, is making telecommunications infrastructure a major priority. To ensure success, the United States is expanding and improving its network through a mixture of targeted public spending, amounting to billions of dollars, and massive private investment made possible by investor-friendly regulatory policies. Canada, in contrast, risks abandoning the technological lead in broadband we once enjoyed. Fortunately, this fate is not set in stone. With the right policy, Canada could once again reclaim a place of prominence. However, this won’t happen unless we decisively and definitively turn away from the backward-looking, heavy handed regulation of the past that is favoured by the CRTC.

31. The Commission is charged with ensuring that telecom services are of a “high quality”. In the United States, the Federal Communications Commission has correctly recognized that high quality services are unlikely to develop if investment incentives are undermined by mandated access regulations. CRTC regulators, in contrast, continue to believe that they know best and that investment will occur in spite of oppressive, investor-hostile regulation. At this critical point for our economy, it is time for Canada to level the playing field.

32. A review of the recent economics literature illustrates the perils of maintaining regulatory disincentives. For example, Drs. Aron and Crandall demonstrate in their White Paper that evidence drawn from many countries proves that mandated sharing policies discourage investment by existing players and undermine any investment by new entrants. It is TELUS’ sincere belief that Canada’s government, having considered the

matter, will take note of and act on the conclusions drawn by Drs. Aron and Crandall. Namely:

- Canada's leadership in broadband deployment is now threatened because it has not yet deployed the extremely fast, "next-generation" networks that can deliver large amounts of data and video services – networks that are currently being deployed in the United States by Verizon and AT&T, and in other countries as well.

- Canada also lags behind the United States in investment in ICT and, consequently, in productivity growth. Promoting economic growth in Canada requires that public policies be designed to facilitate efficient investment in ICT, particularly in the next-generation networks that are vital to unlocking the potential of new information technologies, and that such policy is established promptly.

- ICT investment generates substantial benefits both to the economy as a whole, and to individual citizens. The evidence is that ICT investment is a major driver of labor productivity growth. ICT investment in broadband infrastructure in particular brings to consumers the benefits of greater access to a myriad of services, including health care, education, government services, entertainment, and media, that enhance well-being.

- Deploying new, very high-speed networks requires massive investment in a risky market environment. The risk of deploying these networks is far greater than the risk that the telecommunications companies faced in deploying copper networks in the regulated monopoly era. Given the competition from cable television and wireless platforms, Canadian ILECs cannot be sure that they will be able to recover the enormous costs of next generation networks. It is therefore imperative that the CRTC provide an environment that does not impose additional obstacles to such investments.

- Among the most important potential threats to the economic viability of next generation networks is the prospect that regulators will require unbundling of these networks at regulated wholesale prices. Such regulation would be extremely damaging to investment incentives.

- Ambiguity or uncertainty regarding what future policy will be toward new investment itself stifles investment, as investors hold back investment until the policy position is clear.

- Competition is enhanced when the engine of investment and the consequent response by platform-based competitors is unleashed by policy that encourages rather than hinders investment. Imposing unbundling obligations can only increase the number of companies offering service over the same infrastructure, not the number of genuine, facilities-based competitors or the dynamism of genuine competition. Moreover, they do so at the risk of affirmatively decreasing investment by ILECs, CLECs, cable companies, and other platform providers, a poor bargain indeed for Canadian citizens.

- It is clearly possible for the CRTC to maintain its existing essential facilities policy towards existing network facilities while exempting new next generation networks from mandatory unbundling. This is precisely what the FCC has done in the United States, and the result has been remarkable. Immediately after the FCC announced its policy of exempting these new networks from wholesale unbundling requirements, Verizon and SBC launched massive new investments in fiber-to-the-home and fiber-to-the-node networks.

- Canada can avoid the problems now facing telecommunications carriers in the European Union, which has not exempted next generation networks from unbundling requirements. As a result, European ILECs have been very slow to develop these new networks.

33. Telecommunications is a dynamic and competitive industry. It is no surprise then that TELUS is seeking to remove impediments to further growth. Canadian broadband networks must be upgraded if Canadian consumers are to enjoy the full benefits of our digital age. Canadian productivity and competitiveness in the world economy are similarly dependent on faster, more reliable networks. We are falling behind developed economies on productivity. Investment in ICT, including telecommunications networks, is recognized as a key driver of productivity. However, the CRTC has put in place policies that have been demonstrated, repeatedly and around the world, to suppress

investment levels. The CRTC is therefore threatening Canada's productivity and competitive position.

4.0 CONCLUSION AND RELIEF REQUESTED

34. For many years, the Government of Canada has had a policy of fostering the rollout of broadband network facilities to all Canadians. From the Information Highway Advisory Council to the Canadian National Broadband Task Force to the Telecom Policy Review Panel, the government has sought to ensure that Canadians will reap the benefits of modern, high-speed networks.

35. Previously, Canada enjoyed a lead over most other countries in the rollout of broadband networks. We were ahead of our major trading partners, including the United States, but recently have slipped as other countries invest more heavily in faster, next generation networks.

36. Regardless of any past successes or failures, Canada now finds itself facing a serious economic crisis. Addressing the current economic challenge is clearly the government's top priority. Like its major trading partners, Canada is striving to stimulate the economy, in part by promoting substantial investments in infrastructure. Broadband networks have been specifically included in such stimulus programs in Canada and the United States. The benefits of such investment in terms of short-term and long-term growth have been widely recognized. However, the CRTC's investor-hostile policies threaten to undermine the success of these initiatives in Canada. The U.S. and other countries, based on their own experiences, have recognized that intrusive mandated sharing of such networks causes private investors to scale back or delay investment plans.

37. At this crucial time, Canada cannot afford to allow misguided, out-of-date CRTC policies to undermine the objective of greater investment in broadband capacity for all Canadians. The stakes are simply too high to allow a regulatory agency to sabotage a key national strategy and cause Canada to fall further behind. The benefits that flow from investment in advanced communications networks are vast and important. The Government should not allow the CRTC to take actions that will deprive Canadians of these benefits.

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

39. More specifically, Telecom Decision CRTC 2008-117 should be varied by deleting paragraphs 16 through 24, and paragraph 25 should be revised as follows:

> "25. The Commission denies Cybersurf's application. Telecom Decision CRTC 2008-17 does not require the ILECs to unbundle and offer on a wholesale basis any new services, speeds or functionality beyond those that were available to the general body of the ILECs' retail customers and for which wholesale tariffs were in place as of the date of that Decision. Therefore, having regard to the importance of encouraging investment in new facilities-based networks, the Commission denies Cybersurf's application to impose an obligation on the ILECs to provide, on a prospective basis, such new services, speeds or functionalities on a wholesale basis."

40. With such a change in policy, Canada will see significant investment in next generation broadband networks, with all the benefits that we have witnessed in our major trading partners. Absent such a change, Canada will fall further behind at the very time when the stimulative benefits of such investments are most needed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF MARCH, 2009.

APPENDIX:

White Paper

Investment in Next Generation Networks and Wholesale Telecommunications Regulation

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