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April 12, 2011

Mr. Wayne Wouters  
Clerk of the Privy Council and  
Secretary to the Cabinet  
Privy Council Office, Langevin Block  
80 Wellington Street  
Ottawa, ON  
K1A 0A3

Dear Mr. Wouters,

Re: Petition to the Governor in Council to Vary  
Telecom Decision CRTC 2011-28, *Axia Supernet Ltd. – Application to Review  
and Vary Certain Determinations in Telecom Decision 2010-639 Concerning the  
use of Deferral Account Funds by Telus Communications Company*

Pursuant to section 12 of the *Telecommunications Act*, Axia SuperNet Ltd., a wholly-owned subsidiary of Axia NetMedia Corporation, is filing the attached Petition to the Governor in Council requesting a variance of Telecom Decision CRTC 2011-28, *Axia Supernet Ltd. – Application to Review and Vary Certain Determinations in Telecom Decision 2010-639 Concerning the use of Deferral Account Funds by Telus Communications Company*.

Yours truly,

Murray Sigler  
Executive Vice-President, Axia NetMedia Corporation  
President, Axia North America

cc: Robert Morin, Secretary General, CRTC



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**PETITION TO THE GOVERNOR IN COUNCIL TO VARY  
TELECOM DECISION CRTC 2011-28, AXIA SUPERNET LTD. –  
APPLICATION TO REVIEW AND VARY CERTAIN DETERMINATIONS IN  
TELECOM DECISION 2010-639 CONCERNING THE USE OF DEFERRAL  
ACCOUNT FUNDS BY TELUS COMMUNICATIONS COMPANY**

**By:**

**AXIA SUPERNET LTD.**

April 12, 2011

## OVERVIEW

1. A guiding principle of this Government's funding of broadband infrastructure in rural and remote areas has been that new funds should **complement** existing initiatives – by the federal, provincial and private sectors. This principle reflects a basic requirement of good public policy – that public funds should **not** be used to subsidize duplication of existing infrastructure and to undermine existing public and private investment.
2. If left unchanged, the CRTC's Telecom Decision CRTC 2011-28 violates this fundamental principle. Decision 2011-28 approves the subsidization of TELUS' construction of broadband transport facilities that will duplicate the Alberta SuperNet. It does so notwithstanding the CRTC's express determination that the SuperNet can be used to provide broadband services that are equivalent to the services that TELUS is proposing to offer and to those that are available to consumers in urban centres.
3. The CRTC justifies its decision based on an erroneous application of the Governor in Council's *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction) and of the principle of technological neutrality. Properly applied, neither the Policy Direction nor technological neutrality can justify any aspect of the Commission's deferral account framework, including in particular use of the deferral account funds to overbuild and undermine investment in the SuperNet.
4. For these reasons and as discussed more fully below, Axia seeks a variance of Decision 2011-28 that reaffirms the fundamental requirement to allocate broadband expansion funds so as to complement, not undermine, existing investment in accordance with the principles expressed in the Policy Direction.

## BACKGROUND

5. The Alberta SuperNet (the SuperNet) is a high-speed broadband transport network linking 429 rural and remote communities in Alberta that was funded through a \$193 million investment by the Government of Alberta and significant private investment by Bell Canada and Axia SuperNet Ltd. (Axia)
6. As the manager and operator of the SuperNet, Axia is obliged to provide to third party service providers non-discriminatory access to the SuperNet, at rates that are benchmarked to urban rates charged by TELUS Communications Company (TELUS or TCC) and competing providers of broadband transport services. Axia has made and continues to make significant investments in building the SuperNet service provider business and facilitating these connections.
7. TELUS and other incumbent local exchange carriers (ILECs) were permitted by a CRTC decision in 2002 to charge residential telephone customers in urban centres higher prices than were justified under the CRTC's price cap regime. The revenues earned from the excess telephone rates paid to TELUS by subscribers were retained in a "deferral account" with the disposition of the funds to be determined by the CRTC.
8. In a 2006 decision the CRTC determined that deferral account funds should be used, in part, to expand broadband services to rural and remote communities. The CRTC expressly recognized at that time the importance of complementing existing government initiatives to extend broadband services. (Telecom Decision CRTC 2006-9, *Disposition of funds in the deferral accounts*)

9. TELUS filed a broadband expansion proposal in September 2006, requesting amongst other things that it be permitted to use deferral account funds to construct broadband transport facilities to 34 communities in Alberta that are served by the SuperNet on the grounds that if it had to use the SuperNet it would lose end-to-end control of its Internet service, despite TELUS already being an existing customer of the SuperNet. Axia filed evidence and argument demonstrating that use of the SuperNet would not affect TELUS' control over its Internet service or the quality or reliability of its service. The Commission rejected TELUS' proposal and directed TELUS to use SuperNet transport to deferral account communities where it was less costly than building new broadband transport facilities. (Telecom Decision CRTC 2008-1, *Use of deferral account funds to improve access to telecommunications services for persons with disabilities and to expand broadband services to rural and remote communities* (Decision 2008-1))
  
10. In a subsequent decision, the CRTC affirmed the correctness of this approach, relying on TELUS' statement that in most cases it would be more cost effective for TELUS to use the SuperNet than to build its own facilities. On this basis, the CRTC held that its approval of TELUS' use of deferral account funds for broadband expansion would complement public investment in the SuperNet and avoid duplication of these facilities:
  13. [T]he Commission notes TCC's admission that, in most cases, it will be less costly to interconnect with the Alberta SuperNet than to construct its own network, which will ensure that the government's investment in the Alberta SuperNet network will be complemented by deferral account funding connecting TCC's customers to that network.
  
  14. The Commission considers that its requirement that TCC use the lowest cost alternative to provide its broadband services is efficient and proportionate to its purpose and strikes an appropriate balance between the mandate to provide service in as many communities as possible, while still avoiding the duplication of

facilities by promoting the use of the Alberta SuperNet network wherever economically justified.

*(Telecom Decision CRTC 2008-87, Axia SuperNet Ltd. – Application to review and vary part of Telecom Decision 2008-1 related to the use of deferral account funds for broadband expansion (Decision 2008-87))*

11. Implementation of TELUS' broadband expansion plan was delayed by appeals to the Courts. Following completion of those appeals, TELUS submitted its broadband roll-out plan ostensibly in compliance with Decision 2008-1, proposing again however that TELUS be permitted to build its own transport facilities to all deferral account communities, regardless of whether or not the community could be served more cost effectively using the SuperNet, subject to limiting the drawdown on the deferral account to the costs of using the SuperNet, so as to permit TELUS to have end-to-end control over its network.
12. TELUS filed with the CRTC its estimated costs of using SuperNet transport which, according to TELUS, demonstrated that use of the SuperNet was least cost in only 7 of the 34 deferral account communities already served by the SuperNet. Axia filed detailed evidence demonstrating that the cost of using SuperNet transport was in fact around 18% of (or 82% less than) the costs of using the SuperNet that TELUS had filed with the CRTC. The Commission has never disclosed which communities or the number of communities that can be served more cheaply using the SuperNet based on the Axia costing information, but it would not be surprising – indeed it would make sense – if that were the case for most if not all 34 communities.
13. In Telecom Decision CRTC 2010-639, *Follow-up to Telecom Decision 2008-1 – Proposal by TELUS Communications Company to dispose of the funds remaining in its deferral accounts* (Decision 2010-639), the CRTC held that although there were “some communities” where use of the

SuperNet would be less costly, TELUS should be permitted to use deferral account funds to build duplicate transport facilities to these (unidentified) communities as well as to all other deferral account communities that are already served by SuperNet transport. The CRTC justified this reversal of the requirement to complement the SuperNet on the grounds that the service would be the same regardless of whether or not the SuperNet facilities were used, the drawdown on the deferral account would be the same, and “while ... it would be beneficial to avoid the duplication of facilities in certain approved communities, ... the benefits associated with TCC having greater control over its end-to-end broadband network are significant.” (Decision 2010-639, para. 26)

14. The Commission cited no evidence to support the reversal of its earlier determinations that the public interest in avoiding subsidization of duplicate facilities was more important than TELUS' desire to maintain “greater” end-to-end control of its network. The Commission also cited no evidence of benefits, significant or otherwise, to TELUS of greater end-to-end control of its Internet services or how these benefits trump the public interest. Nor did it identify anywhere in Decision 2010-639 whether it had accepted TELUS' or Axia's conflicting evidence of the costs of using SuperNet transport to deferral account communities.
15. In the Decision that is the subject of this Petition – Telecom Decision CRTC 2011-28, *Axia SuperNet Ltd. – Application to review and vary certain determinations in Telecom Decision 2010-639 concerning the use of deferral account funds by TELUS Communications Company* (Decision 2011-28 or the Decision) - the CRTC rejected a request by Axia to reinstate the requirement that TELUS use SuperNet transport to serve deferral account communities where it is least cost holding that:

- The CRTC was entitled to reconsider its direction to use SuperNet as this was the first time it had comparative costing information before it;
- While it would be desirable to complement government initiatives, the approach in Decision 2010-639 is technologically neutral;
- There are benefits to TELUS having a “uniform network as it provides TCC with end-to-end control of its broadband network and permits TCC to better manage its network”; and
- The CRTC had identified costing evidence used to determine that some communities could be served more cost effectively using the SuperNet and further differentiation was unnecessary once the decision was made to permit TCC to build its own facilities.

16. In fact:

- the comparative costing information is not cited anywhere in the Decision or Decision 2010-639 as the basis for reversing the requirement to complement SuperNet;
- neither the Decision nor Decision 2010-639 identifies any technological difference between SuperNet and TELUS transport (and in fact, the record showed that the SuperNet rides, in significant part, on TELUS fibre);
- The CRTC cited no evidence to support its assertion of benefits to TELUS of a “uniform network” and there was no evidence of benefits of end-to-end network control, including evidence of better network management before the Commission. Nor is it clear what



a “uniform network” is, but if it means a wholly owned network, then it makes no sense, as Shaw noted in comments it filed with the Commission, since all carriers interconnect with and rely on other carrier networks for the provision of Internet and other services<sup>1</sup>; and

- Nowhere in the Decision or Decision 2010-639 did the Commission state whether it accepted Axia’s or TELUS’ evidence on the costs of using SuperNet transport to deferral account communities – a matter that is clearly crucial to assessing how the Commission arrived at TELUS’ approved deferral account funding of \$99.4 million (for Alberta and BC) and that did not simply fall off the table when the CRTC decided to subsidize TELUS’ construction of duplicate transport facilities.

#### **SUBSIDIZATION OF DUPLICATE FACILITIES IS BAD PUBLIC POLICY**

17. Not only is the CRTC’s reasoning incorrect and unsupported by evidence but the Decision also violates a fundamental policy principle – that scarce public funds should not be used to duplicate and undermine existing investment in facilities.
18. Industry Canada expressly recognized this when it undertook a comprehensive mapping exercise to identify communities eligible for federal broadband funding. The mapping exercise identified areas that were already served as well as areas “that were to become served

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<sup>1</sup> Shaw stated: “It is normal course of business for ISPs and TSPs to use the transport facilities of other service providers. As evidenced on the record of the proceeding, TELUS also routinely uses the SuperNet facilities for transport purposes within its own network.” Shaw comments on Part VII Application by Axia SuperNet Ltd. to review and vary Telecom Decision 2010-639, November 12, 2010, [http://www.crtc.gc.ca/PartVII/eng/2010/8662/a90\\_201015793.htm](http://www.crtc.gc.ca/PartVII/eng/2010/8662/a90_201015793.htm).

through existing provincial/territorial or private sector initiatives, to ensure that the federal program complements existing efforts."<sup>2</sup>

19. There is no question that the CRTC's decision to allow TELUS to use deferral account funds to subsidize TELUS' construction of facilities that duplicate the existing SuperNet facilities contravenes this basic requirement.
20. The SuperNet is a publicly funded broadband transport facility that, as the CRTC expressly recognized in its decision, can support broadband transport services of the same quality as TELUS will support over duplicate facilities. Accordingly, there is no public benefit to channeling additional public funds to build duplicate infrastructure and jeopardize public and private investment in the SuperNet. This is simply a waste of funds and bad public policy.

#### **UNNECESSARY AND ANTI-COMPETITIVE INTERFERENCE IN THE MARKETPLACE**

21. Section 1(a) of the Policy Direction directs the Commission to: rely on market forces to the maximum extent feasible to achieve the telecommunications policy objectives set out in section 7 of the *Telecommunications Act* and, when relying on regulation, use measures that are efficient and proportionate to their purpose and interfere with the operation of market forces to the minimum extent necessary to meet these policy objectives.
22. In the Decision, the CRTC pays lip service to this requirement concluding that because TELUS is only permitted to withdraw from its deferral

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<sup>2</sup> Broadband Canada: Connecting Rural Canadians – Canada's Economic Action Plan, How it Works, <http://www.actionplan.gc.ca/initiatives/eng/index.asp?mode=5&initiativeID=96>

account the costs of using SuperNet transport, "deferral account funds will be used efficiently and effectively".

23. Since the CRTC has never stated what evidence it used to determine SuperNet transport costs – that is, whether it relied on TELUS' or Axia's evidence or some combination of the two – it is not possible to assess whether in fact the CRTC has used a proper measure of SuperNet transport costs.
24. In any event, the allocation of funds to TELUS to build duplicate broadband infrastructure, without any type of competitive bidding process, cannot, by any stretch of the imagination be considered to be an efficient and effective use of the funds. The fact that the drawdown on the deferral accounts has in theory been limited to TELUS' estimated subsidy requirements based on SuperNet transport costs does not address this fundamental flaw in the CRTC's approach.
25. Use of the deferral account funds to subsidize TELUS' construction of its own duplicate facilities also undermines the pro-competitive SuperNet model and ensures that TELUS and only TELUS will provide broadband service in the deferral account communities. As only TELUS has access to subsidies to serve these communities, including both transport and local access subsidies, no other service providers can compete.
26. The SuperNet model, in contrast, was expressly designed to ensure non-discriminatory competitive access to transport facilities, by all ISPs, at urban rates, and to support retail broadband competition in the rural communities served by the SuperNet. The model has been extraordinarily successful. As a result of the SuperNet, Alberta currently has a vibrant broadband service provider community of over 80 service providers that compete at the retail level in communities that were unserved or received

service from a monopoly service provider or, at the very best, duopoly service providers prior to the SuperNet.

27. The Decision fundamentally undercuts the pro-competitive SuperNet model. In addition, the existing public and private investment in SuperNet capacity to allow third party service providers to offer competitive broadband services to residences and businesses in the deferral account communities is effectively stranded.
28. Communities served by SuperNet that do not have retail broadband service remain unserved because TELUS' wholesale local access rates are too high and prevent competitive entry – not because of a problem with broadband transport to these communities. Non-discriminatory deferral account subsidies to wholesale local access can address this problem – subsidies to TELUS alone to build duplicate transport facilities and for its retail local access services clearly do not address the problem and effectively deny rural and remote communities the benefits of retail broadband competition.

#### **PERVERSE RELIANCE ON TECHNOLOGICAL NEUTRALITY**

29. Section 1(b) of the Policy Direction states as follows:
  - The Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that
    - (i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with this Order,
    - (ii) if they are of an economic nature, neither deter economically efficient competitive entry nor promote economically inefficient entry,

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

(iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of these arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers; and

30. While the use of deferral account funds to subsidize broadband expansion to rural and remote communities is intended to foster the objectives in sections 7(a), (b) and possibly (h) of the *Telecommunications Act*, TELUS' ability to use those funds to subsidize its own network and duplicate existing infrastructure does not enhance or even align with any objective under section 7 of the Act.
31. Section 1(b)(iii) requires that measures that are not of an economic nature be implemented, to the greatest extent feasible, in a symmetrical and competitively neutral manner. As discussed above, there is nothing symmetrical or competitively neutral about the CRTC's approval of TELUS' use of deferral account funds to build broadband facilities or in the CRTC's determination that TELUS can use the funds to duplicate existing facilities and investment. To the contrary, this determination effectively entrenches a TELUS retail broadband monopoly in the 34 deferral account communities.
32. It is doubtful that section 1(b)(iv) applies, as there is no question that TELUS can (and already does) connect to the SuperNet on non-discriminatory terms that are technologically and competitively neutral and these terms are unaffected by the Decision. Even if the section does apply, it requires the CRTC to "ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent

possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers". The Decision does not enable any competition, let alone competition from new technologies. Moreover, it clearly does artificially favour TELUS – an incumbent carrier – over other service providers, including resellers.

33. Finally, there is no evidence that TELUS is proposing a technologically different network from SuperNet.
34. The Governor in Council has also expressly recognized, in Order in Council P.C. 2009-2007, 10 December 2008, "it is critical that the regulatory regime provide a cohesive, forward looking framework that provides the proper incentives for continued investment in broadband infrastructure, encourages competition and innovation and leads to consumer choice". The Decision conflicts with all of these objectives.

#### **REQUEST FOR RELIEF**

35. For these reasons, Axia submits that a variance of the Decision is required to uphold the Policy Direction and affirm the basic public policy principle that the limited funds available to governments and government agencies for broadband expansion should be used to complement, not undermine, existing investment in broadband infrastructure and to promote, not stifle, competition in rural and remote communities.
36. Axia therefore respectfully requests the Governor in Council to exercise its power under section 12 of the *Telecommunications Act* to vary the Decision by reinstating the requirement that TELUS use SuperNet transport to all deferral account communities where it is least cost, and refer the Decision back to the CRTC with directions to:

- identify all deferral account communities where it is less costly to use SuperNet transport than to construct new facilities; and
- for all communities where the Commission found that it is less costly for TELUS to construct its own facilities, require TELUS to disclose its estimates of the transport costs of serving the community as well as estimated revenues over the study period, and establish a public proceeding to assess the TELUS cost and revenue estimates or, if TELUS declines to disclose its cost and revenue estimates, require TELUS to use the SuperNet to serve these communities.

37. Axia thanks the Governor in Council for considering this Petition.