

**Petition to the Governor in Council to Vary**

**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**

**Bell Aliant Regional Communications,  
Limited Partnership**

**and**

**Bell Canada**

**11 March 2009**

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## 1.0 **INTRODUCTION**

"Canada was one of the first countries to implement a connectivity agenda geared toward facilitating Internet access to all of its citizens. To this day, Canada remains one of the most connected nations in the world, with the highest broadband connection rate among the G7 countries. However, gaps in access to broadband remain, particularly in rural and remote communities.

The Government is committed to closing the broadband gap in Canada by encouraging the private development of rural broadband infrastructure. Budget 2009 provides \$225 million over three years to Industry Canada to develop and implement a strategy on extending broadband coverage to all currently unserved communities beginning in 2009-10."<sup>1</sup>

1. The above quote from the Government's 2009 Budget addresses an important initiative to stimulate investment in infrastructure in these difficult economic times and, in the process, to close the urban/rural digital divide.

2. Unless the Governor in Council varies two recent CRTC decisions,<sup>2</sup> the remarkable effect will be a slow-down in investment in a sector crucial to all Canadians, the likely perpetuation of the urban/rural digital divide and, importantly, the creation of a new broadband gap in urban areas of Canada – an urban digital divide. It also provides a competitive advantage to cable companies as compared to telephone companies and amounts to a forced subsidization by the Companies of their competitors. The CRTC decisions will act as a significant disincentive to the telephone companies, including Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and Bell Canada (collectively, the Companies), to invest in NGNs and the connectivity that facilitates higher speed Internet access to Canadians. This is clearly contrary to an important objective of the 2009 Budget to stimulate investment in central elements of the Canadian economy such as telecommunications with the associated benefits such as employment and productivity that flow from the investments.

3. In this economic climate, even though investments are scarce and the markets focus on short term gains and carefully scrutinize capital investments, the Companies continue to invest heavily in new infrastructure. Capital expenditure for the Companies this year alone will surpass \$2.5 billion. As for its NGN, Bell Canada and Bell Aliant have invested well over \$1 billion dollars in the last three years since they began building their NGNs to Canadian homes and businesses. As a result of these investments, the Companies will be able to offer new advanced services to businesses, and higher speed Internet and next generation television

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

<sup>2</sup> Telecom Decision CRTC 2008-117 and Telecom Order CRTC 2009-111.

services (in the form of IPTV). For Bell Canada, this new network has been largely built in Toronto and Montréal. The Company's NGN reached 2.4 million homes by the end of 2008. It recently announced plans to spend \$700 million to accelerate this network build to reach 5 million homes by 2012; but that announcement was made on the expectation that the CRTC would not mandate wholesale access at regulated rates to these networks.

4. Simply stated, the pace, speed and location of significant, planned Internet investments by the Companies in their residential networks to enable the delivery of higher speed Internet service will have to be reviewed, given that the CRTC decisions radically alter the financial case for accelerated deployment of NGNs in some geographic areas. This will result in some urban communities being delayed in the buildout of NGNs and some communities not having such networks built at all. Communities that will have to be reviewed in light of the CRTC decision include Ottawa-Gatineau, Québec City, Hamilton, Kingston, Kitchener, London, the Niagara region, Sherbrooke and Windsor in Bell Canada territory as well as Moncton, Fredericton, Saint John, Charlottetown and Sydney in Bell Aliant territory.

5. In short, the CRTC's forced subsidization by the Companies of their competitors disrupts the Companies' commercial projections and business case for building new fibre networks. Although the Companies are under tremendous pressure to build networks that can compete with cable providers, the business case for investments in 2009-2012 in certain cities will no longer be viable under the CRTC's ruling which in effect will dictate the rates and commercial terms under which the new fibre network will be resold.

6. Being mandated to provide wholesale access to the NGNs to all competitors on rates and terms imposed by the CRTC will seriously undermine the Companies' ability to deliver television services in competition with cable companies. There will be a disproportionate harm to the Companies and telephone companies compared to cable companies and the goal of fostering greater competition with cable companies, especially in broadcasting where cable companies are dominant, will be defeated.

7. With this Petition,<sup>3</sup> the Companies respectfully ask the Governor in Council to confirm that investment in NGNs should be encouraged as a matter of policy and, as a result, to rescind Telecom Order CRTC 2009-111 *Cybersurf's application related to the implementation of Telecom Decision 2008-117 regarding the matching speed requirement* (Order 2009-111) and vary Telecom Decision CRTC 2008-117 *Cybersurf Corp.'s application related to matching*

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<sup>3</sup> Filed pursuant to section 12(1) of the *Telecommunications Act*.

*service speed requirements for wholesale Internet services* (Decision 2008-117) as detailed at paragraph 31 in this Petition. Such a rescission and variation would have the effect of allowing wholesale services for access to the NGNs of the incumbent local exchange carriers' (ILECs) to develop based upon market forces. By intervening, the Governor in Council will be ensuring that critically important investment decisions relative to NGNs can be made without the requirement for forced subsidies through regulated network sharing requirements. The pace, speed and location of roll-out determinations by the Companies will then be able to be made using sound business judgment.

8. It should be noted that a significant proportion of the revenues currently generated by the Companies' wholesale business units stem from wholesale services that are forborne from CRTC regulation. The Companies willingly offer these services to competitors, on market terms. If this Petition is granted, then the Companies envision continuing to partner with some competitors who will resell access to the Companies' next generation networks (NGNs), as currently, on market terms with reliance on market forces.

9. The Companies are asking the Governor in Council to address this request on an urgent basis in order to avoid putting a damper on innovation and productivity by interfering with the very investments needed to foster economic recovery

## **2.0 BACKGROUND**

10. In order to deliver their services, ILECs, including the Companies, have been building networks which, until quite recently, were based upon copper wire technology. In most cases, it took more than a hundred years to build what is commonly referred to as the legacy copper network. The invention and adaptation of fibre optic technology has allowed for the design of new telecommunications services characterized by broadband networks at much higher speeds. Telecommunications companies, as well as governments around the world, have identified the introduction of high-speed broadband networks as a national imperative due to the promise of dramatic efficiency gains that, in turn, will boost productivity and penetrate virtually every economic and social sector.

11. The ubiquitous high-speed broadband networks utilizing fibre optic technology are commonly described in a collective fashion as NGNs. It must be appreciated that the design and integration of NGNs represent one of the largest civil engineering projects ever undertaken in Canada. As noted, the legacy copper network took a hundred years or more to build but NGNs are planned to be rolled-out in five to eight years. Millions of individual customers in the

Companies' service territories will need to be physically migrated to the network without interruption to their existing services, including the vital lifeline telephony services.

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

13. A regulator such as the CRTC must not make the mistake, as we will demonstrate the CRTC did in the Decisions, to view the regulation of NGNs in the historic manner that was previously done relative to legacy copper networks. Rather, the CRTC should have been forward-looking with an appreciation for the fundamentally changed environment that surrounds the construction of NGNs, and the offering of services which utilize NGNs.

14. The Companies, informed by the regulatory environment (partly CRTC decisions other than the Decisions that are the subject of this Petition), as well as financial and business considerations, established plans for the investment of significant up-front capital for the construction of high-speed NGNs. Decisions on whether to invest in NGNs are complex and characterized by significant uncertainty. The development of NGNs involves new architectures and protocols, as well as the deployment of new infrastructure, both in the backbone and in an ever closer reach of fibre optic cable towards the end-user. At the point of making investment decisions, consumer demand and valuation for the retail services to be provided over NGNs remains largely speculative. The size of the investment that ILECs, including the Companies, are contemplating to bring NGNs to the vast majority of Canadians ranks in the billions of dollars. Regulatory certainty is critical.

15. Unfortunately, in two recent and related decisions by the CRTC, namely Telecom Decision 2008-177 and Order 2009-111, made in response to an application by Cybersurf Corp. (Cybersurf), an Internet service provider (ISP), the CRTC overturned its 2007 decision that ensured there was no mandated access to the Companies' NGNs, and in so doing, it

undermined the business case for building those networks in some communities.<sup>4</sup> Decision 2008-117 and Order 2009-111 are fundamentally wrong and are the subject of this Petition to rescind the Order and vary the Decision.

16. These decisions undermine the Government's own recent approach to streamlining and removing unnecessary (and in this case harmful) regulation.<sup>5</sup>

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<sup>4</sup> Before the Cybersurf application, Telecom Decision CRTC 2007-77 had removed the requirement that ILECs provide their wholesale customers with services that match, in terms of speed, the services offered to their retail customers, noting that the regulatory framework for wholesale services was under review by the Commission in its Essential Services proceeding.

In June, 2008 Cybersurf applied to the CRTC to have it mandate the Companies (and other ILECs) to offer Cybersurf services that mimic services as the Companies provide to their retail Internet service customers. (In more technical language of Decision 2008-117 to mandate wholesale high-speed Internet access services at speeds that matched the throughput speeds provided to the ILECs retail Internet service customers (the matching service speed requirement)).

In Decision 2008-117, which is the subject of this Petition, the CRTC approved the Cybersurf application, in part, directing the ILECs to offer to competitors, at regulated rates, the same services that are offered to their retail customers. As a result, Telecom Decision CRTC 2008-17 maintained the *status quo* established by Decision 2007-77, above, with respect to access to existing legacy copper-based access services. (In more technical terminology, the ILECs aggregated asymmetric digital subscriber line (ADSL) services.) The CRTC did not impose a wholesale obligation, at that time, for NGN.

In Order 2009-111 (also the subject of this Petition), the CRTC provided a clarification and confirmed that Decision 2008-117 was not limited to existing services offered by the ILECs but applied as well to the FTTN of the NGN services and facilities. The CRTC did not give any recognition to the notion of the NGN and the considerable investment required to push fibre optic cable deep into neighbourhoods, for example, through FTTN networks. Rather, describing the NGN as simply the provision of Internet access to retail customers at a new speed, the CRTC decided that this was not the provision of a new service but rather the provision of the same service, Internet access, at a different bandwidth.

<sup>5</sup> The CRTC is bound to follow this Government's Policy Direction issued to the CRTC in late 2006. The Policy Direction requires that the Commission exercise its regulatory jurisdiction with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities, taking into account the principles of technological and competitive neutrality and the impediments faced by new and existing carriers seeking to develop competing network facilities. On this issue, the CRTC, in Decision 2008-117, concluded that granting competitors NGN access would not dampen investment in alternative facilities and broadband in general because it believed that the Companies' "need to compete with facilities-based competitors in retail broadband markets" and would "recover their causal costs" through regulated rates (Decision 2008-117, at paragraph 22). As the Petition makes clear, these conclusions reflect a gross misreading of the Companies' investment framework. This misreading became manifestly clear to the Companies upon reading Order 2009-111 which – in response to Bell's understanding that Decision 2008-117 did not relate to NGN facilities but only access to services provided over the Companies' legacy "copper facilities" - stated that the reference to copper facilities in paragraph 22 of Decision 2008-117 "means that to the extent that the service is provided over a path that includes copper facilities, the service is subject to the requirements of the Decision". In short, the CRTC decided that access to the Companies' NGN networks should be granted, at regulated rates, to the Companies' competitors. In so doing, the Commission failed to recognize the significance of the issues associated with investment in and deployment of NGN facilities. This Petition seeks such recognition from the Governor in Council. Note as well that the Commission itself has used the disincentive to investment as a reason not to impose regulation on the cable companies. In Public Notice CRTC 1997-25, (PN 1997-25) *New Regulatory Framework for Broadcasting Distribution Undertakings [BDUs]*, the Commission reaffirmed its earlier held view that cable companies should not be subject to a mandatory obligation to resell their broadcasting distribution services, citing as its reason for not imposing regulation on the BDUs the disincentive to investment in competing networks – the same disincentive that it has ignored in its decisions that are the subject of this Petition. In PN 1997-25, the CRTC stated: "In the Commission's view, requiring cable distributors to resell their services could act as a disincentive to the construction of facilities by new entrants."

17. It is interesting to note that Cybersurf provides services in both the U.S. and Canada. However, the Federal Communications Commission (FCC) in the U.S. has eliminated nearly all of the network sharing requirements for next generation fibre access facilities used to provide high-speed broadband services and therefore U.S. ILECs are not mandated by the FCC to sell the services to Cybersurf that Cybersurf is asking the CRTC to mandate relative to Canadian ILECs.

18. If the CRTC decisions are not varied and access to the Companies' NGN facilities must be provided to competitors at regulated rates, then an enormous additional business risk will be introduced into the Companies' NGN investment plans. As explained further in this submission, the business case for investing in NGN facilities is founded on the potential retail revenues from the Companies "winning the broadband home". If the Companies are required to cede access to these facilities at regulated rates, then there will be an inadequate return to warrant the investment risk (based on wholesale rather than retail revenues). Although Bell Canada (Bell) has already started to invest in NGN facilities in Toronto and Montréal, and will complete those investments, being required through the CRTC Decisions to provide access to those facilities at wholesale rates will cause a substantial review by Bell of its investment programs in other locations. The same is true for Bell Aliant. This will be discussed in greater detail below.

### **3.0 WHY IT IS IMPORTANT TO RECOGNIZE DIFFERENT TREATMENT FOR NGN FACILITIES**

19. Investment in information and communications technologies is driving, and will drive, economic growth in developed countries. The investment in higher speed connectivity to Canadian homes and small businesses at issue here generates substantial economic value, beyond the significant purchases of equipment from telecom equipment manufacturers and beyond the creation of high levels of employment needed to deploy the technology necessary to achieve higher speeds. With higher connectivity speeds comes investment in new products and services that require these speeds (such as IPTV), research and development for future services and increased e-commerce activity. Increased e-commerce activity not only improves the Canadian consumers' experience but also improves the ability of Canadians to utilize the Internet to provide products and services from their homes and businesses, e.g., by expanding their geographic reach. This, in turn, enhances the demand for products and services to support this enhanced e-commerce. Of course, enhanced e-commerce provides Canadian consumers with more choices and better prices, with the investments in question extending the benefits of competition to more and more Canadians. All of this benefits the Canadian economy



in terms of productivity, efficiency and economic stimulation, in addition to improving Canadians' lives through greater and less costly access to entertainment, information and knowledge (education), and health care services, among others. The rest of the developed world (our trading partners and competitors) are moving at a rapid pace to derive the economic values and efficiencies described above and Canada cannot afford to be left behind.

20. Telecommunications is one of the few sectors of the economy where companies are continuing to invest despite the economic downturn, with the Companies in the forefront of such investments. The Companies will spend in excess of \$2.5 billion in capital expenditures in 2009 alone. In this regard, the Companies, like all ILECs, are devoting considerable time, effort and money (specifically over \$700 million in the next three years alone in the case of Bell Canada) to the planning and implementation of NGNs. These networks push fibre deep into neighbourhoods, allowing for delivery of faster Internet speeds than traditional copper deployment. Such investment in NGNs is characterized by significant uncertainty. The design and development involves new architectures and protocols as well as the deployment of new infrastructure both in the transport infrastructure (the backbone) and in an ever closer reach towards the end-user customer. This reach is characterized by names that have been given to the various stages of deployment such as FTTN, fibre-to-the-curb, and FTTP. The size of the investment that the Canadian industry is contemplating to bring NGNs to the vast majority of Canadians ranks in the billions of dollars. The importance of investment is evident not only from its size but also from the fact that it is intrinsically linked to Canada's continued prosperity and productivity, particularly in these difficult economic circumstances and the need to be competitive on a world scale.

21. The Companies use the term next generation access (NGA) as distinct from the more ubiquitous term NGN to emphasize the key policy issue facing Government and the regulator, which is to encourage investment in the "last mile" access facilities including FTTN and FTTP. Investment in NGAs is taking place now and in the future. The costs of mistaken regulation of NGAs in terms of foregone or misdirected investment will be high not just to the telecommunications carriers but also to the country.

22. The imposition, through regulatory measures such as the Decisions, to impose mandatory wholesale access will dampen the incentives to invest and therefore reduce much needed investment in NGAs. Absent such incentives, investment, innovation, competition and ultimately, productivity will suffer.

#### **4.0 BUSINESS CASE**

23. By way of background, it is important to recognize the difference between the business case and investment decisions that were made with respect to the Companies' original network (legacy network) and the decisions that need to be made today with respect to the NGNs. Legacy, largely copper-based, networks were constructed prior to the markets being opened up to competition and in a regulatory environment characterized by extensive regulation including rate-of-return prescriptions. As a result, efficient investment decisions could be clearly identified by the Companies since there was a known demand and a much lower investment risk. For many of the legacy components, the original decision to invest was assessed through a comparison of the costs of building the network with the expected revenues to be derived from a single group of voice services. When the CRTC opened the market to competition and forced access to legacy ILEC networks which had already been built, it could do so without fear of an impact on investment decisions of the ILECs which had already been made.

24. Investment decisions for NGNs differ significantly from the traditional legacy approach. A NGN investment decision can only be justified from the expected revenues relating to competitive service offerings such as voice, data and broadcasting. Given the vigorously competitive environment within which the Companies currently operate, no longer is it the case that the Companies benefit from near-certain demand and guaranteed rates of return. Therefore, in building a business case, revenue cashflows will be projected for retail telephony, Internet access and IPTV services. In studies that have been conducted by the Companies, it has been concluded that even under the base-case scenario (*i.e.* no mandated access imposed by the CRTC) an investment in a FTTN network will involve a significant degree of financial risk as well as a long term payback.

25. The business case conclusions reached by the Companies when assessing whether to invest in NGAs did not contemplate a regulated and mandated third party wholesale access to NGNs. Mandated access for a third party competitor alters the business case dramatically. The immediate impact of mandated third party access is foregone revenues from services such as voice, data and broadcasting which can no longer be bundled with Internet (and in the case of IPTV, even offered over the same line). The bottom line impact is that the introduction of a regulated wholesale access obligation on the Companies extends the payback period in many markets to well beyond an acceptable period and eliminates a significant value of the benefit of the investment.

26. It is extremely important to emphasize that, in some communities, company case studies, in which a mandated wholesale access requirement is factored in, leads to the conclusion that not investing is financially superior to investing when there is a mandated wholesale access obligation. The CRTC's determination in Decision 2008-117<sup>6</sup> that mandating wholesale access would neither deter economically efficient entry into the retail high-speed Internet access services market nor promote economically inefficient entry is simply wrong and not borne out by the business case studies conducted by the Companies.

## **5.0 REVIEW OF NGN ROLL-OUT**

27. Bell and Bell Aliant have already made significant investments in their residential networks to enable the delivery of higher speed Internet service. That said, it must be emphasized for Bell that these investments to date have been in two urban markets, Toronto and Montréal. During the period 2005-2008, Bell has invested over a billion dollars to build the NGN in Toronto and Montréal, and the roll-outs in these cities is not yet complete. These investments were made prior to the release of the CRTC Decisions and the access determinations being mandated by these Decisions. The CRTC has noted that the rates that Bell could charge for access to the NGN will be set on the basis of causal costs plus a reasonable mark-up, which the CRTC believes will ensure that such access is provided on an economically efficient basis. The reality is that a regulated rate (wholesale tariff) cannot capture the full cost of network investments and/or the full value of the retail Internet relationship between the ILEC and its retail customers. This regulated rate will fall below ILECs' full cost to deliver the service to a competitor seeking access, and does not compensate for the significant up-front capital the Companies have put at risk (let alone the ability to raise additional financing for such capital in the existing economic climate). Correspondingly, wholesale tariffs structured in the traditional manner allow the wholesaler to compete on a largely variable cost model with no up-front capital at risk.

28. Further, from a technical perspective, having to wholesale Internet access on the FTTN means that the Companies delivery of television services in competition with the cable companies will be seriously undermined. For example, today Bell Aliant offers customers in five cities in Atlantic Canada voice, high speed Internet and Aliant TV (television service) over a single line. Aliant TV is a full-fledged (IPTV) television service offering over 200 channels of

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<sup>6</sup> Paragraph 21.

television, including high definition television, offered in competition with cable companies and satellite distributors. Bell Aliant can only offer its television service where it has built out its FTTN network. In so doing Bell Aliant is able to compete as a facilities-based entrant in the television distribution market. But if Bell Aliant is forced to wholesale Internet access service over its own FTTN network, any end-user that purchases Internet service from that wholesaler cannot share the line with Bell Aliant's IPTV service. Thus any requirement to provide high-speed Internet service to wholesale customers over the FTTN network seriously undermines the ability of Bell Aliant to offer IPTV, thereby defeating the goal of fostering competition with cable companies.

29. From an overall corporate planning perspective, Montréal and Toronto have largely been built and will not be impacted by the negative consequences that might materialize if the CRTC Decisions are not varied. However, the pace, speed and location of the roll-out of NGNs in all other urban markets in Québec, Ontario and Atlantic Canada will have to be reviewed. If the Decisions to mandate third party access are not varied and rescinded, then the implementation of NGNs in the next level of some urban markets in Québec, Ontario and Atlantic Canada will be abandoned due to the lack of adequate financial returns.

30. When one speaks of the "digital divide" it is normally considered to be a divide between citizens living in well-served urban markets as opposed to citizens living in under-served rural communities. The 2009 Budget introduced by the Minister of Finance and the quote from the document, "Canada's Economic Action Plan", above, implicitly refers to the urban/rural digital divide and the need to close the broadband gap in Canada by encouraging the private development of rural broadband infrastructure. A remarkable and unfortunate consequence of the CRTC Decisions is that, unless varied and rescinded, the regulatory measures could well have the effect of creating an urban digital divide.

31. Any digital divide, and any delay in facilitating broadband access to Canadian citizens, is a matter of great concern since it goes to the heart of our ability as a nation to innovate, to compete and ultimately to our productivity. The broadband connection to business and residential premises will be the key driver of competitive activity for the foreseeable future.

## **6.0 INCONSISTENT AND OUT OF STEP**

32. The CRTC Decisions represent a regression from the enlightened telecommunications regulatory environment that has been evolving in Canada. It is important to emphasize that the CRTC Decisions, if not varied and rescinded, lead to sub-optimal incentives to invest and inefficient market entry.

33. All of this has been recognized by the FCC in the U.S. The FCC has eliminated nearly all of the network sharing requirements that formerly applied to the ILECs' next generation fibre loops used to provide higher-speed broadband services. The FCC concluded that requiring ILECs to sell competitors access to these facilities at regulated wholesale rates would undermine ILECs' incentives to invest in these facilities and reduce competitive service providers' incentives to build their own alternative systems. The FCC has also determined that such wholesale requirements are unnecessary to protect consumers, given the widespread availability of broadband facilities and services from cable operators and other providers. A memorandum from the law firm Hogan & Hartson providing a more detailed analysis of the FCC determinations is appended as Appendix 1. The impact of this ruling by the FCC on U.S. ILEC investment decisions for NGNs (namely the expansion of those investments as a result of the decision to remove wholesale regulation) is described in a letter from respected economist and telecommunications market analyst Gregory Sidak, Chairman of Criterion Economics, LLC. As Sidak notes:<sup>7</sup>

"FTTN and FTTP strategies offer distinct tradeoffs in terms of costs, speed of deployment, and the ultimate ability to recoup investment. The main U.S. ILECs have invested billions of dollars to deliver next-generation services to customers quickly. Each has employed a flexible approach to network design, combining various technologies and network architectures in the last mile.

As the FCC observed in its response to unbundling of hybrid fiber-copper infrastructure, the disparate treatment of competing and substitutable transmission technologies can create a profound disincentive to deploy new technology. Firms facing inconsistent or unpredictable regulatory requirements will necessarily be less inclined to invest and to innovate. After the FCC reversed course in 2003 and decided not to require unbundling of next-generation networks, ILEC investments in such infrastructure increased dramatically. If a government's goal is to facilitate the expansion of next-generation services, it would be counterproductive as a matter of economic policy to subject the telecommunications industry to an unbundling regime based simply on the choice of deployment topology."

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<sup>7</sup> Without footnote. Letter dated 11 March 2009 from Gregory Sidak to Jonathan Daniels and copied at Appendix 2.

34. The approach with respect to the CRTC Decisions under review in this Petition stands in contrast to the Commission's approach in an important and significant decision some twelve years ago. In Telecom Decision CRTC 97-8, the Commission established a framework for local exchange competition that was described as balancing the interests and needs of consumers, local competitive entrants, toll competitors and incumbent telephone companies while at the same time maintaining universal access to affordable telecommunications services in high cost areas. For our purposes, it was also significant that the Commission adopted the principle that competitive local exchange carriers (CLECs) were not simply customers of ILECs but were carriers equal in stature to ILECs in the local exchange market. In distinct contrast to the determinations made in the CRTC Decisions under review in this Petition, the CRTC, in Decision 97-8, concluded that ILECs should generally not be required to make available facilities for which there are alternative sources of supply or which CLECs could reasonably supply on their own.

35. This conclusion was the CRTC's determination that CLECs required sufficient incentives to invest in their own facilities because, in the absence of sufficient incentives, CLECs would enter and remain in the market primarily as resellers. The Commission was further of the view that efficient and effective competition would best be achieved through facilities-based competitive service providers. This does not mean that there is not a role for resale. As noted in the next section, competitors will still have alternatives available to them.

## **7.0 ALTERNATIVES FOR COMPETITORS**

36. While policy and regulatory decisions should encourage the construction of facilities in order to provide for the competitive offering of services, it is recognized that gaining access to an existing network can be necessary for the short-term. If this Petition is accepted, and the CRTC Decisions are varied and rescinded, it will not mean that competitors must only build their own facilities in order to provide service. Competitors, such as Cybersurf, will still be able to have access to the facilities of ILECs as well as other service providers. In Canada today there are two facilities-based wireline networks and usually three facilities-based wireless providers available to the vast majority of Canadians. In addition, competitor ISPs are also reselling satellite service to provide Internet services throughout the country. As a result, competitors will continue to have a number of access platforms and supplier options from which to serve retail and business customers by either leasing or constructing their own facilities. Wherever the Companies plan to invest, there will be at least two competing platforms and facilities-based service providers that provide broadband data capability. Cable is the most prevalent wireline-

based service provider of broadband data services. According to the 2006 CRTC Monitoring Report, cable broadcasting distribution undertaking (BDUs) have the largest revenues and market share of the residential Internet access sector. In addition to cable BDUs and ILECs providing facilities-based Internet access services, wireless technologies are available and can sometimes achieve even higher speeds and a more ubiquitous footprint than the ILECs can and at lower costs. Moreover, wireless technologies will continue to evolve.

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

## **8.0 DISADVANTAGES TO ILECS AS THEY COMPETE WITH CABLE**

38. Although the requirement for matching speeds for NGNs may apply in theory equally to both cable companies and the ILECs, in practice this rule will harm ILECs to a much greater extent than cable. Presently, as a result of the history of how the CRTC has imposed Internet wholesale regulation there is virtually no use of cable company wholesale tariffs in most of the country notwithstanding the fact that they have – unlike the ILECs - ubiquitous NGNs (funded, until recently, through monopoly-based cable revenues). Resellers largely rely on the ILECs for providing their Internet service. The reality of today's technologies and markets is that both the cable companies and the ILECs compete for the same customers for the same services. Indeed, when it comes to retail Internet services, the cable companies have larger market shares than do the ILECs in high speed Internet services. Yet, the CRTC continues to impose new regulations that hamper the incentives for the ILECs to invest in a manner that does not undermine the incentives for the cable companies to invest. The imposition of the matching rule will thus have a greater impact on the Companies' business case for investing in NGN as compared to their leading rivals. In other words, this regulation, while neutral on its face, distorts competition between the ILECs and cable companies giving an advantage to the latter.

## **9.0 THE COMPANIES' REQUEST**

39. The Companies respectfully ask the Governor in Council to intervene to ensure that critically important investment decisions relative to NGNs can be made without the requirement for regulated network sharing requirements. This will ensure that the pace, speed and location

of roll-out determinations will be made using sound business judgment unencumbered by forced subsidies. There will still be access services provided to competitors to permit them to resell the Companies' NGN facilities, but these wholesale services will rely on market forces.

40. Specifically, the Companies request that the Governor in Council, pursuant to section 12(1) of the *Telecommunications Act*, rescind Order 2009-111 and vary Decision 2008-117 as follows:

Paragraph 22 "...the Commission notes that this proceeding is limited to addressing the issue of matching service speeds of the ILECs' aggregated ADSL access services, which are provided **entirely** over copper facilities **for the access portion of the network (i.e. from the Central Office to the end user's premises)** (hereafter, referred to as "**copper-based**" services);

Paragraph 24 "In light of the above, the Commission finds that a requirement to provide matching wholesale speeds **for copper-based services** where there is demand by a competitor would be consistent with the Policy Direction; and

Paragraph 25 "...proposed revised tariff pages to include any matching-speed **for copper-based services** with respect to existing retail service speeds offering where there is demand by any such customer. The Commission also directs that upon the introduction of a new retail Internet **copper-based** service speed by any such ILEC, the ILEC in question is to file at the same date proposed revised tariff pages for **copper-based** wholesale aggregated ADSL services at the same speed".

41. This rescission and variation will eliminate the requirement that ILECs provide access to competitors at regulated rates to their NGN facilities.

\*\*\* End of Document \*\*\*