

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

**Telecom Decision CRTC 2006-9**

***Disposition of Funds in the Deferral Accounts***

**by:**

**Barrett Xplore Inc.**

**16 May 2006**

## OVERVIEW

1. With this Petition, filed pursuant to section 12(1) of the *Telecommunications Act*, Barrett Xplore Inc. (BXI) is asking the Governor in Council to address an issue of national importance arising from a decision of the Canadian Radio-television and Telecommunications Commission rendered on February 16, 2006 (“Decision 2006-9” or the “Decision”).

2. The Decision regulates the disposition of approximately \$650 million in revenues collected from subscribers by the Incumbent Local Exchange Carriers (ILECs), including Canada’s largest telephone company, Bell Canada, over a four-year period. As discussed in greater detail below, these revenues resulted from an earlier CRTC decision in 2002 which permitted the ILECs to charge residential telephone subscribers in urban areas higher prices than were justified under the CRTC’s price cap formula and to accumulate these revenues in “deferral accounts”, pending a decision by the CRTC on how to spend them. In the Decision that is the subject of this Petition, the CRTC has decided to permit the ILECs to use the bulk of these funds (up to \$620 million) to subsidize the extension of their broadband telecommunications networks in rural and remote areas of Canada, subject to a number of guidelines specified by the CRTC.

3. While the objective of extending broadband services to these regions is a laudable one, which BXI wholeheartedly supports, **the CRTC’s decision to use the deferral account revenues in this manner to subsidize only the ILECs’ networks, totally undermines the competitive market that is developing in these regions and threatens the businesses of other telecommunications providers, including BXI, that are extending broadband services to those same regions without the benefit of financial subsidies.**

4. BXI is a Canadian company, based in Woodstock, New Brunswick, that provides broadband services to rural and remote areas of Canada using new, state-of-the-art fixed wireless and Ka-band satellite technology. BXI's commitment to "broadband everywhere" is fulfilled by applying a "best fit" approach to technology, based on the characteristics of the market being served. By using advanced Ka-band satellite services, supplied by Telesat Canada, to address those markets where fixed wireless is uneconomical to deploy, BXI has developed and is implementing an economically viable solution to the broadband needs of Canadians in areas that until recently had been denied this service. Ka-band technology represents a quantum leap in satellite service in terms of quality and bandwidth deliverable. With a national footprint that reaches all Canadians, this satellite technology presents for the first time, an opportunity to place all Canadians on an equal footing with respect to broadband connectivity, regardless of their location.

5. By June of 2006, BXI will have invested \$40 million of private capital in its broadband initiatives and the company has entered into supply contracts valued at \$240 million to fulfill its business objective of becoming a leading supplier of broadband services to rural and remote areas of Canada. **The CRTC's Decision undermines BXI's investment and threatens the development of a competitive market for broadband services outside of large urban centres in Canada.** Moreover, in the Decision, the CRTC appears to be oblivious to the technological advancements that have occurred since it first initiated its public proceeding to consider this issue back in March of 2004.

6. BXI is not the only company that will be harmed by the Commission's Decision to confer this unfair competitive advantage on the ILECs. Telecommunications affiliates of electricity distributors are deploying fibre optic networks in rural areas, and the Inukshuk consortium has recently launched a national wireless broadband network to extend service outside major metropolitan centres. There are numerous small to medium-sized companies

using fixed wireless, satellite, and other technology to serve this market. All of these companies will be harmed financially if the Commission's decision is allowed to stand.

7. While the CRTC did seek public input on how to dispose of the deferral account funds, it ultimately adopted a proposal by Bell Canada. Not surprisingly, Bell Canada had proposed that it receive all of the deferral account revenues generated in its operating territory and that these funds be used to help finance the extension of Bell Canada's broadband network into "unprofitable" rural and remote areas.

8. By adopting Bell Canada's proposal in Decision 2006-9, BXI respectfully submits that the CRTC did not give sufficient weight to the submissions of BXI and other parties to the proceeding who had argued for a competitively neutral use of deferral account revenues. Perhaps more importantly, the CRTC appears to have assumed in its decision that competitive suppliers are unwilling or unable to serve the markets in question and that the ILECs represent the only alternative for broadband services in these regions.

9. With the passage of time, this assumption has been proven wrong. BXI notes in this regard that more than two years passed between the time that Bell Canada originally filed its proposal (December 2, 2003) and the date of the CRTC's Decision (February 16, 2006). This is a long time in the world of advanced telecommunications. **New, lower cost, reliable, and highly capable technologies have already changed the face of the telecommunications market and have enabled competitive broadband service providers to provide rural broadband services profitably.** Further improvements are expected over the next few years. The economics of broadband expansion are not the same as they were in 2004, and will further evolve by the time that the ILECs extend their broadband networks into the regions in question.

10. It is not only technology that has changed since 2004. There is now considerably more experience with different models for broadband expansion. As discussed further below, this is particularly true with respect to the very successful experience in Alberta with the SuperNet project. That experience demonstrates that if an independently managed backbone network is constructed, literally dozens of companies will augment that network with their own wireless access networks. The experience in Alberta casts doubt on another of the CRTC's assumptions in the Decision – namely that the subsidy program must include access as well as backhaul facilities. Again, advances in technology and new cost models cast the correctness of the Decision in doubt and merit its reconsideration.

11. **The CRTC's guidelines for broadband extension run counter to the competitive market principles enshrined in section 7 of the *Telecommunications Act*, as well as the principles of competitive neutrality and technological neutrality that the CRTC is purporting to apply.** Decision 2006-9 totally ignores the capability of Ka-band satellite services to reach customers in rural and remote areas and ignores the ability of other types of competing suppliers to provide access facilities on a least-cost basis, where broadband backbone facilities are available.

12. **The CRTC's decision is also contrary to the recommendations of the Telecommunications Policy Review panel (TPRP) in their March 23, 2006 report to the Government of Canada.** The TPRP recommended that the CRTC stay out of the broadband subsidy business and that any government-sanctioned subsidy programs be carefully targeted, be made subject to a competitively neutral bidding process and be required to treat backbone and access issues separately.

13. Decision 2006-9 has also had an immediate adverse impact on independent service providers and their speed in delivering broadband to rural

Canada. **The Decision raises the question, for existing and potential investors in competitive broadband service providers, as to whether it will be possible for these service providers to compete with ILECs having a \$620 million subsidy at their disposal.**

14. Any hesitation by investors will slow down the speed of broadband penetration in rural Canada and will deny consumers the benefit of an expedited service roll-out by nimble and cost-conscious competitive suppliers. **If the Decision is allowed to stand, it is very doubtful that consumers in rural and remote areas will ever receive the benefits of choice as well as price and service competition that consumers in urban areas enjoy.** To curtail the development of a competitive market at this important juncture will therefore have long-term adverse effects on consumers and Canada's broadband connectivity objectives.

15. There is a certain irony inherent in the Decision. The deferral account was originally created as a vehicle to protect nascent competition in urban telephony markets by keeping local rates in those areas higher than was otherwise justified under the price cap formula. Now, as the Decision is currently articulated, these funds will be used in a manner that will adversely impact the entry of competitive broadband service providers into rural regions of Canada. Without these entrepreneurs in the market, there will be less opportunity for choice and competitive pricing of broadband and VoIP services in rural areas. This is a classic case of one distortionary regulatory intervention having given rise to other distortions in a separate market.

16. The Decision also conflicts with the latest policy pronouncement by the Minister of Industry, the Honourable Maxime Bernier, in his comments on the CRTC's VoIP decision, when he warned against excessive interference with market forces:

In order to encourage innovation and productivity, it is imperative that regulatory measures interfere as little as possible with competitive market forces.<sup>1</sup>

17. As indicated above, BXI shares the Government of Canada's desire to extend broadband services to Canadians in all regions of our country. BXI is committed to this objective and has invested considerable financial resources, without subsidy, to achieve this goal. BXI has done so – profitably - because it is convinced that advances in technology (both satellite and fixed wireless) have changed the old paradigm for rural broadband and have given rise to a new business case for the commercial provision of broadband services in rural and remote areas of the country. BXI respectfully submits that the CRTC's proposal to use up to \$620 million in deferral account revenues to subsidize the extension of the ILECs' broadband networks in rural and remote areas will considerably diminish the historic opportunities that are now presented for deployment of a commercially viable service and will relegate Canadians in rural and remote areas back to their traditional position of having to accept monopoly, ILEC-provided, services with less choice and higher prices than Canadians in other more populated regions.

18. In BXI's submission, the CRTC's failure to recognize this opportunity, and its failure to take into account technical developments over the past two years, as well as the emergence of new economic models for broadband deployment, gives rise to substantial doubt as to the correctness of these aspects of its Decision.

19. The distortionary effects on the market that the Decision will have are amply demonstrated by examining its impact on BXI. **BXI has never sought or received a government subsidy to help finance its provision of broadband services** and the company has invested substantial private capital in an

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<sup>1</sup> Industry Canada Press Release: *Government of Canada Refers CRTC Decision on VoIP Back to the Commission for Reconsideration*, May 5, 2006.

economically viable business plan to extend broadband service to Canadians in rural and remote regions. **By effectively granting the ILECs a \$620 million subsidy to serve the same market, the CRTC has threatened the viability of BXI's business plan, and forced BXI and many other independent telecommunication providers to face subsidized competition.** The CRTC has also unnecessarily devoted up to \$620 million in overpayments by the ILECs' retail subscribers to subsidize an ILEC broadband service that BXI and others are already providing without subsidy.

20. The CRTC's decision also ignores the fact that the ILECs do not require artificial financial incentives to improve service to rural and remote areas within their service territory. The ILECs currently generate large cash flows by serving these areas on a *de facto* monopoly basis. This is demonstrated by the ability of Bell Canada to use income trust vehicles to segregate its rural operations, that are less risky, from its urban operations that are riskier, and sell trust units at a higher multiple than would otherwise be possible. This is a valuable market for Bell Canada and, with the advent of broadband competition from BXI and other service providers, it will have an incentive for the first time to protect its investment and cash flow in rural markets by upgrading its own facilities. In this new environment, there is no need for the CRTC to subsidize Bell Canada or any other ILEC. The subsidy is an unnecessary gift that is wasteful and counter-productive in the sense that it will help to preserve the ILECs' *de facto* monopolies in these regions and disincent them to spend their own capital to improve service. It will also destroy the very real opportunity for consumers to gain access to the same choice of competitively priced broadband services that consumers in other parts of Canada now have access to.

21. By denying consumers the opportunity to break free of this old paradigm, the CRTC is doing them a disservice. It is using local telephone consumer-generated revenues from urban markets (collected ostensibly to improve



competition in those markets) to subsidize the ILECs networks in rural markets (which will in turn impede the development of competition in those regions).

22. Finally, the CRTC's implementation plan for its subsidy scheme is unworkable in a competitive environment. As discussed in greater detail below, it is heavily biased against competing suppliers of broadband service in terms of its failure to consider their longer term plans for expansion and by unfairly comparing their unsubsidized pricing and service offerings with subsidized services provided by the ILECs. Competition cannot be micromanaged in this way.

### **BACKGROUND ON BXI**

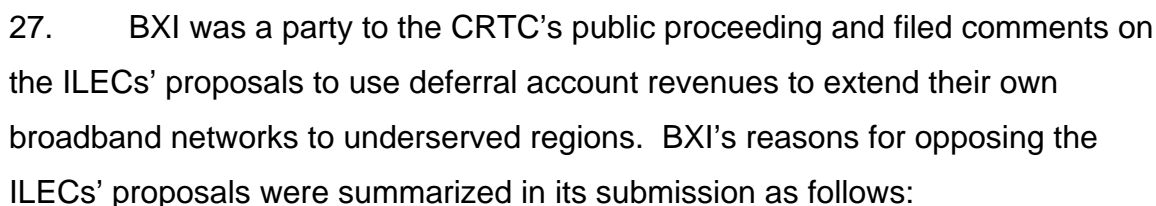
23. As indicated above, BXI is a provider of broadband services to rural and remote areas of Canada. BXI uses bi-directional broadband Ka-band satellite services and broadband fixed wireless services to provide Canadians in all regions of Canada with access to advanced telecommunications services. It tailors its service offerings and its technology choice to the demographics, demand characteristics and other attributes of the market in question and has a broadband solution for Canadians, no matter where they live in our vast country. Unlike many conventional carriers, BXI's business plan is targeted to the rural and remote regions of Canada that the ILECs have left largely unserved by their own broadband services.

24. In February of 2005, BXI entered into a purchase and resale contract with Telesat Canada, one of the world's leading satellite operators, to resell Telesat's broadband Ka-band satellite services. The contract has significant financial commitments including performance penalties. This followed a long-term supply contract with Motorola Inc. to supply BXI's fixed wireless equipment. BXI expects over the next 15 years to make purchase commitments under these contracts that will total more than \$240 million. With these arrangements in

place, BXI launched its broadband services in July of 2005.

25. As indicated above, BXI's business strategy has been to focus on extending the reach of affordable broadband service to Canadians that reside outside areas that terrestrial carriers can economically serve. BXI's fixed wireless services offer bandwidths from 1 to 8 mbps, depending on customers' requirements, at prices starting as low as \$29.99 per month. BXI's Ka-band satellite service delivers high quality broadband services with speeds from 500 kbps to 2 mbps at reasonable prices, starting at \$54.99 per month. Efforts are currently under way to develop a new "lite" broadband service, similar to the cable companies' lite service offering, that will provide less bandwidth at a lower price point for customers who do not require the capabilities of the higher speed offering. These prices and bandwidth offerings compare favourably with prices available in other parts of Canada with higher population densities. BXI services its customers with a network of over 800 local community-based partners who sell, install and support its services.

26. Demand for BXI's services has been extremely robust. Presented below is a map of Canada showing the locations of BXI's current customer base. As can readily be discerned, after less than a year in commercial operation, BXI is serving customers in all provinces and territories of Canada, including vast regions of the country that are hundreds of miles from any urban centre. Importantly, BXI is providing its services in all of these areas without the benefit of a government subsidy.



The HSI Subsidies have the potential to distort the developing marketplace for broadband services in remote and underserved communities to such an extent that a truly competitive marketplace for these services may never be possible. The focus of the HSI Subsidies on only the most economically attractive unserved markets will force existing and future competitive providers into increasingly sparse markets. Although approval of the HSI Subsidies will undoubtedly provide broadband services to some currently unserved customers, it will do so at the high cost of favouring the interests of the ILECs over their competitors and closing off the possibility of facilities-based competition developing in

these markets. Doing so will also provide the incumbents with absolutely no incentive to increase efficiencies or to become more innovative.<sup>2</sup>

## **THE DECISION**

28. In Decision 2006-9, the CRTC determined a methodology to calculate the balance of funds in the deferral accounts of seven ILECs<sup>3</sup> and established guidelines for the disposition of those funds.

29. The deferral accounts in question were created by the ILECs on the CRTC's instructions in *Regulatory framework for second price cap period*, (Decision 2002-34) and *Implementation of price regulation for Télébec and TELUS Québec*, (Decision 2002-43) (collectively, the Price Cap Decisions). At the time the Price Cap Decisions were issued, the CRTC stated that it anticipated that competition would be insufficient to discipline the ILECs' rates for residential local services in non-high-cost serving areas (non-HCSAs) during the price cap period. Accordingly, the CRTC considered it appropriate to subject these services to a productivity offset (X). The CRTC established a basket constraint equal to inflation (I) less this productivity offset and applied it to revenues in the basket of Residential Local Services in non-HCSAs. When I was less than X, rate reductions generally would have been required to satisfy this constraint.

30. However, the CRTC was concerned that these mandated rate reductions could have had an adverse effect on competition in the local exchange market. The CRTC considered that residential local rate reductions that flowed from market forces would generally be preferable to mandated rate reductions. Therefore, it introduced a mechanism in the Price Cap Decisions that required each ILEC to establish a deferral account. The ILECs were directed to assign to that account, in each year of the price cap period, an amount equal to any

<sup>2</sup> BXI Submission, Oct. 15, 2004, para. 6.

<sup>3</sup> Aliant Telecom Inc. (Aliant Telecom), Bell Canada, MTS Communications Inc. (MTS Allstream), Saskatchewan Telecommunications (SaskTel), TELUS Communications Inc. (TCI), Société en commandite Télébec (Télébec), and TELUS Communications (Québec) Inc. (TELUS Québec).

revenue reduction that would otherwise be required under the I-X constraint for the basket of Residential Local Services in non-HCSAs.

31. In the Price Cap Decisions, the CRTC stated that an adjustment to the deferral accounts could be made whenever the CRTC approved rate reductions for residential local services proposed by the ILECs as a result of competitive pressures. The CRTC also stated that the deferral accounts could be drawn down to mitigate rate increases for residential service that could result from the CRTC's approval of exogenous factors or when inflation exceeded productivity improvements. The CRTC further stated that other draw downs could occur, for example, through subscriber rebates or funding initiatives that would benefit residential customers in other ways.

32. In Decision 2006-9, the CRTC estimated that the balance in the ILECs' deferral accounts at the end of the fourth year of the current price cap period in 2006 would total in excess of \$650 million.

33. In Decision 2006-9, the CRTC also established guidelines for the disposition of the balances remaining in the deferral accounts. It identified the following three projects for expenditure of the funds in question:

1. expansion of broadband services;
2. improved accessibility to telecommunications services for persons with disabilities; and
3. rebates to the ILEC's residential local subscribers in non-HCSAs.

34. However, the CRTC made clear in paragraph 116 of Decision 2006-9 that "...each ILEC should, to the greatest extent possible, use funds in their deferral accounts for initiatives to expand broadband services to rural and remote

communities and to improve accessibility to telecommunications services for persons with disabilities.” The CRTC went on to say that to the extent to which any balance remains in the ILEC’s deferral account after the other initiatives have been approved by the CRTC, this amount would be returned to the ILEC’s residential local subscribers in non-HCSAs in the form of rate reductions.

35. As regards the dedication of deferral account funds to improve accessibility to telecommunications services for persons with disabilities, the CRTC indicated in paragraph 210 of Decision 2006-9 that “...at a minimum, five percent of each ILEC’s accumulated deferral account balance should be allocated to this purpose before any of the other draw-downs of this Decision.”

36. This means that it is open to the ILECs to use up to 95% of the accumulated balance, or some \$620 million, for broadband extension.

37. In Decision 2006-9, the CRTC rejected proposals to subject the use of deferral account funds to a competitive bidding process:

The Commission considers that a competitive bidding process, while assisting in the achievement of competitive neutrality, would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden.<sup>4</sup>

38. It also rejected proposals to restrict the use of deferral account funds to backbone facilities:

However, the Commission considers that constructing only backbone facilities in rural and remote areas is not likely to provide sufficient economic incentive to broadband providers to offer broadband services in those communities. The Commission considers that proposals that would provide broadband services to the end-customer, similar to the one submitted by Bell Canada, would be the most effective way to expand broadband services to those communities. The Commission generally agrees with the approach outlined in Bell Canada’s submission, which is likely to be much less administratively burdensome than a competitive

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<sup>4</sup> Decision 2006-9, at para. 189.

bidding process.<sup>5</sup>

39. The CRTC opted instead to permit the ILECs to use the deferral account funds to expand their own broadband networks – both with respect to backbone and access facilities – subject to a number of criteria.

## **THE DECISION DISTORTS THE COMPETITIVE MARKET AND PRE-DETERMINES COMPETITIVE OUTCOMES**

40. The CRTC is required by virtue of section 47(a) of the *Telecommunications Act* to exercise its powers and perform its duties with a view to implementing the Canadian telecommunications policy objectives in section 7. These include:

- a. to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and
- b. to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, when required, is efficient and effective.

41. It is well-recognized that the *Telecommunications Act* put in place a legislative and policy framework to transition the Canadian telecommunications industry from a monopoly model to a competitive market structure. The CRTC has spent much of the past decade encouraging the development of competition in various sectors of the market and lightening regulation where market forces allow. This process included extensive proceedings over a period of several years to eliminate a system of internal subsidies between services and classes of users that impeded the introduction of competition on an economically efficient basis. This regulatory activity culminated with the express quantification of

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<sup>5</sup> Decision 2006-9, at para. 191.

subsidies required to maintain affordable prices for basic local telephone services in the more rural and remote areas of Canada and the creation of a “portable contribution” regime, which in effect placed these subsidies in the hands of consumers and let them select their carrier of choice in a competitively-neutral manner. Since 1997, this principle of “competitive-neutrality” has been followed in many CRTC decisions.

42. While expressly acknowledging in paragraph 189 of Decision 2006-9 that “competitive neutrality is a principal part of the objectives to be considered when implementing the initiatives to be funded from the deferral accounts”, the CRTC’s decision in fact runs counter to that principle (a) by permitting deferral account funds to be used exclusively by ILECs to subsidize their broadband facilities into rural and remote areas; and (b) by ignoring the impact of this decision on other competitors such as BXI, which have invested private capital to serve these same markets on an unsubsidized basis.

43. The CRTC made clear in its Decision that competitive neutrality was an important factor to consider when implementing the initiatives to be funded from deferral accounts:

The Commission notes that, based on parties’ comments in this proceeding, the principle of competitive neutrality was an important factor in guiding the preparation of their respective proposals, as well as their evaluations of the other parties’ proposals – in particular, proposals for the expansion of broadband services.

The Commission considers that competitive neutrality is a principal part of the objectives set out in the price cap decisions and should be balanced against all relevant factors when applying these objectives to the evaluation of the proposals.<sup>6</sup>

As indicated earlier, competitive neutrality is a principal part of the objectives to be considered when implementing the initiatives to be funded from the deferral accounts.<sup>7</sup>

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<sup>6</sup> Decision 2006-9, at paras. 30-31.

<sup>7</sup> Decision 2006-9, at para. 189.



44. Despite the importance attributed to the principle of competitive neutrality, the CRTC's decision fails to apply that principle in a meaningful way.

45. Competitive neutrality in a regulatory context means designing regulations in a manner that does not give one competitor an advantage over another based on the regulation in question. The principle has its roots in the proposition that the market should decide competitive outcomes – not the regulator.

46. This principle found expression in the CRTC's landmark decision on *Local Competition*,<sup>8</sup> where the CRTC made it clear that the new regime was competitively neutral. In *Local Competition*, the CRTC addressed the complex issue of how to administer a subsidy system within the context of a competitive market. Its answer was to make the subsidy transparent and to establish a "portable" contribution regime, which allowed the subsidy to follow the customer's choice of local exchange carrier in high cost areas. This system has worked well, placing all competitors and all technologies on an equal footing in rural and remote markets.

47. Unfortunately, despite paying lip service to these principles in Decision 2006-9, the CRTC has failed to apply them in a meaningful manner. The result is that the decision favours the ILECs over their competitors.

48. During the course of its public proceeding, the CRTC received detailed proposals for a competitively-neutral subsidy scheme, which would have seen competitors bidding for subsidies to extend backbone facilities to rural and remote areas. Such a scheme would have determined which competitor could extend service to rural and remote areas at the lowest cost, using the least-cost technology.

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<sup>8</sup> Decision CRTC 97-8.

49. Unfortunately, the CRTC rejected these proposals on the basis that they would be difficult to administer:

...Some parties suggested that a competitive bidding process would be required to give effect to this objective, so that other service providers, in addition to the ILECs, would have an opportunity to build broadband facilities to rural and remote communities. The Commission considers that a competitive bidding process, while assisting in the achievement of competitive neutrality, would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden.<sup>9</sup>

50. BXI respectfully submits that the CRTC erred in making this determination.

51. As regards “administrative complexity” and “regulatory burden”, BXI would note that these concerns did not prevent the CRTC from introducing a competitively-neutral regime for local telephone service, or a complex regime for local number portability. Nor has it prevented Industry Canada from introducing spectrum auctions with competitive bidding processes.

52. What might be lost to the CRTC, in terms of the time and effort required to establish a competitive bidding process, would be offset by:

- A more sustainable model for rural broadband without the need for ongoing subsidy, and a model which brings much needed choice and competition to broadband, and to internet applications such as voice and entertainment in rural areas;
- The greater speed of execution offered by nimble, entrepreneurial independent service providers; and
- The benefits of Ka satellite broadband service which is “ready now”, providing ubiquitous coverage of the Canadian population.

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<sup>9</sup> Decision 2006-9, at para. 189.

53. The Bell Canada model, which was in large measure adopted by the CRTC, may have appeared to be a good one back in 2003 when it was first formulated, but the economics of broadband delivery have changed in the past 18 months with the advent of Ka-band satellite services and lower cost wireless broadband solutions, as well as the success of the SuperNet model in Alberta. Proceeding with the Bell Canada model now will be counter-productive – leading to fewer builds by competitors, slower roll-out of broadband to customers and no guarantee of choice or least-cost service models for consumers.

54. BXI also respectfully submits that the CRTC ought not to be embarking on a new subsidy program at this juncture unless it can be assured that it is going to be administered in a competitively-neutral manner.

55. It took the CRTC a decade to wring high levels of subsidies out of the Canadian telecommunications system, to reduce them to a sustainable level, and to introduce a portable contribution system that is competitively-neutral. It is a step backwards to now introduce a new subsidy (that is more than twice as large as the existing annual dollar value of the contribution regime) and to fail to make it portable or at least subject to a competitive bidding process.

56. The distortionary effects on the market that the CRTC's Decision will have are amply demonstrated by examining its impact on BXI and other competitors. By effectively granting the ILECs a \$620 million subsidy, that is not available to any other competitor, without establishing the necessary safeguards to ensure competitive neutrality, the CRTC has undermined these other companies' business plan, and unfairly forced them to face subsidized competition. The CRTC has also unnecessarily given up to \$620 million in overpayments by the ILECs' local telephone subscribers to subsidize a broadband service that BXI and other independent broadband providers are prepared to provide without subsidy. More importantly, the decision will have the effect of dampening competition, which will slow down the speed of broadband

deployment and the potential for consumers in rural and remote areas to have access to the same choice of services and price competition that is available in other more populated regions of Canada.

57. This outcome was also projected by consumer groups during the CRTC's public proceeding. A coalition of consumer groups submitted that funding Bell Canada's broadband expansion proposal would have potential negative effects on the development of facilities-based competition in broadband markets. In their view, implementation of a competitive bidding process for broadband expansion represented a "minimum standard of competitive fairness" that should be applied.<sup>10</sup>

### **THE DECISION IS TECHNOLOGY-BIASED AND IGNORES ADVANCES IN SATELLITE AND WIRELESS TECHNOLOGY**

58. Closely tied to the principle of competitive neutrality is the principle of technological neutrality, which postulates that the regulations should not favour one technology over another. Again, the market should determine what technology delivers the highest quality of services demanded by consumers at a price they are willing to pay.

59. By stating in paragraph 195 of the Decision that "the ILECs should expand broadband services to the customer premises in communities located primarily in Bands E and F in high cost exchanges, where service is not available from any service provider and is not part of their existing commitments or planned rollout", the CRTC appears to be unaware that Ka-band satellite services are capable of serving all of these areas and has ignored the fact that BXI not only plans to serve all of these areas – but has actively been implementing its business plan to serve precisely those markets. By ignoring Ka-band satellite capabilities, and focusing its decision on subsidizing the extension

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<sup>10</sup> Decision 2006-9, at para. 156.

of wireline “backbone” facilities to high cost areas, the CRTC has totally ignored the principle of technological neutrality that has underlined its other decisions in recent years.

60. This aspect of the CRTC’s decision is technologically biased since it is premised on the assumption that no service provider can reach these customers without a subsidy. This totally ignores what BXI is doing with a combination of fixed wireless and Ka-band satellite technology. It assumes that a “backbone” network is a prerequisite for service and it allows a subsidy for only ILEC-owned backbones. Since Ka-band service is already ubiquitous in rate bands E and F, the CRTC’s decision effectively devotes up to \$620 million to subsidize the ILECs to compete with BXI in the delivery of broadband services to customers residing in these areas.

61. As discussed above, Ka-band satellite and advanced fixed wireless services provide a new model for delivering sustainable broadband services to rural Canada. In less than a year, BXI has initiated service to 125 rural communities with a further 200 communities scheduled to be served in each of the next three years. BXI’s business plan calls for its fixed wireless and satellite service to be deployed to serve, or be available to, a total of 2 million households by the end of 2008.

62. Failure to take into account these initiatives and the potential of competitive broadband service providers to extend broadband in rural areas on a commercial, unsubsidized basis, constitutes a serious error, which contradicts a well-established CRTC policy of technological neutrality and has no place in a competitive market.

## THE DECISION IGNORES THE SUCCESS OF THE SUPERNET MODEL IN ABLERTA

63. In its decision, the CRTC decided to use deferral account revenues to fund local access facilities as well as backbone facilities:

**... the Commission considers that constructing only backbone facilities in rural and remote areas is not likely to provide sufficient economic incentive to broadband providers to offer broadband services in those communities.** The Commission considers that proposals that would provide broadband services to the end-customer, similar to the one submitted by Bell Canada, would be the most effective way to expand broadband services to those communities. **The Commission generally agrees with the approach outlined in Bell Canada's submission, which is likely to be much less administratively burdensome than a competitive bidding process.**<sup>11</sup>

64. In BXI's respectful submission, this aspect of the CRTC's decision is based on the erroneous assumption in paragraph 191 that: "constructing only backbone facilities in rural and remote areas is not likely to provide sufficient incentive to broadband providers to offer broadband services in those communities." (emphasis added)

65. This determination ignores the experience in Alberta, where the SuperNet backbone network has spawned many independent suppliers of broadband access services in rural and remote areas. As a result of SuperNet, 140 communities are now served by competing access providers that use SuperNet for backbone connectivity. BXI estimates that 40% to 45% of rate bands E, F and G in Alberta are now served by wireless Internet service providers using the SuperNet backbone. At least 37 access providers currently are operating in this market in less than one full year following the launch of SuperNet.

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<sup>11</sup> Decision 2006-9, at para. 191.

66. The potential impact on BXI and other competitive broadband service providers of the CRTC's decision to require the ILECs to provide both backbone and access facilities is made considerably worse by the CRTC's decision to include both "backbone" and "access" elements in its broadband expansion projects. This aspect of the Commission's decision ignores the experience in Alberta where the SuperNet backbone facility has successfully attracted many local access providers, including BXI, to enter the market. Once backbone facilities are available at a reasonable cost, competitive market forces can deliver access. This has been proven time and again in Alberta where some 140 communities previously unserved by terrestrial broadband are now served with fixed wireless access networks off the SuperNet backbone network. By extending the subsidy to the ILECs' access facilities, rather than confining it to backbone facilities, the CRTC is further reducing the size of the market for competitors, threatening the development of a competitive access market, and undermining BXI and other competitors' business models.

67. The SuperNet model, developed and executed by Bell Canada (outside of its own ILEC territory) and Axia NetMedia Corporation ("Axia") in Alberta, has important characteristics designed to encourage entrepreneurial investment by independent service providers, and to ensure that the network manager selected to operate the subsidized facilities is not compromised in its dealings with third party service providers, by being a competitor at the retail level.

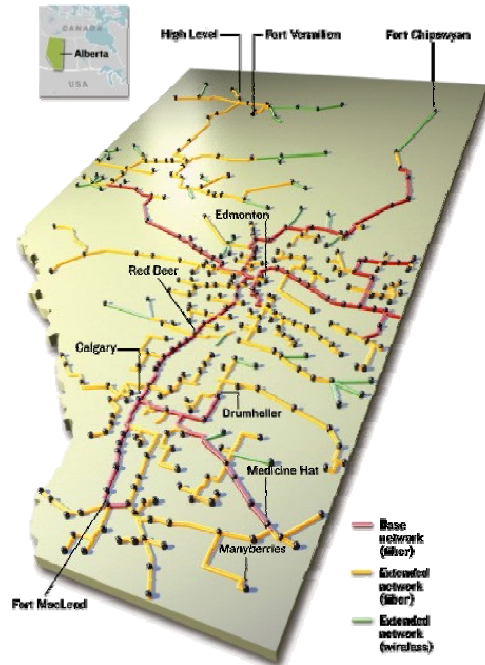
68. The creation of an independent access manager in the SuperNet model is an important factor that assures competitors at the retail level that the network will be operated on a competitively neutral basis. The SuperNet model embodies a number of other safeguards designed to ensure that transactions are transparent, that the manager is accountable and that users are consulted in planning for network expansion. All of these safeguards encourage third party investment in access facilities and help to ensure that public money expended to

subsidize the network is in fact used for the public good and not for the benefit of a single carrier. These features are missing from the CRTC's Decision.

### The Alberta SuperNet

#### The open access model

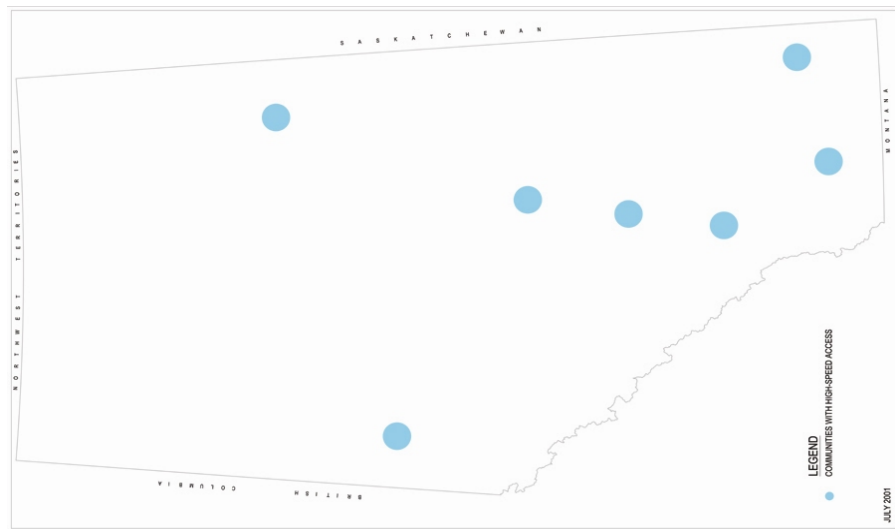
- Any service provider can buy bandwidth on the network.
- Creates a competitive environment for service providers who want to deliver their services to retail and business customers.
- Opens up opportunities for business and economic growth in rural regions.
- As the “operator of operators”, Axia cannot compete with providers by offering services directly to the retail marketplace.



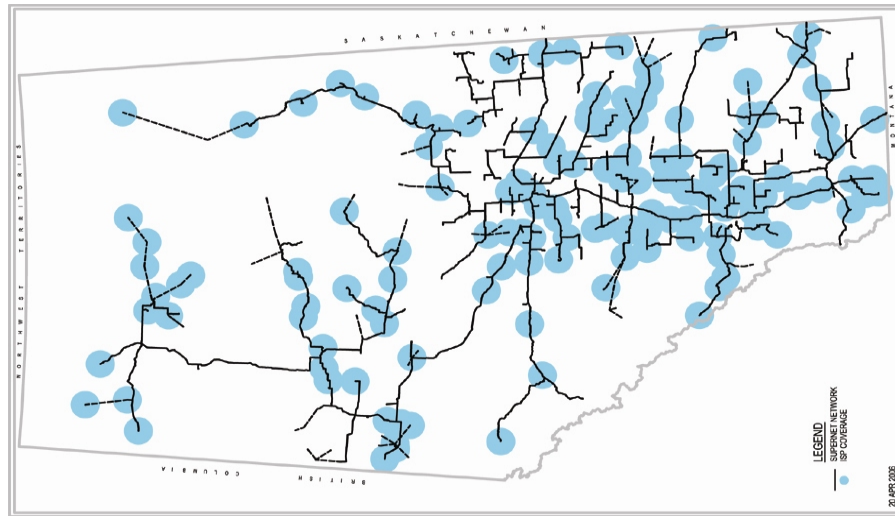
69. The success of the SuperNet model is reflected in the success and speed with which local entrepreneurs, using the backbone network, have invested private capital in providing access to rural communities. After only ten months of operations, there 140 communities served by some 37 broadband service providers, with a further 24 service providers signed up with SuperNet to commence business, and another 31 with applications pending. SuperNet has, in a very short period of time, extended broadband service to between 40% and 45% of high cost rate bands and this coverage is still growing at a rapid rate as new access providers invest in access facilities. The success of this model is readily apparent from the time-lapsed coverage maps presented below.



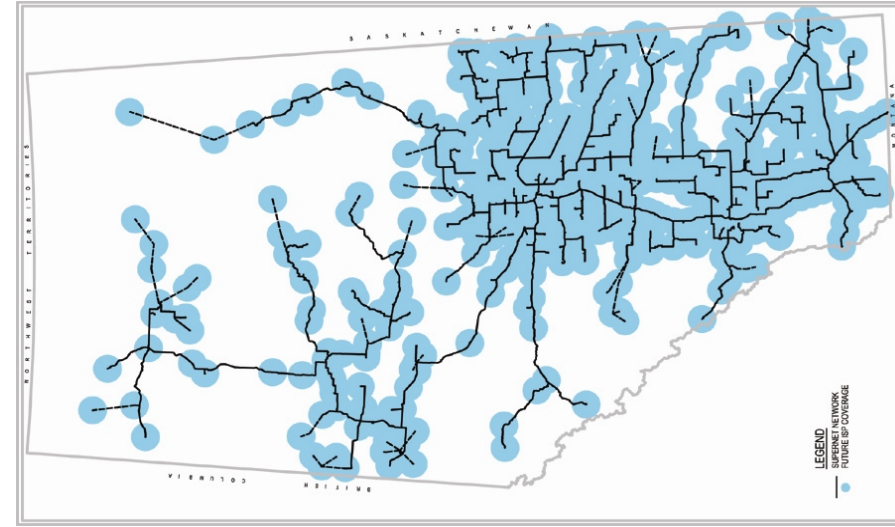
**Communities with competitive  
high-speed network access  
July 2001**



**Communities receiving high-  
speed network access  
April 2006**



**Competitive network coverage  
when providers connect to all  
429 SuperNet communities**



70. Building on the early successes of SuperNet, Axia is exporting its independent access manager model to other jurisdictions. In February 2006 Axia and VINCI Networks entered into an agreement to establish a joint venture to create and support local access operators and ISPs in France as they deliver their IP services to administrative, business and retail customers.

71. This aspect of the CRTC's Decision will affect BXI adversely in two respects. First, it will further reduce BXI's ability to compete with the ILECs using satellite services in areas where ILECs have subsidized facilities, and secondly, it will limit BXI's ability to compete at the local level using fixed wireless facilities, which BXI does in Alberta, where SuperNet backbone facilities are available, and in Ontario, Manitoba and New Brunswick, where BXI secures backbone through a number of third party suppliers.

72. By failing to separate access from backbone facilities, and by failing to put in place other competitive safeguards and accountability mechanisms, the CRTC has ignored the important lessons learned from the SuperNet model in Alberta and has unnecessarily impeded the development of competitive broadband access markets in contravention of paragraphs (c) and (f) of section 7 of the *Telecommunications Act*. This in turn has exacerbated the competitive advantage given to the ILECs in respect of subsidized backbone facilities.

## **THE DECISION CONFLICTS WITH THE TPRP RECOMMENDATIONS**

73. The CRTC's Decision also runs directly contrary to the recommendations of the Telecommunications Policy Review panel (TPRP or the Panel) in their March 23, 2006 report to the Government of Canada. The TPRP recommended that the CRTC stay out of the broadband subsidy business and that any government-sanctioned subsidy programs be carefully targeted, be made subject to a competitively neutral bidding process and be required to treat backbone and

access issues separately.

74. In its report, the Panel warned of the market distortions that would result from a new subsidy scheme for broadband services – and recommended that the CRTC stay out of this area:

In general, however, **the Panel believes cross-subsidies between classes of telecommunications service consumers are an inappropriate means of achieving policy objectives in a competitive telecommunications industry.** If inter-service subsidies remain small, like the CRTC's contribution fund subsidies, then economic distortions and inefficiencies are minimized. However, if the contribution fund were expanded significantly to finance broadband expansion programs, the price distortions and inefficiencies would increase to an unacceptable level. **This would distort markets and result in an inefficient allocation of resources by artificially lowering the prices of some services and raising the prices of others.**

**Internal cross-subsidies are also undesirable from the viewpoint of social equity.** Since the cost of providing subsidies is passed onto consumers, and since all consumers contribute at the same rate regardless of income, internal cross-subsidies effectively impose a regressive tax on the customers of telecommunications service providers.

...

**For all of these reasons, the Panel has concluded that the CRTC contribution fund should not be used to finance expansion of broadband access.<sup>12</sup>**

75. The CRTC's refusal to establish a competitive bidding scheme for subsidies also runs counter to the Panel's report:

**The Panel believes the best approach to fund expansion of broadband access networks in each of these unserved areas is to hold least-cost subsidy auctions.**

Under this approach, private sector service providers, including incumbents and new entrants as well as interested community-based groups, could submit proposals to provide broadband service in a defined area. The subsidy funding should be awarded to the proposal that requires the smallest subsidy, provided that it demonstrates it has the

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<sup>12</sup> TPRP Report at pages 8-9 and 8-10.

technical, financial and managerial capacity to construct and operate the necessary broadband network infrastructure.

**This model contains market-like incentives that should encourage innovation. It also promotes “right size” solutions that would reduce the overall costs to the taxpayer and encourage use of the most efficient technological solution.** Unlike BRAND, it would not require communities to organize themselves in order to aggregate demand, develop business plans and compete for funding, except in those cases where communities choose to do so.<sup>13</sup>

76. The failure of the CRTC to treat backbone and access facilities separately also runs counter to the findings of the Telecommunications Policy Review Panel. The Panel recognized that backbone facilities pose a much greater hurdle than access facilities and recommended that the issue of access be handled separately from backhaul facilities:

The Panel notes that the challenge of providing a broadband network point of presence (PoP) in an unserved area and of providing backhaul from that PoP to regional, national and international backbone networks is significantly greater than the challenge of providing local broadband access within an unserved area, once a PoP has been established.

**The cost of providing local access networks in many cases is relatively low compared with the cost of providing high-capacity links between backbone networks and local PoP, even when least-cost technologies are used.** Different technical, operational and financial capacities are needed to design, build and operate local access and backhaul networks, to scale their capacity in response to changing demand and to upgrade as new technologies become available.

**As a general rule, access and backhaul should be treated as separate components of the U-CAN network expansion initiatives.** Backhaul typically involves provision of high-speed microwave or fibre transport facilities between Internet access points and designated PoPs within the service area. Access, on the other hand, involves providing service on demand to users within the service area, by means of technologies chosen by the bidders in an auction, such as fixed wireless, DSL or cable.<sup>14</sup>

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<sup>13</sup> TPRP Report at page 8-16.

<sup>14</sup> TPRP Report, pages 8-16 to 8-17.

## **THE DECISION WILL ACTUALLY SLOW DOWN EXTENSION OF BROADBAND SERVICES**

77. Decision 2006-9 has also had an immediate and adverse impact on independent service providers and their speed in delivering broadband to rural Canada. The Decision raises the question, for existing and potential investors in competitive broadband service providers, as to whether it will be possible for these service providers to compete with ILECs having \$620 million in subsidy at their disposal. Any hesitation by investors will slow down the speed of broadband penetration in rural Canada and will deny consumers the benefit of a speedy rollout by independent service providers.

78. When the Decision was released, it had an immediate impact on non-subsidized broadband activity in rural and remote areas. The threat of Bell Canada and other ILECs being subsidized to provide broadband services placed an immediate damper on their competitors' plans to extend their own broadband footprint. In a March 10, 2006 letter to the ILECs respecting implementation of the Decision, the CRTC directed the ILECs to identify any broadband routes that would take more than four years to complete. By allowing the ILECs to specify projects with this type of extended implementation period, the CRTC is effectively ensuring that no other service provider will serve these markets. This not only forecloses significant market segments from competition, but it prevents a much faster roll out by competitors and denies consumers an earlier delivery date for much needed broadband services. This impact was predicted by Commissioner Cram in her dissent in Decision 2006-9:

Secondly, this building out process will take perhaps 5 to 7 years to complete. In the meantime, the smaller, more agile and innovative competitor who might have been able to make an economic case in these smaller communities will be stopped in his tracks. Who would even contemplate competing against an incumbent in a community of 4,000, when the incumbent can provide the triple play, with two of three rates for services being unregulated? There will be chill on risk investment in

facilities based construction and on innovation, both of these being part of our statutory mandate.

79. Advances in broadband satellite and fixed wireless technology have positioned Canada for a historic opportunity to:

- change the historic paradigm for rural telecom of higher prices, fewer choices and less availability;
- increase the speed, quality and availability of broadband access to urban levels;
- offer true competition and choice in telecom and IP services; and
- regain Canada's position as the world's leader in the provision satellite and fixed wireless services and broadband connectivity.

These types of opportunities do not present themselves very often and it is critical that they be recognized and acted upon when they do appear. By advantaging the ILECs with \$620 million in broadband subsidies, Decision 2006-9 has the potential to eliminate this important opportunity.

## **THE DECISION IS NOT GOOD FOR CONSUMERS**

80. The Decision presents a classic case of "robbing Peter to pay Paul." As a result, it distorts outcomes in two separate markets for two distinct types of services.

81. The \$620 million in question is the product of overcharging consumers in larger urban markets for their basic telephone service over a four year period – a practice expressly sanctioned by the CRTC. The \$620 million in a very real

sense belongs to the consumers who were overcharged and they are currently before the Federal Court of Appeal seeking leave to recover it.

82. While the money will now be used to subsidize the provision of advanced broadband services to other consumers in other regions of Canada if the Decision is allowed to stand, the distortionary effects of this second regulatory intervention will ultimately hurt the very people that the CRTC is trying to help. It will keep them captive to a *de facto* monopoly and it will dampen the efforts of competitors, like BXI, who are now trying to serve them on a commercial basis, without any subsidy.

83. The CRTC's decision also ignores the fact that with emerging competition from independent broadband service providers, the ILECs do not require artificial financial incentives to improve service to rural and remote areas within their service territory. The rural market is a valuable market for Bell Canada and the other ILECs. They currently generate huge cash flows by serving these areas on a *de facto* monopoly basis. This is demonstrated by the ability of Bell Canada to use income trust vehicles to segregate its rural operations, that are less risky, from its urban operations that are riskier, and to sell trust units at a higher multiple than would otherwise be possible. Bell Canada mentioned this lower risk in a press release announcing the creation of the trust:

“The local access lines to be transferred to the regional trust are located in regions where there is less cable penetration, and are therefore not undergoing the fundamental transformation occurring in the more competitive major cities.”<sup>15</sup>

In the Bell Business Review Conference 2006 presentation, Bell addresses the “favourable trust characteristics” of the “Regional Lines Trust” with “lower competitive exposure”, limited capex variability, and “Stable, modestly growing business.

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<sup>15</sup> BCE Press Release, February 1, 2006.

Bell Canada also indicated that customers in these rural areas will have access to the wireless broadband services offered by the Inukshuk consortium.

84. With the advent of broadband competition from BXI and other service providers, Bell Canada will have an incentive for the first time to protect its investment and cash flow in rural markets by upgrading its own facilities or, as it says, acquire wireless broadband services from Inukshuk. In this new environment, there is no need for the CRTC to subsidize Bell Canada or the other ILECs. The subsidy is an unnecessary and wasteful gift to ILECs that they do not need. It is also counter-productive in the sense that it will help to preserve ILEC's *de facto* monopoly in these regions and disincent them to invest their own capital to improve service. It will also deny rural customers of the benefits of competition such as choice of service providers, improved service and lower prices.

85. One regulatory intervention has begat another, and consumers are the losers in both cases.

### **A 20<sup>TH</sup> CENTURY SOLUTION TO A 21<sup>ST</sup> CENTURY ISSUE**

86. The decision to subsidize the ILECs' extension of broadband services to rural and remote areas represents a significant step backward in the evolution of Canadian regulatory policy. It represents a reversion to a monopoly mentality where a "natural monopoly" is assumed to exist and where subsidies are thought to be necessary to incent incumbent carriers to provide service.

87. While it might have been difficult to conceive of competitive broadband services in rural and remote areas a few years ago, huge advances in technology have put a nail in the coffin of yet another "natural monopoly." BXI is not the only company investing private capital to serve this market. Bell Canada is participating in a national wireless broadband initiative (Inukshuk), and other



wireless and wireline carriers, such as the telecom affiliates of electricity utilities, are extending broadband to areas where no such facilities previously existed.

88. The CRTC's decision to intervene in the broadband market with subsidies, and to restrict the distribution of the subsidies to the ILECs' services and the ILECs' technology, threatens to artificially constrain market forces and create a *de facto* regulatory monopoly.

89. One need only recall Bell Canada's proposal for the construction of a single broadband network (the Beacon initiative) in the 1990's using monopoly revenues, the CRTC's rejection of that model and the subsequent development of a vibrant competitive market for broadband services in urban markets, to realize the extent to which the Decision could ultimately harm the development of advanced telecommunications networks in rural areas of Canada. Had the CRTC approved the Beacon initiative using monopoly rate base revenues to finance it, instead of requiring Bell Canada to use non-utility investment funds, it is quite likely that the cable companies would not have been able to compete with the ILECs in the broadband market and Canada would not be in the enviable position that it is in today, with one of the most competitive broadband markets in the world in most major centres. While it has taken longer to develop the technology required to serve rural and remote areas on an economical basis, that technology is now available and is being deployed. It is precisely the wrong time to jeopardize this deployment with a competitively biased subsidy program that ignores the important lessons learned in the past.

#### **THE DECISION TRIES TO MICROMANAGE BROADBAND EXPANSION AND COMPETITION IN A BIASED MANNER**

90. The CRTC has tried to offset some of the concerns raised by BXI and others during its proceeding by stating that the ILECs will not be able to use subsidy money to extend facilities into areas already served by competitors. The

CRTC has also said that the ILEC must use least-cost technology and must ensure that only unprofitable routes are subsidized.

91. Unfortunately, the CRTC will not be able to ensure that any of these objectives is satisfied no matter how much it tries to micromanage the process through regulatory oversight.

92. First, as discussed above, the Decision ignores the fact the Ka-band satellite already covers the country. The ILECs cannot help but build in areas where BXI already offers its services.

93. Secondly, in the absence of competition, or a competitive bidding process, or a portable subsidy program that puts the money in the hands of consumers, the CRTC has no way of ensuring that the ILECs are in fact using least cost technology or are making efficient use of the \$620 million subsidy. These kind of determinations can only be made in a competitive climate. The CRTC is not equipped to second-guess the ILECs' technology or engineering decisions. The CRTC recognized this when it abandoned rate of return regulation in favour of price cap regulation in 1997. It left technology decisions to competitive market forces and focused on regulating prices rather than investment decisions.

94. The details of the CRTC's implementation plan, which are set forth in a March 10, 2006 letter to interested parties, indicates that the Commission is going to quantify the amount of subsidy required by the ILECs for a particular network build based on 15 year cost and revenue projections. This exercise will involve 15 year demand projections and related estimates of pricing and services over a 15 year period. This exercise, which is reminiscent of the CRTC's old rate of return regulation, will be impossible to perform with any degree of accuracy since it is difficult to project demand, services or prices for a five year period – let alone a 15 year period. These types of cost studies are notoriously inaccurate and are easily subject to manipulation.

95. Thirdly, in its March 10, 2006 letter to the ILECs respecting implementation of the Decision, the CRTC has called on ILECs to prepare and file proposals to extend broadband networks to rural and remote areas over a four year period. The ILECs are then required to file annual updates to their proposals and the CRTC will assess at that time whether an alternative broadband service provider is actually providing service to the same region. The CRTC states that “If no alternative broadband service provider is providing services to any of the communities included in the ILEC’s proposed annual roll-out plan, the Commission intends to approve the updated plan by 15 December of each year.” By focusing on areas where competing suppliers are actually providing services, instead of on areas where they intend to provide services over the same four year period that the ILECs have to roll out their networks, the CRTC is again favouring the ILECs over their competitors and distorting the operation of competitive markets.

96. However, the fact that an alternative supplier such as BXI might already be serving the area in question will not necessarily prevent the ILEC from receiving the deferral account subsidy. The CRTC intends to compare the alternative service provider’s service with that of the ILEC, in terms of number of customers being served, the technology being used, and the service levels being attained. If the competitor’s service level is not comparable to the level that the ILECs are required to deliver (which the CRTC says must be comparable to urban areas in terms of price, terms and conditions, speed and reliability), the ILEC will still get the subsidy:

In their comments, alternative broadband service providers are to state whether they are providing broadband services to any of the communities listed in the ILEC’s 1 November updated annual roll-out plan, and identify each specific community in which it is providing these services. The alternative broadband service providers are to also provide the size of the community and the number of subscribers being served. The technology used by alternative broadband service providers must meet the service requirements imposed on the ILEC (i.e., services comparable to those provided in urban areas in terms of rates, terms and conditions, speed,

and reliability) in order for the community to be considered served.<sup>16</sup>

97. These criteria further stack the deck against competitors since they match the competitor's actual customer count and service parameters against the ILEC's theoretical plans. This approach also takes a snap-shot of where competitors are at a given point in time, rather than considering the projected results of the competitors' service roll-out over a comparable, multi-year, period of time like the ILECs' plans.

98. The idea of tying the service outputs and pricing of unsubsidized broadband providers in higher cost rural and remote areas, with the ILECs' pricing and service outputs in lower cost urban areas, also places competitors in an impossible position. Since the CRTC is comparing an unsubsidized competitor's service with a subsidized ILEC service, and a service in a remote area with a service in a high density area, there is little chance of competitors ever satisfying these criteria.

99. Competitive broadband providers base their conduct on business plans that are carefully crafted, with reasonable assumptions about demand, costs, prices and competitive activity. They cannot operate in a market in which annual determinations by the CRTC over the next four years may effectively deny them entry to any number of markets, or jeopardize an investment and service rollout that they have already committed to.

100. It is impossible for competitors to operate in this artificial environment and it is impossible for the CRTC to micromanage competition in this way without predetermining competitive outcomes and inevitably numbing market forces.

101. The creation of this new broadband subsidy for the ILECs and the CRTC's implementation plan therefore represent a considerable step backward. The

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<sup>16</sup> CRTC letter dated March 10, 2006, *Follow-up to Disposition of Funds in the Deferral Accounts*.

Decision runs counter to many of the regulatory reforms introduced by the CRTC itself over the past decade as well as the policy objectives in section 7 of the *Telecommunications Act*. The CRTC's plan to micromanage this broadband roll-out is doomed to failure. It threatens the viability of competition and investments made by many broadband service providers.

## **THE DECISION USURPS THE GOVERNMENT'S POLICY ROLE**

102. Up until now, the decision of whether or not to subsidize broadband initiatives in rural and remote parts of Canada has been a policy issue for the federal and provincial levels of government. Any such subsidy programs have been set up and administered by those governments. The Decision by the CRTC to set up its own subsidy scheme usurps the Government's role.

103. As indicated above, the TPRP recommended in its recent report to the Government of Canada that the CRTC not become involved in the subsidization of broadband services and that a new Government run program (U-CAN) be administered on a competitively neutral basis by the Government to the extent that the Government considers that such a program is needed. The Panel went on to say that great care must be taken to ensure that such subsidies are limited to areas where competition is unlikely to provide the necessary services. In another part of its report, the TPRP urged the Government of Canada to regain control of the policy-making function in telecommunications and for the CRTC to carry out those policies.

104. These points were also made by parties in the CRTC's public hearing that led to the release of its Decision. As noted by Commissioner Cram in her dissenting decision, she agreed with Saskatchewan Telecommunications, MTS Allstream and the Consumer Groups that "broadband expansion is the bailiwick of governments and taxpayers."

105. As recently noted by Minister Bernier, "...it is imperative that regulatory measures interfere as little as possible with competitive market forces". The CRTC's Decision steps over this line.

## **SUMMARY OF BXI'S SUBMISSIONS**

106. In summation, BXI urges the Governor in Council to grant this Petition for the following reasons:

- **The CRTC's decision to use up to \$620 million of deferral account revenues to subsidize only the ILECs' broadband networks undermines the competitive market that is developing in rural and remote regions and threatens the businesses of other telecommunications providers, including BXI, that are extending broadband services to those same regions without the benefit of financial subsidies.**
- **Due to its distortionary impact on the market, the Decision undermines the development of a competitive market and is contrary to the policy objectives in section 7 of the *Telecommunications Act*.**
- **The CRTC appears to be unaware that new, lower cost, technologies have already changed the face of the telecommunications market and have enabled small to medium-sized competitive broadband service providers, such as BXI, to provide rural broadband services profitably using advanced wireless and satellite platforms.**

- **The Decision is contrary to the CRTC's own policy of implementing regulatory schemes that are competitively and technologically neutral.**
- **The Decision ignores the experience gained in Alberta with the highly successful SuperNet project and does not contain appropriate measures for accountability and competitive neutrality.**
- **The Decision is contrary to the recommendations of the Telecommunications Policy Review panel (TPRP) in their March 23, 2006 report to the Government of Canada, both with respect to the CRTC's failure to use a competitive bidding model for subsidies, as well as its failure to address backbone and access facilities separately.**
- **The Decision will slow down the expansion of broadband services in rural and remote markets due to the dampening effect it will have on commitment of capital by other service providers who will be reticent to risk their own capital to compete with the ILECs' subsidized service.**
- **If the Decision is allowed to stand, it is very doubtful that consumers in rural and remote areas will ever receive the benefits of choice, and price and service competition, that consumers in urban areas enjoy.**
- **The Decision proposes a 20<sup>th</sup> century monopoly solution to a 21<sup>st</sup> century issue ignoring advances in technology and the potential to have a competitive market even in rural and remote areas.**

- **The CRTC's attempt to micromanage the rollout of subsidized broadband facilities by overseeing the ILECs' construction plans cannot match the constraints imposed by competitive market forces and are doomed to failure.**
- **Finally, the CRTC's implementation plan for its subsidy scheme is unworkable in a competitive environment. It is heavily biased against competing suppliers of broadband service in terms of its failure to consider their longer term plans for expansion and its unfair comparison of competitors' unsubsidized pricing and service offerings with subsidized services provided by the ILECs.**
- **The Decision fails to heed the policy expressed by the Minister of Industry that "...it is imperative that regulatory measures interfere as little as possible with competitive market forces".**
- **The Decision usurps the role of Federal and Provincial Governments in deciding whether or not to subsidize broadband services.**

## **REQUEST FOR A STAY AND RELIEF**

107. In these circumstances it is extremely important that the Governor in Council order an immediate stay of those parts of Decision 2006-9 that address the broadband subsidy issue. A stay would prevent the adverse consequences of the Decision from occurring during the period in which the Governor in Council deliberates on a final disposition of the Petition. This would give the Governor in Council time to consider the recommendations of the TPRP on these issues and



to assess whether a subsidy program, if one is thought to be necessary, should be run by Industry Canada or the CRTC.

108. Time is of the essence in issuing a stay since the CRTC has directed the ILECs to file their roll-out proposals by June 30, 2006. These filings will create a huge amount of uncertainty in the market and will distort competition in the market to the detriment of consumers. There are also other issues pending before the Courts that merit a delay in implementation of the CRTC's Decision. For example, consumer groups currently have applications filed with the Federal Court of Appeal to review the Decision in so far as it fails to order the return of the deferral account revenues to the consumers who were overcharged in the first place.

109. In the circumstances of this case the harm that will be caused by failing to grant a stay will far exceed the harm that will befall the ILECs if a stay is granted. The ILECs had no agenda to extend their broadband services to rural and remote areas prior to the CRTC's Decision on February 16<sup>th</sup>, and consumers will be better off in the short, medium and long term if the CRTC's implementation proceeding is delayed in order to correct the flaws in Decision 2006-9.

110. BXI does not view the subsidization of broadband services as a counter-productive measure in all circumstances. The company recognizes that the Government has as a policy objective the extension of broadband services to all Canadians and BXI supports that objective. That said, there are other ways to administer subsidies in a competitively neutral manner with minimal distortion of competitive market forces. There are at least three models in use or proposed that would better serve the public interest. These include:

- (1) The Alberta SuperNet model, which has proven to be highly effective in extending broadband penetration while stimulating competition;

- (2) The U-CAN model proposed by the TPRP, which involves competitive bidding for subsidies; and
- (3) The CRTC's portable contribution regime, which allows consumers to select their service provider of choice and extends the subsidy to the service provider selected.

111. It is also possible to envision a combination of these mechanisms that recognizes the impossibility of extending backbone networks to every location in Canada and looks to other technologies, such as Ka-band satellite services, to complete the job. Such a program might directly subsidize backbone infrastructure using either the SuperNet or the U-CAN model and provide portable subsidies to consumers in areas not reached by these networks. Such subsidies could help consumers to overcome the initial equipment costs associated with reception of satellite-based services. In BXI's view a combination of the SuperNet model for backbone facilities and portable contribution for consumers not served by backbone networks, would be optimal.

112. It is also open to the Governor in Council to decide in this instance that the subsidization of broadband facilities and services is a Government responsibility and that the CRTC ought not to be embarking on a subsidy scheme of its own. In these circumstances the Governor in Council might consider rescinding the CRTC's decision in so far as it applies to broadband services and refer the decision back the CRTC to consider how to return the deferral account revenues to the consumers who were over-charged.

113. For its part, BXI favours a solution which would avoid the adverse consequences of the Decision and remove the decision to subsidize broadband services from the CRTC. It could then be left to the Government to develop a competitively and technologically neutral mechanism for implementing its own

subsidy program. Implementation of such an outcome would necessitate the rescission of Decision 2006-9, in so far as it applies to broadband services, and a referral of the Decision back to the CRTC either for reconsideration of ways to return the deferral account revenues to consumers, or to consider other ways to use the money that does not interfere with competitive market forces.

114. In the alternative, BXI urges the Governor in Council to rescind the CRTC's determinations with respect to the proposed subsidy program in Decision 2006-9 and direct the CRTC to study and report back to the Governor in Council, pursuant to section 14 of the Telecommunications Act, on appropriate ways to implement a competitively and technologically neutral subsidy scheme, including consideration and assessment of the relative merits of the SuperNet, U-CAN and portable contribution schemes, either alone or in combination.

115. Finally, if the Governor in Council does not see fit to grant the relief requested above, BXI respectfully urges it to direct the CRTC to consider alternative means of implementing the Decision that will not have such adverse consequences for competing broadband suppliers. At a minimum, the CRTC should be directed to consider competitors' business plans for extension of broadband services over the same four year period that they consider the ILECs' plans, and account should be taken of the fact that an unsubsidized business cannot be expected to match the pricing of a subsidized business.

116. BXI thanks the Governor in Council for entertaining this Petition and urges it to stay the CRTC's implementation process at its earliest possible convenience.