

**BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF AN APPLICATION BY
TEKSAVVY SOLUTIONS INC.**

**PURSUANT TO SECTION 62 OF THE
TELECOMMUNICATIONS ACT AND PART VII OF THE
CRTC TELECOMMUNICATIONS RULES OF PROCEDURE
REGARDING THE REVIEW AND VARIANCE OF
TELECOM ORDER CRTC 2009-484, *BELL ALIANT REGIONAL
COMMUNICATIONS, LIMITED PARTNERSHIP AND BELL CANADA –
APPLICATIONS TO INTRODUCE USAGE-BASED BILLING AND OTHER
CHARGES TO GATEWAY ACCESS SERVICES,*
12 AUGUST 2009 (“UBB ORDER”)**

**AND IN THE MATTER OF AN APPLICATION BY
TEKSAVVY SOLUTIONS INC.
PURSUANT TO SECTION 55 OF THE
TELECOMMUNICATIONS ACT
REGARDING AN INTERLOCUTORY STAY OF PARAGRAPHS 18 AND
21 OF THE UBB ORDER**

11 SEPTEMBER 2009

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PART A – OVERVIEW

1. In this document two applications are being made on behalf of TekSavvy Solutions Inc. (“TSI”).

2. The first application (“R & V Application”) is made pursuant to section 62 of the *Telecommunications Act* (the “Act”) and Part VII of the *CRTC Telecommunications Rules of Procedure* (“Rules”) to review and vary Telecom Order CRTC 2009-484, *Bell Aliant Regional Communications*, dated 12 August 2009 (the “UBB Order”). More specifically TSI requests that the Commission vary the UBB Order by:
 - (i) amending paragraph 18 so as to rescind interim approval of the request by Bell Aliant Regional Communications, Limited Partnership (“Bell Aliant”) and Bell Canada (collectively the “Bell Companies”) to introduce usage based billing (“UBB”) for Gateway Access Service (“GAS”), pending the Commission’s final determination of Bell Aliant Tariff Notice No. 242 (“TN 242”) and Bell Canada Tariff Notice No. 7181 (“TN 7181”); and
 - (ii) amending paragraph 21 so as to rescind interim approval of the Bell Companies’ proposed excessive usage charge, pending the Commission’s final determination of TN 242 and TN 7181 (the “UBB Tariff Applications”).

3. In order for the Commission to be able to dispose of the R & V Application in an expedited manner, TSI requests that the Commission abridge the usual times for the filing of the Answer of the Bell Companies and Reply of TSI to September 30, 2009 and October 5, 2009, respectively. TSI further requests that the Commission make a determination with respect to the R & V Application on an expedited basis, and in any event no later than the date that the UBB charges are scheduled to go into effect under the UBB Order.

4. In addition, by way of a second application (“Stay Application”), TSI is requesting that the Commission immediately stay the interim approvals granted in paragraphs 18 and 21 of the UBB Order, pending a Commission determination of TSI’s R & V Application.

5. In order for the Commission to dispose of the Stay Application on an expedited basis, TSI requests that the Commission require the Bell Companies to provide their Answer by September 21, 2009 and TSI to file its Reply by September 28, 2009. TSI further respectfully requests that the Commission render a determination on the Stay Application as soon as possible, and in any event by no later than October 8, 2009.

6. TSI is making the two applications in one document, because they are inextricably linked by the same factual foundation and sense of urgency. In addition, because the UBB Order is itself interlocutory in nature, there are common aspects to the reasoning as to why the impugned portions of the UBB Order should be both stayed and varied.

PART B – APPLICATION TO REVIEW AND VARY THE UBB ORDER

1.0 BACKGROUND

7. In Telecom Decision CRTC 2006-77, *Cogeco, Rogers, Shaw, and Videotron – Third-party Internet Access Service Rates*, 21 December 2006 (“Decision 2007-77”), the Commission addressed the issue of volume usage or quota charges in connection with cable carrier third party Internet access (“TPIA”) service in the following terms:

248. The Commission considers it appropriate that each cable carrier be provided the ability to manage the potential negative outcome of high-consuming bandwidth end-users in a manner that does not degrade the Q of S to all end-users, whether it is the cable carrier's end-user or the competitor's end-user. The Commission considers, however, that regardless of the approach adopted by the cable carriers to address this problem, such an approach must provide **equivalent** treatment with respect to excessive usage to both its own retail Internet access service end-users and TPIA end-users. The Commission further considers it appropriate that each cable carrier in this proceeding include a statement in its TPIA tariff to reflect this **equivalent** treatment. Accordingly, the Commission directs Cogeco, RCI, and Shaw to include a statement of equivalent treatment of both retail Internet access service end-users and TPIA end-users in their TPIA tariff pages.

249. With respect to the different treatment by cable carrier of end-users for excessive usage, the Commission considers that, subject to the requirement for equivalent treatment specified above, each cable carrier is permitted to implement its own approach. With respect to RCI's request to remove the volume usage

charge from its TPIA tariff, the Commission considers that it is appropriate to do so. The Commission further considers that all cable carriers should be required to describe their treatment of end-users that are identified as excessive users. Accordingly, the Commission directs each cable carrier to include in its TPIA tariff pages a description of its treatment of end-users that have been identified as excessive users. Also, the Commission directs that if and when a cable carrier introduces changes to its retail quota charges or related excessive usage criteria, it should issue at the same time revised TPIA tariff pages that **match** these changes. (Emphasis added.)

8. In other words, the four major cable carriers that provide TPIA services were, and continue to be, required to treat their own retail customers and the end users of TPIA wholesale customers in the same manner when it comes to quota charges or excessive usage charges.

9. In the correspondence associated with the UBB Tariff Applications, the Bell Companies submitted that traffic growth is straining network capacity and they have adopted a three-prong approach to manage capacity on their networks consisting of: (1) investing in capacity through managed capital spending; (2) moving toward usage-based pricing and new business models in a manner that benefits end-users and takes into account the realities of the highly competitive marketplace; and (3) managing bandwidth.

10. The Bell Companies indicated that, consistent with this three-prong strategy, they began transitioning their retail customers to some form of UBB in 2006 and that a significant (but publicly unspecified) number of their retail customers were on UBB plans as of the end of 2008. Accordingly, the Bell Companies indicated that they were now seeking to transition GAS customers to UBB and that their UBB proposal for GAS was consistent with the principle that the Commission established in Decision 2006-77 when it approved UBB for incumbent cable carriers' TPIA service. The Bell Companies went on to claim that the principle of regulatory symmetry supported approval of their proposals given that UBB had been approved for TPIA.

11. The Bell Companies also advised the Commission that each of the UBB wholesale rate elements was set at a level below that of the corresponding retail service rate.

12. In the case of the excessive usage charge, the Bell Companies sought approval although they were not yet ready to implement such a charge. They advised the Commission that they

would notify the Commission if, and when, they apply the proposed charge to their retail customers, at which time they proposed that the corresponding GAS charge should go into effect, as well.

13. Interveners raised a number of objections to the Bell Companies' UBB proposal and also highlighted numerous questions that remained unanswered. In fact, the Commission received over twenty interventions opposing the proposal from industry participants and consumer groups. These interventions raised a number of serious concerns, including:

- Vast discrepancies between ISP and Bell Companies UBB data making it very hard for ISPs to assess and manage the impact of UBB;
- Lack of provision by the Bell Companies of UBB data that ISPs can effectively integrate into their billing systems;
- Anti-competitive effects due to the fact that UBB and the excess usage charge will be applied to all GAS end users, even though a proportion of the Bell Companies' retail customers will remain on flat-rated services;
- Additional anti-competitive effects due to the Bell Companies' ability to waive UBB and excess usage charges for end users who are contemplating moving to another ISP; and
- A severe diminishment of competition by forcing GAS to take on the same attributes as the Bell Companies' retail high-speed Internet access services, thereby turning ISPs who are reliant on GAS from competitors that provide value-added retail services that differ from those of the Bell Companies to mere resellers of the Bell Companies' high-speed Internet access services.

14. Despite these serious and other numerous objections, the Commission approved the Bell Companies UBB for GAS in the UBB Order, effective November 10, 2009.

15. In so doing, the Commission indicated that its approval of UBB for GAS is consistent with Decision 2007-77 thereby promoting regulatory symmetry. The Commission also found that the Bell Companies' UBB proposal, while discriminating against GAS customers because it would not apply to the Bell Companies' retail customers who are not on UBB plans, is not unjustly discriminatory.

16. The Commission also approved the excess usage charge on the basis that the charge would represent a new charge with respect to all customers who are on UBB plans, whether they are retail or wholesale customers of the Bell Companies.

17. On August 20, 2009, the Commission posed 17 interrogatories to Bell, most of which have several parts. It is clear that the Commission also has many unanswered questions regarding the Bell Companies' UBB proposal for GAS.

2.0 REQUEST FOR VARIANCE OF THE UBB ORDER

18. TSI acknowledges that the UBB Order is in the nature of an interlocutory decision and does not represent a final determination by the Commission with respect to the UBB Tariff Applications. Accordingly, this application does not contain comprehensive arguments regarding the ultimate merits of the UBB Order. Rather, the purpose of this application is to demonstrate that the variance sought by TSI to the UBB Order is warranted on the basis that the implementation of the UBB and excess usage GAS rates in the absence of a full record and final Commission determination, will have a significant deleterious effect on GAS customers and competition in the provision of high-speed access services as soon as these charges go into effect. TSI argues that this risk that is neither necessary nor appropriate for the Commission to take.

19. It is for these reasons that TSI requests an order from the Commission rescinding its interim approval of the Bell Companies' UBB and excessive usage charges.

3.0 THE LAW RELEVANT TO VARIANCES

20. Section 62 of the *Act* provides:

The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.

21. Part VII of the *Rules* applies to applications made pursuant to section 62 of the *Act*.

22. In Telecom Public Notice CRTC 98-6, the Commission described the conditions under which it would exercise its jurisdiction under section 62 of the *Act*, as follows:

Accordingly, in order for the Commission to exercise its discretion pursuant to section 62 of the *Act*, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to:

(i) an error in law or in fact;

(ii) a fundamental change in circumstances or facts since the decision;

(iii) a failure to consider a basic principle which had been raised in the original proceeding; or

(iv) a new principle which has arisen as a result of the decision.

The Commission notes that there may still be instances where the Commission may decide to review a decision in the first instance, for example, where it considers there was a procedural error, and then conduct a proceeding to determine whether to vary the decision.

4.0 APPLICATION OF THE LAW REGARDING VARIANCES TO THE FACTS IN THIS CASE

4.1 Anti-Competitive Consequences of the UBB Charges Proposed by the Bell Companies Should not be Risked in an Interim Ruling

23. It is important for the Commission to appreciate that unlike other straightforward rate changes, the Bell Companies' proposal for GAS UBB and excessive use charges represent a radical departure in the structure of the GAS tariff. The approval of the UBB Tariff Applications, if upheld, will represent the first time that end users of an ILEC's aggregated ADSL service will have no choice but to pay for Internet access services based on usage and excess usage thresholds defined by the ILECs.

24. A number of interveners in the TN242/TN7181 proceeding raised significant concerns regarding the prospect for significant harm to competition that could arise from the approval of the Bell Companies' proposals. The most serious of these concerns is the limitation that such a pricing structure will impose on the prices that ISPs who are GAS customers can charge their own retail customers. This is a live issue that can only be fully assessed once the record of this proceeding is complete. However, as further discussed below, there are many other reasons that militate overwhelmingly against the approval of the GAS UBB and excess usage charges on an interim basis.

25. As the Commission is well aware, competition in the provision of high-speed Internet access services is still very fragile. In 2008, incumbent local exchange carriers (ILECs), excluding their out of territory operations and cable broadcasting distribution undertakings (BDUs) accounted collectively for 93.7% of residential Internet access revenues.¹ These same entities also served 92.0% of all residential subscribers.² Therefore, all other ISPs, including those who employ the Bell Companies GAS and those who do not accounted for the remaining 6.3% of residential Internet access revenues and 8.0% of all residential subscribers.

¹ Figure 5.3.1, CRTC 2009 Communications Monitoring Report, at page 218.

² Table 5.3.2, CRTC 2009 Communications Monitoring Report, at page 219.

26. Clearly, the geographic markets for the provision of residential Internet access services are, for the most part, duopolies in which an ILEC and a cable BDU are jointly dominant. Under these conditions, the Commission must be very cautious in exercising its powers and performing its duties with respect to services such as residential GAS. Any misstep, no matter how inadvertent, could weaken competitors and decrease competition in the provision of residential Internet access services further, contrary to the Commission's pro-competitive policies, the telecommunications policy objectives of the *Act* and the Policy Direction.

27. As noted above, since Decision 2006-77 was rendered, cable carriers have been required to match their TPIA and retail quota (i.e., UBB) charges and related excessive usage criteria.

28. To this point, no such explicit requirement has been imposed on the Bell Companies. In the UBB Tariff Applications, the Bell Companies indicated that they would actually charge GAS customers UBB and excessive usage charges that are lower than the corresponding retail rates. On its face, this seems like a good deal for GAS customers and their end users. However, there are three factors at play that completely eliminate this benefit and actually make matters much worse for competitors than the situation that existed prior to the UBB Order.

29. First, the Bell Companies have resisted forcing their own remaining non-UBB retail customers to migrate to UBB services. In so doing, they have immunized the revenue base represented by those customers from competition from GAS customers because no GAS customer will be able to afford to offer a corresponding non-UBB retail service once GAS is subjected to UBB pricing.

30. Second, in the absence of an explicit requirement to maintain the relationship proposed by the Bell Companies between GAS UBB and excess usage charges and corresponding retail rates over time, the Bell Companies are free to vary that relationship on a going forward basis. They are also free to win back customers or to prevent customers from migrating to competitors by waiving or reducing such charges in the case of retail customers.

31. Finally, the Bell Companies have introduced a Usage Insurance Plan that provides an additional 40 GB of throughput per month for an additional \$5.00 to their retail customers. This

option is available in conjunction with all of the Bell Companies’ residential high-speed Internet access offerings. Thus, retail customers who choose this option can actually eliminate the application of UBB to their services, even at reasonably high levels of monthly usage. This is an option that GAS customers do not have. When this option is taken into account, the calculations in Table 4 of the cover letter associated with the UBB Tariff Applications are modified as follows:

Retail Service	Monthly Rate (includes Usage Insurance Charge)	Monthly Usage Allowance (includes “insured” usage)	Usage Charge per additional GB	Wholesale Service	Monthly Rate (GAS Rate ³ Plus Maximum UBB Charge)	Monthly Usage Allowance When Maximum UBB Charge Reached
512 Kbps				512 Kbps		
Ontario	\$32.95	42 GB	\$2.50	Ontario	\$43.00	14 GB
Québec	\$29.95	42 GB	\$2.50	Québec	\$43.00	14 GB
2 Mbps				2 Mbps		
Ontario	\$42.95	60 GB	\$2.00	Ontario	\$44.50	35 GB
Québec	\$39.95	60 GB	\$2.50	Québec	\$44.50	35 GB
5 Mbps				5 Mbps		
Ontario	\$42.95	100 GB	\$1.50	Ontario	\$45.00	80 GB
Québec	\$54.95	100 GB	\$2.50	Québec	\$45.00	80 GB

* To a maximum Usage Charge of \$22.50 per month.

** The implementation of an Excessive Usage Charge to GAS service is conditional upon the implementation of a corresponding charge for the Companies’ retail Internet services.

32. This table shows that, as soon as GAS UBB charges go into effect, it will be impossible for GAS customers to compete with the Bell Companies’ retail services for most retail end users that require monthly usage allowances, over a broad range of typical monthly usage patterns. This is the case even before other costs incurred by GAS customers are taken into account.

³ The monthly GAS rate is based on the minimum volume commitment and shortest contract period available as found in the Residence GAS rate table at General Tariff Item 5410 4.(f).

33. Such a result, which is unduly discriminatory, and hence contrary to subsection 27(2) of the *Act*, would have an immediate and devastating effect on the fragile state of competition in the residential high speed Internet access service market by essentially eliminating or marginalizing GAS customers as competitors.

34. This is particularly the case given other developments that have affected GAS customers in the last few years.

35. First, the Bell Companies are refusing to offer the full range of available of matching speeds to competitors under the GAS tariff that that the Bell Companies offer to their own retail customers. This has served to diminish the value of the Bell Companies' GAS service to competitors and to reduce the competitiveness of GAS customers as ISPs relative to the Bell Companies.

36. Second, the Bell Companies are applying the same Internet traffic management practices to both GAS customer traffic and their own retail customer traffic. This has severely curtailed the ability of GAS customers to distinguish their retail services from those of the Bell Companies.

37. Given these developments, the flexibility of GAS customers to offer their own flat-rate and UBB rated services, without being constrained by GAS UBB and excess usage charges was the last major means that competitors had to distinguish their retail services from those of the Bell Companies. The introduction of GAS UBB and excess usage charges is now removing that remaining flexibility as well, making GAS competitors wholly uncompetitive with the Bell Companies as soon as those charges go into effect.

38. Given this evidence, the immediate and severe deleterious impact of the Bell Companies' GAS UBB and excess usage charge proposals on competition in the provision of residential high-speed Internet access services should not be risked by interim approval of these charges. The stakes are simply too high for the Canadian economy and consumers. The impact of these proposed charges on the competitive landscape is a matter that should be scrutinized thoroughly on the basis of a complete record before the Commission determines whether to approve, reject,

modify or otherwise qualify these charges. This is a principle that the Commission failed to consider adequately in this proceeding prior to rendering the UBB Order, thereby justifying a review and variance of the UBB order as requested by TSI.

39. The implementation of the Usage Insurance Plan also calls into question the Bell Companies' true motives for introducing a UBB-based regime for GAS. If the purpose of UBB is to assist the Bell Companies in managing capacity on their networks, it makes no sense for the Bell Companies to turn around and provide their own retail customers with an "insurance" plan that reverses a large part of the incentive for the reduced demand created by the UBB-based rates of the base retail offerings of the Bell Companies. However, such an approach does make sense for the Bell Companies from a competitive standpoint, since by not making the Usage Insurance Plan available to competitors the Bell Companies can gain a significant cost advantage over their GAS customers. Such a practice is unduly discriminatory, contrary to subsection 27(2) of the *Act*.

40. The Bell Companies have also proposed an excess usage charge that is lower, on a per GB basis, than the proposed monthly overage usage charge. Such an approach does not accord with the Bell Companies' claim that the rationale for the imposition of both charges is to manage capacity on their networks either. In other words, the structure of the Bell Companies' proposed UBB regime calls into question the rationale for the UBB Tariff Application. This further justifies a review and variance of the UBB order as requested by TSI.

4.2 The Disruption and Costs Caused to Competitors by an Interim Ruling is not Justified

41. Due to the radical nature of the changes represented by the GAS UBB and excess usage charges, the implementation of those charges will impose significant disruption and costs on competitors. TSI is a case in point.

42. For example, in the case of TSI, the move to UBB and excess usage charges imposes numerous start-up activities, including:

- the re-design of TSI's wholesale and retail high-speed Internet access services offerings;
- educating TSI's # private label and # reseller wholesale ISP customers about changes to TSI's offerings, as well as designing and implementing new marketing plans for these customers;
- educating TSI's direct and indirect # retail customers about changes to TSI's offerings, as well as designing and implementing new marketing plans for these customers;
- dealing with customer complaints;
- the deployment of additional equipment and software; and
- changes to TSI's billing system.

43. TSI estimates that the costs associated with these transitional activities will amount to # . This is a very significant expense, representing approximately # of TSI's gross revenues for the fiscal year ending in 2009. The activities required for TSI to prepare for the introduction of GAS UBB and excess capacity charges are also very labour intensive and constitute a significant diversion from the company's core business.

44. TSI fully expects that other GAS customers will be affected in a similar manner as TSI by the approvals in paragraphs 18 and 21 of the UBB Order.

45. The new UBB charges imposed by the Bell Companies, if allowed to stand, will result in an additional monthly expense of # per month or # per year for TSI, representing approximately # of TSI's gross revenues for the fiscal year ending in 2009. This is a very large unanticipated cost for TSI to bear on an interim basis, given that it is not known whether the UBB charges proposed by the Bell Companies will be approved, rejected, modified or otherwise qualified on a final basis. TSI expects that other GAS customers will also be very adversely affected by the new GAS UBB charges.

46. In addition, TSI has entered into longer term contracts for the provision of transit services based on its demand forecasts prior to the introduction of GAS UBB and excess capacity charges. To the extent that the GAS UBB and excess capacity charges will cause TSI a significant loss of market share, TSI will still be committed to paying for its existing transit capacity for some time to come, leading to the further deterioration of its competitive position. More specifically, TSI estimates that it will have to continue paying # for a period of # for excess transit services that it will not require.

47. TSI and other competitors should not be required to incur such expenses, to dedicate resources to activities associated with the introduction of such charges or to modify their business plans significantly based on an interim ruling, given that a final determination may be quite different. This is a principle that the Commission failed to consider adequately in this proceeding prior to rendering the UBB Order, thereby justifying a review and variance of the UBB order as requested by TSI.

4.3 The Loss of Revenues and Net Income Suffered by Competitors based on an Interim Ruling is not Justified

48. Implementation of the UBB and excess capacity charges will reduce GAS customer revenues significantly, as well. Once again TSI serves as a good example of this phenomenon.

49. In order to avoid some of the recurring costs described in section 5.2 above costs, TSI would have to radically redesign its services and, for the reasons set out in section 5.1 above, TSI would still not be in a position to compete fully with the Bell Companies' retail services if the GAS UBB charges are actually implemented. Customer cancellations and complaints can be expected to ensue as TSI's customers voice their dissatisfaction with the UBB regime even though TSI is not the cause of the problem.

50. Ironically, the Bell Companies have managed to avoid a similar consequence by not forcing the transition of their flat-rate customers to UBB rates. However, they are quite content to thrust this chaos and attendant revenue losses on their GAS customers.

51. The GAS UBB charges would also force TSI to stop providing certain services to its residential customers almost immediately, resulting in an additional revenue loss of # per month or # per year, representing approximately # of TSI's revenues for the fiscal year ending in 2009.

52. The loss of high-speed Internet access customers for TSI also means the loss of other services that TSI cross sells to such customers, including static IP addresses, dry loops for dry DSL accounts, and local phone services. TSI estimates that this will put additional revenues of # per month or # per year in revenues from these sources at risk, not including associated long distance revenue losses.

53. TSI and other competitors should not be required to incur such revenue losses and have their business models turned upside down, based on an interim ruling, given that a final determination may be quite different. This is a principle that the Commission failed to consider adequately in this proceeding prior to rendering the UBB Order, thereby justifying a review and variance of the UBB order as requested by TSI.

4.4 The Lack of Proper Tools for Measuring Real-Time Bandwidth Usage Make the Introduction of UBB Fertile Ground Billing Disputes

54. Although the Bell Companies propose to bill for GAS on a UBB basis going forward, they are not sharing with their GAS customers any tools by which the Bell Companies are measuring usage in order to apply UBB and excess usage charges on a real-time basis and there is presently no independently verifiable and standardized method of measuring such usage. To the extent that differences may arise between how the Bell Customers and their GAS customers measure usage, significant billing disputes are likely to arise between the Bell Companies and their GAS customers. In this respect, TSI notes the statement made by the Canadian Association of Internet Providers ("CAIP") at paragraph 25 of its 14 April 2009 submission in the proceeding relating to the UBB Tariff Applications, wherein CAIP indicates that ISPs are reporting difference between their data and that of the Bell Companies of as much as 800%. This is a problem that will require more than a ninety day delay in the implementation of a UBB regime for GAS to adequately address and resolve. This is a principle that the Commission failed to

consider adequately in this proceeding prior to rendering the UBB Order, thereby justifying a review and variance of the UBB order as requested by TSI.

4.5 The Commission has a lot of Unanswered Questions about the UBB Tariff Applications

55. In addition to all of the issues raised above, it is now also clear that the Commission also has a lot of unanswered questions about the UBB Tariff Applications. In fact, on August 20, 2009, the Commission issued 17 (mostly multi-part) interrogatories to the Bell Companies with respect to the UBB Tariff Applications. Some of the interrogatories address issues that are critical to sustainable competition.

56. Given the additional information that the Commission requires by way of responses to these interrogatories to assess the merits of the UBB Tariff Application and the potentially devastating effect on competitors and competition if the Commission's determination with respect to the UBB Tariff Application is not correct, it is not prudent or appropriate for the Commission to approve the UBB Tariff Applications on an interim basis.

57. In fact, approval of the UBB Tariff Application under these anti-competitive circumstances also contravenes the pursuit of a number of telecommunication policy objectives, such as: (1) to foster increased reliance on market forces for the provision of telecommunications services and ensure that regulation, where required, is efficient and effective (subsection 7(f)); (2) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications (subsection 7(c)); (3) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada (subsection 7(b)); and (4) to respond to the economic and social requirements of users of telecommunications services (Subsection 7(h)).

58. For the same reasons, the Commission's interim approval of the UBB Tariff Application also contravenes the following requirements contained in the Policy Direction: (1) the Commission should rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives (subsection 1(a)); and (2) the Commission

should only use only tariff approval mechanisms that are as minimally intrusive and as minimally onerous as possible (subsection 1(c)(i)).

59. These are further principles that the Commission failed to consider adequately in this proceeding prior to rendering the UBB Order, thereby justifying a review and variance of the UBB order as requested by TSI.

4.6 The Errors Committed by the Commission amount to an Error of Law

60. Given the dire consequences for competitors and competition associated with implementation of the UBB and excess capacity charges approved in the UBB Order and the lack of a complete evidentiary record for a final determination of the merits of the UBB Tariff Application when the UBB Order was rendered, the approvals granted to the UBB and excess capacity charges in the UBB Order are unreasonable and amount to a reviewable error of law.

61. A rescission of the approvals granted in paragraphs 18 and 21 of the UBB Order is required in order to reverse this error.

4.7 The Timing of this Proceeding Favours the Review and Vary Request of TSI

62. Based on the current schedule of this proceeding, it appears that the record will not close until mid to late November. This means that a final determination in this proceeding is not likely to be issued before the end of the year. At the same time, under the UBB Order, the Bell Companies will be able to start charging the new UBB rates for GAS as of November 10, 2009. In addition, under the UBB Order, the Bell Companies could start applying the excess usage charge at any time after advising the Commission that a similar charge is being applied to their retail customers who are on UBB. Given the risks identified herein associated with the implementation of the UBB regime proposed by the Companies and the additional disruption that would ensue if such a regime were subsequently rescinded or modified, TSI requests that the Commission vary paragraphs 18 and 21 of the UBB Order on an expedited basis so as to rescind the interim approval of the GAS UBB and excess usage charges.

5.0 CONCLUSION

63. For all of the foregoing reasons, TSI requests an order rescinding the interim approvals granted in paragraphs 18 and 21 of the UBB Order on an expedited basis.

64. In order for the Commission to be able to dispose of this Application in a timely manner, TSI requests that the Commission abridge the usual times for the filing of the Answer of the Bell Companies and Reply of TSI to September 30, 2009 and October 5, 2009, respectively.

PART C – APPLICATION FOR STAY OF PARAGRAPHS 18 AND 21 OF THE UBB ORDER

6.0 BACKGROUND FOR STAY APPLICATION

65. The background that is relevant for the Stay Application is the same as the background set out in Section 1.0 of the R & V Application Above. Accordingly, TSI hereby adopts and incorporates that portion of the R & V application here in for the purpose of the Stay Application.

7.0 REQUEST FOR STAY OF PARAGRAPHS 18 AND 21 OF THE UBB ORDER

66. TSI acknowledges that the UBB Order is in the nature of an interlocutory decision and does not represent a final determination by the Commission with respect to the UBB Tariff Applications. Accordingly, this Stay Application will not argue the ultimate merits of the UBB Tariff Applications. Rather, the purpose of the Stay Application is to demonstrate that the stay of paragraphs 18 and 21 of the UBB Order sought by TSI is warranted according to the applicable legal test for stays.

67. It is for these reasons that TSI requests an order from the Commission, on an expedited basis, staying its interim approval of the Bell Companies' UBB and excessive usage charges.

8.0 THE LAW RELEVANT TO STAYS

68. Section 55 of the *Act* vests the Commission with the powers of a superior court in the exercise of its powers and the performance of its duties. Those powers include the jurisdiction to grant a stay of its own determinations.

69. The Commission applies the three-part test established by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*,⁴ as modified in *RJR-MacDonald Inc. v. Canada (Attorney General)*⁵ ("*RJR-MacDonald*"), to applications for stay brought before it. The *RJR-MacDonald* test requires that the Commission grant the Companies' requested stay if:

- (i) there is a serious issue to be determined;
- (ii) the applicant will suffer irreparable harm if the stay is not granted; and
- (iii) the balance of convenience, taking into account the public interest, favours granting a stay.

70. With regard to whether there is a serious issue to be tried, the Court in *RJR-MacDonald* stated:

There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merit of the case...

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.⁶ [Emphasis added]

71. The Commission has, itself, followed this reasoning and noted "...that the threshold for this criterion to be met, is a low one. The issue is whether or not the application to review and vary is frivolous or vexatious".⁷ In this case, the Stay Application is brought in the context of the

⁴ *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd* [1987] 1 S.C.R. 110.

⁵ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311.

⁶ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 at paragraphs 49 and 50.

⁷ Telecom Decision CRTC 2004-63, *Application by the Canadian Marketing Association to stay Decision 2004-35, (CMA Decision)* dated 28 September 2004 at paragraph 39.

corresponding R & V Application, which raises serious public policy and legal issues surrounding the interim approvals granted by the Commission in paragraphs 18 and 21 of the UBB Order.

72. With respect to irreparable harm, the Supreme Court, in *RJR-MacDonald*, made it clear that the issue to be addressed is whether a refusal by the Commission to grant the stay sought could so adversely affect the applicant that any harm it suffers pending a determination in the proceeding on which the application for a stay is founded (in this case the R & V Application) could not be remedied or compensated at a later point in time, but that it is the nature of the harm not its magnitude that is in issue.⁸ The Commission has, itself, adopted this approach.⁹ In *RJR-MacDonald*, the Supreme Court recognized "permanent market loss"¹⁰ as one type of irreparable harm and noted that, "it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm".¹¹

73. Finally, the balance of convenience test from *RJR-MacDonald* translates into a requirement for the Commission to consider which of TSI (and other competitors) or the Bell Companies will suffer the greater harm from the granting or refusal of a stay, taking into consideration the public interest.

9.0 APPLICATION OF THE LAW REGARDING STAYS TO THE FACTS OF THIS CASE

9.1 There is a Serious Issue to be Tried

74. The R & V Application raises a number of serious issues to be tried, including:

- whether Commission approval of the UBB and excess capacity charges proposed in the UBB Tariff Application, even on an interim basis will have serious anti-competitive effects, both generally and on competitors, such as TSI;

⁸ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1.S.C.R. 311 at paragraph 59.

⁹ *CMA Decision, supra*, at paragraph 40.

¹⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1.S.C.R. 311 at paragraph 59.

¹¹ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1.S.C.R. 311 at paragraph 61.

- whether the disruption and cost to competitors created by the UBB Order, which is interim in nature, is justified;
- whether the loss of revenues to competitors created by the UBB Order, which is interim in nature, is justified;
- whether the lack of proper tools for measuring real-time bandwidth usage according to a generally accepted standard make the introduction of a UBB approach to GAS within the time frame contemplated by the UBB Order fertile ground for billing disputes between the Bell Companies and their GAS customers;
- whether it was appropriate for the Commission to grant the approvals contained in paragraphs 18 and 21 of the UBB Order given how many unanswered questions remain regarding the UBB Tariff Application pending completion of the record of that proceeding, as evidence by the interrogatories recently posed by the Commission to the Bell Companies with respect to the UBB Tariff Application;
- whether the interim approvals granted at paragraphs 18 and 21 of the UBB Order are contrary to the telecommunications policy objectives of the *Act* and/or the Policy Direction; and
- whether the interim approvals granted at paragraphs 18 and 21 of the UBB Order constitute a reviewable error of law, given the dire consequences for competitors, such as TSI, and competition generally, associated with those approvals

75. These are all genuine and serious issues on which Commission determinations are being sought in the R & V Application. All of these issues are discussed in greater detail in sections 4.1 to 4.6 of the R & V Application. TSI adopts those sections and incorporates them by reference herein for the purpose of this section of the Stay Application. There can be no doubt that the issues raised in the R & V Application for determination by the Commission are serious and genuine. They are not frivolous or vexatious.

9.2 Irreparable Harm

76. There is no doubt that TSI (and other similarly situated GAS customers and competitors of the Bell Companies) will suffer irreparable harm if the Commission does not stay the approval of the UBB and excess capacity charges before they go into effect.
77. The first type of irreparable harm that will be suffered by TSI and similarly situated competitors if the UBB and excess capacity charges described in the UBB Tariff Applications go into effect will be the diminution of their already small competitive position in the market for high-speed Internet services as they face: (1) an inability to distinguish their retail services from those of the Bell Companies; and (2) a retail rate structure offered by the Bell Companies that they cannot match.
78. TSI and other GAS customers will also be forced onto UBB pricing for all of their end users at the same time that the Bell Companies will be insulated from this impact with respect to existing customers who will be allowed to remain on the flat-rate pricing plans to which they currently subscribe.
79. The attention of TSI and other competitors will also have to be diverted from competing and investing in the market for high-speed Internet access services to dealing with the radical change in structure of the GAS tariffs resulting.
80. All of this will translate into significant revenue losses at the same time as TSI and other GAS customers will also have to contend with vastly increased costs (both start-up and recurring) resulting from the new GAS tariff structure.
81. Billing disputes between the Bell Companies and their GAS customers will also flourish due to the lack of commonly accepted standards for measuring traffic throughput.
82. Even if the Commission addresses all of these problems by ultimately rejecting, modifying or otherwise qualifying the UBB and excess charge proposals of the Bell

Companies on a final basis, the irreparable harm described above will have already occurred if the UBB and excess capacity charges are first applied on an interim basis. That harm, which includes harm to competition, competitors, as well as the Canadian economy and unnecessary turmoil for consumers, cannot be undone once it occurs.

83. The irreparable harm that will occur to TSI, other GAS customers and competition itself if the UBB and excess charge proposals of the Bell Companies go into effect, even on an interim basis, are more fully described in sections section 4.0 of the R & V Application, which TSI adopts and incorporates by reference into this section of the Stay Application.

9.3 Balance of Convenience

84. The harm to competition, competitors (including TSI), the Canadian economy and consumers resulting from the implementation of the UBB and excess capacity charges proposed by the Bell Companies has already been described in section 9.2. These hazards are real and imminent.

85. On the other hand, the Bell Companies will not be prejudiced if these charges are not implemented on an interim basis and the Bell Companies have to await until the Commission disposes of the UBB Tariff Applications on a final basis. This is clear based on at least two considerations.

86. First, as noted in the UBB Tariff Applications, the Bell Companies have been migrating their retail customers to UBB since 2006, but have only recently chosen to attempt to migrate GAS customers to UBB this year. There is no reason that they cannot wait a few more months for a Commission determination regarding the UBB and excess capacity charges.

87. Second, the UBB charges adopted by the Bell Companies for their own retail customers are not meant only for the purpose of managing capacity on the Bell Companies' networks. As noted in section 4.1 of the R & V Application, the Bell Companies have provided their own retail customers with an "insurance" plan that reverses a large part of the incentive for reduced demand created by the UBB-based pricing of the base retail offerings of the Bell Companies. The Bell

Companies have also proposed an excess usage charge is also lower, on a per GB basis, than the proposed monthly overage usage charge. Accordingly, the Bell Companies will not be harmed by having to wait until the Commission makes a final ruling with respect to the UBB and excess capacity charges.

88. Based on the foregoing, the balance of convenience and public interest clearly favour the granting of the stay sought by TSI.

9.4 Timing

89. In order for the Commission to dispose of the Stay Application on an expedited basis, TSI requests that the Commission require the Bell Companies to provide their Answer by September 21, 2009 and TSI to file its Reply by September 28, 2009. TSI further respectfully requests that the Commission render a determination on the Stay Application as soon as possible, and in any event by no later than October 8, 2009.

PART D – CONFIDENTIALITY CLAIMS

90. Pursuant to section 39 of the *Telecommunications Act*, certain information related to the costs, revenues, supply arrangements and customers of TSI in the R & V Application, also incorporated by reference in the Stay Application, is designated as confidential information of TSI and is being filed in confidence with the Commission. As a private company, TSI is not required to disclose this information publicly. The information in question is confidential and is treated consistently in a confidential manner by TSI. Disclosure of this information could also reasonably be expected to prejudice the competitive position of TSI and to result in material financial loss to TSI, thereby causing TSI specific direct harm. The information designated as confidential is merely illustrative of certain points made on the public record in the submissions set out in the R & V Application, which is also incorporated by reference in the Stay Application. Therefore, the specific direct harm to TSI from disclosure of the confidential information would not be outweighed by any public interest in the public disclosure of the information. For all of these reasons, TSI is not placing this confidential information on the public record of this proceeding.

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