Before the Canadian Radio-television and Telecommunication Commission

Telecommunications Notice of Public Consultation CRTC 2009-261-7

Supplemental Submission of

Cybersurf Corp. and Alberta 1356382 Ltd.

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Executive Summary

1. By way of Process Letter on December 23 2009 the Commission expanded the scope of the proceeding initiated by Telecom Notice of Consultation 2009-261 to include consideration of matters arising from Order in Council P.C. 2009-2007, which requires the Commission to reconsider Telecom Decision 2008-117 and Telecom Order 2009-111 which are determinations from the Commission that requires incumbent local exchange carriers to provide competitors access to their higher-speed service offerings.

2. The Order in Council states; that the Governor in Council considered that the continued development and availability of broadband Internet infrastructure and services is important for Canadians and the Canadian economy. It noted that it is critical that the regulatory regime provide a cohesive, forward-looking framework that provides the proper incentives for continued investment in broadband infrastructure, encourages competition and innovation, and leads to consumer choice.

3. Further, the Order in Council refers to the proceeding initiated by Telecom Notice of Consultation 2009-261, in which the Commission is examining the appropriateness of mandating the provision by major ILECs and incumbent cable carriers of certain wholesale high-speed access services for competitor use to provide retail Internet services (the high-speed access proceeding). In referring the decisions back to the Commission for reconsideration, the Governor in Council stated that she considers it material to this reconsideration for the Commission to consider whether: (a) the speed matching requirements unduly diminish the incentives to invest in new network infrastructure in general and, in particular, in markets of different sizes; (b) in the absence of the speed matching requirements there would be sufficient competition to protect the interests of users; (c) the respective wholesale obligations imposed on incumbent telephone and cable companies are equitable or represent a competitive disadvantage; and (d) the impact of these wholesale requirements unduly impairs the ability of incumbent telephone companies to offer new converged services, such as Internet Protocol television (IPTV).
4. The Commission noted in its December 23 2009 process letter that the matters the Governor in Council considers relevant to reconsideration of the decisions are generally under examination in the high-speed access proceeding in the context of whether to mandate the provision of high-speed access services. Given this, the Commission considered it appropriate to expand the scope of the high-speed access proceeding to consider the issues in a broader and more cohesive manner.

5. The Commission then invited parties to provide their views, with reasons, on the following:

- the application of the existing essential service framework on a forward-looking basis such that it provides appropriate incentives for continued investment in broadband infrastructure,

- encourages competition and innovation, and leads to consumer choice;

Furthermore in context to the discussion provided in response to the, above:

- whether the speed-matching requirement, mandating the provision of the high-speed access services under consideration, or mandating access to any new types of Internet access infrastructure does, or would, unduly diminish incentives to invest in new network infrastructure in general and, in particular, in markets of different sizes;

- whether, in the absence of the speed-matching requirement and the mandated provision of the high-speed access services under consideration, there would be competition sufficient to protect the interests of users;

- whether the respective wholesale obligations imposed on ILECs and on incumbent cable carriers are equitable or represent a competitive disadvantage;

- and whether the impact of these wholesale requirements unduly impairs the ability of incumbent telephone companies to offer new converged services, such as IPTV.
6. What’s apparent is that the ILECs have exerted enough political pressure to cause the expansion of the current process to once again warm over the old NGN arguments in an attempt to modify The Wholesale Regulatory Framework specifically for the purposes of marginalizing competition, by obtaining forbearance based on technology (and now application in IPTV) contrary to the Policy objectives and Policy Direction. Albert Einstein once said; "The definition of insanity is doing the same thing over and over again and expecting different results".

7. In its previous submission Cybersurf Corp and Alberta 1356382 Ltd. (Cybersurf) have demonstrate that the Commission has already correctly made a determination that the The New Wholesale Regulatory Framework Decision 2008-17 would apply to future services, including NGNs after careful consideration, have affirmed that determination multiple times¹ and the ILECs nor cablecos have yet to present any convincing arguments or evidence that those determinations were incorrect. Moreover, that the ILECs have made several unsuccessful attempts to review and vary the Commissions’ determinations including a Federal Appeal Application that have rightly failed. Thus the Commission should come to the same conclusion it already has multiple times.

8. In fact the ILECs have failed to meet any of the criteria required by Telecom Public Notice CRTC 98-6, 20 March 1998, Guidelines to Review and Vary, and since they cannot even meet those criteria it would mean that the Commission would have to reverse itself on previous determination, after providing explicit statement of how its determination requiring ILECs to provide access to higherspeed networks and the regulatory framework were compliant with the Policy Objectives to begin with, and ignore its own review and vary criteria. ²

9. An outcome such as this would be directly contrary to the December 14 2006 Policy Direction and Policy Objectives exactly for the reasons the Commission found itself to be compliant to in

¹ Telecom Decision 2008-117 paragraph 9. “Contrary to TCC’s submission, and consistent with the Commission’s finding in Telecom Decision 2008-116 regarding an application by Bell Canada et al. for a forbearance framework for new non-essential services, the Commission considers that Telecom Decision 2008-17 does provide the framework for the treatment of new wholesale services.” Telecom Regulatory Policy 2009-34 paragraph 76.
the first place. Meaning for example, that the Commission would have to completely reverse itself on its reasons and determinations (and supporting rationale) that the ability for competitors to provide services with matching speed attributes was an essential element of competition did not dampen ILEC investments and was in accordance with the Policy Objectives.

10. That in itself is not conducive the regulatory certainty and coherent forward looking regulation, the very same Governor General in Council required the Commission to achieve in creating The New Regulatory Framework, (Telecom Decision 2008-17); including the Commissions current mandate from the very same Governor General in Council (GIC) “that the regulatory regime provide a cohesive, forward-looking framework that provides the proper incentives for continued investment in broadband infrastructure, encourages competition and innovation, and leads to consumer choice”.

11. After much consideration the Commission has found multiple times that ILECs and cablecos (collectively Incumbents) have market power, their networks are not easily duplicable, that competitors being able to match the service attributes of the Incumbents are an essential ingredient of competition. There has been nothing presented thus far that could lead anyone to believe that those determinations are incorrect.

12. The ILEC argument primarily made by Bell et al requires the Commission to once and for all abandon the goal of creating a multi-competitor market for IP related services. The Bell argument also requires the Commission to accept that decreased retail pressure, through less competitors will lead to more innovation and investment; which is akin to a natural monopoly argument that has been rejected by telecom regulators worldwide. ILEC arguments are simply not conducive to the GIC’s criteria that in reconsidering the Wholesale Framework that the Commission “encourages competition and innovation, and leads to consumer choice”.

13. The cablecos’ argument turns on the notion that TPIA is regulation enough to secure competition in the “retail Internet”; while at the same time admitting they have no customers to

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Bell et al. June 22 paragraph 63.
speak of and that TPIA offers no investment opportunity and no real opportunity to compete because the service available today are entirely dependent on the choices made by the network owner. The cablecos feel no compunction to explain how their proposal allows competitors to utilize new technologies and realize the benefits of converged service offerings conducive to consumer choice and innovation. They do not explain how the “wholesale alternatives” they point to can functionally compete in converged services offerings; nor do they explain on what basis the Commission should view wireless services as alternatives to wire-line services when the combined total of all technologies other than cable modem and ADSL accesses make up only 3% of the market.

14. While the industrialized world advances through comprehensive broadband policies, (including access regimes to NGNs and wireless networks) resulting in multiple providers and new entrants making new investments; the Incumbents proposals ask the Commission to accept mediocrity in relation to OECD country performance in retail offering speed and pricing and to protect their bottom line from retail pressure by limiting access arrangements so that they can full enjoy the full profit potential of their networks.

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4 Response to Interrogatory 31 August 2009 Rogers Non-Cable(CRTC)17July09-5; Attachment 1-Cable Carriers(CRTC)17July09 5(a)-8 re TNC CRTC2009-261-Aug31-09.pdf “Service providers competing using resold facilities, whether last mile or backhaul, are limited in their ability to control and minimize costs. This is the case with ISPs using TPIA today and would continue to be the case with any other head-end based high-speed access service. The limited control over costs increases their operating risks and limits their ability to compete on price. Resale-based service providers may also be limited in the nature and timing of service features that can be offered to end-users, based on the functionality supported by the underlying facilities leased from the third party. In addition, dependency on third party facilities constrains the ability to plan for and adapt to new technologies as the evolution path is determined to some degree by the decisions of the underlying supplier.

5 Telecom Decision 2008-17 paragraph 35; “Furthermore, the Commission considers that this condition must also refer to the functionality of the facility since duplication of the functionality, not merely the facility itself, is a critical consideration.”

6 CRTC Monitoring 2009 Report page 221.

7 The Berkman Center of Internet and Society at Harvard University’s report “The Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy From Around The World” (Berkman Report) Page 11; “Yet the evidence suggests that transposing the experience of open access policy from the first generation transition to the next generation is playing a central role in current planning exercises throughout the highest performing countries. In Japan and South Korea, the two countries that are half a generation ahead of the next best performers, this has taken the form of opening up not only the fiber infrastructure (Japan) but also requiring mobile broadband access providers to open up their networks to competitors. In leading countries like Sweden and the Netherlands, following the earlier example of the United Kingdom, regulators are addressing the complexities of applying open access policy to next-generation infrastructure by pushing their telecommunications incumbents to restructure their operations and functionally separate their units that sell access to network infrastructure from their units that sell connectivity directly to consumers.”

8 The Berkman Center of Internet and Society at Harvard University’s report “The Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy From Around The World” (Berkman Report)Page 80; “We find that U.S. and Canadian companies—both telephone and cable incumbents—that occupy markets that rely on intermodal competition, offer the lowest speeds at the highest prices. Japanese, French, and Swedish firms, including telephone incumbents and cable and unbundling-based entrants, offer the highest speeds and lowest prices, together with the more ambiguous cases of Finland and South Korea. The rest of the companies we observed occupy a middle ground.”
15. Competitive access arrangements that irrefutably benefit the public through multiple service providers’ offerings, which have with ability to define their own service offerings, IMTPs and benefit economically to the same degree Incumbents can be providing multiple services over the same platform.\(^9\)

**Forbearance by Investment**

**ILEC Investments Will Not be Dampered**

16. The ILEC’s have two boogey-men that have long borne their frontline arguments; 1) that providing cost based access arrangements would dampen investment because competitors would not invest in their own networks, but would instead, perpetually rely on ILEC investments because an incentive to invest was lacking. 2) Investment in facilities would be dampened because ILECs themselves would have no incentive to invest if they could not realize a reasonable profit from those investments because they had to provide those facilities to competitors.

17. Cybersurf’s requested relief in March 2009 for an unbundled cable access service was exactly a request that the Commission create the opportunity for competitors to invest in their own networks; and to require the cable companies to only provide the absolutely essential last mile network components or facilities. The incentive to invest is clear; the ability to own the network

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\(^9\) The OECD 2009 Broadband Policy Report page 49; “The fastest connections, lowest prices and most innovative services are in areas where there is a range of consumer choices for broadband.”

The OECD 2009 Broadband Policy Report, page 41; Unbundling of copper telephone lines itself seems to be a factor in reducing the price of broadband subscriptions, as they introduce more competition at the telecommunication exchange. Evidence points to lower’per Mbit/s’ charges in countries with unbundling rules. Prices per Mbit/swerere significantly higher in the least expensive of the four countries, with limited or no unbundling compared with other leading broadband economies. The price per Mbit/s in Japan was USD 0.22 per Mbit/s while the least expensive Mbit/s in the United States was 14 times more expensive (seeFigure 1.15). Switzerland adopted local loop unbundling in 2007 and is among the top five OECD countries in terms of penetration. However, in 2006 before unbundling, Switzerland’s price per Mbit/s, even in PPP terms, was 19 times more expensive than in Japan and five times more expensive than in neighbouring France.”

“Competition is a key to lowering prices but it also has a significant effect on the services and speeds available to businesses and consumers. Broadband quality tends to increase over time even as prices decline. This is a common feature in the ICT sector but broadband changes have been particularly rapid. At the end of 2004 the average DSL speed across the OECD was less than 2 Mbit/s. The average advertised broadband speed had more than quadrupled to nearly 9 Mbit/s over a period of less than three years.17 The trend continues as operators upgrade their networks.”
so that Cybersurf (competitors) could define its own ITMP, and service bundles. This is not logic and motivation exclusive to Cybersurf. During PN 2006-14 TELUS on cross examination testified similarly. Operators want full control of their network, even if there is a premium attached to that control. Secondly, Cybersurf as a small publically traded company can attest to the simple fact that investment bankers and investors want service providers to have tangible network assets and not just user bases. This is not achieved through resale arrangements or the current broadband access arrangements.

18. Indeed competition can only go so far, when every competitor has its service defined and controlled by the network provider; and all have exactly the same supply costs vis a vis tariffs. While TPIA and Aggregated ADSL services provide a means for market entry; in their current forms they will not produce sufficient competition, nor will they facilitate meaningful investment by competitors.

19. Cybersurf believes that its proposal, and the kinds made by competitors, will lead to more competitors striving to make their services the most efficient, economically viable and competitive, and that this will be the catalyst to new service offerings and downward pressure on retail pricing and the emergence of a wholesale market. Cybersurf’s proposal; that more providers using unbundled network components leads to lower prices and more diversified offerings is borne out by the most recent OECD Report: Broadband Growth and Polices in OECD Countries (OECD Report), and The Berkman Center of Internet and Society at Harvard University’s report “The Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy From Around The World” (The Berkman Report).

20. Those two reports demonstrate that, not only will open access arrangements facilitate investment from competitors that, the network provider or Incumbent will need to invest more

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10 Mr. John Fleiger, Vice President, Global Sourcing Solutions, for TELUS Partner Solutions and Business Unit, Oct 25,2007;” Clearly at the outset we were quite interested in building our own facilities end·to·end, which is very important to us. I heard last week that it was important from a network operations and cost perspective. It is more important from a customer experience perspective. So, the more you rely on, say, a third party to provide you with the facilities, the less control you have over the actual end·to·end customer experience.”
to compete with new market participants’ offerings. The OECD report and the Berkman Centre both demonstrate that more competitors means more pressure to make ones service faster and cheaper for competitor and Incumbent alike.\textsuperscript{11}

21. Here at home, the Commission made a similar finding in responding to ILEC arguments that speed matching and competitor access to NGNs would dampen investment; Telecom Decision 2008-117 paragraph 22 states; “Further, the Commission considers that the ILECs' investment incentives will be principally impacted by their need to compete with facilities-based competitors in retail broadband markets.”

22. Meaning pressure from cablecoes offering higher through-put speeds would require ILECs to respond. This is exactly the market discipline the Commission should be striving for, and can only be enhanced with more facilities based competitors. The Commission’s definition of facilities based competition does not require competitors to own end to end networks. Facilities based competition can be achieved with competitors using unbundled components.\textsuperscript{12}

23. The Berkman Report:

a. “Moreover, the overall level of investment in the fiber market questions the argument that open access deters investment. Despite early availability of unbundling for dark fiber, and Japan's continued commitment to assuring open access to the network layer independent of technology, \textit{NTT responded to the fiber challenge by investing and building out fiber} (with support of low-cost loans from the government), and today has over half the fiber market in Japan.” (page 85) [emphasis added]

b. “In Denmark, Norway, and Sweden, unbundling and open access worked exactly as they “should” have, according to the underlying theory that supported unbundling. Innovative

\textsuperscript{11} \textit{ibid} footnote 8
\textsuperscript{12} Telecom Decision 2008-17 paragraph 62; The Commission notes that no expert witness or party submitted evidence or argument that facilities-based competition on a complete end-to-end basis is an achievable goal. Telecom Decision 97-8: para. 237 While resale competition can help promote the development of a competitive market, it is the Commission's view that the full benefits of competition can only be realized with facilities-based competition.
entrants opened up markets; some continued to operate; others were bought out by pan-European or pan-Nordic players and became the basis for entry by those players. The risks—*that incumbents would disinvest, that entrants would never graduate to independent competitors—did not materialize.*” (Page 90) [emphasis added]

c. “The Nordic countries appear to represent the case that a well functioning unbundling and open access regulatory regime, combined with well functioning markets and facilities-based competition, create a competitive market and deliver high levels of penetration and quality at, mostly, reasonable prices. Competition occurs between companies that each compete across multiple platforms, not between companies that use different platforms. *Investment and expansion are opportunistic, wherever there is capacity to be bought or built, and companies mix-and-match unbundled and own copper with cable and fiber.*” (Page 90) [emphasis added]

d. “*France Telecom has responded to all this activity with higher investment and lower prices.* Its prices are still higher for its triple-play offers than those of Free and SFR (USD48.70PPP for up to 100Mbps) (it also adds a EUR3 per month box rental and a 49EUR deposit on the box). *It has increased its announced investment plans in fiber rollout from EUR270 million to between 3 and EUR4.5 billion,* but hedged that it would not invest more than 2 billion if it did not attain sufficient market share. Like Free, FT too reached agreement with a major multi-unit building owners' association to install FttH in 800,000 French homes. At least one market analysis credits FT's broadband response as an important part of improving FT's financial performance, stating that “*The success here has been attributed in the main to the rapid development of ADSL access, increased revenues gained from unbundling broadband lines and more recently, its commitment to fiber-based ultra-high speed technologies.*” (page 98) [emphasis added]

24. The OECD Report;

a. “Competition is a key to lowering prices but it also has a significant effect on the services and speeds available to businesses and consumers. Broadband quality tends to increase over time
even as prices decline. This is a common feature in the ICT sector but broadband changes have been particularly rapid. At the end of 2004 the average DSL speed across the OECD was less than 2 Mbit/s. The average advertised broadband speed had more than quadrupled to nearly 9 Mbit/s over a period of less than three years.17 The trend continues as operators upgrade their networks.” (emphasis added) (page 41).

b. “The strongest new infrastructure-based competition has come from fibre networks built by new entrants who can attract consumers by offering speeds greater than cable or DSL. Competitive providers, municipalities and power companies have installed these networks. The areas where they have had the most significant positive impact on competition have been where networks have been run on “open access” principles. One example is the STOKAB fibre network in Stockholm, Sweden, which has approximately 60 telecommunication companies as clients serving subscribers using STOKAB’s fibre lines. Open access networks separate the provision of bandwidth from the delivery of services. Operators of open access networks typically allow any operator to sell their services over the network for a standard rate.” (page 52)

25. Boogey man one is dead; overwhelming proof from trusted international sources demonstrates that competitors invest in their own networks and service offerings when unbundled components are available.

26. Boogey man two is seriously injured, and in desperate need of a transfusion. The proof is logical and refutable; if the Commission creates a regime whereby competitors can profit through investment, the market will respond with investment and create competition. Competitors will invest to create profit potential and Incumbents will have to invest to respond to that competition. There’s no logic or rationale to suggest that the open access policy relied on by regulators worldwide to create competition are not valid because there’s been a shift from copper to fiber; or called a “NGN”.

27. The Commission need only look to last year’s spectrum auction for PES; new entrants raised hundreds of millions of dollars to compete; the Incumbent wireless operators also invested hundreds of millions so as to protect the investments they had already made, and be able to
deploy platforms and applications consumers want. Given the opportunity and profit potential, the market will respond with investment. The Incumbent strategy is to create regulation or forbearance criteria to inhibit those opportunities for their own benefit and not the benefit of the public.

28. There has been no actual evidence presented that open access arrangements dampens investment; to the contrary the available evidence suggests the increased competition from open access arrangements leads to both competitor and ILEC investment. The ILECs have completely relied on self serving statements that their investments maybe slowed, and dubious conclusions that deregulation of fiber by the FCC has benefited the American market.

Technical Limitation Arguments Are Not Valid

29. With boogey man two on the ropes the Incumbents provided a much needed transfusion; a new twist to the old arguments. The cable companies and to some extent the ILECs now argues that competitive access is not technically feasible.

30. A careful reading of the cablecoes submission from their friends at CableLabs really doesn’t attest to unfeasibility, rather at best it suggests that certain access arrangements are not “optimal” or are ‘economically constraining’

14 This is a long way from unfeasibility. In many cases competition comes with costs, there is no way around that. Providers may have to lose some capacity, invest more, market more and discount their offerings to acquire or retain their market share.

13 http://wirelessnorth.ca/2008/07/21/spectrum-auction-its-over-final-results-of-canadas-2008-aws-spectrum-auction/ “Rogers: Big red was the biggest spender in this auction going right to the precipice of 1 Billion dollars to take almost the entire A block, 20MHz of new spectrum coast to coast. Bell/Telus: Between them Bell and Telus split the E and F blocks for 30MHz of contiguous spectrum nearly in every province with exception of Manitoba and Saskatchewan where only Telus won spectrum. These two are expected to continue their network sharing arrangement to exploit this new AWS spectrum nationally. Globalive: Winning 10MHz in every province except Quebec, Globalive (Yak) is your new national cell carrier. They also landed a little extra, 20MHz over Toronto which they’ll no doubt put to good use. Data A/V (DAVE Wireless): John Bitove’s scrappy wireless startup grabbed 10MHz in Ontario and nearly the breadth of BC and Alberta. http://www.iphoneincanada.ca/iphone-news/bell-and-telus-building-gsm-iphone-time/ “ Darren Entwistle, the CEO of Telus, said during a conference call with analysts and investors that offering two 3G networks side-by-side will help to “future-proof” Telus as the entire wireless industry moves toward a common standard over the next few years. “This will enable a smoother transition to a fourth-generation wireless network,”

14 Cableco supplemental submission Oct 30 2009, Attachment 1 “Effects of Managed Unbundled Access”.

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31. The ILEC technical limitation boiled down is really based on a unique end user scenario, where if the end user chooses a different highspeed provider and IPTV provider simultaneously a question of cost and modem ownership arises.¹⁵ This is hardly an insurmountable issue, and really isn’t a technical question but one of costs, and CPE ownership.

Forbearance by NGN

32. Besides not being technologically neutral, incompatible with regulatory symmetry (more on this later) a regime such as this would be impossible to regulate. One need only to look at TELUS’ expert witness evidence from Dr. Deborah Aaron¹⁶ where she points out that every network provider is constantly overbuilding their network, and one network is intractably built upon the other. They cannot be delineated in the manner proposed by Bell et al. A regulator must regulate or not regulate, anything otherwise is not really facilities based regulation, but rather technology based regulation. This is not tenable or desirable, whereby the regulator must undertake to decide when and how much is enough of the desired technological ingredient to grant forbearance. Particularly problematic when for example different providers have used different technologies to create what they respectively call NGNs.

¹⁵ Bell et al June 22, 2009 paragraph 18; “But where an ILEC is forced to provide wholesale high-speed access service over its own FTTN network, it cannot provide its IPTV service to an end-user subscribing to a wholesaler’s high-speed Internet service over the same line. Having to provide wholesale high-speed access on FTTN facilities thus means that the Companies’ delivery of television services in competition with the cable companies will be seriously undermined, “.

¹⁶ Telus July 07 2008 Reply- Cybersurf Part VII Request to Reconsider ILECs Obligation to Provide Service Parity to competitors when introducing new ADSL throughput speeds. Appendix A Dr Debra AronTHE EFFECT OF EXPANDED UNBUNDLING OBLIGATIONS ON INVESTMENT IN BROADBAND INFRASTRUCTURE AND ECONOMIC WELFARE IN CANADA paragraph 7. “But more generally, it is misleading to think that there is a bright line between the existing network and a "new" broadband network that can be characterized as "old" and "new" investment. While certainly it is true that prospective investment in fiber-to-the-home or fiber-to-the-node would be massive new investment, it is also true that the existing network requires and receives significant ongoing new investment to maintain, replace, and expand it. For instance, from my own calculation based on TELUS’ financial data, just under 50 percent of TELUS’ wireline assets in its ILEC service territory were placed into service within the past 10 years.6 What this figure demonstrates is that the existing network is not stagnant, but is an evolving complex of assets whose components are being continually retired, replaced, and augmented via new investment.”
33. TELUS chose copper, and Bell chose fiber; how would the Commission delineate what would be regulated and what is not to be regulated? The cablecos have had NGNs by Bell’s definition for over ten years; do they lose any chance at forbearance by virtue of deploying early?

34. Pursuant to the *Telecommunications Act*, a regulator must regulate, or not regulate: a facility based on telecom policy objectives and market conditions, period. The underlying technology used to provide the service should be irrelevant.

35. There can be no neutrality or symmetry in a regime cobbled together in this manner. Once a regulator makes a determination, that competition requires intervention, a network is not duplicable and access does not dampen investment, the regulators have to regulate. The fact that they are copper, fiber wireless, old or new should be irrelevant.

36. In the present case unless the Commission finds that somehow fiber or NGNs are more duplicable than the old copper ones, or more duplicable to the fiber–coaxial networks of the cablecos, then the rational that lead to the copper network regulation is still valid.

37. While the ILECs point to the United States and example of fiber forbearance or even NGN forbearance policy that works, the fact is the FCC has chosen not to regulate some highspeed networks comes from a different regulatory legacy.

38. The rationale the FCC took wasn’t entirely based on a finding that access regimes dampened investment as Bell would have the Commission believe. The FCC also believed among other things that nascent technologies would emerge to discipline the market.17

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17 FCC October 27th 2004 Order (FCC 04-254) paragraph 22: “Further, in the *Triennial Review Order*, the Commission observed that “[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for . . . wireline broadband service.”17[1] The Commission recognized in the *Triennial Review Order* the “important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.” Ku-band satellite service and fixed wireless service are available to provide high-speed Internet access across large parts of the country, and the Commission has a pending proceeding addressing broadband over power lines and has also created a task force on wireless broadband. The record here likewise demonstrates the existence of numerous emerging broadband competitors.”
39. The FCC also hoped that well entrenched competitors would build facilities or develop wireless technologies out of necessity. As of today, ILECs in the United States now supply well over 95% of all connections and hold 48% of the market, similar to the dynamics in Canada. High-speed wireless connections have not developed to rival ILEC and cable offerings. Also similar to Canada, all “other” (those that are not cable, ADSL or fiber) technologies only account for 3% of broadband accesses, and most of those cannot deliver converged services or the throughput speeds of wire-line facilities, besides being incumbent controlled.\(^{18}\)

40. The ILECs ask the Commission to look to the Americans\(^{19}\) for guidance, and suggests that the FCC’s fiber free for all\(^{20}\) circa 2004 has lead to massive investments in fiber from ILECs, particularly in the case of Verizon. This Bell states, is proof that prohibiting access to NGNs of their second boogey man theory; as Verizon once unencumbered by competitive access arrangements spent billions of dollars on network infrastructure.

41. However, what’s missing from that story is that the North American’s reliance on an “intermodal” or completely separate facilities based two provider competition regime has ensured the purchasing public some of the highest prices and slowest speeds in the OECD\(^{21}\).

42. Also missing from Bell’s argument is the disclosure that the Americans fiber-centric policy hasn’t made them the leaders on a per capita basis for broad band deployment and adoption in the OECD reporting countries. Rather countries competitive access regimes hold those honors; even when there is strong facilities based intermodal competition. In fact only three countries in the OECD have adopted the idea of closed ILEC broadband facilities the U.S., Switzerland and New Zealand; the latter two most recently reversing themselves by creating mandatory access regulation.\(^{22}\)

\(^{18}\) OECD Broadband Statistics- Penetration: Subscribers by 100 inhabitants [http://www.oecd.org/document/54/0,3343,en_2649_38690102_1_1_1_37441,00.html](http://www.oecd.org/document/54/0,3343,en_2649_38690102_1_1_1_37441,00.html).

\(^{19}\) Bell et al June 22, 2009 Submission paragraphs 103 through 112.

\(^{20}\) FCC Order 04-254, October 14 2004.

\(^{21}\) Ibid footnote 8

\(^{22}\) The Berkman Report page 11; “Moreover, countries that long resisted the implementation of open access policies, Switzerland and New Zealand, changed course and shifted to open access policies in 2006.”
43. Despite its fiber centric policy the United States also falls below the OECD average on the “Percentage of fibre connections in total broadband among countries reporting fibre subscribers, June 2009”\textsuperscript{23}. The top five countries, all have open access regimes; Japan, Korea, Sweden, Denmark and Norway.\textsuperscript{24}

44. The OECD Report:

a. “Certain countries with infrastructure-based competition and unbundling rules have competition from not only the cable operator and incumbent telephone company, but also additional market players who rely on unbundling. This has reduced the danger of a duopoly market structure. As an example, the Netherlands has strong infrastructure-based competition between cable and DSL (see Figure 1.14) but also leads in ECTA’s analysis of main distribution frames upgraded with competitive DSL equipment. Countries such as the United States have chosen to focus on infrastructure based competition in broadband markets due to the manner in which intermodal competition arose in the marketplace, as well as concerns that unbundling could create investment disincentives and limit the rollout of new networks. Policy makers in the United States are looking to power-line communications and wireless technologies as important competition to existing fixed line and cable providers.” (page 51)

b. “The largest growth in broadband penetration in per capita terms was in the Netherlands, Norway, Denmark and Finland – countries that now lead the OECD in penetration overall. The Netherlands added over 20 subscribers per 100 inhabitants in a three-year period to its total broadband subscribership, helping push it to the top two countries of the OECD, alongside Denmark. The penetration rate increase in the Netherlands over those three years, by itself, was higher than the total penetration of 16 OECD countries in December 2006. Policy makers should focus attention on what has helped propel these leading countries over the previous three years. Clearly the blossoming of competition among providers in the Netherlands and Denmark has been a key factor in their strong penetration gains during the period and may also explain their leading places in the OECD as a whole. Both the Netherlands and Denmark benefit from

\textsuperscript{23} http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_37441,00.html
\textsuperscript{24} The Slovak Republic erroneous reported homes past, as opposed to subscriptions.
infrastructure based competition and same-line competition over DSL. In addition, fibre to-the-home networks are appearing in both countries, often with the partnership of local municipality or utility company.” (page 31)

c. “Switzerland adopted local loop unbundling in 2007 and is among the top five OECD countries in terms of penetration. However, in 2006 before unbundling, Switzerland’s price per Mbit/s, even in PPP terms, was 19 times more expensive than in Japan and five times more expensive than in neighbouring France.”(page 41)

45. What’s also not clear is if the FCC’s fiber free for all actually induced the fiber investments, whereby ILECs could achieve forbearance by investing in fiber; as opposed to the route taken by TELUS in deploying NGNs over copper networks, via hardware and other facilities construction. Thus, there’s no way of really knowing if Verizon was investing in fiber to compete with cablecos’ higher speed service and triple play bundles; or if it was investing in fiber so as to shed competitive access requirements. That is of course, other than self serving statements from Verizon itself attesting to the benefits of fiber forbearance.

46. After the FCC’s 2004 forbearance regulation, many of the independent ISPs and CLECs which were quite large and healthy, exited the market or are completely marginalized unable to access higher speed and higher capacity networks. CLECs in the U.S. are now fighting a new battle trying to prevent ILECs from “retiring” the still regulated copper facilities, and thereby further reduce competition.

47. Mark McGuiness Vice President of Business Development for Expedient;

“I’m sure the RBOCs are trying to avoid competition over the copper for IP telephony, because they’re making an investment in fiber-to-the-home and they would prefer not to have competition from the copper,” says Mark McGinness, vice president of business development for Expedient, a Penn.-based data center and disaster recovery company. It offers affordable Ethernet services with speeds up to 40 megs, something the LECs can’t touch, he says. If Expedient’s copper access gets cut off, the company will have to bond special-access T1s. This
is an expensive alternative and services will slow dramatically, he says. "Essentially, my costs would go up tenfold," says McGinness. "And the irony is, I'm still using copper to get to the end user. The only difference is I'm being forced, for a portion of that circuit, to go through the RBOCs’ fiber."

Marty Clift, Vice President of Regulatory Affairs for Cavalier Telephone LLC;

“They’ve seen our petitions at the FCC. They know this is a hot item,” says Marty Clift, vice president of regulatory affairs for Cavalier Telephone LLC. “The quicker they can get some retirements off the books, the better.” Copper decommissioning threatens to hurt Cavalier. The company provides triple-play services, including IPTV, over copper in direct competition with Verizon’s FiOS product. If Cavalier loses direct copper access, prices will soar and technological innovation will suffer.”

48. What is clear is that preventing access to higher speed networks will ensure an inevitable two dominant provider retail market, as Incumbent higher speed and bundled offers push competitors restricted to slower speed networks out of business. They will also ensure that any potential of competitor investment will be dampened, as no competitor will be willing to co-locate and build facilities knowing that from the start it cannot compete with the dominant providers, higher speeds and converged services, and cannot reach areas served by ILEC remotes.

49. While TELUS and Bell point to FCC finding that ILECs had no advantage in deploying NGN’s, they have not offered a single example where a competitor has successfully deployed a NGN in any meaningful way in the United States, that has not been done by either a cableco or ILEC. Whereas the OECD and the Berkman report both provide multiple examples of competitors deploying NGN’s using unbundled components provided on a regulated basis, that are today delivering converged services.

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25 Copper Retirement Notices Stack Up; CLECs Ask FCC for Formal Review; http://www.xchangemag.com/articles/07julfeat06.html
50. The argument, primarily asserted by Bell, is that providing access to higher speed networks will mean that Incumbents cannot fully enjoy the profit potential from its deployments, because competitors will use up capacity and adversely affect the ability to bundle services. This in turn will affect the Incumbent’s business plan, and slow its deployment of new services. The Commission has to be cognizant that Bell’s argument is not that mandatory access is not cost recoverable, but that it would affect profit.26 In essence this argument requires the Commission to protect Incumbent investment from competition; this is completely absurd outside the notion of (or akin to) a natural monopoly27,28 and is completely counter-intuitive to the Commission’s mandate to create regulation that “encourages competition and innovation, and leads to consumer choice”.

51. Accepting the ILEC proposal means the Commission has to accept the inevitability of a two provider dominated market, and the potential American rationale of having some of the highest prices and lowest penetration of broadband services in the industrialized world. The starkness of this position – “don’t take steps to promote competition, because it will mean less profit for me” – is startling outside the era of a monopoly; and is completely contrary to the Commission’s mandate, under the Telecommunications Act, to create regulation that “encourages competition and innovation, and leads to consumer choice”.

52. What is easily garnered from Bell’s submissions is that its arguments and requested relief is predicated on, and only deals with the idea of facilitating and promoting and ILECs ability to compete with the cable companies.29 The benefits to the public in choice, price and the prospect of real choice in ITMPs has to be ignored in accepting the ILEC proposal. The ILECs know this; thus they backstop their arguments for the inevitability of competitive access, with the principle of regulatory symmetry that requires the Commission to impose similar access conditions on the cable companies.

27 Natural Monopoly Definition: Law. 1) A right granted by a government giving exclusive control over a specified commercial activity to a single party. 2) a)A company or group having exclusive control over a commercial activity. b) A commodity or service so controlled.
28 "Like many businessmen of genius he learned that free competition was wasteful, monopoly efficient. And so he simply set about achieving that efficient monopoly." - Mario Puzo 1963, Author : The Godfather.
29 Bell et al (090622 TNC 2009-261 Submission - Abridged.doc), paragraph 112.
Forbearance by Symmetry

53. Cybersurf first applied to the Commission to create an unbundled cable access arrangement under the auspices of symmetry in its initial application in March 2009; whereby the ILECs were already required to provide unbundled ADSL Access Services.

54. In Cybersurf’s view, there is no question that once the Commission determined that cablecos were Carriers providing telecommunications services under the Telecommunications Act then there was no question that they should be unbundled to the greatest extent possible; other than for valid technical reasons.

55. The ILEC argument has become a “me too” proposition that suggests that if for any reason the Commission determines that the cablecos cannot be further unbundled then this is reason enough to forbear the ILECs.

56. The question in respect to cable companies has not been so much their regulatory obligation to unbundle but their ability to do so, i.e. to what extent is it feasible considering the cablecos’ other regulatory obligations and technological differences.

57. The framing and scope of the current proceeding hint at a predetermination on which the ILECs have apparently picked up. It seems that the way the Commission and the GIC have positioned the question of symmetry suggests that, unless identical competitive service attributes are foisted upon cable they cannot be required of ILECs. This is completely absurd, and a perversion of what is intended by competitive neutrality. This would mean that if the Commission where to be consistent with previous determinations that an unbundling of networks is required according to the essentiality test, but the cablecos can’t provide one, because of technical or other regulatory considerations, then the ILECs are also relieved of their unbundling obligations.

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30 Telecom Decision 2008-17, paragraph 37
58. This would constitute a Review and Vary of Decision 2008-17 and nullify the entire framework. It would entail a “me too” reason for forbearance, that would trump the essentiality test. It would actually allow forbearance by a finding that competitors would be prohibited from an unbundled alternative wholesale option, and would leave them with none.

59. Moreover, turning to the broadcast arena, it is worth noting that, one of the ILECs, Bell Canada, has repeatedly and successfully argued before the CRTC that its satellite BDU affiliate Bell TV (formerly Bell ExpressVu) should not be subject to the identical obligations of its cable competitors, such as carriage of all local signals, due to technical and operational factors such as the national market served by satellite providers and the capacity limitations of satellite transponders. In that context, Bell has argued that technological neutrality must necessarily take into account material technical and other differences between licensees.

60. Cybersurf submits that it cannot have been the Commission’s or the GIC’s intention to merge the Cybersurf and Bell applications in order to carry out Bell’s suggestion of a blind, slavish adherence to absolute symmetry between ILECs and cablecos.

61. Cybersurf submits “symmetry” is achieved by the Commission in consideration of the obligations of both Incumbents to provide competitive access and their technical ability, or inability to provide access, and the greatest degree the prospective networks can be practically unbundled. Meaning, in Cybersurf’s view if the Commission were to find that TPIA is the unbundling of the cable network to the highest degree possible, then the service should be classified as ‘conditional essential’ and priced accordingly.

**Forbearance by Speed**

62. The OECD Communications Outlook 2007: Policy Issues and Market Structure page 19 states:

“Broadband is quickly becoming the basic medium for service delivery on both fixed and wireless networks. This has been made possible though the dismantling of service specific network architectures. The telecommunication industry has long been segmented, with different
networks delivering different services. The transition from circuit-switched telecommunications to packet-based networking on the Internet has broken down these segment barriers. What is left is a broadband data platform that is able to carry a wide range of telecommunication services."

63. It is not entirely the need to be able to match speed on megabyte for megabyte basis that is really important. It’s the fact that higher speed networks are actually higher capacity networks, and those higher capacity networks have the ability to provide converged services over the same platform, and the economic benefits therein. Also true is that more and more Internet applications are becoming “heavy” and require the higher capacity and throughput speed to operate.

64. The 2009 CRTC Monitoring Report states:

“The deployment of high-capacity digital networks and the emergence of Internet Protocol (IP) as the standard for data transmission and delivery have facilitated the carriage of multiple types of data on a single network; this has been a major enabler of network convergence. Today’s unified data networks are capable of delivering all forms of information, be it voice, data, text or video. In 2008, over 80% of communications revenues were generated by converged companies offering both broadcasting and telecommunications services.

Convergence in the communications industry can be observed through the behaviour of consumers. In 2008, approximately 25% of residential customers subscribed to service bundles that consisted of two or more of the following services: local telephone, Internet access, video, and mobile.

In 2008, excluding mobile revenues, almost 44% of cable companies’ revenues were from telecommunications services. Similarly, broadcasting service revenues represented approximately 10% of the incumbent telephone companies’ residential communications revenues.”

65. In TELUS’ March 11 Petition to the Governor General in Council, it states at paragraph 18;
“The Commission found that the enhanced functionality of higher speed technology results in fundamentally different services and applications becoming available. Put simply, there is a change in the market and the change is so significant that the market is re-defined. That analysis clearly should apply to the impending advances in Canadian networks. A 500 Kbs ADSL service will simply not be comparable to a 15 Mbs or 30 Mbs access service. They are as different as a stagecoach and an airplane. The market is re-defined by such a technological advance.”

66. Undeniably consumers will demand the higher capacity and higher speed networks to access Internet content. A competitor that cannot deliver that content cannot compete.

67. While for instance the cablecos made the rather disingenuous statement that ‘many factors play a role in a consumer selecting a service provider’ (that is of course notwithstanding incumbents control wholesale customers’ speed, ITMP and to large degree price), anyone subjected to inserts on the local availabilities or has a mailbox knows that the cablecoes have long been capitalizing on their ability to provide higher and higher through-put speeds, and their advertising dollars revolve around it31.

68. In Decision 2008-117 at paragraph 19, the Commission stated that “[s]ervice speed is an important competitive attribute, with rates differing significantly by speed and speed often being a major differentiation point from a marketing standpoint. The Commission considers that absent a matching service speed requirement, the ability of competitors that rely on the mandated aggregated ADSL service to compete in the retail market would be significantly restricted, which would likely result in a substantial lessening or prevention of competition in the retail high-speed Internet services market ”. There has been no evidence presented thus far to suggest the Commission should vary that determination.
69. Moreover, the ability to provide higher capacity and speeds being essential ingredients to competition come from the ILECs themselves. In TELUS’ response to Cybersurf’s application for speed matching, it stated in its July 21, 2008 submission at paragraph 43:

“Dr. Aron points out that in Canada, the ILECs face significant challenges if they wish to compete effectively against the cable providers, who currently offer much faster Internet access services and triple play bundles that the ILECs are unable to match, a development that has manifested itself in recent market shares statistics that show cable has overtaken the ILECs in Internet access revenue market share. Dr. Aron notes if Canadian ILECs are provided a regulatory environment conducive to investment, it is reasonable to expect an escalation of investment not only by ILECs but by cable companies as well, to the overall benefit of Canadian citizens.”

70. It’s disingenuous then for the ILECs on the one hand to argue that they have to build NGNs in order to compete with cable’s triple play and higher through-put speeds and at the same time take the position that competitors can compete without the same capabilities. The ILEC proposal, as stated before will lead to a two provider market, period.

71. The Commission must be cognizant that “NGNs” lead to converged services, bundles and unified networks; the inability for competitors to compete on these networks does not only put retail Internet service competition at risk, but also long distance, local phone competition, and many of the transport services like Ethernet, as competitors are pushed from the market unable to provide these services in bundles that consumers want.

**Forbearance by Application**

72. Indeed, ILECs across North America have been increasing capacity and through-put, at the cost of billions of dollars, to compete with cables ability to offer triple play bundles. This fact alone provides compelling evidence of the potency and necessity of having higher capacity networks. And the lucrative economic benefit of being able to provide multiple services on a single
platform is significant. Bell for example is deploying IPTV over its terrestrial broadband facilities, even though it has the ability to deliver broadcast services via Express Vue.

73. When discussing cable wholesale obligations, Bell itself has dismissed the idea that the Commission should alleviate a regulatory burden on the basis that a network provider can find other uses for its network. Bell et al June 22, 2009 initial submission TNC 2009-261, paragraph 223;

“At the outset, the Companies submit that the Commission should not be swayed by cable companies' oft-repeated argument that they should be exempted from stringent wholesale obligations because of capacity constraints. Every network faces capacity constraints, and if the fact that a network operator could put its network to a variety competing uses were reason enough to deny access or further unbundling, then no access would ever occur.”

74. This same thinking is equally relevant to ILEC wholesale obligations, and is especially salient when the basis for Bell’s argument is constructed around the argument that providing wholesale access is less lucrative than providing retail access. That of course can also be said about any mandatory access arrangement, and thus cannot be accept by the Commission as a precedent for forbearance.

75. In Order in Council P.C. 2009-2007, which requires the Commission to reconsider Telecom Decision 2008-117 and Telecom Order 2009-111, the Governor in Council specifically asks the Commission to consider the impact of wholesale requirements and if they unduly impairs the ability of incumbent telephone companies to offer new converged services, such as Internet Protocol television (IPTV).

76. Studies by the OECD have demonstrated that network unbundling has lead to multiple IPTV providers in European Union countries.\(^{32}\) Nearly every competitor to this public process has expressed a desire to provide the so called “converged services”, which includes IPTV.

\(^{32}\) The OECD 2009 Broadband Policy Report page 96 “Recent analysis, however, shows that IPTV subscriber numbers have grown fast in the last year, effectively doubling during the 12 months to 30 June 2006. Fibre, high definition IPTV, three-dimensional TV, video
77. Cybersurf submits that, the question as it is posed; “the impact of these wholesale requirements unduly impairs the ability of incumbent telephone companies to offer new converged services, such as Internet Protocol television (IPTV)” is cast incorrectly outside of some of the technical limitations that Bell suggests would limit its ability to provide its own service and a competitive service to individual end users. In the context of telecommunication access regulation the question put to the Commission by the GIC, suggests that IPTV deployment by an ILEC is preferable than facilitating multiple deployments by competitors through unbundled access arrangements. Under the GIC’s own Policy Direction, the Commission cannot make determination that favor Incumbents over competitors.\(^\text{33}\) Secondly, despite the fact that all of the ILECs except for the Bell companies (which can offer Broadcast services via Express Vue an affiliated undertaking) have already largely deployed their IPTV networks. Obviously the Commission cannot inhibit something that has already largely occurred.

78. The notion that the Commission can refrain from requiring wholesale access to certain telecommunications facilities that it has deemed essential (or conditional essential) on the basis that the carrier would prefer to use these facilities to provide a broadcasting distribution service, falls outside the Commission’s jurisdiction under the *Telecommunications Act*. It’s no more valid than a cablecos’ argument that it shouldn’t have to provide competitive access because doing so is less lucrative than selling other services, such as VOD or PPV services, and will hinder its ability to do so.

79. The notion loses site of the Commissions mandate to create competition, and harkens back to monopolistic policy. The Commission should be striving to facilitate a competitive environment applications for tele-work and tele-medicine will push demand for highbandwidth further. Eventually this demand for heavy video files will put pressure on the existing capacity of the Internet.”

Telecommunications Liberalization Fuels Growth in IP Services, "Like the UK and Germany, France has opened its formerly monopolistic telecommunications market to competitors, and the results have been spectacular," says James Belcher, Senior Analyst and author of the new report, French Connections: The Triple Play Triumphs. "France Telecom now shares the market with nimbler DSL providers who also offer broadband-based phone (VoIP) and television (IPTV) services for less money.”


\(^{33}\) Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives P.C. 2006-1534 December 14, 2006 1 b) (iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers;
that would require the ILECs to make available wholesale access to their facilities, recognizing that ILECs will make investments in their prospective networks, be it fiber or otherwise, because they have to compete with other providers and meet public demand; not because they are assured a return due to Government protection.

80. Nonetheless, if the Commission were to consider the idea of forbearing an ILEC because it plans on delivering an application (which is all IPTV is), the Commission is creating a condition of *forbearance by application*, that cannot possibly be reconciled with the essentiality test, that tests the duplicability of a facility and not downstream market power. It also cannot be reconciled with Telecommunications Policy Objectives, December 14, 2006 1 b) iii) and iv) that require the Commission regulation to be technically neutral and symmetrical. The ILECs would be achieving forbearance on their higher speed networks because they are offering converged services, over NGNs which the cablecos have been doing for years, but are deployed in a different manner.

81. All of which is notwithstanding that the application in question, IPTV, is for the purposes of broadcast and broadcast competition, and can only be treated by the Commission on the Telecommunication forum technically neutral as an Internet application.

**A Framework that Encourages Competition and Innovation**

82. Cybersurf maintains that a wholesale regime that promotes meaningful choice among an array of competitors and a variety of service features and parameters is good for the Canadian Public and will minimize regulatory oversight over both the retail market for Internet services and the wholesale market for broadband access services.

83. Open access regulation in Europe has lead to multiple competitor competition, including not just voice and Internet providers but also broadcast providers.\(^{34}\)

\(^{34}\) *Ibid* footnote 31
84. Moreover, Cybersurf believes that the best way for the Commission to ensure that not just the economic interests, but also the social interests of the Canadian public are met is through telecommunications policy that supports a vigorous, cost-effective unbundling regime. Such a regime would mitigate concerns over cross media ownership, and concentration and control of infrastructure in the hands of the incumbent duopoly.

85. Despite the consensus of opinion between parties that there is ever-increasing convergence of technologies, services and platforms the cablecos have continually made the argument that the scope of the current proceeding is limited to “Retail Internet Services” only. As a result, they propose an apple for apple access arrangement, in the form of TPIA, as all that can be appropriately required of them, since it allows competitors to offer similar “Retail Internet Services” to those that they offer. Cable maintains this position, despite the fact that during the ITMPs proceeding they espoused that the ability of an ISP to control ITMPs was critical to competition and that the choice of providers and a variety of ITMPs approaches protected the public from the possibility of carrier abuse.

86. Cybersurf maintains that the cablecos’ definition of “retail internet services” as being the relevant market is no longer valid, since access aimed only at providing these services has inherent constraints that that prohibit competitors from bundling services and offering a whole array of IP based services, as do the Incumbents. The cablecos want to exclude from the range of services to be supported by unbundled wholesale access both IPTV and VoIP applications, which could also be properly characterized as “retail Internet services”; indeed, the cablecos argue that TPIA is a sufficient solution, and that no further unbundling is required, without recognizing the functional constraints on the TPIA service that prevent competition.

87. In recognition of this convergence of technologies and services, which are now often bundled or overlapping (TV on Cell phones, Voice over Internet) Cybersurf proposes that the CRTC should

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36 Cable Carriers Response to Appendix 2 c) of TNC 2009-261 June 22 2009 paragraph 58
37 Telecom Decision 2008-17 paragraph 35; “Furthermore, the Commission considers that this condition must also refer to the functionality of the facility since duplication of the functionality, not merely the facility itself, is a critical consideration.”
avoid attempting to regulate services or applications, as it has often done in the past, and should
instead concern itself more with open access to networks, allowing competitors to avoid the
constraints imposed by the business decisions of the Incumbents and innovate, invest and
define their own services. The Commission needs to stop thinking in terms of Internet access,
and start thinking in terms of broadband access as a vital, enabling transport technology.
Workable, fairly priced, unrestricted wholesale broadband access can support the provision to
the Canadian public of a number of applications, as well as innovations yet to come – in true
competition to the triple plays of the incumbents. In order to replicate the European experience
and cultivate a multiple competitor market with differentiated service offerings and real price
competition, the Commission must construct a wholesale regime that permits competitors to
provide the broader range of services discussed above, To fail to do so will limit Canada to
relatively low-level resale-modeled competition in Internet access.

88. The Incumbents also overlook the Commission objective to unbundle networks not just to
discipline the retail market, but to discipline the wholesale market as well.\textsuperscript{38,39} In this regard the
cable companies argue that TPIA and wholesale aggregated ADSL services are sufficient
alternatives so that TPIA should not be further unbundled. This proposal does not remove
monopoly control of the wholesale market from the Incumbents requiring perpetual regulated
wholesale services.

\textbf{Incentive to Invest and Compete}

89. As discussed earlier, Cybersurf believes that for facilities based competition to flourish
competitors the following ingredients are required:

\textsuperscript{38} Telecom Decision 97-8 paragraph 73: The Commission is of the view that efficient and effective competition will be best achieved through facilities-based competitive service providers; otherwise, competition will only develop at the retail level, with the ILECs retaining monopoly control of wholesale level distribution.

\textsuperscript{39} Telecom Regulatory Policy 2009-34 paragraph 76: “The Commission considers that, similar to the situation with respect to ULLs, there are not sufficient wholesale alternatives to the ILECs’ line-sharing services. The Commission also considers that in the absence of wholesale alternatives, withdrawing mandated access to the ILECs’ line-sharing services would likely result in a substantial lessening or prevention of competition in the retail high-speed Internet access service market and that this would be inconsistent with both the policy objectives set out in section 7 of the Act and the Policy Direction. The Commission further considers that, at a point in the future, technological advances and industry evolution may provide a wholesale alternative to the ILECs’ line-sharing services.
90. Regulatory certainty. No competitor will invest the capital required to build facilities under the current regime that has permitted ILECs to obfuscate by continually delaying competition by having old arguments reconsidered over and over again. The Commission and the GIC need to be definitive and clear; Canada needs a broadband policy with no wiggle room for continuous reconsideration and rehash of old arguments.

91. Fair pricing and access arrangements. No competitor to this proceeding as suggested that either of the Incumbent operators provide access on less than cost based basis. However, as suggested by the Berkman Report the Commission should undertake to determine why it’s costing approach results in the highest access fees in the OECD. The result of this methodology is clearly demonstrated by the lack of subscription by competitors to TPIA and ADSL Access services. Access arrangements that are constructed with an academic methodology that do not result in any actual competition is regulation not proportionate to its purpose. 40

92. Regulate access to broadband facilities and not services or applications. Competitors are not asking the Commission to require Incumbents to provide access arrangements to their IP based services, but rather to the facilities these services are provided over so that they can define their own services. Aggregated ADSL and TPIA should be seen as entry level services that allow competitors to build up user bases with the goal to be able to self supply to the greatest extent possible. The Commission needs to ensuring there are graduated access arrangements exist that allows competitors to invest in their own networks (beyond the prohibitively expensive, inefficient to duplicate last mile access networks of the incumbents). The Commission should continue to refrain from prohibiting any type of IP based service; aside from those that can technically infringe upon the delivery of other services by other providers, or harm the network.

93. Focus on the health of competition, and not the health of the Incumbents. As discussed above, the Commission approach to regulation thus far has been to ensure competitors have the proper incentives to invest and not perpetually rely on Incumbent facilities. It has done this by applying

40 The Berkman Report pg 111: The Canadian experience suggests, consistent with the experience of the larger European countries, that formal adoption of unbundling is insufficient to achieve competition. In Canada, formal unbundling was coupled with regulatory uncertainty introduced by the threat of sunset, and high regulated rates.
cost plus pricing and sunset conditions. These to date have not achieved any significant new competitor entry into the market. The Commission should rely on the market and market pressure to encourage service providers to invest in their services. The OECD Report demonstrates that when a profit potential exists service providers invest; it also suggests that when that profit potential exists, it’s typically out of territory ILECs (in the E.U. this means ILECs from other E.U. countries) that are the ones that quickly move into new markets. This suggests that out of territory Incumbent moving into new markets and competing should be the bell weather indicating the success of the Commissions regulation. As discussed above Cybersurf believes there is also enough evidence supplied by the OECD that in a competitive market, access arrangements do not dampen Incumbent investments.

**Conclusion**

94. Cybersurf believes that its proposal, and the kinds made by competitors, will lead to more competitors striving to make their services the most efficient, economically viable and competitive, and that this will be the catalyst to new service offerings and downward pressure on retail pricing and the emergence of a wholesale market. Cybersurf’s proposal; that more providers using unbundled network components leads to lower prices and more diversified offerings is borne out by the most recent OECD studies cited and the Berkman Report. Furthermore, the network provider or Incumbent is not immune from this pressure. The OECD report and the Berkman Report both demonstrate that more competitors means more pressure to make ones service faster and cheaper.

95. The incumbent proposals are proposals that only benefit the incumbents. They offer no safeguards to a duopoly, and no safeguards to carrier ITMP abuse. It puts the existing competition in transport, local phone and long distance markets at risk. It stifles any potential

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41 Since the advent of broadband services and IP enable service the CRTC Telecommunications Monitoring Reports show a significant year over year decline in Independent ISP retail market share as percentage of revenue. In 1998, ISPs accounted for nearly 50% of Internet Access Revenue, the latest Monitoring Report shows ISPs accounting for less than 7% after 10 years. Cybersurf submits this is due to the consumer move from dial-up to highspeed services, and the inability of ISPs to obtain equitable highspeed access arrangements. The Commission should not expect that the move from highspeed to converged services or so called NGNs should have a different result if Independent ISPs are delayed or
at future for a multi–BDU market dynamic. In short, their proposals offer less to the public by way of their own investments and the potential not only for those investments to be made by competitors and incumbents alike, but a more competitive and dynamic telecommunications market.

96. Cybersurf does not believe any further consideration absent compelling evidence can logically lead to the Commission making determinations it already has come to multiple times. No question in recent history has been considered more than the ILECs NGN arguments. Cybersurf hopes that this proceeding will finally provide finality to the broadband question once and for all and provide competitors the certainty required to make the investments in their own networks.