



## Telecom Decision CRTC 2005-5

Ottawa, 3 February 2005

### **TELUS Communications Inc. – Application to reopen the record of the proceeding initiated by Telecom Public Notice CRTC 2002-4**

Reference: 8661-T66-200408791

*In this Decision, the Commission **denies** a request by TELUS Communications Inc. to reopen, update and supplement the record of the proceeding initiated by Competitor Digital Network Access service proceeding, Telecom Public Notice CRTC 2002-4, 9 August 2002.*

#### **Introduction**

1. The Commission received an application by TELUS Communications Inc. (TELUS), dated 17 August 2004, filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, requesting that the Commission reopen, update and supplement the factual record of the proceeding initiated by *Competitor Digital Network Access service proceeding*, Telecom Public Notice CRTC 2002-4, 9 August 2002 (Public Notice 2002-4).
2. Specifically, TELUS requested that the Commission:
  - direct selected hydro telecommunications service providers (hydro TSPs) to respond to supplemental interrogatories 1001 to 1007 of the Part A series addressed to competitors by the Commission in its letter of 20 March 2003, and direct all parties to the Competitor Digital Network Access service proceeding (the CDNA proceeding), including the cable companies, to update their responses to these interrogatories;
  - issue a new interrogatory to all parties, including the hydro TSPs and cable companies, regarding data on intra-exchange and inter-exchange routes where the company or its affiliates own dark fibre;
  - incorporate by reference the evidence regarding third-party supply of Digital Network Access (DNA) services filed by Bell Canada in support of its application for forbearance for High-Speed Intra-exchange Digital services, dated 23 February 2004 (Bell Canada's DNA forbearance application);
  - include additional information filed on the record of the CDNA proceeding and amend these tables to show intra-exchange and access facilities separately;
  - initiate an expedited comment and reply comment process, before rendering its decision in the CDNA proceeding; and
  - incorporate by reference all evidence requested by TELUS into the CDNA proceeding.

## Process

3. On 30 August 2004, the Commission received comments from Aliant Telecom Inc., Bell Canada, Bell West Inc., and Saskatchewan Telecommunications (collectively, Bell Canada et al.), Call-Net Enterprises Inc. (Call-Net), the Canadian Cable Telecommunications Association (CCTA), ENMAX Envision Inc. (Envision), MTS Allstream Inc. (MTS Allstream), Microcell Telecommunications Inc. (Microcell), Rogers Wireless Inc. (RWI), on behalf of itself and Rogers Cable Inc., and Xit télécom inc. (Xit télécom), on behalf of itself and Télécommunications Xittel Inc.
4. On 3 September 2004, the Commission received reply comments from TELUS.

## Background

5. In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002 (Decision 2002-34), the Commission directed the major incumbent local exchange carriers (ILECs), Aliant Telecom Inc., Bell Canada, MTS Communications Inc., Saskatchewan Telecommunications and TELUS, to develop a CDNA service. This service made the ILECs' DNA access and associated link facilities available to competitors at competitor service rates. In this Decision, the Commission also initiated a number of follow-up proceedings to examine issues related to the CDNA service.
6. In Public Notice 2002-4, the Commission provided clarification of, and certain procedural changes to, the follow-up proceedings initiated in Decision 2002-34. The Commission found it appropriate to combine the follow-up proceedings into one CDNA proceeding.
7. During the course of the CDNA proceeding, the Commission issued *Procedural determination in the Competitor Digital Network Access service proceeding with respect to an application made by the Canadian Cable Television Association*, Telecom Decision CRTC 2003-52, 1 August 2003 (Decision 2003-52). In this Decision, the Commission directed Cogeco Cable Canada Inc., Bragg Communications Inc. carrying on business as EastLink, Shaw Communications Inc., Rogers Cable Inc. and Vidéotron Télécom ltée to respond to two Commission interrogatories, with regard to their DNA-equivalent facilities, that had previously been addressed to competitors (Allstream Corp., Call-Net, FCI Broadband, a division of Futureway Communications Inc., LondonConnect Inc., Microcell and RWI), including the ILECs in respect of their out-of-territory operations.
8. The Commission stated in Decision 2003-52 that the record of the CDNA proceeding suggested that the facilities of other non-dominant carriers that were not parties to the CDNA proceeding, such as hydro TSPs, were less important alternatives to the ILECs' DNA services. The Commission therefore determined that more detailed information regarding the alternative supply by such non-dominant carriers was not necessary for the Commission's purposes in the CDNA proceeding.
9. On 30 October 2003, the Commission released 12 tables of aggregated supply data that related primarily to the provision and use of DNA facilities by competitors, aggregated across all ILEC territories, and placed this data on the public record of the CDNA proceeding.

10. Final comments in the CDNA proceeding were filed by 12 December 2003, and comments in reply were filed by 23 December 2003.

### **TELUS' application**

11. TELUS argued that since the time of the Commission's determination in Decision 2003-52, ample and credible evidence had emerged regarding the activities of hydro TSPs as alternative suppliers of DNA. According to TELUS, it was evident on a *prima facie* basis that hydro TSPs now represented a significant and increasingly important source of alternative DNA supply. TELUS further argued that the DNA supply by other non-ILEC service providers had increased significantly since evidence was placed on the record of the CDNA proceeding.
12. TELUS noted that some of the data collected as part of the CDNA proceeding was more than two years old and submitted that if the Commission rendered a decision in the CDNA proceeding on the basis of the current CDNA record, it would be based on outdated facts and made without reference to evidence that there was a great deal of self-supply and third-party supply of the DNA services at issue.
13. Relying on jurisprudence, TELUS argued that the Commission had a duty to properly consider evidence that was *prima facie* relevant to the matters before it when parties place evidence before it, or the Commission becomes aware of such evidence, prior to rendering a determination.
14. TELUS further submitted that, if evidence now available was not considered as part of the record of the CDNA proceeding, the Commission would have denied TELUS and other parties a meaningful opportunity to put forward evidence and have it fairly considered because, without reopening the record, the evidence upon which the Commission would base its decision would not reflect the current state of self-supply and third-party supply of DNA-equivalent services.
15. TELUS relied on the following evidence to support its application:
  - "Lights Out: Canadian Electric Utilities in Telecom Service Markets, 2003", November 2003, by IDC Canada (the IDC Report), which was appended to Bell Canada's DNA forbearance application, as Attachment 6;
  - "Alternative Suppliers of Digital Network Access Facilities", February 2004, by Mark H. Goldberg & Associates Inc. (the Goldberg Report), which was appended to Bell Canada's DNA forbearance application, as Attachment 4;
  - the websites of EPCOR Utilities (EPCOR), Envision, and BC Hydro;

- submissions made by hydro TSPs in respect of three other Commission proceedings;<sup>1</sup> and
  - *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets – Deployment / Accessibility of Advanced Telecommunications Infrastructure and Services*, November 2003 (2003 Competition Report).
16. With respect to the IDC Report, TELUS stated that the introduction summarized the powerful yet largely undetected presence of utility companies in telecommunications markets. TELUS submitted that the IDC Report stated that municipal hydro TSPs were now in a strong position to challenge the supremacy of the ILECs in the access market. TELUS noted that the IDC Report provided high-level observations relative to the telecommunications activities of utility companies, and discussed the facilities and services of specific electric utility companies, such as Envision, EPCOR and BC Hydro, all of which operate in TELUS' ILEC serving territories.
  17. TELUS noted the Goldberg Report's assertion that virtually every Municipal Electric Utility (MEU) was involved in the telecommunications industry and that MEU support structures such as poles, towers and conduits were sold on a wholesale basis to telecommunications providers. According to TELUS, the Goldberg Report noted that MEUs had moved along the telecommunications value chain to provide lit transport services, fully managed private line services, and network-based services such as frame relay, ATM and high-speed Internet service.
  18. TELUS also submitted that the websites of Envision and EPCOR, electric utilities based in Alberta, and BC Hydro, an electric utility based in British Columbia (B.C.), provided additional information regarding the network and service offerings provided by these companies.
  19. TELUS submitted that information on Envision's website indicated that Envision's challenge was to leverage its extensive fibre infrastructure and rights-of-way to offer leading-edge optical broadband services to business consumers, service providers and large enterprises on a wholesale basis. TELUS further submitted that Envision indicated that market research illustrated that Envision's Optical Ethernet services could serve 40 to 60 % of Calgary's technology-intensive businesses.
  20. TELUS submitted that in addition to public statements made on their websites, utility companies had also divulged their market capabilities on the record of other Commission proceedings. TELUS stated that it was clear that utility telecommunication providers represented a formidable player in the telecommunications access and services markets, and offered competitive alternatives to ILEC DNA, given their significantly increased participation in Commission proceedings.

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<sup>1</sup> (1) Part VII application made by the Coalition of Hydro Telecom Service Providers, 1 October 2003, in which it sought relief in regards to certain determinations made in *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003; (2) application filed by Bell Canada on 5 November 2003 to review and vary and stay a portion of *Review of Bell Canada's customer-specific arrangements filed pursuant to Telecom Decision 2002-76*, Telecom Decision CRTC 2003-63, 23 September 2003; and (3) the proceeding initiated by *Amendments to Telecom Public Notice CRTC 2003-8 – Review of price floor safeguards for retail tariffed service and related issues*, Telecom Public Notice CRTC 2003-10, 8 December 2003.

21. In further support of its application, TELUS stated that the market share of electric utilities relative to other competitors was documented by the Commission in the 2003 Competition Report.
22. TELUS submitted that the 2003 Competition Report illustrated that utility telcos experienced nearly a four-fold increase in their telecommunications revenues from 2001 to 2002, and submitted further that this represented 1.3% of total competitor telecommunications service revenues for 2002. TELUS submitted further that if revenue growth for utility telcos continues to grow at only half the rate of growth represented in the 2003 Competition Report, TELUS estimated that utility telcos could earn up to \$3.3 billion by 2007. TELUS argued that this conflicted with the Commission's statement in Decision 2003-52 that hydro companies were less important alternatives to the ILECs' DNA service.
23. TELUS argued that the competitive landscape had changed significantly since the release of Decision 2002-34 and Decision 2003-52 and that other competitors, including non-traditional telecommunications service providers, had accelerated the deployment of their networks, added new technology and forged new alliances.
24. TELUS argued, for example, that Bell West had been aggressively deploying facilities in western Canada. TELUS stated that Bell West had actively marketed to TELUS and filed, in confidence, a copy of a Bell West marketing presentation, showing the extent of its network coverage in B.C. and Alberta.
25. TELUS submitted that the Government of Alberta SuperNet project continued to progress towards its mid-2004 target date of serving 4,700 schools, hospitals and government offices in 422 communities. TELUS submitted further that, as part of the Alberta SuperNet initiative, Bell West had signed a contract with the city of Red Deer to use dark fibre to connect 99 locations within the city.
26. TELUS argued that development of significant infrastructure in western Canada accelerated in May 2004 when 360networks Corporation sold its Canadian assets, including 56,000 kilometres of fibre, to Bell Canada Enterprises (BCE). TELUS submitted that this purchase not only increased Bell Canada's facilities-based presence in western Canada, but that the licensing agreement, with Call-Net, for the eastern-based assets would also accelerate Call-Net's presence in central Canada.
27. TELUS argued that the merger of Allstream Corp. and MTS Communications Inc. represented a significant alteration to the competitive landscape, and that the company would have the interest and financial backing to become a major national facilities-based player.

### **Other parties**

28. With the exception of Bell Canada et al., parties argued that the Commission should deny TELUS' application.

29. Bell Canada et al. submitted that the evidence set out in TELUS' application and the evidence TELUS requested be incorporated by reference into the record of the CDNA proceeding was highly probative, and relevant to the matters under consideration in that proceeding. Relying on jurisprudence, Bell Canada et al. submitted further that the Commission had a clear duty in law to consider all factors relevant to the proper fulfillment of its statutory decision-making functions under the *Telecommunications Act*. Bell Canada et al. submitted further that the record of the CDNA proceeding did not reflect the significant market share and service capabilities of hydro TSPs.
30. Call-Net, MTS Allstream and RWI argued that TELUS' application did not provide any new evidence regarding the significance of hydro TSPs.
31. Call-Net argued that the Goldberg Report consisted mainly of quotations and anecdotal evidence of emerging competition from hydro TSPs. Call-Net noted that the report focuses on the opportunity for utility telcos to become formidable, responsive competitors.
32. Call-Net stated further that TELUS' extrapolation of utility telcos' market share as reported in the 2003 Competition Report was unrealistic. Call-Net argued that TELUS used continuous growth factors of 200% year over year to arrive at a \$3.3 billion market share by 2007 for utility telcos. Call-Net argued further that these projections are disingenuous given that utility telcos' total revenues for 2002 were only \$104.5 million, compared to \$24.2 billion for the ILECs, and compared to an industry total of \$32.3 billion.
33. The CCTA was of the view that it was not necessary to collect new information for the record of the CDNA proceeding. The CCTA stated, however, that if the Commission considered it beneficial to consider the most current information, it could rely on 2003 data filed in the spring of 2004 for the purposes of the Commission's 2004 Report to the Governor in Council regarding the status of competition in Canadian telecommunications markets and the deployment/accessibility of advanced telecommunications infrastructure and services.<sup>2</sup> The CCTA submitted that consideration of this data could be undertaken without further process, delay or imposition of burdens on parties.
34. MTS Allstream submitted that the majority of the data contained in the IDC Report and the Goldberg Report was contemporaneous with the data available to the Commission at the time that it was accepting evidence in the CDNA proceeding, or was largely irrelevant. MTS Allstream further submitted that the two reports spoke primarily of the potential for growth in the hydro TSP sector. MTS Allstream added that the Goldberg Report relied almost exclusively on information from press releases and hydro TSP websites, all of which was publicly available information.
35. MTS Allstream argued further that information cited by TELUS from Envision's website merely described the infrastructure with which Envision anticipated offering more advanced telecommunication services in the future.

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<sup>2</sup> This report was issued as the *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets – Deployment / Accessibility of Advanced Telecommunications Infrastructure and Services*, November 2004 (2004 Competition Report).

36. MTS Allstream disagreed with TELUS that the Commission was under a legal duty to reopen the record and disputed TELUS' interpretation of the main jurisprudence on which TELUS relied.
37. RWI submitted that hydro TSPs were known to be providing telecommunications services in 2003 and noted that the Commission made an express determination in Decision 2003-52 that more detailed information regarding supply of DNA service by other non-dominant carriers was not necessary for the Commission's purposes in the CDNA proceeding. RWI submitted further that the 2003 Competition Report illustrated that utility telco revenues amounted to less than one-third of one percent of the total telecommunications service revenue market in 2002. RWI argued that these numbers did not support TELUS' case.
38. Envision submitted, among other things, that, as a small telecommunications business, it would be a large burden for it to respond to the interrogatories TELUS requested, and that it could contribute little, if anything to the Commission's knowledge. Envision further submitted that diverting its limited resources in this way was hardly in the interest of promoting what little competition the company offers.
39. Call-Net, the CCTA, Microcell, MTS Allstream, RWI and Xit télécom argued that approving TELUS' request would significantly delay the CDNA proceeding, and that this would be unfair and prejudicial to parties with a strong interest in the finalization of the CDNA service.
40. Call-Net submitted that markets by their nature are not static and that the Commission was required to make its decision based on the evidence available to it. Call-Net argued that it would be impossible to have a perfect snapshot of the industry at the time a decision is rendered, and that to grant TELUS' application regarding the CDNA proceeding could subject other proceedings to additional delay, to the advantage of the ILECs.
41. MTS Allstream, Call-Net, the CCTA and RWI argued that TELUS' application constituted a request that the Commission review and vary Decision 2003-52, and that it failed to address and meet the criteria applicable to such applications as set out in *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998 (Public Notice 98-6).

#### **TELUS' reply**

42. In its reply, TELUS reiterated its position that, despite the inconvenience, updating the record of the CDNA proceeding was legally necessary. TELUS submitted that there would be minimal delay if its application were approved, and that this delay would be outweighed by the benefit of the Commission having a more accurate picture of the competitive DNA-equivalent supply base.
43. TELUS argued that its application was not a request to review and vary Decision 2003-52, but a new application, based on new evidence.

#### **Commission's analysis and determinations**

44. The Commission has carefully considered the submissions of all parties as well as the evidence identified by TELUS.

45. The Commission considers that TELUS' application does not constitute an application to review and vary Decision 2003-52. Rather than contesting the original correctness of Decision 2003-52 at the time it was rendered, TELUS' application takes issue with the continuing correctness of Decision 2003-52, in light of new evidence and circumstances. Consistent with the approach set out in Public Notice 98-6, the Commission is considering TELUS' application as a new application.
46. The Commission notes that TELUS relied primarily on the Federal Court (Trial Division) decision in *Yushchuk v. Canada (Minister of Employment and Immigration)* 1994 F.C.J. No. 1324 (*Yushchuk*) for the proposition that the Commission is under a legal duty to reopen the record of the CDNA proceeding. In *Yushchuk*, the Court quashed a decision of the Immigration and Refugee Board (the Board) on the grounds that the Board failed to even consider the admissibility of certain evidence, which was submitted after the last day of the hearing. The Court ruled that the Board could not preclude itself from considering the evidence in question merely because such evidence was submitted after the last day of the hearing.
47. Bell Canada et al. relied on the Supreme Court of Canada's decision in *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)* [1985] 2 S.C.R. 164 (*Oakwood*). That case involved a municipal council denial, on the basis of a potential flooding problem, of an application to subdivide flood-prone land. The Supreme Court of Canada found that the municipal council had refused to consider any information whatsoever regarding the potential flooding problem and possible solutions to it.
48. In the Commission's view, the facts of those cases are very different from those relating to TELUS' application. In both those cases, the decision-maker refused to consider whether it should consider certain evidence. In this proceeding, by contrast, the Commission is considering whether the evidence identified by TELUS should be considered in the CDNA proceeding. In light of the above, the Commission is not persuaded that the jurisprudence relied on by TELUS and Bell Canada et al. constitutes authority for the proposition that the Commission is under a legal duty to reopen the record of the CDNA proceeding.
49. As an administrative tribunal, the Commission must comply with the requirements of procedural fairness. The Commission considers that in the present case procedural fairness would require it to reopen the record of the CDNA proceeding and consider the evidence identified by TELUS if, on a *prima facie* basis, that evidence supported the company's claims with respect to the state of supply of DNA-equivalent facilities by hydro TSPs and other competitive service providers.
50. To reach a determination on this matter, the Commission assessed the evidence submitted by TELUS with respect to the supply of DNA-equivalent facilities both by hydro TSPs and by other non-ILEC suppliers. In addition, the Commission assessed the evidence appended to Bell Canada's DNA forbearance application.

#### ***Hydro TSPs***

51. In support of its contention that ample and credible evidence had emerged, since the release of Decision 2003-52, regarding the activities of hydro TSPs as alternative suppliers of



DNA-equivalent services, TELUS relied on the following evidence: the IDC Report; the Goldberg Report; the EPCOR, Envision and BC Hydro websites; submissions made by hydro TSPs in other Commission proceedings; and the 2003 Competition Report.

52. With respect to the IDC Report, the Commission notes that it describes events in the power and telecommunications markets within the past decade that have prompted electric utilities in North America to enter the telecommunications market. The IDC Report reviews 16 hydro TSPs which, collectively, provide service in all provinces except Saskatchewan and the Atlantic region. The Report provides an overview of those companies' market strategies, services and customers, and provides a network diagram and map that generally locates each company's facilities. The IDC Report profiles Cable VDN Inc., a dark fibre telecommunications provider in the Montréal market, and Réseau de l'information scientifique du Québec, a consortium in Montréal consisting of municipalities and school boards. A discussion of fibre-to-the-home in Japan is also provided.
53. With regard to the Goldberg Report, the Commission notes that it provides a definition of DNA and discusses the means of provisioning DNA services. The author discusses the history of telecommunications services and electric utilities, and reviews Ontario's *Electricity Act*. The Goldberg Report also presents a brief overview of six Ontario-based hydro TSPs, and one Quebec-based cable company, Vidéotron Télécom ltée, and discusses the plans of other non-dominant carriers, such as three community networks based in Ontario and Quebec, and Cable VDN Inc. in Quebec.
54. The Commission notes that TELUS submitted that the websites of EPCOR, Envision, and BC Hydro provided more detail than the IDC Report and the Goldberg Report, regarding the network and service offerings of these three companies.
55. The Commission notes that EPCOR's website (<http://www.epcor.ca>) contains information on customer service for homes, farms and small business, business-to-business services, municipalities (e.g., water services and partners), safety, citizenship, and tariffs and regulatory services as they relate to water and hydro companies. The Envision website (<http://www.enmax.com.doorway.htm>) provides links to Enmax Corp., Enmax Energy, Enmax Envision and Enmax Power. The Enmax Envision website provides links to corporate information, partners, customer care and services, including private line point-to-point services ranging from OC-3 to OC-48 and gigabit Ethernet speeds. The BC Hydro website (<http://www.bchydro.com>) contains links on general information, policies, and services such as transmission services, careers, community and the environment.
56. As the information in the IDC Report, the Goldberg Report and the three above-noted websites did not link the network and service offerings to the availability of DNA-equivalent services, the Commission does not consider that it is sufficiently specific to allow the Commission to assess the extent of DNA-equivalent supply offered by hydro TSPs.
57. TELUS submitted that the hydro TSPs have divulged their network and service capabilities through participation in three other Commission proceedings. TELUS also argued that the increased participation by hydro TSPs in Commission proceedings demonstrates that they represent a formidable player in the telecommunications access and services markets, and that they offer competitive alternatives to ILEC DNA.

58. The Commission is of the view that participation in Commission proceedings is not evidence, in and of itself, of a company's ability to compete with the ILECs with respect to the provision of DNA-equivalent services. The Commission also considers that the information provided by the hydro TSPs in those proceedings provides little or no indication of the extent to which those facilities are used to provide DNA-equivalent services.
59. The Commission notes TELUS' reliance on utility telco telecommunications revenue data from the 2003 Competition Report. The Commission considers that, for the purpose of the CDNA proceeding, the relevant revenues are DNA and DNA-equivalent service revenues and notes that in its Competition Reports DNA and DNA-equivalent service revenues are included in the data and private line market revenues.
60. The Commission has available to it confidential information submitted for the purposes of the Competition Reports with respect to utility telcos' data and private line revenues in 2002 and 2003, and considers that such revenues remained insignificant in both 2002 and 2003.
61. Finally, the Commission notes that TELUS did not submit evidence with respect to its DNA market loss due to competition from hydro TSPs.
62. In light of the above, the Commission considers that the evidence relied on by TELUS fails to establish, on a *prima facie* basis, the company's claim that hydro TSPs represent a significant and increasingly important source of alternative DNA-equivalent supply.

#### **Other non-ILEC supply**

63. In support of its submission that the DNA supply by other non-ILEC service providers had increased significantly since evidence was placed on the record of the CDNA proceeding, TELUS referred to Bell West's deployment of facilities in western Canada; the Alberta government's SuperNet project; the purchase by BCE and Call-Net of the assets of 360networks Corporation; and the merger of MTS Communications Inc. and Allstream Corp.
64. Regarding Bell West, TELUS attached a confidential Bell West document, dated December 2003. TELUS characterized the document as a Bell West presentation, which included detailed network maps, and other information that would typically be considered to be competitively sensitive information. TELUS submitted that the document was directly relevant to the state of competitive supply of facilities in western Canada.
65. The Commission notes that the Bell West presentation consisted of various proposed facility builds between locations in a particular province. In the Commission's view, the information in the presentation, while very specific to the locations concerned, does not assist the Commission in assessing the extent of any increase in DNA-equivalent facility supply by Bell West. The presentation did not link the proposed facilities to DNA-equivalent services nor was there any indication that these facilities would, in fact, be installed.
66. The Commission notes that TELUS did not submit evidence with respect to any DNA market loss on its part due to competition from Bell West.

67. With regard to the Alberta SuperNet project, TELUS submitted that the network continued to progress towards its mid-2004 target date of serving 4,700 schools, hospitals and government offices in 422 communities.
68. The Commission notes that the Alberta SuperNet project focuses on providing broadband Internet access using Ethernet and other services in the communities involved. Although the facilities of Alberta SuperNet could be used to support the provision of DNA-equivalent services, TELUS did not provide information regarding such services.
69. With regard to the sale of the Canadian assets of 360networks Corporation and the creation of MTS Allstream, while TELUS submitted that these transactions accelerated the development of significant infrastructure, in the Commission's view, not only do they not, in and of themselves, affect the number of facilities available to competitors, but they could well result in a reduction in the amount of third-party facilities available to competitors.
70. With respect to TELUS' request to update the record of the CDNA proceeding with information from cable service providers, the Commission notes that the aggregated supply data, which was placed on the public record of the CDNA proceeding, did not include information supplied by cable companies. The Commission further notes that while this information was not placed on the public record for reasons of confidentiality, as noted by TELUS in its final comments in the CDNA proceeding, this information was available to the Commission for consideration in that proceeding.
71. The Commission has available to it confidential information submitted for the purposes of the Competition Reports with respect to cable companies' data and private line revenues in 2002 and 2003 and considers that such revenues remained insignificant in 2003.
72. With respect to non-ILEC competitors other than hydro TSPs and cable companies, the Commission has reviewed confidential revenue data submitted for the purposes of the 2003 and 2004 Competition Reports and considers that there was no material change to the data and private line revenues of such competitors between 2002 and 2003.
73. In light of the above, the Commission concludes that the evidence TELUS relies on fails to establish, on a *prima facie* basis, the company's claim that there has been a significant increase in competitive supply by cable companies and other non-ILEC service providers since evidence was placed on the record of the CDNA proceeding.

#### **Other evidence**

74. The Commission notes that while TELUS did not specifically rely upon the evidence filed by Bell Canada in support of its DNA forbearance application, except for the IDC and Goldberg Reports, the company did refer to such evidence and requested that it be incorporated by reference and considered in the CDNA proceeding. Given this, the Commission has also examined the evidence filed by Bell Canada to determine whether it establishes, on a *prima facie* basis, TELUS' claims in this proceeding.

75. Attachment 2 to Bell Canada's DNA forbearance application, titled "Local fibre-based competitors", identifies, by name, the exchanges in Ontario and Quebec for which Bell Canada requested DNA forbearance and identifies the local fibre competitors known to be operating in each exchange. It also lists the number of wire centre areas in each exchange and the number of wire centres in which at least one competitor is co-located.
76. Attachment 3, titled "Local fibre-based competitors", briefly describes each competitor's strategy, products and services. These services include Wavelength Access Service, Ethernet Connectivity Service and Private Line Services.
77. The Commission considers that the information in Attachment 2 is more specific than the information specifically relied on by TELUS in support of its application, because it identifies known local fibre competitors at the exchange level. However, the Commission notes that neither the information in Attachment 2 nor that in Attachment 3 links these competitors' fibre facilities to the provision of DNA-equivalent services. The Commission considers that these Attachments do not permit an assessment to be made regarding the magnitude of such competitors' DNA-equivalent service base.
78. Attachment 5, a report titled "State of Competition in High-Speed Intra-Exchange Digital Services", by Neil Quigley and Margaret Sanderson, dated 4 February 2004 (the Quigley Report) considers the state of competition in high-speed DNA services in Ontario and Quebec.
79. The Commission notes that while the Quigley Report presents supply data on DNA-equivalent access facilities, the supply data relied on in the Quigley Report is the aggregated supply data the Commission placed on the public record in the CDNA proceeding. Given this, the Commission considers that the information in the Quigley Report does not support TELUS' claims that the information in the CDNA proceeding is outdated.
80. The Commission notes that the remaining attachment was filed by Bell Canada in confidence. In the Commission's view, the information in this attachment, while disaggregated, does not substantiate, on a *prima facie* basis, TELUS' claims in this proceeding.

### **Commission determination**

81. In light of the above, the Commission finds that the evidence submitted or referenced by TELUS in its application fails to establish, on a *prima facie* basis, the company's claims that hydro TSPs now represent a significant and increasingly important source of alternative DNA-equivalent supply, and that the DNA-equivalent supply by other non-ILEC service providers had increased significantly since evidence was placed on the record of the CDNA proceeding.

82. In the Commission's view, the rules of procedural fairness do not require, in the circumstances of this case, that the Commission reopen, update and supplement the record of the CDNA proceeding. The Commission also considers that it is in the public interest to provide certainty with respect to the issues addressed in the CDNA proceeding without further delay.
83. Accordingly, TELUS' application is **denied**.

Secretary General

*This document is available in alternative format upon request and may also be examined at the following Internet site: <http://www.crtc.gc.ca>*