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June 27, 2005

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Ms. Diane Rhéaume  
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Canadian Radio-television and  
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Ottawa, Ontario  
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Dear Ms. Rhéaume:

**Re: Telecom Public Notice 2004-1, Review and disposition of deferral  
accounts for the second price cap period**

These Reply Comments are filed by the Canadian Cable Telecommunications Association (CCTA) pursuant to the procedures established in Telecom Public Notice 2004-1, *Review and disposition of deferral accounts for the second price cap period* (PN 2004-1) and the Commission's letter dated February 2, 2005.

An electronic copy of this submission is provided to the Commission by email.

Yours truly,

Michael Hennessy,  
President

Attachment

c.c.: Registered Interested Parties, Telecom Public Notice 2004-1



**CCTA • ACTC**

**TELECOM PUBLIC NOTICE CRTC 2004-1**

**REVIEW AND DISPOSITION OF DEFERRAL ACCOUNTS FOR THE  
SECOND PRICE CAP PERIOD**

**REPLY COMMENTS OF THE  
CANADIAN CABLE TELECOMMUNICATIONS ASSOCIATION**

**June 27, 2005**

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## 1. Overview

1. These Reply Comments are filed by the Canadian Cable Telecommunications Association (CCTA) pursuant to the procedures established in Telecom Public Notice 2004-1, *Review and disposition of deferral accounts for the second price cap period* (PN 2004-1) and the Commission's letter dated February 2, 2005.
  
2. Failure to address any particular allegation or argument should not be construed as acceptance of, or agreement with, that allegation or argument, where such acceptance or agreement would be contrary to the interests of CCTA.
  
3. In Public Notice 2004-1, the Commission identified the following objectives to assist parties in preparing their proposals for the treatment of the amounts in the ILECs' deferral accounts
  - (a) to render reliable and affordable services of high quality, accessible to both urban and rural area customers;
  - (b) to balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies;
  - (c) to foster facilities-based competition in Canadian telecommunications markets;
  - (d) to provide incumbents with incentives to increase efficiencies and to be more innovative; and

- (e) to adopt regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives.<sup>1</sup>

4. When the Commission directed the incumbent telephone companies to create deferral accounts, it said that funds in the accounts would be used for projects that balance the interests of customers, competitors and ILECs, and that the use of the funds should help achieve the Commission's price cap policy objectives.<sup>2</sup> The deferral accounts do not represent funds for use by the incumbent telephone companies as they see fit. Indeed, it has never been the Commission's intention that the revenues from the rates customers pay that make up deferral account funds be considered an unencumbered revenue stream in favour of the ILEC. Rather these payments were considered to constitute additions to a fund that support future (deferred) consumer benefit.

5. In its May 19, 2004 submission, CCTA proposed that the amounts accrued in the deferral accounts be used to fund the construction of fibre interexchange transport facilities to bring broadband Internet to rural and remote communities. This proposal would promote the competitive supply of broadband Internet service in these communities by alleviating the cost barriers of connecting to the Internet backbone.

6. CCTA submits that supporting the expansion of broadband services into unserved rural and remote communities, through the method proposed by CCTA, uniquely fulfills the Commission's objectives for use of the deferral account funds. In addition, the proposal would further the policy objectives set out in section 7 of the *Telecommunications Act* (the Act) by accomplishing the following:

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<sup>1</sup> PN 2004-1, paragraph 21.

- Expanding high-speed Internet service to all regions;
- Increasing customer access to broadband networks and advanced communications services, and
- Increasing competition in all regions

7. In addition to the proposals for broadband expansion from CCTA and other parties, a number of parties including the ILECs advanced other proposals to use funds from the deferral account. These proposals fell largely into four categories: rebates, rate reductions and promotions, ILEC cost recovery, and support for competitors in the local exchange market.

8. CCTA submits these proposals are flawed because they do not meet important objectives and would unduly benefit one stakeholder group to the detriment of the others. The Commission's intent in PN 2004-1 was unambiguous. Proposals to dispose of deferral account funds must meet the five primary objectives reproduced above. CCTA submits its own proposal is fully up to the task while most others fall well short and should therefore be rejected.

## **2. Broadband Initiatives**

### **2.1 CCTA Proposal**

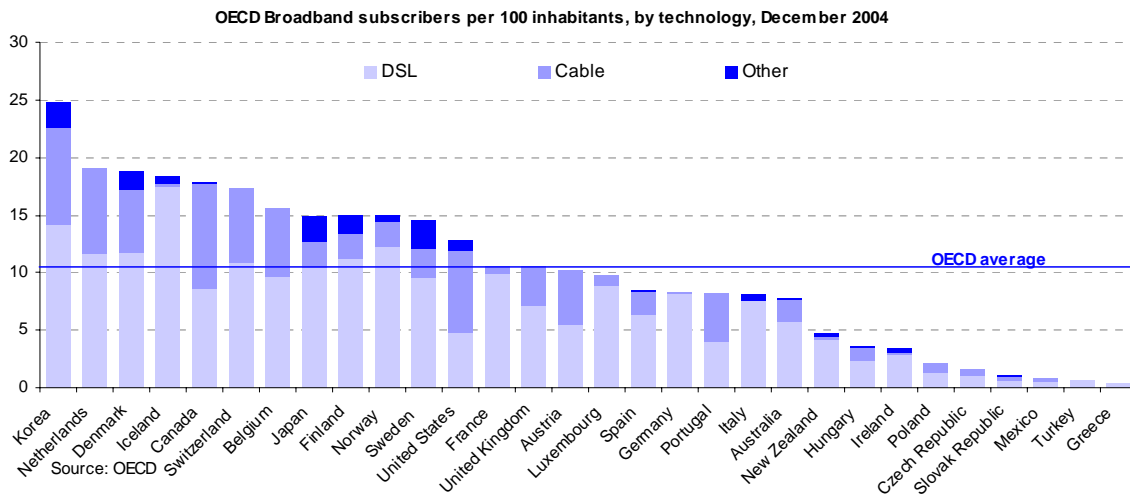
9. CCTA proposes that the amounts in the ILECs' deferral accounts be used to fund the construction and maintenance of transport facilities needed to extend broadband services from the Internet backbone to unserved rural and remote communities rather than allocated to construction of facilities in a community. CCTA submits it is possible to stimulate facilities-based competition in a rural and remote community if the high cost of long distance transport needed to connect to

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<sup>2</sup> See, Telecom Decision 2002-34 at paragraphs 409 and 413.

the Internet can be overcome. Subject to eligibility requirements, selected communities will be those where a supplier of higher speed access service<sup>3</sup> commits to making available high-speed Internet services upon completion of the transport facility. CCTA submits its proposal best meets the objectives of the proceeding as well as those set out in section 7 of the *Telecommunications Act*.

10. CCTA submits that expanding the roll-out of broadband services is also consistent with the government of Canada's policies and broadband initiatives. However, CCTA notes that Canada's leadership position in broadband penetration is in danger of weakening further. Recent OECD statistics indicate that Canada's broadband penetration ranking among OECD member countries slipped to fifth in 2004 from second in 2001 - 2003.<sup>4</sup>



<sup>3</sup> Defined by the Commission in Telecom Decision 98-9, as services above 64 Kbps.

<sup>4</sup> OECD Broadband Statistics, December 2004. Available at: [http://www.oecd.org/document/60/0,2340,en\\_2649\\_33703\\_2496764\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,2340,en_2649_33703_2496764_1_1_1_1,00.html).

11. A broadband expansion program, funded from the ILECs' deferral accounts will help provide reliable and affordable broadband services of high quality, accessible to both urban and rural area customers, consistent with the Commission's first objective. A broadband program can be designed to balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies, as required by the Commission's second objective. Facilities-based competition in the supply of broadband services will also be promoted if the funding is provided on a basis that is competitively neutral. CCTA believes that its broadband initiative will provide incumbents with incentives to increase efficiencies and to be more innovative. The fifth objective the Commission identified requires the balancing of a desire to minimize regulatory burden with a need for sufficient regulatory oversight to avoid anti-competitive behaviour or misuse of the deferral account funds. CCTA believes that its proposal strikes the correct balance.

12. Supporting the expansion of broadband services to unserved rural and remote communities, through the method proposed by CCTA, uniquely fulfills the Commission's objectives for use of the deferral account funds. Deploying broadband service in unserved rural and remote areas involves substantial costs, within the community to upgrade the local access facilities and particularly with respect to the transport facilities necessary to connect the community to the Internet backbone. The transport portion is frequently the single largest cost of providing broadband services and therefore, the greatest barrier to broadband deployment in rural and remote communities. CCTA proposes that the deferral account funds be available only for the transport facilities. Costs associated with the local network, any upgrades or equipment should be ineligible, since these can be provided on a competitively neutral basis once the cost of transport is reduced.



13. CCTA proposes that the transport facilities, funded from the deferral account, be made available to any and all broadband service providers that wish to use them. Most often, transport facilities are fibre facilities. However, there could be occasions when an alternative technology is more appropriate for transport, such as microwave.<sup>5</sup> CCTA's broadband initiative will promote the competitive supply of broadband Internet service in these communities by alleviating the cost barriers of connecting to the Internet backbone.

14. Any party with a commitment to provide broadband service to the community would be permitted to access the transport facility without further payment for the use of that facility. There should not be any charges paid by the broadband service providers to use the transport facilities constructed because the company that constructed the facility would be compensated for all relevant costs from the deferral account. The construction of the transport facility does not represent an investment by the company, the cost recovery of which requires a future stream of revenue from rates charged to users. If broadband service providers were charged an additional amount for the use of the transport facilities, the company that constructed the transport facilities would be compensated twice for the same facility.

15. CCTA developed a preliminary list of potential communities where CCTA member companies could offer a broadband Internet service.<sup>6</sup> The community list indicates a total of 220 communities that could be eligible under CCTA's proposal. The potential number of households that could obtain service would approach 140,000, based on the number of dwellings located within the communities

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<sup>5</sup> Microwave could be a better technology in cases where the construction of fibre is particularly difficult or expensive. Rugged terrain, environmentally sensitive areas and absence of necessary rights of way are examples circumstances when microwave technology could be a preferred alternative over fibre.

<sup>6</sup> See the response to CCTA(Bell)23June04-2 PN 2004-1.

identified. The broadband service provider would file an application for funding of the transport facility based on analysis that demonstrates a community's eligibility.

16. The administration of a broadband expansion initiative can be minimal and tailored to complement specific programs as needed. In its May 19, 2004 submission, CCTA proposed a 10-step procedure for the administration of its proposal. CCTA recognizes that one of the criteria used by the Commission to assess proposals is to "adopt regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives".<sup>7</sup> CCTA fully endorses the reduction of regulatory and administrative burdens. However, CCTA also submits that administrative simplicity must be balanced with a process that is sufficiently transparent to avoid anti-competitive behaviour or misuse of the deferral account funds. If there is too little oversight of the use of the deferral account the potential for misappropriation arises. While CCTA remains of the view that its proposed method of administration set out in its May 19, 2004 submission would be an appropriate approach for overseeing the use of the deferral accounts, CCTA also recognizes that alternative, less burdensome procedures could be easily adapted in support of the construction of transport facilities to extend broadband services to unserved areas.<sup>8</sup>

17. Several parties have advanced broadband expansion proposals of one type or another that would extend service to Canadians who reside in unserved rural and remote areas. Unlike other proposals, particularly those of TELUS and Bell, CCTA's plan is competitively neutral and promotes facilities-based competition. It allows the incumbent telephone companies, cable companies and other service providers to compete and deploy broadband service in communities that are currently unserved. CCTA's proposal would open up opportunities for a range of broadband service providers to take the initiative and begin providing broadband

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<sup>7</sup> Telecom Public Notice CRTC 2004-1, paragraph 21.

<sup>8</sup> See CCTA(CRTC)11Mar05-101 and CCTA(CRTC)23Jun04-11 b) and c).

access services in unserved communities. Funding of the transport facilities places all broadband service providers on an equal footing. By excluding local plant costs from those costs eligible for funding, the proposal would foster competitive and technological neutrality among potential service providers. This would also create incentives for service providers to efficiently deploy broadband within the community.

18. It is the Commission's long-standing policy to encourage facilities-based competition. Competition among facilities-based carriers is expected to "ensure high quality, affordable service, as well as innovation and service differentiation"<sup>9</sup> and that "the full benefits of competition can only be realized with facilities-based competition"<sup>10</sup>. Having achieved a high measure of success in the creation of broadband services competition among facilities-based competitors in larger markets, the Commission should ensure that new policies implemented for the use of the deferral account funds do not, in any way, benefit one facilities-based competitor over another or diminish the ability of existing facilities-based suppliers to compete.

19. Facilitating broadband service expansion will benefit the interests of customers, competitors and incumbent telephone companies in a balanced way. There are obvious and substantial benefits of a broadband initiative for customers in areas that are not served and not likely to be served. Businesses and educational institutions also benefit because they gain access to larger potential markets. Competitors and incumbent telephone companies benefit because the roll-out of broadband services enables them to compete in new markets that they would not otherwise serve. Also, if the Commission were to approve CCTA's broadband initiative, the transport facility provider (most likely the incumbent

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<sup>9</sup> Telecom Decision CRTC 2002-34, paragraph 94.

<sup>10</sup> Telecom Decision CRTC 97-8, paragraph 237.

telephone company) may reap additional benefits from ownership of transport assets such as opportunities to reduce cost or generate additional revenue.

20. The record of the proceeding indicates that a number of parties consider that the expansion of broadband would be beneficial and many cited strong public policy reasons why the deferral accounts should be used for this purpose.

**Bell:** Indeed, the benefits associated with the widespread availability of broadband networks are so compelling that provincial and federal governments in Canada have identified the expansion of these connections throughout communities as one of their highest policy priorities. [Final Comments, 15 October 2004, para 132]

**Fido Solutions** (previously Microcell): Ready access to broadband access is widely recognized across Canada, and indeed across the world, as a vital enabler of economic and community development in the new century. Broadband access permits individual citizens and business enterprises to participate to the fullest extent possible in the new information economy, independent of their geographic location. Broadband networks can also be used to deliver valuable distance learning and health services, especially to remote communities, as well as “basic” voice service, through the use of VoIP technology. [Final Comments, 15 October 2004, para 16-17]

**NetWork B.C.:** ...the Province of British Columbia has identified a significant requirement to provide affordable broadband connectivity to bridge the B.C. digital divide. Numerous public hearings have been held and the need to provide an affordable and stable broadband network is well supported by the citizens of the province of British Columbia. [Initial Submission, page 7]

**RipNET:** It is in the public interest to build the facilities needed to provide high-speed broadband and other telephony services to low-density rural and remote communities. [Initial Submission, para 2]

**SaskTel:** ...commend[s] companies in this proceeding for proposing initiatives that will accelerate the deployment of broadband facilities in communities throughout Canada. It is another step in Canada’s national goal of eliminating the “digital divide” among Canadian communities. [Final Comments, 15 October 2004, para 56]

**Telesat:** The Company agrees that use of the funds in the deferral account to extend broadband access is appropriate and would make a significant contribution in closing the “digital divide” currently separating those Canadians living in urban centres from those living in more rural and remote areas of this vast country. [Final Comments, 15 October 2004, para 2]

**TELUS:** These facilities will enable a wide range of services and will help to achieve the BC and federal governments’ objective to provide high-speed digital transport facilities to all communities. [Final Comments, 15 October 2004, para 59]

21. In addition, the Consumer Groups acknowledged that the expansion of broadband services would create benefits.<sup>11</sup> Call-Net and BXI also indicated that proposals to expand broadband services have merit, if properly implemented.<sup>12</sup>

22. CCTA maintains that its broadband proposal holds far greater promise to deliver broadband to unserved areas and is more aligned with the Commission’s objectives than the proposals offered by other parties to this proceeding.

## **2.2 Broadband initiatives should be competitively neutral**

23. In this proceeding parties, including CCTA, have advocated that the use of the deferral accounts should be competitively neutral, even though this was not one of the objectives explicitly identified in Public Notice 2004-1 as a factor to consider when developing proposals. On the other hand, no party in this proceeding has argued that competitive neutrality is not relevant and should not be pursued as a goal.

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<sup>11</sup> See Consumer Groups, PN 2004-1 Initial Submission, May 19, 2004, para. 49-50.

24. CCTA submits that the competitive neutrality concept is a logical and necessary extension of the *Telecommunications Act* objectives and the Canadian telecommunications policy objective "to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications". A use of the deferral account that is not competitively neutral would not be consistent with the policy objective to enhance efficiency and competitiveness.

25. CCTA also recognizes that considerations of competitive neutrality will depend on the circumstances of the market under review. Under some conditions, the Commission may issue directives that benefit one competitor over another for the purpose of creating a competitive market. However, the broadband services market is already competitive and the factors which should be considered in this market will not be the same as those in a historically monopoly-controlled market, such as local voice services.

26. Any broadband service expansion initiative that draws on the deferral accounts must be competitively neutral to prevent from harming the existing, highly competitive broadband services market. As noted by the Commission:

The Commission further notes that it stated in *IMCAIP against certain incumbent cable and telephone carriers – Provision of higher-speed access and retail Internet services including Lite service*, Telecom Decision CRTC [2004-28](#), 5 May 2004, that there is *rigorous competition* including facilities-based competition between separate and unaffiliated telephone and cable competitors, and independent ISPs, and that statistics from the NBI/Sone Report indicate that in 2002, telephone carriers had 3.6 million IS subscribers, cable carriers had 2.3 million IS subscribers and independent ISPs had 4.3 million IS subscribers. The Commission also stated that *end-users have greatly benefited from the operation of this market*.

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<sup>12</sup> Call-Net, PN 2004-1 Final Comments, October 15, 2004, para. 16 and 22; BXI PN 2004-1 Final Comments, October 15, 2004, para. 6, 11 and 31.

The Commission notes that in prior decisions it determined that the IS market is characterized by *rivalrous behaviour*, including *vigorous and aggressive marketing campaigns*, and that *users have a choice of a variety of pricing plans* in the market for IS. The Commission considers that the reduction, in recent years, in the cost of modems for access to higher-speed Internet access services has lowered barriers to customers switching service providers and thereby contributed to *rivalry among service providers* in the market. The Commission considers that such *rivalrous behaviour is an indication of a robustly competitive market*.<sup>13</sup> (emphasis added)

27. The Commission is aware that cable companies and ILECs are actively pursuing new markets, as well as competing between themselves. The growth in high-speed Internet service has been remarkable in Canada. More than 5.6 million households had a high-speed connection as of 2004 and the numbers continue to grow today. A growing percentage of households can choose from two or more suppliers of broadband service. The competitiveness of the market has encouraged the spread of service availability, as well as the introduction of a range of service levels and features to meet the differing needs of consumers. That said, there will be some communities that will not be served without further financial support. A critical component of any initiative to support the expansion of broadband service should be fostering further competition and not limiting entry to a particular supplier or technology.

28. It is important to remember that deferral account funds do not belong to the ILECs. For robust competition and for customers to "greatly benefit from the operation of this market" all competitors, not just the ILECs, must have equal opportunities to enter new markets. Use of the deferral accounts for the primary or exclusive benefit of only one class of competitors will prevent entry by other facilities-based competitors to the detriment of customers in those new markets.

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<sup>13</sup> Telecom Decision CRTC 2004-66, paragraphs 30 and 32.

29. Bell's proposal to use the deferral accounts to fund the construction of facilities for the supply of DSL-based broadband services is skewed in favour of the ILECs, to the detriment of other potential competitors including CCTA's members. Under that proposal, ILECs could use the deferral accounts to upgrade and expand their DSL networks and related technologies. These technologies cannot be used by broadband service providers that rely on cable modem, wireless or other technologies, thereby shutting out competitors from providing services to those communities funded by the deferral account.

30. Ultimately, the absence of rivalry in communities where competition could have been introduced would be to the disadvantage of consumers. Where competition in the supply of facilities-based broadband services exists, consumers have, as noted by the Commission, "a choice of a variety of pricing plans". Consumers benefit in other ways. In the October 15, 2004 Comments, CCTA noted that:

In the existing broadband services markets competitors have introduced "lite" and "extreme" services, raised the download and upload speeds, partnered with companies such as Yahoo and Microsoft for additional features, competed with bundled broadband service offerings, and offered customers an array of additional services such as multiple email addresses and space for creation of web pages.<sup>14</sup>

31. CCTA submits that the absence of competition is also likely to disadvantage consumers in ways that are only becoming obvious today. It is now expected that broadband services will bring about new services and advanced features that can be deployed in conjunction with broadband access, whether by the access provider or by resellers whose services enable broadband users to take advantage of the capacity of their broadband services to access services of independent providers. Voice over IP is among the services that can be deployed where



broadband service is enabled, resulting in increased competitive choice in both broadband data and voice services. Advanced features, price plans and service upgrades are more likely to be available to consumers in markets where two or more broadband service providers compete. Because of the remote nature of many existing unserved communities, it is often customers living in these areas that could benefit the most from broadband service and the benefits that competition can bring.

32. There is no compelling reason to take the chance that monopoly-supplied broadband services will produce the same benefits as competitively supplied facilities-based services. Under CCTA's proposal, the deferral accounts can be used in a way that will help ensure that broadband services can be competitively supplied by multiple facilities-based competitors, in communities that do not yet have any service.

33. The benefits of competitively-delivered broadband services are clear. Accordingly, the Commission should seek to ensure that initiatives to fund broadband expansion from the deferral account are competitively-neutral. CCTA submits that the Commission should consider the following factors when determining whether a broadband proposal is competitively neutral:

- (i) initiatives should be technologically neutral to ensure that facilities-based competitors are eligible to use facilities regardless of their chosen underlying serving technology;
- (ii) facilities to support broadband expansion that are financed from the deferral accounts should be equally available to all broadband service providers;

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<sup>14</sup> CCTA, October 15, 2004, paragraph 48.

- (iii) facilities should be chosen based on economic and technical efficiency;
- (iv) facilities should provide sufficient capacity for use by all potential broadband service providers;
- (v) only facilities that are required for the provision of broadband service access and which would not otherwise be commercially constructed should be eligible; and
- (vi) use of the deferral accounts should promote facilities-based competition.

34. A comparison of the attributes of CCTA broadband initiative and Bell's DSL footprint expansion proposal are provided in Table 1.

**Table 1**

**Attributes of CCTA and Bell Broadband Proposals**

<b>Criteria</b>	<b>CCTA</b>	<b>Bell</b>
1. Initiatives should be technologically neutral to ensure that facilities-based competitors are eligible to use facilities regardless of their chosen underlying serving technology.	Yes: CCTA proposes technology neutral transport facilities.	No: Bell proposes the use of DSL technology.
2. Facilities to support broadband expansion that are financed from the deferral accounts should be equally available to all broadband service providers.	Yes: Fibre strands would be made available to any and all competitors willing to offer broadband service.	No: Bell does not propose direct access to facilities but will resell access services at tariffed rates.
3. Facilities should be chosen based on economic and technical efficiency.	Yes: CCTA proposes a process that permits parties to propose serving technologies based on efficiency and least cost.	No: Bell makes the determination on the type of facilities without input from affected parties.
4. The facilities should provide sufficient capacity for use by all potential broadband service providers	Yes: CCTA proposes that the transport facilities be planned and constructed with potential competitors in mind.	No: Bell may restrict access to the use of the facilities if it deems that capacity is insufficient. <sup>15</sup>
5. Only facilities that are required for the provision of broadband serve access and which would not otherwise be commercially constructed should be eligible.	Yes: Transport is the single largest impediment for the provision of broadband service in rural and remote communities.	No: Bell proposes to use the deferral account to finance the construction and upgrade of local facilities and the purchase of equipment.
6. Use of the deferral accounts should promote facilities-based competition.	Yes: Any facilities-based service provider may use the dark fibre in conjunction with its existing network for the provision of broadband services.	No: Under Bell's proposed wholesale arrangement, only resellers can use the facilities.

<sup>15</sup> Nowhere in its filings has Bell specified the "wholesale" that it envisions the ISPs using. In footnote 2, Appendix 3 of Bell's May 19, 2004 Submission, Bell indicates that the wholesale rates, which will permit ISPs to use the DSL footprint facilities financed from the deferral account, are associated with Tariff Notice No. 6622 services (GT Item 5400 Asymmetric Digital Subscriber Line (ADSL) Access Service – available under interim approval since 2001. Final approval not yet granted.). However, the CCTA assumes that Bell's services proposed in Tariff Notice 6767 (approved in Telecom Order 2005-62) would also be available. These services have a host of restrictions including a requirement that the loop lengths be shorter than a distance determined by Bell, availability of ADSL wholesale service(s) in the communities requested by the ISP, the ISP must support PPPoE over Bell's ATM network, and other requirements and restrictions contained in the service agreement relating to the wholesale service(s) but which was not provided to the Commission in the proceeding associated with TN 6767.

35. CCTA submits that its proposal is competitively-neutral and would meet all of the above factors. Moreover, Bell acknowledged that CCTA's proposed broadband initiative is competitively neutral and satisfies Bell's own criteria, which states:

... the proposal ensures competitive neutrality by avoiding the potential that one service provider would be advantaged over another service provider, and ensures that access to the facilities enabled by the program would be available to all parties on equal terms.<sup>16</sup>

36. While CCTA's proposal has met the test of competitive neutrality, Bell's own proposal does not. Bell's broadband proposal entails the use of the deferral account to expand its "*DSL footprint* to areas that are otherwise unlikely to have such services available for the foreseeable future"<sup>17</sup> (emphasis added). CCTA believes that Bell's proposal has a number of serious flaws, which make it competitively biased, not competitively neutral, and unsuitable for funding from the deferral accounts.

37. In CCTA's submission, the fundamental flaw in Bell's proposal is that it would impede facilities-based competition. While Bell allows that "any Internet service provider (ISP) will be able to make use of the deferral account funded facilities", this is only on a resale basis and only by those using DSL technology. Given that cable companies use a technology that is entirely different from Bell's digital subscriber line technology, there would be no opportunity for these facilities to be used by other facilities-based competitors, whether cable companies or other service providers such as wireless providers.

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<sup>16</sup> Bell, October 15, 2004, paragraphs 95 1) and Table 3.

<sup>17</sup> Bell, December 2, 2003, Part VII Application, "Re: Proposal To Seek Funding From The Deferral Account For The Expansion Of Bell Canada's Digital Subscriber Line Footprint To Certain Areas", paragraph 61.

38. Bell also failed to explain why its proposal for cable companies to disclose broadband service rollout plans should be considered competitively neutral. In its October 15, 2004 Comments, Bell states:

As per the process identified for Year 1, say in September of each year, the Company's CSG would send the list of the areas being contemplated for the following year to all registered telecommunications carriers, along with maps which showed the geographic coverage of those areas. As in Year 1, within a three week period, these carriers would be requested to identify any area where they already offered broadband service, or where they plan to offer such service over the period covered by the next year's program. These areas would then be excluded from the next year's rollout.<sup>18</sup>

39. Such a process is entirely unacceptable in a competitive environment. Although the information would be provided to Bell's Carrier Services Group (CSG), removal of a community from Bell's list would immediately identify the communities where a cable company or other competitor plans to provide service. As soon as the CSG informs Bell's marketing personnel that one or more communities are ineligible for deferral account funding, those marketing personnel will have knowledge of their competitors' rollout plans in those areas. This competitively sensitive information would then be used by Bell to develop its commercial broadband rollout strategy, to the detriment of facilities-based competition.

40. The process is also unacceptable because a cable company or other competitor may have firm plans to expand service into one or more of the communities on Bell's list within the next two or three years. However, unless the company informs Bell that it plans to provide service within the next twelve months, Bell would commence to draw down the deferral account to construct facilities to support broadband to, and within, those communities.

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<sup>18</sup> Bell, October 15, 2004, paragraph 149.

41. Bell's proposed process is also unacceptable because broadband service providers frequently require more than one year to progress from the planning stage to turning up service in a community, particularly with respect to more rural and remote unserved communities. The completion of plans, purchase of equipment, installation of facilities and testing and customer turn up could take more time to coordinate and implement than Bell permits under its proposal. Under Bell's proposal, a company would have only "the period covered by the next year's program" to provide service.

42. It is within this context that it is important to consider Bell's interpretation of what constitutes a competitively neutral broadband expansion proposal. It has described its proposal as competitively neutral because it believes no other broadband service provider would be prepared to deploy service to a community. The 'neutral' aspect is derived solely from the view that, absent deferral account funding, serving a community is so "economically unattractive" that there would be no other competitors. As a result, it is Bell's opinion that the Commission's approval for the funding of only Bell's facilities would not foreclose entry by another competitor and would not give Bell an advantage. CCTA submits that Bell's assumption that no other competitor would ever choose to deploy broadband service to a community based on plans for a single year is unrealistic. Moreover, if other competitors were given the same opportunity to benefit from deferral account funding, then there would likely be more potential entrants than just Bell.

43. CCTA further submits that a number of the communities identified by Bell for the first year of its proposal cannot reasonably be viewed as "economically unattractive" and unlikely to be served by another competitor. Bell filed with its Initial Submission a series of maps that indicated the serving boundaries of communities to which it proposed to deploy broadband services using the

deferral account.<sup>19</sup> While these maps may no longer be current, they included at the time some areas that are already served by CCTA's member companies or are likely to be served within the next one to two years.

44. While Bell may consider these communities to be uneconomic under its business criteria, that does not rule out the possibility that another competitor may consider it economical to deploy service today or in the near future. Under these circumstances, it is clear that Bell's proposal cannot be considered to be competitively neutral.

45. CCTA has proposed that the deferral accounts be used to fully finance the construction and maintenance of transport facilities to unserved areas. Any broadband service provider can use the facilities to provide broadband services. Since the facilities are fully funded from the deferral account, competitors that use the facilities should not be required to pay the ILECs to recover costs they have not incurred.

### **2.3 Balancing administrative transparency and complexity**

46. CCTA submits that considerations relating to administrative burden must be balanced against the need to ensure sufficient regulatory oversight to guard against anti-competitive behaviour and misuse of the deferral account funds.

47. It is recognized that the procedures suggested by CCTA in its May 19, 2004 proposal for the supply of broadband access to unserved communities are more detailed than those set out by other parties. CCTA also recognizes that one of the criteria used by the Commission to assess proposals is to "adopt

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<sup>19</sup> Bell PN 2004-1 Initial Submission, May 19, 2004, Appendix 2.

regulatory approaches that impose the minimum regulatory burden compatible with the achievement of the previous four objectives".<sup>20</sup>

48. CCTA fully endorses the reduction of regulatory and administrative burdens. However, CCTA also submits that administrative simplicity must be balanced with a process that is sufficiently transparent to avoid anti-competitive behaviour or misuse of the deferral account funds. If there is too little oversight of the use of the deferral account the potential for misappropriation arises.

49. It is misleading to conclude that the detail provided by CCTA is administratively complex while assuming that the proposals submitted by companies such as Bell and Telus are administratively simple. CCTA submits that these companies have not provided the Commission with an adequate description of how their proposals would be implemented and administered. A lack of specificity does not equate to administrative simplicity.

50. As noted by CCTA in its October 15, 2004 Comments, adopting CCTA's broadband initiative for the construction of transport facilities does not require the adoption of CCTA's recommendations for the administration of the deferral account funds. While CCTA has a preference for the method of administration set out in its May 19, 2004 submission, the broadband initiative could be also be implemented under alternative administrative schemes that provide less regulatory oversight or involve participation by third parties.

51. As noted above, the administration of CCTA's proposal may seem more complicated than other proposals because CCTA has provided more details of the specific processes involved in administering its proposal; details that are lacking from other parties' proposals.

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<sup>20</sup> Telecom Public Notice CRTC 2004-1, paragraph 21.



52. Parties such as Fido Solutions and Telus have not provided the Commission or parties to this proceeding with any explanation as to how their respective proposals should be administered. They leave the following questions unanswered:

- how would parties be informed in advance of a specific construction proposal and how would other facilities-based broadband service providers provide notification that they have commercial plans for expansion to the unserved communities?
- what penalties, if any, would be applied if the party drawing down funds from the deferral accounts did not fulfil its commitment to construct the facilities?
- what opportunity, if any, would parties have to review the proposed communities and costs?
- what opportunity, if any would the Commission have to review the broadband expansion plans?
- what opportunity, if any, would other facilities-based service providers have to propose alternate technologies?

53. CCTA submits that if the Commission were to consider the proposals of Fido Solutions or Telus, these and many other questions would first need to be answered. The outcome could be an administrative regime that is as or more "complex" as that proposed by CCTA.

54. While Bell has described some administrative processes, it appears to have underestimated the processes and requirements needed to implement and run its DSL expansion initiative. The absence of detail in Bell's proposal can lead to an incorrect conclusion that the plan would involve less administrative burden.

55. Earlier in the proceeding, Bell criticized CCTA's proposal because it involved a "significant level of administrative complexity at every stage of the propose program". Bell contrasted CCTA's proposal with its own stating:

In contrast to CCTA's proposal, under the Company's proposal, the Commission would be required to review and approve the rollout plan for the Company's broadband expansion program on an annual basis. The Commission would also review the Company's tracking results, which would be filed on an annual basis, and approve adjustments to the approved draw down amounts, if required. This would be the extent of the Commission's involvement, as the Company would be responsible for all other administrative aspects of the program.<sup>21</sup>

56. It is apparent that Bell would gain access to the funds with a minimum of oversight by the Commission, the affected communities or facilities-based competitors. The Commission's role would be limited to an annual review of the "rollout plan", although Bell does not indicate the nature of the rollout plan review, or whether any of the questions listed above would be addressed.

57. Other than a cursory overview of Bell's rollout plans, once a year, "the Company would be responsible for all other administrative aspects of the program". CCTA submits that allowing Bell to have sole discretion over the use of \$120 million of funds from the deferral account over four years, would undermine the price cap framework, provide Bell with supra-normal returns and would lead to consequences that would not "balance the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies"<sup>22</sup>.

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<sup>21</sup> Bell(CRTC)23Jun04-5 PN 2004-1.

<sup>22</sup> Public Notice CRTC 2004-1, paragraph 21.

58. Details concerning the administration of its DSL expansion proposal were not revealed by Bell until its October 15, 2004 filing. Perhaps in recognition of this shortcoming, Bell modified its proposal in its October 15, 2004 Comments. In that filing, Bell conceded that the administration of CCTA's proposal could be effectively managed through a third party. Included in Bell's list of activities that a third party could manage are the following:

- establishing both the eligibility criteria to select the areas that merit the construction of transport facilities and the criteria used to prioritize areas;
- establishing the criteria for selecting the various projects that should be funded from the deferral account;
- establishing the criteria to select the party that would construct the transport facilities;
- reviewing and evaluating the proposals from broadband service providers, the reports containing the assessments of the constructing party or, in some cases, several constructing parties, and the comments on those assessments that would be provided by third parties;
- monitoring the actual deployment of broadband services to ensure that such services are actually being provided to customers; and
- administering the fund.<sup>23</sup>

59. It would appear that Bell has recognized the benefit of these functions and the only point of contention remaining is whether the Commission or another organization would perform these functions. Bell says that "the administrative process associated with the implementation of the program proposed by CCTA places a heavy reliance on the Commission and its resources to oversee the

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<sup>23</sup> Bell Canada, October 15, 2004, paragraph 167.

program"<sup>24</sup> and that the functions listed above "would be managed more effectively through a third party".<sup>25</sup>

60. CCTA made this same point in responses to the Commission's interrogatories in July, 2004 and its response to CCTA(CRTC)11Mar05-101. In response to interrogatory CCTA(CRTC)23June04-11, CCTA offered two alternative procedures to implement the broadband initiative, including a third party formed as an industry consortium similar to the CLNPC or the CPCC. Such an organization would "administer the transport facility program and the administration of the deferral account funds".

61. CCTA acknowledges the requirement for sufficient oversight of the funds in the ILECs' deferral accounts and notes Bell's agreement that administration and oversight could be conducted by a third party. In CCTA's submission, it may be appropriate to permit a third party to take on this role, based on guidelines approved by the Commission.

62. CCTA also indicated that, under its proposal, the administrative process could include competitive bidding to select the company that would construct and maintain the transport facility. Contrary to earlier concerns raised by Bell respecting such a process, it acknowledged in its Final Comments that competitive bidding could be used.<sup>26</sup> Bell identified issues that would need to be addressed under such a scheme, including:

- an independent third party would manage the competitive bidding process;
- comprehensive criteria would be used to identify eligible areas;

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<sup>24</sup> Bell Canada, October 15, 2004, paragraph 167.

<sup>25</sup> Bell Canada, October 15, 2004, paragraph 168.

<sup>26</sup> Bell PN 2004-1 Final Comments, October 15, 2004, para. 159.

- criteria would be used to ensure bidders were sufficiently viable to fulfill their commitments;
- progress on deploying the facilities would need to be monitored and steps taken where necessary; and
- the entity overseeing the initiative would require sufficient technical expertise.

63. CCTA notes that its own proposal has many of the same provisions for administration of the deferral accounts by the Commission or, as noted above, by an independent third party. The views of Bell respecting a competitive bidding process provide further support to including these important elements in the administration of the deferral account. It is clear that differences in the simplicity of the administrative process are due more to whether the ILEC is permitted to internalize much of the decision-making process. CCTA submits that it is preferable for the Commission to oversee the dispersal of the funds, either directly or through an independent third party, than for the Commission to grant the ILECs unfettered discretion over the use of the funds.

#### **2.4 National Fund is not necessary**

64. CCTA proposal can be implemented such that the funds used to support broadband expansion are limited by the amount available in the deferral account of each ILEC. As CCTA noted in the response to CCTA(CRTC)23Jun04-1, the “proposal could be implemented using the funds exclusively within each ILEC’s operating territory.” CCTA submits that SaskTel was mistaken in suggesting that CCTA’s proposal depends on the creation of a national fund.

65. Some parties have suggested that a national program should be established to support the expansion of broadband to unserved areas.<sup>27</sup> CCTA agrees that there would be merit to pursuing this initiative on a national basis. Even on this basis, however, it is not necessary to pool the funds from across the ILECs' deferral accounts. It is overly simplistic to assume, as Bell did, that establishing a national initiative requires that there also be a single national pool of funds.<sup>28</sup> Rather, the broadband expansion initiative could be scaled to reflect the available resources within an ILEC territory. For example, the Commission could determine for each ILEC that a certain percentage or dollar amount of its deferral account (where a positive balance exists) should be allocated towards broadband expansion in that ILEC's territory. The level of funding could take into consideration the anticipated requirements for broadband expansion in that territory, as well as other initiatives that may be undertaken in a given ILEC territory.

66. CCTA notes that the majority of funds in the deferral account are associated with the two largest ILEC territories – Bell and TELUS. These are also the territories where the majority of unserved communities identified by Industry Canada are located.<sup>29</sup> This should alleviate some of the concern that there are insufficient funds in the deferral accounts to implement the broadband expansion proposal in a manner that is national in scope while limited to regional availability of funds.

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<sup>27</sup> Fido Solutions PN 2004-1 Final Comments, October 15, 2004, para. 25.

<sup>28</sup> Bell PN 2004-1 Final Comments, October 15, 2004, page 24.

<sup>29</sup> Presentation by Michael Binder, Industry Canada, May 29, 2003, which indicated unserved communities by province and territory; and Industry Canada announcements of October 24, 2003 and May 20, 2004 respecting successful projects under the two rounds of BRAND and the NSI.

67. CCTA does not agree with the position of SaskTel that the “allocation of funds on a regional basis for purposes that are national in scope will simply create further inequities in regions of the country.”<sup>30</sup> In the case of broadband deployment, some provinces have already achieved a higher level of success while others are currently engaged in initiatives that will substantially increase the areas served.<sup>31</sup> CCTA submits that using the deferral account to fund the expansion of broadband to unserved areas will lessen the inequities, not exacerbate them. Under CCTA proposal, the eligibility of a community requires that it be unserved and not expected to receive service as part of a government program. CCTA further notes that the BRAND initiative is a program that is national in scope while providing financial support in a manner that will assist the expansion of broadband to unserved communities to greater and lesser degrees across the regions of Canada.<sup>32</sup>

68. CCTA submits that its proposal will also distribute benefits in a manner that responds to the demands for broadband expansion to unserved areas in a manner that complements existing government initiatives and reduces inequities in broadband availability.

## **2.5 CCTA’s proposal removes economic barriers while promoting efficiency**

69. CCTA submits that its proposal to fund the construction and maintenance of transport facilities from the deferral account will remove the substantial economic barriers to deploying broadband in more rural and remote communities. At the same time, the proposal will promote efficient entry as it

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<sup>30</sup> SaskTel PN 2004-1 Final Comments, October 15, 2004, para 29.

<sup>31</sup> TELUS and the Government of British Columbia announced earlier this year arrangements to extend broadband services to 366 BC communities. See:  
[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2005OTP0066-000543.htm](http://www2.news.gov.bc.ca/nrm_news_releases/2005OTP0066-000543.htm).

<sup>32</sup> Based on Industry Canada announcements of October 24, 2003 and May 20, 2004.

requires the broadband service provider to assume the risk associated with investing in the facilities within the local community to support broadband.

70. The necessity of funding support is demonstrated when consideration is given to the cost of obtaining transport facilities to these unserved communities under current tariffed rates.

71. The tariffed rates which TELUS proposes to charge competitors were identified in its response to TELUS(CCTA)23Jun04-3.<sup>33</sup> The response indicates TELUS would charge competitive broadband service providers \$10,596 per month for a DS-1 provided over a distance of 200 kilometres. Local access facilities needed to connect to the interexchange DS-1 would be in addition to \$10,596 per month, as would service charges for both the interexchange facilities and the local access services. A DS-3, which would be required to provide broadband services to medium-sized rural communities, would cost \$47,682 per month, plus local access charges, plus service charges. DS-1 and DS-3 rates with distances greater than 200 kilometres are substantially higher.

72. Bell's response to the same CCTA interrogatory reveals that the cost of leasing facilities from Bell to a rural or remote community which has Bell's DSL service funded from the deferral accounts would be equally prohibitive. Bell would charge a broadband service provider \$7,412.40 per month for a DS-1 provided over a distance of approximately 200 kilometres. This monthly charge would apply for a DS-1 between locations that are treated as Band 0 by Bell. For rural communities where the service would be provided, the DNA service might not be available at all. If it was available, DNA service in Band 3 would be approximately 40% more expensive than DNA service in Band 0. A DS-3, which

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<sup>33</sup> In response to TELUS(CCTA)23Jun04-27 n), TELUS indicates that the relevant tariffed rates that would be charged to competitors are those identified in response to TELUS(CCTA)23Jun04-3.



would be required to provide broadband services to medium-sized rural communities, would cost \$60,577.20 per month, over a distance of approximately 200 kilometres. Total charges over a three year period would amount to more than \$2.3 million. If an optical fibre facility is used, charges would more than double to \$144,000 in monthly recurring payments; with total payments approaching \$5.2 million over three years.<sup>34</sup>

73. At a monthly rate of \$40 for broadband service, a broadband service provider would require more than 1,500 residential broadband service customers to recover just the monthly recurring cost of the DS-3 transport facility and 3,600 customers in the case of a fibre transport facility.<sup>35</sup> Very few of the communities that remain unserved have enough households to reasonably result in this many residential broadband service customers.

74. These amounts demonstrate that, so long as competitive broadband service providers are required to pay tariffed rates for the transport facilities to access rural and remote communities, the magnitude of the costs would continue to preclude competitors from providing broadband services to the unserved markets in competition with the ILECs. Only the ILECs, who are able to internalize the underlying costs, can consider serving such communities. Moreover, under the proposals by Bell and TELUS to use deferral account funds to expand facilities to their serving territories, the ILECs would gain additional benefits to the exclusion of other facilities-based competitors.

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<sup>34</sup> Bell(CCTA)23Jun04-4, Table 2, PN 2004-1. Information is based on rates that were proposed in Tariff Notices 6787 and 6769. The rates were subsequently approved in Telecom Order CRTC 2004-262, August 4, 2004 and Telecom Order CRTC 2004-355, October 29, 2004.

<sup>35</sup> If a DS-1 facility was leased, it would require almost 200 customers to recover the monthly recurring cost of the transport facility. It should be noted, however, that a DS-1 would not have sufficient bandwidth to support service to this many customers.

75. CCTA's proposal would minimize the cost of the transport facilities required to serve communities that are well beyond established areas, bringing the total cost of deploying broadband service down to levels more comparable to the cost of serving communities that are relatively close to larger urban areas. As a result, the decision to deploy broadband to a particular community would focus on the relative costs to establish access within a community, regardless of whether it was near or far from an existing served area.

76. Under CCTA's proposal, entry decisions will be based on economic considerations similar to those in more urban areas. Broadband service providers will still need to assess the costs of upgrading the local access network, consider least cost alternatives, and determine whether the expected revenues justify the investment. The technology to be employed, the availability of suitable existing plant and other factors, such as community size and density, will determine the economics of entry. These are the same variables that would be considered when deploying broadband in communities located in areas surrounding large centres and in the areas between such centres.

77. In addition, as CCTA has noted previously in this proceeding, there may be multiple providers of broadband service that could enter a community once the cost of long haul transport facilities has been factored out of the equation. As CCTA stated in the response to CCTA(TELUS)23Jun04-2,

Funding of the high cost fibre transport facilities to rural and remote communities places all service providers on an equal footing and maintains competitive neutrality between them. Two or more service providers will compete to provide service in a community if they each believe that they have a superior service and better cost efficiencies.

78. CCTA submits that proposals to permit service providers to recover all costs, including local network upgrades costs, would provide no incentive for service providers to minimize costs or develop ways to provide broadband service in rural communities more efficiently. Such an approach would eliminate the incentive to make decisions based on economic criteria for entry within the community. Bell's proposal would also effectively restrict entry to a single broadband service provider and/or serving technology. This would produce outcomes that are neither competitively or technologically neutral.

79. Some parties have raised concerns that, under CCTA's proposal, there would be uneconomic use of the transport facility as a result of their not being any payment by the broadband service provider for the use of that facility. These views disregard the fact that the broadband service provider must make its own investments in related broadband facilities within the community in order to make use of the transport facilities. CCTA's proposal ensures that the broadband service provider seeking to enter a market will commit to investing some of its own financial resources, thereby accepting the risk and responsibility to recover its own within community access costs. CCTA submits that its proposal represents an appropriate sharing of the risk of deploying broadband services in rural and remote communities.

80. CCTA further submits that there should not be any charges paid by the broadband service providers to use the transport facilities constructed because the company that constructed the facility would be compensated for all relevant costs from the deferral account. The construction of the transport facility does not represent an investment by the company, the recovery of which requires a future stream of revenue from rates charged to broadband service providers. If service providers were charged an additional amount for the use of the transport facilities, then the company that constructed the transport facilities would be compensated twice for the same facility.

81. It has also been suggested that the amount of draw down from the deferral account for the cost of the transport facility should be reduced and the difference made up with charges to the broadband service provider. While this approach may have some advantages in allowing the funds to be spread across more projects, it would impose on the company constructing the transport facility greater risk of recovering those costs. The company constructing the transport facility would likely seek additional compensation from the broadband service providers to reflect the risk, as well as the charges based on the proportion of costs not recovered from the deferral account. The Commission would also need to consider all charges for the transport facility, pursuant to section 25 of the *Telecommunications Act*. This would further complicate the process for approving projects to extend broadband service with funds from the deferral account.

### **3.0 Dispersal of Deferral Account Funds**

#### **3.1 Balancing the interests of stakeholders does not require equal sharing of deferral account funds**

82. TELUS<sup>36</sup> and Bell<sup>37</sup> appear to interpret the Commission's objective of balancing the interests of stakeholders as meaning an equal apportionment of funds to the stakeholders. CCTA submits that this is incorrect and would be inconsistent with Decision 2002-34 and PN 2004-1. Rather, fulfillment of the objectives requires a demonstration that a particular initiative is, itself, balanced in its delivery of benefits to stakeholders.

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<sup>36</sup> TELUS paragraph 14.

<sup>37</sup> Bell, paragraph 214.

83. TELUS, Bell and the other ILECs draw attention to benefits certain competitors have received under the current price cap, specifically cost-based pricing of competitor digital network (CDN) services. Operating under the belief they have discharged a large part of their obligation with respect to competitors, the ILECs, notably TELUS and Bell, turned their attention to initiatives that disproportionately benefit themselves. Call-Net puts numbers to TELUS' approach to balancing stakeholder interest with the following estimate:

TELUS' proposal to spend \$160.7M includes benefits for consumers (5%), benefits for competitors (8%) and benefits for themselves (86%).<sup>38</sup>

84. The attachment to TELUS' Comments of October 15, 2004 provided updated numbers (\$164M total, a number that already assumes a significant entitlement to cost recovery for outstanding and possibly future Commission proceedings). Interestingly, the percentage allocation across the three groups appeared even more favourable to TELUS: 3% in direct subscriber benefit, 8.6% directed to service improvements for resellers and ILEC-loop dependent CLECs, and 88.4% dedicated to replacement and upgrade of TELUS facilities. In its comments to update its deferral account proposal on June 10, 2005, TELUS withdrew its funding request for initiatives that benefits competitors, and requested that the Commission give top priority to its proposed initiatives to replace and upgrade its own facilities.<sup>39</sup> Thus under TELUS' proposal there is no balancing of interests among stakeholders in clearing the deferral account balances.

85. Bell Canada's proposals appear to provide for more significant benefits to customers given the dollar amounts earmarked for calling feature rate reductions.

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<sup>38</sup> Call-Net Initial Submission, paragraph 10.

<sup>39</sup> TELUS Comments, June 10, 2005, paragraphs. 22 and 27.

However, as with its broadband expansion plan, this initiative provides direct benefit to Bell in respect of services that are ostensibly in a competitive market.

86. Rather than further dissect the ILEC proposals (CCTA positions remain as set out in its October 15, 2004 Comments), CCTA seeks to focus on the standard established by the Commission to be used in assessing initiatives for approval.

87. First, nowhere in Decision 2002-34 or PN 2004-1 did the Commission express its intent to allocate the actual dollars in the deferral accounts in proportionate shares among stakeholders. Rather, it set out objectives and did so without establishing a hierarchy among these objectives. This is critically important for two reasons: first, it serves as a clear expression of Commission intention that parties are to propose initiatives capable of contributing to all of the objectives; and second, as with its approach to interpreting the section 7 objectives of the *Telecommunications Act*, the Commission has signalled that it would not abandon certain objectives in pursuit of others.

88. Most parties to this proceeding, including CCTA, sought to demonstrate the capacity of their proposals to contribute to each of the Commission's objectives. The ILECs, however, appear to have taken the approach that sufficient funds have already been directed to the benefit of competitors and that the focus should be on initiatives that spend more on other stakeholders, including themselves. In CCTA's submission, the Commission should proceed with initiatives that do not frustrate any of the Commission's objectives and, preferably, promote their achievement.

### **3.2 Deferral account funds do not belong to the ILECs and there are no significant limits on the Commission's authority to pursue its objectives**

89. This section addresses issues raised in course of this proceeding that address the Commission's authority to direct the use of deferral account funds towards initiatives consistent with the PN 2004-1 objectives and the second price cap period. A number of parties have raised general arguments that suggest the origin of the funds, the *Telecommunications Act*, and Commission practice establish a limit on the Commission's authority to deal with the funds. CCTA will address these issues as well as contentions specific to the Commission's ability to carry out CCTA proposal.

#### **3.2.1 Entitlement**

90. Grounded in their views respecting the Commission's intent in establishing deferral accounts, the limitations of the Commission's authority to approve certain initiatives, and the necessary implications of the forgoing and of the Act generally, parties have advanced different positions on the matter of entitlement to deferral account funds. Three broad positions have been advanced:

- (i) TELUS, alone, appears to argue that the funds belong solely to the ILECs.<sup>40</sup> TELUS argues, notwithstanding the acknowledged primary source of additions to the fund (rate reductions denied residential consumers by operation of the Price Cap),<sup>41</sup> that as rates charged to consumers were "just and reasonable," the revenue earned by the ILEC is a fair return on its investment<sup>42</sup> and

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<sup>40</sup> TELUS Comments, October 15, 2004, paragraph 31.

<sup>41</sup> TELUS Comments, October 15, 2004, paragraph 11.

<sup>42</sup> TELUS Comments, October 15, 2004, paragraph 25.

there have been no consumer overpayments made that could support a claim of entitlement.<sup>43</sup>

- (ii) The Consumer Groups, and others such as BCOAPO, argue that ratepayers are entitled to the deferral account funds.<sup>44</sup> In their view, while a delay in delivering to ratepayers the forgone benefits of lower rates may be within the Commission's power,<sup>45</sup> a failure to grant ratepayers the full benefit would amount to an abjuration of the Commission's duty to set just and reasonable rates.<sup>46</sup>
- (iii) The third position, held by most other parties and as borne out by Commission practice to date insofar as deferral account draw downs are concerned, would see deferral account funds having no owner, per se, but rather only presumed beneficiaries: customers, competitors and incumbents. Parties advancing this view rely on the Commission's statements in Decision 2002-34 and PN 2004-1, in particular the express objective of pursuing initiatives that balance the interests of stakeholders. Refinements on this position are offered by some. For its part, Bell argues for maintaining a rational connection between the contributors and the beneficiaries (i.e., some benefit must accrue to the customer).<sup>47</sup>

91. CCTA's view is that its proposal for the disposal of the deferral funds is consistent with the third position that considers ownership of the funds does not rest with any one party. At paragraphs 18 and 19 of its May 19, 2004 Initial Submission, CCTA stated:

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<sup>43</sup> TELUS Comments, October 15, 2004, paragraph 29.

<sup>44</sup> PIAC Comments, October 15, 2004, paragraph 18.

<sup>45</sup> PIAC Comments, October 15, 2004, paragraph 17.

<sup>46</sup> PIAC Comments, October 15, 2004, paragraph 19.

<sup>47</sup> Bell Comments, October 15, 2004, at paragraph 71 (3).



18. In a sense, the overpayments made by residential customers are held in trust accounts, administered by the incumbent telephone companies. The money is held for the future benefit and use of residential customers. The deferral account does not represent funds for use by the incumbent telephone companies, as they see fit. The role of the telephone companies is to hold the money in trust until the Commission directs how it should be used.

19. When the Commission directed the incumbent telephone companies to create deferral accounts, it said that funds in the accounts would be used for projects that balance the interests of customers, competitors and ILECs, and that the use of the funds should help achieve the Commission's price cap policy objectives. The Commission said:

The Commission considers that the creation of a deferral account for residential local services will assist in achieving the objective of balancing the interests of the three main stakeholders in telecommunications markets: customers, competitors and ILECs.<sup>48</sup>

The Commission intends to clear these amounts in a manner that contributes to achieving the Commission's objectives for the next price cap framework, including balancing the interests of the three main stakeholders in the telecommunications markets.<sup>49</sup>

### 3.2.2 Just and reasonable rates

92. CCTA observes that TELUS and the Consumer Groups both stake their ownership claim on what they believe to be the necessary implications of the Commission's approach to establishing just and reasonable rates for residential local exchange service in non-HCSA areas during the second Price Cap period. There is, however, a schism in interpretations. TELUS captures the source of that schism as follows:

On its face, the deferral account mechanism established by Decision 2002-34 appears to raise an ambiguity as to which rate for residential local exchange service in non-HCSAs is the just and reasonable rate. This is so because Decision 2002-34 appears to establish two sets of rates: the

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<sup>48</sup> Telecom Decision CRTC 2002-34, paragraph 409.

<sup>49</sup> Telecom Decision CRTC 2002-34, paragraph 413.

rate actually charged to the customer and the rate actually received by the company once the operation of the deferral account mechanism is taken into account. TELUS emphasizes, of course, that this ambiguity is only apparent, not real, because the Act makes it very clear that the just and reasonable rate is the rate charged to the customer.<sup>50</sup>

93. TELUS appears to consider the matter settled. It argues that by virtue of Commission approval, rates charged were just and reasonable and so the revenue generated by such rates belongs to TELUS. The Consumer Groups argue that only through application of all the parameters of the price cap model, including required adjustments, can the rates be adjudged just and reasonable.<sup>51</sup> Though questioning the legitimacy of a regulatory scheme that compels the suspension of adjustments, the Consumer Groups allow for the possibility that an “elastic approach to rate adjustments,” as may be required to support other objectives, may yet deliver the required benefits to customers and thereby result in the application of just and reasonable rates “with minimal intergenerational inequity.”<sup>52</sup>

94. To paraphrase TELUS, for the purposes of the present exercise the divergence of views respecting the implications of a “just and reasonable rate” analysis is “only apparent, not real,” because the respective conclusions of the parties do not follow from their argument. CCTA finds merit in both positions but ultimately can not accept the proposition that whether findings of “just and reasonable rates” are fixed on tariff approval or revealed only through application of all price cap parameters, the answer is determinative of exclusive entitlement to benefit from the deferral account.

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<sup>50</sup> TELUS Comments, October 15, 2004, paragraph 20.

<sup>51</sup> PIAC Comments, October 15, 2004, paragraph 16.

<sup>52</sup> PIAC Comments, October 15, 2004, paragraph 17.

95. Both parties relied in support of their position on the Supreme Court of Canada's discussion in *Northwestern Utilities v. Edmonton (City)*, 1929 S.C.R. 186. CCTA has reproduced below what it believes to be the salient passage from that decision:

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested.

96. CCTA submits that in establishing the deferral account and in setting out the circumstances through which funds would be added and draw downs permitted, the Commission properly adhered to its obligations under this decision. Specifically, the Commission took into account, within the parameters of the price cap model, what it considered necessary to ensure fair rates for customers and a fair return on capital invested for the ILECs. In this regard, additions to the deferral account must be seen as funds over which neither group had a predetermined claim. In the absence of the deferral account, there would have been considerable risk that the outcome would have undermined the Commission's pro-competition policies or granted the ILECs excess returns at the expense of consumers and competition generally.

97. CCTA observes that the Commission's treatment of deferral account funds supports the view that neither the ILECs nor consumers have a predetermined claim over funds added to the deferral account, particularly one arising from an assessment of just and reasonable rates for non-HCSA local residential services. CCTA notes the draw downs approved to date (e.g., CDN services approved in Decision 2005-6 and TTY costs arising from Decision 2004-47) have not been based on any demonstration that the dispersal of benefits (i.e., ILEC recovery of forgone revenues or of costs incurred) or the source of funds (unreduced local rates) are explicitly related to or dependent on whether local rates were or remain

just and reasonable. Not only has demonstrating this connection not been required, but to now make such findings as are sought by TELUS and the Consumer Groups, the Commission would be compelled to treat all decisions and directions connected to the deferral account (including Decision 2002-34) as nullities given that those decisions and directions would have been improper and made in contravention of the Commission's obligations under section 27 and 47 of the *Telecommunications Act*.<sup>53</sup>

### 3.2.3 Are the funds held "in trust"?

98. As noted above, CCTA holds the view that deferral account funds are in the nature of a trust account held by the ILECs for the benefit of all stakeholders, including customers. It is beyond dispute that the imposed forfeiture of reduced rates residential rates, in furtherance of the Commission's objectives, constitutes the primary source of deferral account funds. Moreover, delivering customer benefit explicitly and implicitly guides use of the funds. In CCTA's view, these factors suggest the deferral account is in the nature of a trust.

99. Bell has publicly described the purpose of the deferral accounts in a manner that would imply funds are held with customers as an intended beneficiary:

Under price caps, regulated telecom companies including Bell are required to set aside a portion of revenues each year that are then to be used for the general benefit of customers.<sup>54</sup>

100. Whether constituting a legal trust or not, the implication of the suggestion – that the funds do not belong to the ILEC – should be unambiguous.

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<sup>53</sup> See, for example, *TELUS Communication Inc. v. CRTC et al.*, 2004 FCA 365, at 47, leave to appeal dismissed by the Supreme Court of Canada April 28, 2005.

<sup>54</sup> <http://www.bce.ca/en/investors/newsevents/newsreleases/bc/2003/12/02/70775.html#top>.

101. TELUS disputes the suggestion that deferral account funds are held in trust:

Furthermore, because there has been no “overcharging,” no “trust fund” has been established as alleged by CCTA.<sup>55</sup> [footnotes omitted]

102. TELUS mistakenly links its position on “just and reasonable rates” to the matter of whether deferral account funds are held in trust, i.e., for purposes beyond its own benefit. The trust arises because the Commission has reserved jurisdiction to determine the use of the funds and the ILEC is bound to maintain the account and draw on it only as permitted. The Commission’s purpose was not to merely monitor a gradual transfer of funds to the ILEC managing the account, but rather, as stated in Decision 2002-34 and in PN 2004-1, to fund initiatives supportive of the Commission’s objectives.

103. CCTA observes that notwithstanding TELUS’ position in this proceeding, its accounting treatment of deferral account funds demonstrates an understanding that deferral account funds may have a destination other than its own bottom line.

The deferral account arises from the CRTC requiring the Company to defer the income statement recognition of a portion of the monies received in respect of residential basic services provided to non-HCSAs. The revenue deferral is based on the rate of inflation (as measured by a chain-weighted GDPPI index), less a productivity offset of 3.5%, and an exogenous factor that is associated with allowed recoveries in previous price cap regimes that have now expired. The Company may recognize the deferred amounts upon the undertaking of qualifying actions, such as Service Improvement Programs (SIPs) in qualifying non-HCSAs, rate reductions (including those provided to competitors as required in Decision 2002-34 and Decision 2002-43) **and/or rebates to customers**. To the extent that a balance remains in the deferral account, interest is

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<sup>55</sup> TELUS paragraph 29.

required to be accrued at the Company's short-term cost of borrowing.<sup>56</sup>  
(emphasis added)

104. Indeed, the recognition of the liability and other aspects of the TELUS accounting treatment appear consistent with how the funds held for the possible benefit of others should be managed. According to notes accompanying TELUS financial statements, for balance sheet purposes, TELUS books the "liability" associated with deferral account totals in the same account as advanced billings and customer deposits.<sup>57</sup> CCTA notes that TELUS' accountants appear to concede that the money may not necessarily be released to TELUS for its sole benefit.

105. Finally, CCTA notes that in an attachment to its June 20, 2005 submission in respect of Public Notice 2005-3, expert evidence presented on TELUS' behalf also observes TELUS' treatment of deferral account funds as being consistent with a liability to others.<sup>58</sup>

#### 3.2.4 Whether or not the funds "belong" to the ILEC is immaterial to the Commission's authority to direct their use

106. At paragraph 31 of its Comments, TELUS states as follows:

Two critical implications emerge from the foregoing discussion. First, having adjudged the rates to be just and reasonable, the Commission has no scope for ordering customer rebates on the basis that customers have been overcharged. Customers have been charged the correct amount, and nothing more. Second, given that the Commission has determined that the rates charged to the customer are just and reasonable, the revenues yielded to the ILECs from the charging of these rates have been

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<sup>56</sup> TELUS 2003 Annual Report, page 53, available at:  
<http://about.telus.com/investors/annualreport2003/en/downloads/telusar2003.pdf>

<sup>57</sup> TELUS 2002 Annual Report, page, available at:  
<http://about.telus.com/investors/annualreport2002/english/downloads/annualreport2002.pdf>

<sup>58</sup> Appendix C, Legal Opinion of Michael H. Ryan, at paragraph 13.

found to be fair. This conclusion, which flows from the case law outlined above, means that the Commission is limited in its ability to take away such funds from the ILECs and confer them on any other parties (either via subscriber rebates, by dedicating the funds to uses and projects not involving the ILECs or by deploying the funds out of territory). A confiscation of funds in such a manner would be inconsistent with a finding that the rates charged are just and reasonable.

107. Would a direction that subscriber rebates be issued or activities “not involving the ILECs” be funded amount to a confiscation of funds? CCTA submits that in respect of the former, the answer surely is no, and as for the latter, the point is moot as activities “not involving the ILECs” would presumably be rejected by the Commission for failing to balance the interests of stakeholders. The price cap regime established in Decision 2002-34 ensured that the ILECs would continue to have an opportunity to earn a reasonable rate of return, based on rates that would generate a stream of revenues **excluding** the revenue in the deferral account. Handing the revenues in the deferral account to the ILECs would equate to resetting the price cap parameters to the benefit of the ILECs’ shareholders.

108. CCTA submits that TELUS misunderstands the Commission’s intent in establishing the deferral account and the Commission’s authority to direct its use. Any purpose consistent with the objectives of the deferral account is reasonably contemplated by the price cap model. As Bell noted at paragraph 250 of its Final Comments, Decision 2002-34 contemplated that initiatives approved in this proceeding “could be characterized as achieving ...[Decision 2002-34] objectives.”

109. Further, TELUS overlooks the Commission’s general authority to direct ILEC activity, including activity that carries a financial cost. Whether in relation to the establishment of competitor services, development of databases, modifications to billing information, or other activities, the Commission frequently

directs carrier activity that necessarily involves expenditures drawn from fairly received revenues. In some cases, but not all, the Commission allows for explicit cost recovery.

110. Notwithstanding the limited possibility of the Commission approving an initiative that directs the deferral account funds to “uses and projects not involving the ILECs,” CCTA observes that neither the *Telecommunications Act* nor Decision 2002-34 impose a specific fetter on the Commission’s ability to approve uses or direct funding. To the contrary, given that section 47(a) compels the Commission to “exercise its powers and perform its duties...with a view to implementing the Canadian telecommunications policy objectives,” it is clear that the Commission’s determinations in this proceeding are to be guided by these broad imperatives rather than the narrow constraints proposed by TELUS.

111. In any event, the CCTA proposal would clearly not qualify as one “not involving the ILECs.” First, CCTA submits that an assessment of ILEC involvement would have to be at the initiative level, not merely on a route-by-route basis. Further, under the CCTA proposal, ILECs are presumed to be the most likely (indeed, the default) candidate to undertake the construction of transport facilities. Finally, in the case where a competitor constructs the transport facilities needed to bring broadband services to a community, the ILEC will have access to the capacity at no charge provided they are prepared to compete in the broadband access market within that community.

112. Ultimately, it is of little consequence whether funds added into the account are eventually recognized by TELUS as revenue and whether draw downs are paid out predominantly, solely, or not at all to ILECs. What matters is that the Commission has, through Decision 2002-34, reserved unto itself authority to dictate the use of the funds. TELUS may eventually be permitted to account for the dispersal as capital or an expense, depending on the outcome of this



proceeding and the nature of the approved initiatives. In the interim, however, TELUS and all other ILECs with positive balances in their deferral accounts are merely stewards of the funds and not owners.

### 3.2.5 Commission has authority to direct ILECs (or other carriers) to build broadband facilities

113. Among the aspects of CCTA's broadband initiative to which Bell objects, is the prospect that where no carrier steps forward to construct the interexchange transport facilities needed to bring service to a rural or remote community, the Commission may direct the ILEC to undertake the construction and subsequent management of the facility.<sup>59</sup> Bell objects on the following basis:

The Commission cannot mandate the Company to construct such facilities, as such a requirement would be beyond the Company's obligation to serve. The limits of ILEC obligations to serve were determined by the Commission in Decision 99-16, *Telephone service to high-cost serving areas*, wherein the Commission mandated ILECs to extend basic service to unserved and underserved areas in order to satisfy the basic service objectives that were defined in the same decision. (Bell 170)

114. The "obligation to serve" argument Bell puts forward is irrelevant. CCTA does not dispute the fact that, in the context of high cost serving areas, Bell is entitled to rely on Decision 99-16 as circumscribing the limits of its obligation to construct facilities for the support of local exchange service. Decision 99-16 does not, however, address obligations or expectations with respect to the construction of facilities to support other services. CCTA submits the Commission's authority to direct an ILEC (or any carrier with a plan to provide broadband service, for that matter) to construct and maintain the necessary transport facility comes directly from section 42 of the *Telecommunications Act*.

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<sup>59</sup> See, Bell(CCTA)23Jun04-6(e) and CRTC(CCTA)23Jun04-8.

115. Sections 42 provides as follows:

"42. (1) Subject to any contrary provision in any Act other than this Act or any special Act, the Commission may, by order, in the exercise of its powers under this Act or any special Act, require or permit any telecommunications facilities to be provided, constructed, installed, altered, moved, operated, used, repaired or maintained or any property to be acquired or any system or method to be adopted, by any person interested in or affected by the order, and at or within such time, subject to such conditions as to compensation or otherwise and under such supervision as the Commission determines to be just and expedient.

(2) The Commission may specify by whom, in what proportion and at or within what time the cost of doing anything required or permitted to be done under subsection (1) shall be paid.

116. The extent of the Commission's authority under section 42 was at issue in the proceeding leading to Decision 2003-45. In that proceeding Bell argued as follows:

Sections 42 and 48 of the *Act* grant the Commission specific powers in the furtherance of the objectives set out in section 7. (Comments, 31 Oct 2000, para 27)

117. At paragraph 146 of that Decision, the Commission described its authority under section 42 of the *Act* as follows:

Section 42 of the *Act* empowers the Commission to issue an order requiring or permitting any or all of a very broad range of actions, subject to such time-frames and conditions and such supervision as the Commission determines to be just and expedient.

118. Section 42 permits the Commission to make such orders as are necessary to exercise its powers and carry out its mandate. In an exercise of general, residual and specific powers (e.g., rate-setting), the Commission provided in

Decision 2002-34 for the creation of deferral accounts and determined that their dispersal would be tended to “in a manner that contributes to achieving the Commission’s objectives for the price cap period.”<sup>60</sup> The Commission’s objectives in the present proceeding are in furtherance of the objectives set out in section 7 of the *Telecommunications Act* and an expressly contemplated continuation of powers exercised in Decision 2002-34. It is abundantly clear, therefore, that to the degree the Commission sought to invoke section 42 to give effect to its purpose, it is fully entitled to do so. Accordingly, CCTA submits that the Commission does in fact have the authority to mandate the construction of facilities as contemplated in CCTA’s proposal, if in the unlikely event no party stepped forward to construct the facilities.

#### **4.0 Proposals to fund initiatives other than broadband do not satisfy the Commission’s objectives**

119. At paragraph 21 of PN 2004-1, the Commission expressed its desire that “Deferral accounts were to be cleared in a manner that contributes to achieving the Commission’s objectives for the current price cap period. Parties should use the objectives set out by the Commission as a guide when preparing their submissions.” The Commission’s intent in this regard was unambiguous. Proposals to dispose of deferral account funds must meet five primary objectives. CCTA submits its own proposal is fully up to the task but certain others, as discussed in this section, fall well short and should therefore be rejected.

120. As the CCTA indicated in its October 15, 2004 comments, outside of the broadband expansion proposals discussed above, deferral account proposals presented by parties fell largely into four categories: (1) rebates, (2) rate

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<sup>60</sup> PN 2004-1 paragraph 5.

reductions and promotions, (3) ILEC cost recovery, and (4) support for local service competitors. CCTA submits that these proposals are flawed because they do not meet important objectives established by the Commission and would unduly benefit one stakeholder group to the detriment of the others.

#### **4.1 Rebates**

121. Consumer groups advocate refunding the balances in the deferral accounts to residential local service customers. As CCTA indicated in its October 15, 2004 comments, it does not support this proposal. CCTA submits that the consumer groups have not demonstrated how rebates will serve the objectives identified by the Commission in PN 2004-1.

122. CCTA submits that, in the event that the Commission were inclined to consider the rebate proposal, factors relating to administrative complexity and unintended consequences provide sufficient cause to reject the proposal. Finally, as set out in the CCTA's response to CCTA(CRTC)23Jun04-3, there would be considerable administrative effort required to ensure that the appropriate amount of rebate is provided to each of the customers who paid for service within the relevant time period.

#### **4.2 Rate reductions and promotions**

123. CCTA submits that deferral account proposals falling into this category are activities designed to further generate revenue and goodwill for the ILEC. As with rebates, these proposals entice the consumer to favour the ILEC because of the potential for tangible, immediate benefits to existing customers. And like rebates, they suffer from the defects of administrative challenges, an overly broad diffusion of insignificant and short-term benefits across ILEC customers.

Under these proposals, the only clear winner would be the ILEC that would receive benefits including receipt of most of the disbursed monies, improved customer relationships and ongoing goodwill. CCTA strongly urges the Commission to reject all proposals of this nature.

124. As stated elsewhere, funds derived from residential customer overpayment should not be put to purposes that unduly benefit the ILECs. Furthermore, temporary rate reductions and promotions are precisely the type of proposal the Commission was seeking to discourage when it established objectives for deferral account fund use. Nothing about these proposals would foster facilities-based competition, increase efficiencies, encourage innovation, contribute broadly to affordability of services, or strike an appropriate balance among the interests of customers, competitors and incumbent telephone companies. Indeed, as with rebates, they offer only small and temporary benefits to customers, at no cost to the ILECs and with the added bonus of increased customer commitment and public goodwill.

125. CCTA also notes that in Decision 2002-34, the Commission contemplated adjusting the amount of money destined for the deferral account when it approved residential rate reductions proposed by an ILEC. However, in the current proceeding, the ILECs have misinterpreted the Commission's intentions by seeking to use balances built up over the course of the price cap period to fund future rate actions resulting in a mismatch of the funds generated and their dispersal. Furthermore, rather than seeking to reduce the deferral account for Commission approved rate reductions, the ILECs have sought to circumvent the tariffing process for the filing of rate changes by seeking approval to use funds for rate actions that have yet to be filed for tariff approval.

126. As the Consumer Groups noted in its June 10, 2005 comments on Aliant's proposal, in Decision 2002-34 the Commission did not intend to subsidize the ILECs' prospective competitive rate actions through the deferral account:

Aliant believes that the language in paragraph 412 of Commission Decision 2002-34 to the effect that "an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures" inures to their benefit. It does not. The intent is to reduce the annual amount to be placed in the deferral account, levied from residential ratepayers, in cases where the rates have been reduced because of competitive pressures. Under such circumstances, the rates actually paid are closer to the rates these customers should have been paying under the price cap formula. Thus there is less overcharging, and a lesser amount of money needs to be placed in the deferral account. The words certainly cannot mean that deferral account monies subsidize the Company's rate reductions.<sup>61</sup>

127. In its June 10, 2005 updated comments Bell has gone so far as to seek approval for the concept of rate reductions, indicating that it will file a specific proposal at a later date when the remaining balance left in the deferral account is known.<sup>62</sup> TELUS for its part has now lowered the priority of its consumer-oriented proposals to enhance affordability and universal service, clearly stating that it favours funding its initiatives to upgrade and enhance its network first.<sup>63</sup>

## **4.2 ILEC Cost Recovery**

128. As CCTA stated in its October 10, 2004 comments, the Commission should reject ILEC proposals to use deferral account funds to recover the costs

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<sup>61</sup> Consumer Group Comments, June 10, 2005, paragraph 10.

<sup>62</sup> Bell Canada, Updated Comments, June 10, 2005, paragraph 100.

<sup>63</sup> TELUS Comments, June 10, 2005, paragraph 16.

associated activities that are either routine, necessary in competitive markets or are designed to provide the ILEC with an edge over other service providers. Further, and particularly in reference to TELUS' surprising proposal to replace fuel storage tanks, the Commission must reject outright proposals that are "ordinary course of business" and would be required of any similarly situated carrier.

129. In addition, CCTA submits that the Commission should reject any ILEC cost recovery proposal that would fail to qualify as an exogenous adjustment. As CCTA stated in its comments on Aliant's cost recovery proposals, the Commission determined in Decision 2002-34 that deferral funds are appropriately used to fund initiatives or events that qualify as exogenous adjustments under the current Price Cap regime.<sup>64</sup> CCTA submits that the Commission did not intend for the ILECs to seek compensation for events or initiatives that would not classify as exogenous factors. This approach is also supported by the Consumer Groups:

In the view of the Consumer Groups, the ILEC deferral accounts were not intended to be a rainy day fund for ILEC expenditures designed to improve their bottom line. To the extent that any expenditures are considered as exogenous to the price cap and eligible for contribution in rates, they must meet Commission criteria for exogenous factors.<sup>65</sup>

130. CCTA submits that only for those circumstances where the Commission has expressly authorized or contemplated draw downs, or where the case for exogenous factor eligibility is fully justified should the Commission accept ILEC projections regarding impacts on deferral account balances.

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<sup>64</sup> CCTA Comments, June 10, 2005, paragraph 7.

<sup>65</sup> Consumer Group Comments, June 10, 2005, paragraph 13.

131. Proceedings or initiatives not previously authorized or contemplated by the Commission, or not independently justified as qualifying for exogenous factor treatment yet introduced in this proceeding as potential anticipatory draw downs should be disregarded in their entirety by the Commission. This would apply to initiatives that neither meet the qualifying criteria applied by the Commission in the past for deferral account draw downs (i.e. CLEC access to OSS), nor were raised in this proceeding in a manner that would permit scrutiny and testing as an initiative that would be funded from deferral account surpluses.

132. Examples of such initiatives include MTS Allstream's anticipated de-linking of DSL service from its local telephone service and the provision of DSL service over "dry loops".<sup>66</sup> In addition to the concerns noted, CCTA observes that these initiatives also warrant dismissal based on the fact they represent examples of purely commercial initiatives, which were or would be pursued out of the of the companies' self interest irrespective of regulatory action.<sup>67</sup>

133. The Commission should also disregard funding proposals that have previously been rejected by the Commission for treatment as exogenous factor adjustment, such as Aliant's proposal to recover lost revenue relating to late payment charges.<sup>68</sup>

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<sup>66</sup> MTS Allstream Comments, June 10, 2005, paragraph 15.

<sup>67</sup> CCTA notes that the Bell TN 6767 service was originally offered by Bell Canada affiliate Bell Nexxia, on a non-tariffed commercial basis (see TN 6767 August 3, 2003). CCTA notes that other ILECs have made decisions, described as commercial in nature, to offer de-linked or stand-alone DSL services. (see, for example, the comments of TELUS Executive Vice President Janet Yale at the PN 2004-2 oral hearings:

*So it's a marketplace-driven initiative, because, at the end of the day, from our perspective, we would rather get some revenue from the customer than no revenue. So as a consequence, we are saying if the only thing the customer wants from us is DSL service and not primary exchange service, fair enough, we will make DSL service available on a standalone basis.* Transcripts Vol. 1, page 287.

<sup>68</sup> CCTA Comments, June 10, 2005, paragraph 9.



### **4.3 Competitor Support**

134. Call-Net has proposed to use the deferral account to also fund initiatives in support of competitors that rely substantially on ILEC inputs to offer service in the local exchange market. CCTA concedes that for competitors of these classes, the proposals arguably contribute to achievement of some of the Commission's objectives in this proceeding, most notably to objectives respecting ILEC efficiencies and to the interests of certain competitors. Notwithstanding this, CCTA is concerned that such proposals could encourage increased reliance on one competitive entry model. CCTA submits that proposals to benefit competitors should ensure that those benefits are available to all competitors in the local market, not only a specific subset. Technology neutrality has been a hallmark of Commission regulation and should implicitly guide the Commission's consideration of these proposals.

135. Furthermore, CCTA notes that in its June 10, 2005 comments, TELUS withdrew its support for its initiatives to improve service to competitors, noting the Commission's denial in Decision 2005-14 for the recovery of ILEC costs to implement OSS from the deferral account, as well as the reduced balance available in the deferral account following the Commission's determinations regarding CDN services and the TTY upgrade program.<sup>69</sup> In Decision 2005-14, the Commission considered that the costs associated with CLEC access to ILEC OSS are an enhancement of an existing service that should be funded through the ILEC tariffs for the associated competitive services.<sup>70</sup>

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<sup>69</sup> TELUS Comments, June 10, 2005, paragraph 22.

<sup>70</sup> Decision 2005-14, paragraph 61.

## **5.0 MTS Allstream Proposed Elimination of Deferral Account Mechanism**

136. In its June 10, 2005 comments, MTS Allstream proposes that as part of the current proceeding the Commission should consider simultaneously closing out each ILEC's deferral account as of the initially scheduled end of the second price cap period (May 31, 2006).<sup>71</sup> MTS Allstream's proposal is made with reference to PN 2005-3 and the Commission's proposal to extend the current price cap regulation regime for a period of two years.

137. CCTA submits that MTS Allstream's proposal to close out the deferral account is more appropriately dealt with in the context of PN 2005-3. MTS Allstream's proposal raises a number of issues regarding potential changes or adjustments to the current price cap regime. Indeed, MTS Allstream's proposal would significantly modify the price cap regime and provide a windfall gain to the ILECs and its shareholders. At paragraph 25 of its comments MTS Allstream states:

However, going forward, this same objective of avoiding potential adverse effects on local competition can be readily and more efficiently achieved by simply adopting the same price cap constraint for residential services in non-HCSA rate bands as currently applies to residential services HCSA rate bands.

138. Under the current price cap regime implemented in Decision 2002-34, in conjunction with the deferral account, residential local services in non-HCSAs are subject to a basket constraint equal to inflation less productivity applicable to all revenues from residential local services including including service bundles that include a residential local exchange service or a residential optional local service. In addition to the basket constraint applied to the non-HCSA basket of local residential, the Commission applied the following constraints to the sub-baskets

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<sup>71</sup> MTS Allstream Comments, June 10, 2005, paragraph 23.

of services: ILECs may increase residential local exchange service rates in non-HCSAs, on average, by inflation less the productivity offset in each year in which inflation exceeds the productivity offset. If the productivity offset exceeds inflation in a given year, then the ILECs' average rates for residential local exchange services assigned to the residential local exchange service sub-basket in non-HCSAs may not increase in that year. For the optional local services sub-basket in non-HCSA, the Commission imposed a maximum annual increase of \$1 per feature.

139. In contrast to the treatment of non-HCSA residential local services, the Commission did not apply any basket constraint for HCSA residential local services. The Commission did impose similar sub-basket constraints to residential local exchange services and residential local optional services.

140. Thus, under MTS Allstream's proposal, the basket constraint for residential local services in non-HCSA equal to inflation less productivity would be eliminated. The effect of this change is that the ILECs would be relieved from depositing the funds associated with the basket constraint into the deferral account and instead would be free to disperse these funds in any manner they see fit, including distributions to shareholders or competitive actions such as targeted advertising, promotional activities and price reductions. In addition, funds currently included in the deferral account associated with the reversal of past exogenous adjustments would also flow directly to the ILEC's. MTS Allstream's "simple adoption" of the pricing constraints applicable to residential services in HCSA rate bands would result in substantial windfall gains to the ILECs and shareholders.

141. In its comments filed on June 20, 2005 in the PN 2005-3 proceeding, CCTA supported the Commission's proposal to extend the existing price cap regime by two years. CCTA submits that if the Commission proceeds with

extending for two years the current price cap regime for the ILECs, then it follows that all elements of the current price cap regime would remain in place, including the deferral account mechanism. MTS Allstream's proposal is self-serving and benefits only the ILECs to the detriment of consumers and competitors. The deferral account mechanism is a fundamental component of the current price cap regime and the pricing of non-HCSA residential local services. Changing these elements of the current price cap regime, as proposed by MTS Allstream, would fundamentally alter the existing price cap regime and the balance achieved by the Commission in establishing that regime.

## **Conclusion**

142. The Commission has received a wide range of proposals for the use of funds in the deferral accounts. CCTA submits that the most appropriate criteria for assessing the proposals are the objectives set out by the Commission in PN 2004-1. Proposals that fail to meet these objectives should be rejected.

143. A number of parties, including CCTA have proposed broadband service initiatives that would extend service to Canadians who reside in unserved rural and remote areas. Each of the parties have identified strong public policy reasons why the deferral accounts should be used for this purpose. The proposals build on programs launched by the federal government and some provincial governments to support broadband expansion. Many communities have benefited but many more remain.

144. A broadband expansion program, funded from the ILECs' deferral accounts will help provide reliable and affordable broadband services of high quality, accessible to both urban and rural area customers, consistent with the Commission's first objective. A broadband program can be designed to balance

the interests of the three main stakeholders in telecommunications markets, i.e., customers, competitors and incumbent telephone companies, as required by the Commission's second objective. Facilities-based competition in the supply of broadband services will also be promoted if the funding is provided on a basis that is competitively neutral. CCTA submits that its broadband initiative will provide incumbents with incentives to increase efficiencies and to be more innovative. The fifth objective the Commission identified requires the balancing of a desire to minimize regulatory burden with a need for sufficient regulatory oversight to avoid anti-competitive behaviour or misuse of the deferral account funds. CCTA believes that its proposal strikes the correct balance.

145. Consistent with the objectives identified by the Commission in Public Notice 2004-1, the focus of the CCTA proposal is to promote the expansion of broadband services to unserved rural and remote communities through the construction of transport facilities. Funds from the deferral accounts would be drawn down for the construction and maintenance of transport facilities to provide broadband services to unserved communities.

146. CCTA's proposal is competitively neutral and creates incentives to efficiently deploy broadband in the communities. It allows all facilities-based service providers to benefit from the construction of transport facilities. CCTA believes that the ILECs would maintain an advantage by virtue of the control and ownership of the transport facilities while competitors obtain access to the use of facilities that would not otherwise be available. In contrast to CCTA's proposal, Bell's proposal does not permit competitors, including the CCTA's members, to gain access to the facilities funded from the deferral accounts. The TELUS proposal would require broadband access competitors to pay standard tariff rates for the use of services that the company would have been paid for up front using the deferral account.

147. The CCTA's proposal is also competitively neutral since the selection of a community to which broadband services will be extended can be made by any facilities-based competitor that commits to providing broadband service. By contrast, the Bell and TELUS proposals do not provide any opportunity for cable companies or other facilities-based competitors to select communities that they wish to serve.

148. CCTA maintains that its broadband proposal holds far greater promise and is more aligned with the Commission's objectives than the broadband proposals offered by other parties to this proceeding.

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