

Barrett Xplore Inc.

Petition to the Governor in Council to Vary Telecom Decision CRTC 2006-9

Disposition of Funds in the Deferral Accounts



COMMENTS

OF

TELUS COMMUNICATIONS COMPANY

AUGUST 25, 2006

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EXECUTIVE SUMMARY

These are the comments of TELUS Communications Company (“TELUS”) in respect of the petition filed by Barrett Xplore Inc. (“BXI”) relating to Telecom Decision CRTC 2006-9, *Disposition of funds in the deferral accounts* (“Decision 2006-9”), issued by the Canadian Radio-television and Telecommunications Commission (CRTC) on February 16, 2006.

BXI asks the Governor in Council to halt consideration by the CRTC of plans to expand broadband service to up to 2.7 million Canadians in rural and remote areas. BXI claims that consideration of broadband plans will undermine BXI’s own business plan. For the reasons stated below, TELUS opposes BXI’s petition.

Competitors Not Crowded Out

Future proceedings will be held by the CRTC to consider specific broadband plans, which may or may not be accepted. The CRTC has indicated that broadband plans should not crowd out competitors. The whole idea of Decision 2006-9 is that deferral account funds will only be spent when there is no alternative present. It is difficult to see how BXI’s business plan is undermined because the deferral account funds will only be used where no competitor provides or plans to provide service in rural and remote areas.

Decision 2006-9 Not Ripe for Cabinet Intervention

BXI’s petition is premature. There is no compelling reason for the Governor in Council to interfere in this process. The CRTC has not approved any expenditure of funds for broadband expansion.

BXI has recently filed a separate application to the CRTC asking for consideration of its business plans along with the incumbent local exchange carriers’ broadband proposals. The Governor in Council should allow the CRTC to deal with BXI’s CRTC application and the actual incumbents’ broadband proposals. Further, the Federal Court of Appeal recently denied a stay of Decision 2006-9 on the grounds that there will be no irreparable harm arising from the filing of the incumbents’ broadband expansion plans. It would be highly unusual for the Governor in Council to overrule the Court and now issue a stay as requested by BXI.

The time is not ripe for intervention in any form by the Governor in Council. There is a risk of contradictory rulings before these institutions have made all of the factual and legal determinations. The CRTC is the agency charged with implementing the Government of Canada’s telecommunications policy and should be permitted to finish its job before any consideration is given to a petition.

Mischaracterization of “Subsidy” and “Rebate”

BXI mischaracterizes funds in the deferral account as a subsidy that must be rebated to customers. As a matter of law, these funds arose from final rates in urban centres. Competitive pressures have already been created by these final rates and urban Canadians enjoy a wealth of

competitive choice. Incumbent local exchange carriers have been and continue to be subjected to these pressures and the pricing constraints imposed by the CRTC. A rebate as proposed by BXI does not address the disparity of broadband service that exists between urban and rural and remote parts of Canada. A rebate is confiscatory and fails to account for the market risk borne by the incumbents. Furthermore, any rebate program would not be cost-effective, as the CRTC has already found as a matter of fact. In short, BXI's call for a rebate is unlawful, unreasonable and impractical.

Implementing Agency in Harmony with Government Policy

The CRTC's role is to implement the Government of Canada's telecommunications policy. It has done so in Decision 2006-9, as that decision is in full accord with the Government's long-standing policy of broadband expansion to rural and remote areas, including the recent policy recommendations endorsed by the Telecommunications Policy Review Panel. Decision 2006-9 indicates that in reviewing the broadband expansion plans, the principles of technological neutrality and competitor access to backbone facilities at wholesale rates will be active considerations. The CRTC has respected government policies and has promised to consider these policies when looking at the actual broadband plans.

2.7 Million Reasons to Let the CRTC Finish its Job

The Telecommunications Policy Review Panel concluded that the maximum number of people in areas without land-based broadband service who could be adequately provisioned by satellite would be a mere 300,000, leaving 2.7 million Canadians to be served by land-based technology. It is unacceptable to frustrate the CRTC's efforts to investigate how these 2.7 million Canadians might be served through incumbent local exchange carriers' broadband expansion plans before these plans have even been filed.

TELUS urges the Governor in Council to reject BXI's petition and let the CRTC finish its job.

1.0 INTRODUCTION

1. In accordance with section 12(1) of the *Telecommunications Act* and the procedures set out in Canada Gazette, Part I, Vol. 140, No. 22, June 3, 2006, Notice No. DGTP-008-2006, TELUS Communications Company (“TELUS”) files herewith its Comments in reply to a petition (the “Petition” or the “BXI Petition”) to the Governor in Council to vary *Disposition of funds in the deferral accounts*, Telecom Decision CRTC 2006-9 (“Decision 2006-9”) filed by Barrett Xplore Inc. (“BXI”). TELUS opposes the Petition and urges the Governor in Council to reject it for the reasons stated below.
2. The deferral accounts at issue were created in 2002 when the Canadian Radio-television and Telecommunications Commission (“CRTC”) established rates and pricing rules for the incumbent local exchange carriers. In order to encourage competition in urban areas, the CRTC maintained high rates and directed each incumbent to place proceeds from these high urban rates in a deferral account. In 2004, the CRTC initiated a public proceeding as to how to dispose of the outstanding amounts in the deferral accounts.¹
3. Following this public proceeding, the CRTC issued Decision 2006-9, which determined guidelines for the disposition of funds remaining in the deferral accounts. The CRTC determined part of the funds could be used to expand broadband services to rural and remote communities. The CRTC considered that expanding broadband services to rural and remote communities would enhance their social and economic development and be an effective way to reduce the disparity that exists with urban communities. Accordingly, the CRTC directed the incumbent local exchange carriers to file their respective broadband expansion plans by June 30, 2006. This filing date has since been extended.
4. The essence of BXI’s complaint is that the incumbent local exchange carriers will have access to a subsidy to undercut BXI’s business plan.² BXI claims that the CRTC’s

¹ Decision 2006-9, paragraphs 1, 4-8.

² BXI Petition, paragraph 3.

decision ignores the promise of satellite technology,³ usurps the Government's policy role⁴ and disregards the recommendations of the Telecommunications Policy Review Panel.⁵ In BXI's view, the filing of broadband expansion plans will harm Canadians in remote and rural areas who currently have no access to broadband service.⁶

5. The many alternative heads of relief advanced by BXI are all aimed at having the Government preclude the CRTC from looking at the incumbents' yet-to-be filed broadband expansion plans relating to serving Canadians in rural and remote areas of the country. BXI seeks the following relief:

- (1) Rescind Decision 2006-9 insofar as it applies to broadband services and refer it back to the CRTC to consider how to return the deferral account revenues to consumers.⁷
- (2) Alternatively, rescind Decision 2006-9 insofar as it applies to broadband services and:
 - (i) consider other ways to use the deferral account monies for a broadband extension subsidy program;⁸ or
 - (ii) direct the CRTC to study and report back to the Governor in Council, pursuant to section 14 of the *Telecommunications Act*, on ways to implement a competitively and technologically neutral subsidy scheme, including consideration and assessment of the relative merits of the SuperNet, U-CAN and portable contribution subsidy schemes, either alone or in combination;⁹ or
 - (iii) direct the CRTC to consider alternative means of implementing Decision 2006-9, at a minimum directing the CRTC to consider competitors'

³ BXI Petition, paragraph 5.
⁴ BXI Petition, paragraph 102.
⁵ BXI Petition, paragraph 12.
⁶ BXI Petition, paragraph 14.
⁷ BXI Petition, paragraph 112.
⁸ BXI Petition, paragraph 113.
⁹ BXI Petition, paragraph 114.

business plans for extension of broadband services over the same four year period that it considers the incumbent local exchange carriers' plans.¹⁰

(3) Issue an immediate stay of those parts of Decision 2006-9 that address broadband subsidy issues.¹¹

6. TELUS' Comments are organized as follows. Section 2 outlines what the CRTC actually decided in Decision 2006-9 and why Decision 2006-9 does not adversely affect BXI in a substantive fashion. Section 3 outlines collateral proceedings to the Petition – the Federal Court of Appeal's denial of a stay and BXI's parallel review and variance application to the CRTC. Section 4 explains why funds in the deferral account can only properly be used for network modernization, not a complicated and costly "rebate" scheme. Section 5 shows that broadband expansion is in harmony with government policy and Section 6 explains why the particular directions advanced by BXI are not feasible. Section 7 sets out the consequences of delay on as many as 2.7 million people who need land-based broadband connectivity to participate in modern Canadian society.

2.0 DECISION 2006-9 AND BXI'S BUSINESS PLAN

7. The exact nature of what was decided in Decision 2006-9 is particularly relevant in this case where the Governor in Council is asked to intervene before the CRTC has fully completed the public process. The CRTC has not yet made a final determination that any sum certain will actually be spent on broadband expansion plans. Decision 2006-9 directs the incumbent local exchange carriers to file detailed proposals on broadband expansion in compliance with a number of conditions, including:

- the ILEC must submit a proposal to provide broadband service...where:

¹⁰ BXI Petition, paragraph 115.

¹¹ BXI Petition, paragraph 107.

- (1) broadband service is not available from any service provider and is not part of their existing commitments or planned roll-out, and
 - (2) the community has not received funding, or approval for funding, from any government broadband expansion programs;
 - deployment must be based on least-cost technology;
 - backbone facilities must be made available to alternative broadband service providers at a minimal rate that will be approved by the Commission when reviewing the broadband expansion proposals for approval;
 - any wholesale broadband service offered by the ILEC must be made available in all funded communities.¹²
8. BXI suggests that the prospect of the broadband expansion plans funded through the deferral account has threatened the viability of its business plan.¹³
9. The operative directions in Decision 2006-9 prescribe the filing of plans and a further public process or set of processes that will allow the CRTC to properly consider the plans:
262. The Commission directs each ILEC to file, by 15 May 2006, its updated deferral account schedule and its proposed rate reductions to eliminate the recurring amount in its deferral account. The Commission also directs each ILEC to file, by 30 June 2006, its initiatives to dispose of the funds that will have accumulated in its deferral account by the end of the fourth year of the price cap period. These submissions should take into consideration the determinations made in this Decision as well as any subsequent decisions that will impact the amounts in the

¹² Decision 2006-9, paragraph 197.

¹³ BXI Petition, paragraph 19.

company's deferral account. Once these proposals have been filed, the Commission will determine what process or processes will be required to consider these submissions. [emphasis added]

10. There is no CRTC determination that “totally undermines the competitive market”¹⁴ or any decision that will “relegate Canadians in rural and remote areas back to their traditional position of having to accept monopoly,”¹⁵ as BXI would have the Governor in Council believe. Decision 2006-9 expressly directs the incumbent local exchange carriers to ensure that communities selected for expansion of broadband services would not be likely to receive broadband services from competitors in the near future.¹⁶ The CRTC has said that the principle of competitive neutrality would guide its determination of broadband expansion plans and, far from usurping the role of governments, the incumbents must consult with provincial government agencies before filing plans.¹⁷ The CRTC said it will take into consideration funding “from any government broadband expansion programs.”¹⁸ Only after consultation, the preparation of plans in accordance with the CRTC’s guidelines (*i.e.*, including due consideration of the principle of competitive neutrality) and a process to consider the submissions,¹⁹ will any determination be made on whether or not to permit the expenditure of funds from the deferral account.
11. The intent of Decision 2006-9 is that deferral account funds will only be spent when there is no alternative present. It is difficult to see how BXI’s business plan is undermined because the deferral account funds will only be used where no competitor provides or plans to provide service in rural and remote areas.
12. BXI’s petition creates the impression that use of deferred account funds for broadband is somehow a new concept that has taken investors by surprise. In this regard, there were

¹⁴ BXI Petition, paragraph 3.

¹⁵ BXI Petition, paragraph 17.

¹⁶ Decision 2006-9, paragraph 195.

¹⁷ Decision 2006-9, paragraph 198.

¹⁸ Decision 2006-9, paragraph 195.

¹⁹ Decision 2006-9, paragraph 262.

several indications well before Decision 2006-9 was issued that deferral account funds might be used to roll-out broadband services to Canadians in remote and under-served areas. Indeed, given one of the purposes of the deferral account established in 2002 was funding of initiatives that would benefit residential customers,²⁰ an initiative such as improving accessibility and broadband capability would seem to be an obvious possibility. Another indication was the December 2, 2003 application by Bell Canada to use funds in the deferral account to expand its DSL footprint.²¹ Against this background, it should have been apparent that at least by December 21, 2004, when BXI announced the sale of its equity to a New York based private equity firm for \$30 million,²² the CRTC might ultimately use the deferral account funds for an initiative that would improve broadband access for Canadians. Presumably, BXI and sophisticated investors such as Sandler Capital Management would understand this possibility when making investment decisions.

13. Certainly, BXI had every opportunity to participate in the CRTC proceeding, and, in fact, it did. The views of BXI were recited in paragraphs 151 and 152 of Decision 2006-9. The CRTC did much more than pay “lip-service”²³ to arguments raised by BXI and other competitors of the incumbents. The CRTC said that broadband expansion plans should not replicate services available from other service providers. The CRTC also stated that backbone facilities should be made available to alternative broadband service providers at a minimal rate.²⁴ BXI ignores these clear directions and overstates the risks to its own private business plans.

3.0 COLLATERAL PROCEEDINGS

14. The existence of collateral proceedings, not yet completed, further suggests that the time is not ripe for intervention by the Governor in Council. In addition to filing the Petition,

²⁰ Decision 2002-34, paragraph 412.

²¹ Decision 2006-9, paragraph 13.

²² See http://www.sandlercap.com/news_dec2104b.html

²³ Decision 2006-9, paragraph 47.

²⁴ Decision 2006-9, paragraph 197.

BXI has applied to the CRTC for a review and variance and a stay of Decision 2006-9 pursuant to section 62 of the *Telecommunications Act*.²⁵

15. It seems curious and contradictory that BXI has chosen to seek a review and variance from the CRTC and to petition the Governor in Council in parallel. Ordinarily, a petition is the remedy of final resort. It seems premature for the Governor in Council to consider any Petition until after the CRTC deals with BXI's review and variance request and, thereafter, issues future rulings approving or denying the specific broadband expansion proposals.
16. BXI mentions in passing the application for leave to appeal to the Federal Court of Appeal filed by the Consumers' Association of Canada and the National Anti-Poverty Organization ("CAC/NAPO").²⁶ However, BXI fails to disclose that CAC/NAPO also sought a stay of Decision 2006-9. Although leave to appeal has not been granted (the Court is still considering whether CAC/NAPO has made out an arguable case) the Court has already disposed of the stay application. TELUS opposed CAC/NAPO's application for a stay on the grounds there is no irreparable harm to anybody, precisely because the CRTC has given all interested persons an opportunity to participate in a future regulatory process to consider whether or not to approve the incumbents' actual broadband proposals. The Federal Court of Appeal agreed. On June 26, 2006, Nadon J.A. dismissed CAC/NAPO's motion for a stay of Decision 2006-9.²⁷
17. It would be unusual for the Governor in Council to overrule the Federal Court of Appeal. Intervening at the interlocutory stage of court proceedings, before leave to appeal has even been ruled upon and where no irreparable harm exists, broadens the scope of Cabinet intervention beyond anything that has occurred so far under section 12 of the *Telecommunications Act*.

²⁵ Application by Barrett Xplore to Review and Vary Telecom Decision CRTC 2006-9 – Disposition of funds in the deferral accounts, June 2, 2006.

²⁶ BXI Petition, paragraph 108.

²⁷ *CAC/NAPO v. CRTC et al*, [2006] FCA 239.

18. Against this background, the alternative heads of relief sought by BXI in its Petition seem overblown and quite premature. There is no foundation for a direction or a stay in this case. BXI is worried that the incumbent local exchange carriers' plans will take a "snapshot" of where competitors are at a given point in time, rather than considering their projected plans over a multi-year period of time.²⁸ In its Reply Argument filed in its review and variance application to the CRTC, BXI offered that it would be "prepared to provide the Commission in confidence with whatever additional information it might need to access the capabilities, quality and capacity of satellite platforms that exist today and that are being brought online on 2007 and 2008."²⁹ These more modest requests seem to mirror what has already been decided. As noted above, the Commission has already provided for competitor input in its guidelines in Decision 2006-9 at paragraph 197.
19. As explained in further detail below, at the end of the day, satellite technology resold by BXI will not be all things to all people. Gaps in service and service capacity will result if the plans for broadband expansion are shelved. It is a virtual certainty that if the broadband expansion plans are halted, as requested by BXI, the objective of expanding broadband to unserved Canadians by the year 2010 will be seriously impaired.³⁰ The key issue for the CRTC to consider is how that gap can be narrowed. BXI's real point is that the incumbents' plans must be calibrated with the rollout of competitors. The CRTC is well aware of the consideration of competitive neutrality and the need to ensure that Canadians have an opportunity to gain access to broadband connectivity. This is a case where the implementing agency should be permitted to complete its task.

4.0 DEFERRAL ACCOUNTS ARE NOT A "SUBSIDY" TO BE "REBATED"

20. BXI states that the funds in the deferral account arose as a result of consumers being "overcharged"³¹ and deploying these funds to expand broadband facilities amounts to a

²⁸ BXI Petition, paragraph 97.

²⁹ BXI Reply Argument, July 14, 2006, paragraph 52.

³⁰ See Telecommunications Policy Review Panel Final Report 2006, Recommendation 8-1.

³¹ BXI Petition, paragraph 81

subsidy that should be rebated.³² BXI ignores the fact that TELUS and the other incumbent local exchange carriers charged consumers the exact amounts permitted in final tariffs. Consumers were not overcharged. TELUS and the other incumbent local exchange companies bore the risk and the consequences of rates being set at the levels that were approved on a final basis in urban areas. Consumers and competitors have enjoyed and continue to enjoy the benefits of powerful economic incentives for competitors to enter urban areas. For the record, TELUS disagreed with the CRTC's approach of restricting pricing flexibility and setting high rates in urban areas in order to invite entry by competitors, such as Voice over Internet Protocol ("VoIP") service providers. But that is water under the bridge now. Rates were set on a final basis, consumers paid these rates for services provided and competitive forces have responded. It is not possible to turn back the clock, unwind final rates already paid and pretend the competitive pressures produced by such rates will somehow disappear.

21. BXI sees irony in deferral account funds from rates in urban areas being used to extend wireline service in rural areas.³³ BXI is naturally optimistic that its resale of satellite service will be attractive to rural Canadians. The reality is satellite will not adequately cover all areas, certainly not by 2010 as recommended by the Telecommunications Policy Review Panel.³⁴ While urban Canadians have a wealth of competitive options, rural Canadians do not. There is symmetry, not irony, in allowing funds that incited urban competition to help address the disparity between urban and rural parts of the country, especially if there is also sensitivity to competitor plans in rural and remote regions.
22. Further, and as a matter of law, the funds are not available to be appropriated by the CRTC for any purpose whatsoever, as BXI assumes. The Supreme Court of Canada issued an important ruling after the record of Decision 2006-9 was completed. In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4, the Court held that a public utility board does not have the prerogative to expropriate property of

³² BXI Petition, paragraph 112.

³³ BXI Petition, paragraph 15.

³⁴ Telecommunications Policy Review Panel Final Report 2006, Recommendation 8-1.

the regulated company – in that case, final proceeds from the sale of assets. Ordering a rebate of the allocation of the proceeds of the sale would cancel the private nature of the utility. Significantly, while the regulatory body cannot allocate the property of the utility to rate payers, the Supreme Court of Canada opined that it might be permissible for the regulatory body to impose a condition that “the utility re-invest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.”³⁵

23. There is no free-floating subsidy contained in the deferral accounts considered by the CRTC in Decision 2006-9. These funds are the proceeds of final rates charged by the incumbent local exchange carriers. Canada’s highest court has said that a public utility regulator cannot take away property rights of the public utility. The sole condition that might legally be imposed by a public utility regulator in these circumstances relates to maintaining a modern operating system to provide service to consumers. This is precisely the condition that the CRTC is contemplating in requesting that the incumbents file plans for broadband expansion.
24. BXI’s theory that the deferral account funds should be rebated to consumers is without merit. Even setting aside the illegality of a rebate to consumers, the CRTC has already found that there are serious practical difficulties with a rebate proposal.³⁶ BXI’s request that the Governor in Council “refer the decision back to the CRTC to consider how to return the deferral account revenues to the consumers who were overcharged,”³⁷ would place the CRTC in the impossible position of having to contradict the Supreme Court of Canada’s latest ruling on public utility regulation and then develop an “overly complex and not cost-effective”³⁸ rebate scheme.

³⁵ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, paragraph 77; see also TELUS Reply Comments dated July 27, 2005 filed in PN 2004-1, paragraphs 9-16.

³⁶ Decision 2006-9, paragraph 114.

³⁷ BXI Petition, paragraph 112.

³⁸ Decision 2006-9, paragraph 114.

5.0 DECISION 2006-9 IS CONSISTENT WITH LONGSTANDING PUBLIC POLICY GOALS AND POLICY OBJECTIVES

25. The CRTC's views on the importance of broadband service extension initiatives recognize the need to fulfill the longstanding public policy goal of providing broadband access service to Canadians in rural and remote areas. These determinations are also fully consistent with the Canadian telecommunications policy objectives outlined in section 7 of the *Telecommunications Act* and are also consistent with the CRTC's objectives for the second price cap period. The CRTC's determination to require incumbent local exchange carriers such as TELUS to expend the deferral account funds on broadband initiatives is a worthy use of the deferral account monies since the extension of the incumbent local exchange carriers' broadband networks will contribute to the widely held public policy goal of all levels of government, and the private sector, to extend broadband services to rural and remote areas.

5.1 Broadband Expansion to Rural and Remote Areas Is a Longstanding Government Public Policy Goal

26. The expansion of broadband services to rural and remote areas is a longstanding public policy goal of both the Federal Government and most provinces. As noted by the Telecommunications Policy Review Panel, "[s]ince 1993, it has been the policy of the Government of Canada and most provinces to increase the level of electronic 'connectedness' of Canadian consumers and businesses to each other and to the world."³⁹ The Panel also noted that "[i]n July 2001, following the report of the National Broadband Task Force, the Government of Canada set a critical new goal towards realizing its connectivity agenda: ensuring that broadband networks and services would be available to business and residents in every Canadian community."⁴⁰

27. This goal has been pursued by both the private sector and the public sector. The private sector has made considerable investments in facilities to extend broadband services. In

³⁹ Telecommunications Policy Review Consultation Paper, June 6, 2005, page 30.

⁴⁰ Telecommunications Policy Review Consultation Paper, June 6, 2005, page 30.

the public sector, there have been numerous Federal Government programs to extend broadband services including the Broadband for Rural and Northern Development Pilot Program (“BRAND”), the National Satellite Initiative, and the Canada Strategic Infrastructure Fund,⁴¹ as well as various provincial government initiatives, including the Alberta SuperNet and Network B.C.

28. The goal of broadband extension to rural and remote areas is not yet complete. Most recently, the longstanding public policy goal of broadband expansion was re-affirmed in the Telecommunications Policy Review Panel Final Report 2006 by stating that “[u]biquitous broadband availability is a desirable national policy objective in terms of both economic and social policy.”⁴² In this regard, the Panel further states, “[i]n 2000 the federal government set a policy goal of ensuring that broadband networks and services would be available to businesses and residents in every Canadian community,”⁴³ and that “[g]iven the increasing importance of broadband access for full participation in the 21st century society, the Panel believes the federal government should re-affirm its commitment to maintaining Canada’s global broadband leadership and to ensuring that broadband access is available everywhere in the country.”⁴⁴

5.2 Broadband Expansion Determinations in Decision 2006-9 Are Consistent with Canadian Telecommunications Policy Objectives

29. BXI states that the CRTC has excessively interfered with market forces.⁴⁵ This charge is contradicted by the CRTC’s intentions to conduct follow-up proceedings.
30. As noted above, the CRTC has imposed conditions designed both to ensure their broadband expansion plans do not crowd out competitors and that backbone facilities are available to competitors.⁴⁶ Decision 2006-9 contemplates that the CRTC will ensure

⁴¹ See http://www.infrastructure.gc.ca/csif/projectmaps/project_desc_prov_e.shtml for broadband project descriptions in New Brunswick, Newfoundland and Labrador and Quebec.

⁴² Telecommunications Policy Review Panel Final Report 2006, page 8-10.

⁴³ Telecommunications Policy Review Panel Final Report 2006, page 8-3.

⁴⁴ Telecommunications Policy Review Panel Final Report 2006, page 8-5.

⁴⁵ BXI Petition, paragraph 16.

⁴⁶ Decision 2006-9, paragraph 197.

existing and planned roll-out by competitors will be carefully considered and these competitors would be allowed to acquire backbone facilities and wholesale broadband services from the incumbent local exchange carriers at rates that will allow them to fairly compete with the incumbents.

31. Further, in Decision 2006-9, the CRTC stated that its choice of proposals was guided by a policy decision that the deferral account funds should be used to primarily provide benefits to residential subscribers.⁴⁷ As stated in Decision 2006-9:

...the Commission, in its evaluation of the proposals...has used the objectives set out in the price cap decision and reiterated in Public Notice 2004-1. The Commission has placed more emphasis on the principle of competitive neutrality in the evaluation of the various proposals, where applicable, and on proposals that primarily provide benefits to residential subscribers in order to achieve an overall balance among stakeholders.⁴⁸

32. Broadband expansion is also consistent with other policy objectives. For example, the CRTC considered that “expansion of broadband services is an initiative that would meet this objective [policy objective 7(b) of the *Telecommunications Act*] since it would improve the quality of telecommunications services to customers, particularly in those [rural and remote] communities.”⁴⁹ The CRTC also had regard for Canadian telecommunications policy objective 7(c) by ensuring that incumbents’ services will be offered efficiently and competitively by requiring them to deploy least-cost technology. The CRTC also had regard for the Canadian telecommunications policy objectives 7(a) and 7(h), stating that it “considers that the social and economic development of rural and remote communities would be enhanced through the establishment of broadband services.”⁵⁰ The CRTC also noted that:

...considerable benefits would accrue to subscribers [in rural and remote areas] from the greater availability of broadband services, such as expanding Canadian’s capacity to access, create, communicate, and share information, knowledge, and entertainment. Other benefits to subscribers

⁴⁷ Decision 2006-9, paragraph 38.

⁴⁸ Decision 2006-9, paragraph 39.

⁴⁹ Decision 2006-9, paragraph 75.

⁵⁰ Decision 2006-9, paragraph 76.

could include improved access to health care, education, and electronic services and the potential for enriched relationships between individuals and among communities.⁵¹

33. A fair reading of Decision 2006-9 shows that the CRTC's determinations concerning broadband initiatives are in harmony with Canadian telecommunications policy objectives 7(c) and 7(f) of the *Telecommunications Act* and are also consistent with policy objectives 7(a), 7(b) and 7(h) of the *Telecommunications Act*.

5.3 Broadband Expansion Is in the Public Interest

34. While BXI is says that it “shares the Government of Canada’s desire to extend broadband services to Canadians in all regions of our country,”⁵² BXI nonetheless would halt the preparation of plans designed to further the goal of broadband extension.
35. It may well be that BXI’s primary motivation is to delay broadband implementation by parties other than itself, thus preserving, as long as possible, a *de facto* monopoly on providing services for those geographic areas which it has targeted in its business plan. The Governor in Council should not bless a private attempt to frustrate the important public policy goal of extending broadband services to rural and remote areas, a goal recently reiterated in the Telecommunications Policy Review Panel Final Report 2006.⁵³

6.0 REQUESTED ALTERNATIVES FOR BROADBAND IMPLEMENTATION ARE INFEASIBLE

36. BXI asks the Governor in Council to issue prescriptive directions to the CRTC to study and report back on a number of alternatives to administer subsidies such as models based on the Alberta SuperNet, U-CAN or a “portable subsidy.”⁵⁴ The Alberta SuperNet model and portable subsidies are not feasible, would likely waste the CRTC’s time and likely delay the process to consider the broadband expansion plans. The U-CAN model already provides for the very approach the CRTC is taking.

⁵¹ Decision 2006-9, paragraph 78.

⁵² BXI Petition, paragraph 17.

⁵³ Telecommunications Policy Review Panel Final Report 2006, page 8-5.

⁵⁴ BXI Petition, paragraph 110.

6.1 It is Beyond the Jurisdiction of the Commission to Implement an Alberta SuperNet Model Solution

37. The Alberta SuperNet model is predicated upon government subsidies as the source of funds for the SuperNet network. Decision 2006-9 provides for no government subsidies for broadband expansion. The *Telecommunications Act* does not afford the CRTC the jurisdiction to establish a government funding mechanism.
38. It is also beyond the jurisdiction of the CRTC to authorize the use of the deferral account funds as a source of funding for an Alberta SuperNet model solution for the extension of broadband services. As outlined above, it is beyond the CRTC's jurisdiction to confiscate these funds and direct that they be conferred on a third party with a view to implementing an Alberta SuperNet type model.
39. Further, TELUS notes that the Telecommunications Policy Review Panel has proposed a different model for broadband expansion, namely the U-CAN model, rather than an Alberta SuperNet model solution. Unlike the Alberta SuperNet model, the U-CAN model provides for the use of general tax revenues⁵⁵ as the source of funding only after it is determined that broadband services cannot be provided by the private sector, and only after coordination with those involved in other broadband expansion programs of the private sector, federal government departments and agencies as well as other levels of government.

6.2 The U-CAN Model Provides for Coordination with CRTC-Approved Broadband Projects Funded from the Deferral Accounts

40. BXI states that the CRTC's decision, "runs directly contrary to the recommendations of the Telecommunications Policy Review panel ... in their March 23, 2006 report to the Government of Canada"⁵⁶ since the Panel recommended that "any government-

⁵⁵ Telecommunications Policy Review Panel Final Report 2006, page 8-10.

⁵⁶ BXI Petition, paragraph 73.

sanctioned subsidy programs be carefully targeted, be made subject to a competitively neutral bidding process and be required to treat backbone and access issues separately.”⁵⁷

41. BXI misunderstands or mistates the Telecommunications Policy Review Panel Final Report 2006. In the first instance, it should be noted that the U-CAN program explicitly provides for coordination with all interested stakeholders, including the CRTC, and that the U-CAN program supplements, rather than supplants, ongoing broadband extension programs. As noted in the Telecommunications Policy Review Panel Final Report 2006:

Coordination

Telecommunications service providers, departments and agencies of the federal government, the provinces and territories, municipalities and community organizations have all contributed to the expansion of broadband access in Canada through past and current initiatives. In the Panel’s view, all these players should be stakeholders in the U-CAN program.

Experience from previous broadband programs has shown that the best results are obtained when stakeholders are consulted in program design and development, and initiatives are implemented in a coordinated fashion. Prior to undertaking a broadband expansion initiative in any region, the U-CAN program administrators should conduct a public consultation process. The goal of this process should be to avoid duplication of public and private sector efforts, to understand the programs of different jurisdictions and departments of government, and to ensure that program initiatives align with regulatory requirements imposed on telecommunications service providers. In particular, the U-CAN broadband initiatives should supplement, and not duplicate, infrastructure projects mandated under CRTC-approved service improvement plans or broadband infrastructure projects that may be funded out of the CRTC-established price cap deferral accounts.⁵⁸ [emphasis added]

42. The Panel’s intentions are made clear in Recommendation 8-8 which states:

Recommendation 8-8

U-CAN broadband expansion initiatives should be implemented only after coordination with those involved in other broadband expansion programs

⁵⁷ BXI Petition, paragraph 73.

⁵⁸ Telecommunications Policy Review Panel Final Report 2006, page 8-12.

of the private sector, federal government departments and agencies as well as other levels of government. [emphasis added]

43. In recommending the U-CAN program, the Panel expected this program to be coordinated with, and supplement, CRTC-approved broadband projects funded from the deferral accounts, and not to supplant the CRTC's initiative. It is clear that the Panel was of the view that the disposition of the deferral account funds for broadband extension would be in the public interest. It is also clear that the Panel was of the view that the disposition of these funds is necessary in order for broadband extension to be completed by 2010,⁵⁹ and that the U-CAN program should not duplicate or replace these expenditures.
44. Significantly, the Panel's recommendations regarding the U-CAN program guidelines⁶⁰ for providing subsidies to broadband network providers by means of least-cost subsidy auctions⁶¹ and holding separate auctions for backhaul network and local access facilities within each unserved area⁶² in a competitively neutral manner⁶³ would come into effect after the coordination with other broadband expansion programs, as noted above in Recommendation 8-8.
45. In calling for the adoption of the U-CAN model as an alternative to explore as a justification for its request for a stay, it is evident that the Petition is fundamentally flawed in that it completely ignores, or betrays a complete ignorance of, the Panel's recommendations regarding the U-CAN program and, in particular, Recommendation 8-8. It is also evident that the timely disposition of the monies in the deferral account funds is required in order to achieve the longstanding public policy goal of broadband expansion to rural and remote areas by 2010 called for by the Panel.

⁵⁹ Telecommunications Policy Review Panel Final Report 2006, Recommendation 8-1.

⁶⁰ Telecommunications Policy Review Panel Final Report 2006, pages 8-16ff.

⁶¹ Telecommunications Policy Review Panel Final Report 2006, Recommendation 8-13.

⁶² Telecommunications Policy Review Panel Final Report 2006, Recommendation 8-15.

⁶³ Telecommunications Policy Review Panel Final Report 2006, Recommendation 8-15.

7.0 BENEFITS FOR 2.7 MILLION CANADIANS

46. The Governor in Council's review power has been exercised relatively infrequently since 1993 when the *Telecommunications Act* was enacted.⁶⁴ This is not a case where the Governor in Council should intervene.
47. Approving BXI's Petition would amount to the Government of Canada leaving Canadians in remote and rural areas without any realistic expectation of broadband access in the timeframes recommended by the Telecommunications Policy Review Panel. These Canadians would be told they must wait for satellite technology to improve and, perhaps even then, accept substandard service in many cases.⁶⁵ Of course, leaving a sizeable portion of Canada's population to be served only by satellite service providers would place BXI in an enviable commercial position at the expense of the right of citizens to participate in modern society.
48. The CRTC has taken the reasonable view that plans should be investigated to see how Canadians in remote and rural areas might be afforded access to broadband service. The CRTC is not the only party that has concerns with access to broadband. The Telecommunications Policy Review Panel prepared a detailed market analysis of broadband service in rural and remote Canada.⁶⁶ The Panel concluded that the maximum number of people in areas not covered by land-based broadband services that could be served by satellite would be 300,000, leaving 2.7 million Canadians to be served by land-based technology. The short answer to BXI is there are up to 2.7 million very good reasons to allow plans to be filed in accordance with Decision 2006-9. BXI, for its part, can take comfort in the CRTC's sensitivity to the issue of technological neutrality; it has specifically directed the incumbents to avoid pre-empting competition when preparing their broadband expansion plans.

⁶⁴ Telecommunications Policy Review Panel Final Report 2006, page 9-18.

⁶⁵ BXI Petition, paragraph 98.

⁶⁶ Telecommunications Policy Review Panel Final Report 2006, Annex A.

49. The most prudent course of action for the Government of Canada is to allow the implementing agency to complete its process. The CRTC gave heed to the policy objective of reliance on market forces and the other objectives in Section 7 of the *Telecommunications Act* in writing the guidelines for the filing of the broadband expansion plans and the approval process that will follow. It is premature for the Governor in Council to intervene at this time. There is no irreparable harm to BXI or anyone else if broadband expansion plans are filed and reviewed by the CRTC.

8.0 CONCLUSION

50. The filing of plans is one step in the process to deal with the amounts in the deferral accounts. The plans ought to be filed unimpaired by a stay or other intervention by the Governor in Council at the behest of BXI. There are significant benefits to extending broadband service to rural and remote communities, as the CRTC found following a full public review. The Telecommunications Policy Review Panel shares this policy determination.
51. Against the need to step forward and connect up to 2.7 million Canadians, BXI alleges that its business plans will be undercut. But the CRTC made it crystal clear that the principle of competitive neutrality and timely options to serve Canadians in rural and remote areas will be explicitly taken into account in consideration of the broadband expansion plans.
52. BXI's concerns are also premature. There is a follow-up proceeding where BXI will have ample opportunity to provide its input. BXI has also filed a review and variance application with the CRTC. There are ongoing judicial proceedings. The time is not ripe for the Governor in Council to insert itself into this process.
53. BXI's preference that the deferral account funds be rebated is wrong in law and contradicts the CRTC's own finding of fact that a rebate would be complex and not cost-effective. BXI would put the CRTC in the invidious position where it must act in an unlawful fashion and then develop a complex and uneconomic rebate scheme.

54. BXI is also quite selective in its interpretation of the Telecommunications Policy Review Panel Final Report 2006. In particular, while BXI seizes on recommendations of the Telecommunications Policy Review Panel when it suits its purpose, specific recommendations, such as the need to achieve broadband expansion to rural and remote areas by 2010, are glossed over. A fair reading of Decision 2006-9 reveals that the CRTC has paid close attention to existing government policy and that it is working hard to implement this policy, which has again been reaffirmed by the Telecommunications Policy Review Panel.
55. The right path forward is to allow the implementing agency to finish its work plan of scrutinizing the broadband expansion plans. TELUS urges the Governor in Council to reject BXI's petition and let the CRTC finish its job.

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