



## Telecom Decision CRTC 2004-28

Ottawa, 5 May 2004

### **IMCAIP against certain incumbent cable and telephone carriers – Provision of higher-speed access and retail Internet services including Lite service**

Reference: 8622-C51-03/02

*In IMCAIP's request for mandatory resale of retail Lite Internet service, Telecom Decision CRTC 2003-47, 14 July 2003, the Commission addressed part of the relief requested in the application of the Independent Members of the Canadian Association of Internet Providers (IMCAIP), specifying that the incumbent cable carriers are required to make their retail Lite Internet service (IS) available for resale at a 25% discount from the lowest retail price charged by the cable carrier to a customer in the applicable service area. The balance of IMCAIP's requested relief is addressed in this decision.*

*In this decision, the Commission directs incumbent carriers who have a tariff for third-party Internet access service or asymmetrical digital subscriber line (ADSL) service to file, within 60 days, cost studies based on the Commission's incremental Phase II costing approach, delineating the specific costs causal to Lite access service. The Commission further directs Cogeco Cable Canada Inc. (Cogeco), Rogers Communications Inc. (RCI), Shaw Communications Inc. (Shaw) and Vidéotron Inc. (Vidéotron) to file, within 60 days, updated cost studies based on the Commission's Phase II incremental costing approach for the access services which relate to the per end-user access rates approved by the Commission in Terms and rates approved for large cable carriers' higher speed access service, Order CRTC 2000-789, 21 August 2000. The Commission further directs Cogeco, RCI, Shaw and Vidéotron to file, within 60 days, their respective views on the appropriate mark-ups to be used in establishing the above-referenced per end-user access rates, with full justification.*

*In light of the fact that the scope of the proceeding on Bell Canada's Tariff Notice 6622 was expanded to include Aliant Telecom Inc. (Aliant Telecom), and in that proceeding, the provision by Aliant Telecom of ADSL access service, on a tariff basis, is being considered, the Commission **denies** IMCAIP's request that the Commission direct Aliant Telecom to provide higher-speed access service to independent Internet service providers in accordance with a Commission-approved tariff and that the Commission prohibit Aliant Telecom from promoting and marketing its retail higher-speed IS until such an approved tariff is in place.*

*The Commission **denies** IMCAIP's request that the Commission review and vary previous determinations to forbear from regulating the retail IS market, review and vary the mandatory resale condition applicable to retail higher-speed IS provided by incumbent carriers pursuant to Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities, Telecom Decision CRTC 99-11, 14 September 1999, and direct each incumbent carrier to provide its retail higher-speed IS subject to a minimum price floor.*

## **The application**

1. The Commission received an application on 12 November 2002 from the Independent Members of the Canadian Association of Internet Providers (IMCAIP), filed pursuant to the *Telecommunications Act* (the Act) and Part VII of the *CRTC Telecommunications Rules of Procedure*. In its application, IMCAIP requested that the Commission issue a number of orders against Cogeco Cable Canada Inc. (Cogeco), Rogers Communications Inc. (RCI), Shaw Communications Inc. (Shaw), Vidéotron Inc. (Vidéotron), Bell Canada, MTS Communications Inc. (MTS), Saskatchewan Telecommunications (SaskTel), TELUS Communications Inc. (TCI) and Aliant Telecom Inc. (Aliant Telecom) (collectively, the incumbent carriers). IMCAIP filed parts of its application in confidence.

## **The process**

2. The Commission received requests from the following parties for disclosure of information filed in confidence by IMCAIP: the Canadian Cable Television Association (CCTA) on 18 November 2002, Aliant Telecom, Bell Canada, MTS and SaskTel (collectively, the Companies) on 19 November 2002, and TCI on 20 November 2002. On 25 November 2002, IMCAIP filed its response. On 6 December 2002, IMCAIP was directed to disclose and file on the public record certain information that it had filed in confidence. IMCAIP filed the requested information on 13 December 2002.
3. The Commission received comments on IMCAIP's application from the CCTA, Quebecor Media Inc. on behalf of Vidéotron, Shaw, TCI, the Companies and François D. Ménard on 20 January 2003, and from ABC Communications on 26 January 2003. Reply comments were received from IMCAIP on 10 February 2003.
4. The Commission received further comments from Valerie Lai on 26 February 2003, François D. Ménard on 27 February 2003 and the CCTA on 28 February 2003. Further reply comments were received from IMCAIP on 5 March 2003.
5. Further comments were received from the Companies on 7 March 2003. A further reply was received from IMCAIP on 11 March 2003. Further comments were received from the Companies on 18 March 2003.

## **Requested relief**

6. IMCAIP requested that the Commission:
  - a) review and vary the Commission's determinations to forbear from regulating the incumbent carriers' retail higher-speed Internet service (IS) rates made in:
    - Telecom Order CRTC 97-471, 8 April 1997 (Order 97-471);
    - Telecom Order CRTC 97-928, 30 June 1997 (Order 97-928);
    - Telecom Order CRTC 97-1666, 14 November 1997 (Order 97-1666);
    - Telecom Order CRTC 97-1667, 14 November 1997 (Order 97-1667);

- Telecom Order CRTC 98-619, 23 June 1998 (Order 98-619);
  - *Regulation under the Telecommunications Act of certain telecommunications services offered by "broadcast carriers"*, Telecom Decision CRTC 98-9, 9 July 1998 (Decision 98-9);
  - *Forbearance from retail Internet services*, Telecom Order CRTC 99-592, 25 June 1999 (Order 99-592); and
  - *Independent Members of the Canadian Association of Internet Providers – Digital Subscriber Line Internet services by Bell Canada and Bell Nexxia*, Telecom Decision CRTC 2002-37, 27 June 2002 (Decision 2002-37).
- b) direct that each incumbent carrier provide its retail higher-speed IS such that the minimum retail price equals the sum of the rates for essential components charged to competitors, including higher-speed access service and the incremental costs of other components required to provide the service.
- c) direct the incumbent carriers to amend their third party Internet access (TPIA) service and asymmetrical digital subscriber line (ADSL) tariffs, respectively, to make Lite IS comparable to that offered now, or in the future, by an incumbent carrier, available to third party Internet service providers (ISPs) either in the form of an access service, or where required by means of resale, under reasonable terms and conditions and at just and reasonable rates.
- d) review and vary the TPIA rates approved in *Terms and rates approved for large cable carriers' higher speed access service*, Order CRTC 2000-789, 21 August 2000 (Order 2000-789), to ensure that they cover their underlying costs in light of the Lite IS rates.
- e) review and vary the mandatory resale condition applicable to retail higher-speed IS provided by incumbent carriers pursuant to *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities*, Telecom Decision CRTC 99-11, 14 September 1999 (Decision 99-11), such that the mandatory 25% discounted resale price off the lowest retail price for higher-speed IS applies to each higher-speed service offering, including Lite IS and associated modems, Ethernet cards, installation and related costs.
- f) direct Aliant Telecom to provide its higher-speed IS to independent ISPs in accordance with a tariff approved by the Commission, and prohibit Aliant Telecom from promoting and marketing its retail higher-speed IS until such tariff is approved and in place.
- g) order any other relief the Commission considers appropriate.

7. In *IMCAIP's request for mandatory resale of retail Lite Internet service*, Telecom Decision CRTC 2003-47, 14 July 2003 (Decision 2003-47), the Commission addressed part of the relief requested by IMCAIP, specifying that the incumbent cable carriers are required to make their retail Lite IS available for resale at a 25% discount from the lowest retail price charged by the cable carrier to a customer in the applicable service area. The balance of IMCAIP's requested relief is addressed herein.

**A. Forbearance from regulating the incumbent carriers' retail higher-speed IS rates**

*Position of parties*

8. IMCAIP requested that the Commission review and vary the Commission's determinations to forbear from regulating the incumbent carriers' retail higher-speed IS rates. IMCAIP submitted that those markets served by DSL or cable modem technology were characterized by insufficient competition and should be subjected to Commission regulation.
9. IMCAIP argued that there was substantial doubt as to the correctness of the Commission's definition of the retail IS market as one market and of the Commission's finding in Decision 98-9 that incumbent cable and telephone carriers lacked substantial power in the relevant retail IS market.
10. IMCAIP submitted that in assessing whether there was sufficient competition to warrant forbearance from regulation, the relevant market to be examined by the Commission was not a combined dial-up and higher-speed IS market. IMCAIP submitted that the retail IS market had evolved into two distinct markets: dial-up IS at transmission speeds at, or below, 64 Kbps; and higher-speed IS at transmission speeds above 64 Kbps.
11. IMCAIP submitted that dial-up and higher-speed IS were discrete product markets because of: (i) the growing list of Internet functions for which dial-up was no longer a substitute for higher-speed service; (ii) pricing differences; (iii) differences in user demographics; and (iv) the increasingly divergent market characteristics of each market.
12. IMCAIP submitted that dial-up IS was no longer a substitute for numerous functions that could only be performed utilizing higher-speed IS. In support of its argument, IMCAIP referenced an April 2002 survey<sup>1</sup>, which indicated that relative to higher-speed IS subscribers, dial-up IS subscribers downloaded fewer movies and less music, and listened to fewer online audio broadcasts.
13. IMCAIP noted that a Spring 2002 survey of Canadian Internet users conducted by Ipsos-Reid<sup>2</sup> (the Ipsos-Reid Report) indicated that the average monthly price paid by residential higher-speed IS subscribers was \$27.10 compared with \$19.10 for dial-up IS. IMCAIP submitted that a further distinction was that dial-up IS was billed based on hours of use, whereas higher-speed IS was based on the volume of data transmissions.

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<sup>1</sup> NFO CF Group, *State-of-the-Net*, April 2002.

<sup>2</sup> Ipsos-Reid, *the Canadian Inter@ctive Reid Report* (Spring 2002).

14. IMCAIP noted that the Ipsos-Reid Report cited different demographics, usage patterns and market growth rates for dial-up and higher-speed IS subscribers.
15. IMCAIP noted that the EKOS Report<sup>3</sup> indicated, among other things, that 33% of respondents to the EKOS survey reported that their main reason for switching ISPs was to move to higher-speed IS and 6% reported that their prior service was too slow.
16. IMCAIP submitted that the findings of the National Broadband Task Force<sup>4</sup> (the NBTF Report) indicated that approximately three quarters of Canadian communities, representing about one quarter of the Canadian population, did not have access to higher-speed IS provided by cable or telephone carriers. In IMCAIP's view, a significant number of Canadians, particularly those in small, rural and remote communities, could not depend on competition between the telephone and cable carriers to protect their interests.
17. IMCAIP submitted that the pioneers of the Internet and the drivers of Internet innovation in Canada were independent ISPs. IMCAIP further submitted that a retail higher-speed IS market duopoly consisting of the incumbent carriers was far less likely to provide innovation, and new products and services than a higher-speed IS market in which the incumbents were forced to compete with independent ISPs.
18. The Companies, TCI and the CCTA opposed IMCAIP's request that the Commission should regulate the retail higher-speed IS market. They submitted that the Commission's decision to forbear from regulating this market remained appropriate.
19. The Companies submitted that the evidence before the Commission in the current proceeding confirmed that the IS market conditions described by the Companies in previous retail IS forbearance proceedings continued to prevail: that is, the IS market continued to be highly contested, with end-users enjoying decreasing prices, innovative service offerings and a range of other benefits resulting from the high degree of rivalry between a growing number of service providers. The Companies submitted that the introduction of lower-speed, lower priced IS by the incumbent carriers provided further compelling evidence of the high degree of rivalry in this market and demonstrated that end-users continued to benefit from this rivalry.
20. The Companies submitted that there was no evidence that IMCAIP's several markets theory had any greater basis than when put forth by IMCAIP in previous retail IS forbearance proceedings. The Companies referenced an American study<sup>5</sup> that stated "...most of the activities people engage in when connected to the Internet at home – e-mail, online shopping, checking sports scores, visiting chat rooms – can be done with a low-speed connection...."

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<sup>3</sup> EKOS Research Associates, The ISP Marketplace, Summer 2002.

<sup>4</sup> Report of the National Broadband Task Force "The New National Dream: Networking the Nation for Broadband Access", 18 June 2001.

<sup>5</sup> Unleashing the Potential of the High-Speed Internet: Progressive Policy Institute Technology & New Economy Project, Atkinson, Robert D., Shane Ham and Brian Newkirk authors, September 2002.

21. The Companies further referenced a Yankee Group Report dated November 2002<sup>6</sup> that stated: "Small and Medium Businesses (SMBs) purchase Internet access primarily from local and regional ISPs, dial-up continues to dominate the access market... and that e-mail remains the killer (application) for SMBs...most SMBs have not adopted applications that demand a broadband connection..."
22. The Companies cited IS end-user subscriber data from NBI/Michael Sone Associates<sup>7</sup> (the NBI/Sone Report) which they submitted showed that the size of the overall market had grown dramatically since December 2000, and that there was a 13.5% increase in the number of customers served with lower-speed IS.
23. The Companies stated that confidential information it provided indicated that retail prices for dial-up IS acted as a substantial influence on the ability of higher-speed ISPs to raise retail prices, and that there was considerable movement of customers from higher-speed IS to dial-up IS. The Companies maintained that the ability of customers to migrate back and forth between higher and lower-speed IS demonstrated that: (i) there were low barriers to switching; (ii) the lower price for dial-up IS was clearly a relevant factor in a user's decision as to which IS to purchase; (iii) the two services were substitutable from functionality and price perspectives; and (iv) higher-speed IS were part of the same relevant product market as dial-up IS.
24. The Companies submitted that the demand data for Bell Canada and/or BCE Nexxia's wholesale DSL-based Internet access service offerings filed in confidence in this proceeding demonstrated that growth in demand for these services had been substantial and appeared to be accelerating. The Companies added that ISPs had increased their use of wholesale services offered by Bell Canada and BCE Nexxia since the roll-out of Bell Canada's lower-speed retail DSL-based IS offering.
25. TCI submitted that no evidence had been provided to demonstrate that lower-speed and higher-speed IS were not reasonable and practicable substitutes for each other, or that the price of one service did not influence or constrain the price of the other.
26. TCI submitted that the retail IS marketplace displayed rivalrous behaviour depicting price and service competition provided from a number of independent firms using several different technologies. TCI submitted that in Calgary, Edmonton, Vancouver and a number of other communities across Canada, five or six companies, in addition to TCI and the cable carrier, offered various DSL and other IS at various speeds and at various prices, terms and conditions.
27. The CCTA submitted that, given the overwhelming evidence that competition in this market remained dynamic in terms of price, choice and innovation, it would be contrary to the interests of users to impose retail rate regulation on a competitive market. In its view, the goal and intent of IMCAIP's request appeared to be less about protecting the interests of users and more about protecting its members from the impacts of a competitive and evolving market.

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<sup>6</sup> "2002 Canadian SMB Survey Reveals Market's Great Potential for ISPs", Canadian Market Strategies Series, the Yankee Group, Quigley, Mark author, November 2002.

<sup>7</sup> NBI/Michael Sone Associates, Canadian Internet Service Providers Market Report, 2002 Edition, page 193.

28. The CCTA submitted that there had been no change in market conditions since Decision 2002-37, when the Commission re-affirmed the competitive nature of the market, to warrant the relief sought by IMCAIP. The CCTA noted that public statements made by Cybersurf Corp. (Cybersurf), an independent ISP, revealed that: (i) dial-up was still growing and was a profitable business segment for Cybersurf; (ii) Cybersurf planned to roll out higher-speed IS using TPIA to approximately 3 million households; and (iii) pricing retail higher-speed IS "significantly below" competitor rates and using the TPIA service to provide access was an economically viable proposition for Cybersurf.
29. The CCTA submitted that in the 2003-2004 timeframe, two new satellite-based Ka-band broadband Internet access services comparable to that of cable modem and DSL would be made available to Canadian consumers and small business markets anywhere in Canada, at competitively priced monthly rates. The CCTA noted that there were other new wireless alternatives, such as 2.5G and 3G wireless services, as well as Wireless-Fidelity 802.11b standards that were expected to permit users to connect to the Internet using public wireless access points.
30. In reply, IMCAIP stated that its application provided extensive, corroborated evidence confirming that lower-speed services were not effective substitutes for higher-speed services, and that these two markets exhibited radically different demand and supply characteristics, as well as differing market dynamics and levels of rivalry. IMCAIP submitted that downward migration was, and would continue to be, negligible compared to upward migration from dial-up to higher-speed IS. IMCAIP further submitted that based on its members' tracking of migration of higher-speed IS subscribers to independent ISPs, at most, 7% of their customers previously subscribed to a higher-speed IS. IMCAIP also submitted that the Companies' migration data did not provide evidence of the extent to which subscribers required high bandwidth functions and did not incorporate a significant non-transitory price increase.
31. IMCAIP noted that in a report dated 17 December 2001, the United Kingdom's telecommunications regulator, the Office of Telecommunications (Ofcom), reversed its conclusion regarding the definition of the retail Internet market in 2001 and now considered that the retail higher-speed IS market was a separate market.
32. IMCAIP submitted that as the cable and telephone carriers' duopoly in the retail higher-speed IS market became more entrenched, it would be easier for two dominant companies to control market pricing than it would be in a multiple service provider environment.
33. In IMCAIP's view, while retail higher-speed IS penetration and pricing compared favourably to other countries, Canada's performance was not as strong as it might otherwise have been in a multiple service provider environment. According to IMCAIP, Canada's performance was not an indicator of effective competition.
34. IMCAIP submitted that the Organization for Economic Co-operation and Development (the OECD) was unequivocal in its view that duopolies did not provide sufficient competition to ensure a competitive industry in the long term. IMCAIP also submitted that the OECD accepted that infrastructure competition was the most fundamental policy available to

OECD governments to boost broadband access and that as a second step, the opening up of the network elements of players in dominant positions, using such regulatory tools as unbundling of local loops and line sharing, was also necessary.

35. In response to IMCAIP's reply, the CCTA submitted that it was not appropriate for the Commission to adopt Oftel's findings. The CCTA submitted that the Canadian IS market was much more developed than the United Kingdom market both in terms of the penetration rates of IS of all speeds, as well as the deployment of broadband IS infrastructure.
36. The CCTA further submitted that if one were to accept Oftel's definitions for use in the Canadian situation, the lower-speed/narrowband market, which limits downstream speed up to 128 Kbps, would include both dial-up IS as well as the Lite IS offerings from the telephone and cable carriers.
37. The CCTA noted that Oftel's regulatory strategy document, referenced by IMCAIP, expressed concern that too heavy-handed regulation could hinder the longer-term prospects for infrastructure competition. In this regard, the CCTA further noted that Oftel's regulatory strategy document stated that a particular challenge of regulatory action was addressing problems in a manner that did not deter investment or stifle innovation.
38. The CCTA submitted that the OECD supported the opening of the network of players in dominant positions to competitive forces and that Canada had already taken this step for broadband access. The CCTA submitted that the primary and fundamental policy endorsed by the OECD to boost broadband access was infrastructure competition. The CCTA noted that the success that Canada had achieved regarding broadband Internet penetration was highlighted by the OECD in a report on Canada's regulatory reform:

Canada is ranked 2<sup>nd</sup> in the OECD in terms of overall broadband penetration. By June 2001, Canada had 1.9 million subscribers to cable modem and DSL services. A key ingredient in Canada's rapid development of broadband services is competition between different networks owned by independent actors. In addition, Canada was also one of the first OECD countries to introduce unbundling for telecommunication networks and open access for cable networks. Canada has high penetration rates for fixed telephony and cable infrastructure. These competing infrastructures are already providing strong competition in broadband Internet markets.

#### **Commission analysis and determination**

39. IMCAIP's request that the Commission review and vary previous forbearance decisions with respect to retail IS rates was based on IMCAIP's allegation that there is substantial doubt as to the correctness of the Commission's definition of the retail IS market as one market and the finding that incumbent carriers lack substantial market power in the relevant IS market.
40. In *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission adopted the concept of market power, commonly used in economics and in competition law, as the standard by which to determine whether a market is competitive. In that decision, the Commission also stated that a well-defined product market



which takes into account practical substitutes and other demand features is critical in analyzing market power. In this regard, the Commission noted, "The relevant market is essentially the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase."

41. In Decision 98-9, the Commission concluded that retail IS constitutes a single market, irrespective of transmission speeds. The Commission noted that all retail IS provides users with applications such as e-mail, and the ability to upload and download information to and from the Internet. The Commission also concluded that the retail IS market was sufficiently competitive for the Commission to forbear from regulating retail IS rates.
42. In Decision 2002-37, the Commission rejected IMCAIP's request that the Commission reverse its decision to forbear from regulating the provision of retail residential DSL IS by Bell Canada and its affiliates. The Commission found that the degree of competition between the telephone and the cable carriers was sufficient to protect the interests of consumers.
43. In Decision 2002-37, the Commission considered that a finding that retail DSL IS constitutes a separate and distinct market would require evidence to demonstrate, among other things, that the services in question are not reasonable and practical substitutes for each other or that the price of one service does not influence or constrain the price of the other.
44. The Commission notes that the EKOS Report, relied upon by IMCAIP, indicated that 33% of customers who had switched ISPs identified higher-speed as the main reason for having switched. However, it also indicated that of customers who switched ISPs, only 6% cited the fact that prior service was too slow as the main reason for switching ISPs. In the Commission's view, this does not lead to the conclusion that higher-speed and dial-up IS are not reasonable and practical substitutes.
45. IMCAIP provided information on IS functions for which dial-up IS was problematic. For example, IMCAIP submitted that dial-up IS could not provide the same level of performance as higher-speed IS in respect of high-bandwidth applications, such as real-time video programming, customized music, video libraries and telemedicine. IMCAIP, however, did not provide evidence of actual usage patterns of Canadian IS users. The Commission also notes that IMCAIP provided information indicating that many activities in which people currently engage when connected to the Internet can be done with a lower speed IS connection.
46. The Commission does not consider that the price and billing differences presented by IMCAIP and the fact that higher-speed IS users spend more time on the Internet than dial-up users, indicate that higher-speed and lower-speed IS are not part of the same relevant product market. The Commission considers that the key issue is whether these two services are substitutes for one another from a demand perspective. In this regard, the Commission considers that there is insufficient evidence to conclude that higher-speed and dial-up IS are currently not reasonable and practical substitutes for each other, and that the price of one service does not influence or constrain the price of the other.
47. The Commission considers that in determining whether dial-up and higher-speed IS constitute separate markets, a relevant question is whether higher-speed IS customers would switch to dial-up in the face of a significant non-transitory price increase. While mindful of concerns

expressed by IMCAIP with respect to the migration evidence filed in confidence by the Companies, the Commission considers that such evidence suggests that competitive behaviour in the provision of retail higher-speed IS has resulted in movement of end-users between dial-up, DSL Lite, higher-speed DSL, cable modem Lite and higher-speed cable modem service offerings. The Commission considers that this type of churn is suggestive of a single relevant product market.

48. The Commission notes IMCAIP's submission that the growth of higher-speed IS and the decline of dial-up IS, as a percentage of the overall market, are reflective of two distinct relevant product markets.
49. As a new technology enters the market and is vigorously marketed and promoted, the proportion of customers using the existing technology as a proportion of the overall market is likely to decline, and the fact that customers can choose one type of service and its technology over another does not necessarily suggest that there are two separate markets. The Commission does not consider that the growth of higher-speed IS and the decline of dial-up IS as a percentage of the overall market is reflective of two distinct relevant product markets.
50. In light of the above, the Commission considers that IMCAIP has not provided adequate evidence to establish that the provision of retail higher-speed IS currently constitutes a separate relevant product market. Accordingly, the Commission finds that there is no substantial doubt as to the correctness of the Commission's definition of the retail IS market as one market.
51. With regard to IMCAIP's allegation that there is substantial doubt as to the Commission's finding that incumbent carriers lack substantial market power in the relevant IS market, the Commission notes that the analytical framework set out in Decision 94-19, for determining whether to forbear from regulation pursuant to section 34 of the Act, focuses on an analysis of market power.
52. The Commission further notes that in Decision 94-19, market power is stated to be a function of three factors: (i) market share held by the dominant firm; (ii) demand conditions affecting responses of customers to a change in price of the product or service in question; and (iii) supply conditions affecting the ability of other firms in the market to respond to a change in the price of the product or service.
53. The Commission considers that IMCAIP has not sufficiently addressed the underlying analytical framework required to revoke forbearance.
54. The Commission considers that the retail IS market is highly competitive and exhibits characteristics associated with such competitiveness. There is no dominant firm in the retail IS market. Rather, there is rigorous competition including facilities-based competition between separate and unaffiliated telephone and cable competitors. 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 non-incumbent ISPs had 4.3 million IS subscribers. The Commission notes that as referenced in the *Report to the Governor in Council: Status of*

*Competition in Canadian Telecommunications Markets - Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, issued 20 December 2002 (2002 - GIC Report), as of 31 December 2001, Internet access revenue market shares were split 39% for telecommunications incumbents, 31% for cable incumbents and 30% for non-incumbents<sup>8</sup>.

55. The Commission notes that consumers have benefited from the roll-out and expansion of networks to provide retail IS, the development and launch of new service offerings, as well as promotional offers and pricing in the marketplace as competitors try to attract more customers to their services. The Commission notes that the market for retail IS has been characterized by price decreases over the years and by many short term promotional offers. The Commission further notes that there are numerous retail IS price options across the whole spectrum of IS, ranging from less than \$10 per month to \$70 per month and more. Also, price incentives are regularly introduced and met by competitors. The Commission considers that end-users have greatly benefited from the operation of this market.
56. The Commission further notes that there is a wider range of retail IS available today than when the Commission forbore from regulating the retail IS market. These include dial-up services, Lite services, higher-speed, high priced "ultra higher-speed" services, as well as business higher-speed, 2.5 GHz wireless and emerging satellite services.
57. The Commission considers that the cable carriers' introduction of lower-speed and lower priced cable modem IS to compete with the telephone carriers and other service providers' dial-up IS, and their ability to attract customers away from ADSL-based services, further suggests a responsive and competitive market for retail IS in Canada.
58. The Commission further considers that Canada is a world leader in Internet and broadband penetration and consumers are profiting from some of the lowest prices in the world. The Commission notes that overall penetration of IS in Canadian households has grown from less than 25% in 1998 to almost 50% in 2001.
59. In light of the above, the Commission finds that IMCAIP has not demonstrated that the incumbent telephone carriers or the incumbent cable carriers have market power in the provision of retail IS.
60. The Commission notes that the higher-speed retail IS market segment is characterized by vigorous facilities-based competition between separate and unaffiliated telephone and cable carriers. The Commission further notes that no firm is dominant. As referenced in the 2002 - GIC Report, as of 31 December 2001, higher-speed Internet access revenue market shares were split 35% for telephone carriers, 49% for incumbent cable carriers and 16% for non-incumbents<sup>9</sup>. As with the overall retail IS market, the higher-speed retail IS market segment is characterized by price decreases, promotional offers, as well as a variety of service and pricing options.

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<sup>8</sup> *The Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets - Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, issued 27 November 2003 (2003 - GIC Report) also supports the fact that there is no dominant firm in the retail IS market.

<sup>9</sup> The 2003 - GIC Report is supportive of the fact that there is no dominant firm in the higher-speed retail IS market.

61. With respect to IMCAIP's submission that a significant number of Canadians cannot depend on competition between the telephone and cable carriers, the Commission notes that the NBTF Report dated June 2001, cited by IMCAIP, indicated that approximately three-quarters of Canadians had access to retail higher-speed IS and that approximately half of all Canadians had a choice in their type of retail higher-speed IS. The Commission notes that the provision of retail higher-speed IS continues to evolve and is expected to be enhanced by new satellite alternatives and new business networks built under government broadband initiatives.
62. In light of the above, the Commission finds that IMCAIP has not demonstrated that the higher-speed segment of the retail IS market, even if it were found to be a separate relevant market, is not sufficiently competitive to protect the interests of users.
63. Accordingly, the Commission finds that IMCAIP has not demonstrated that there is substantial doubt as to the correctness of the Commission's determinations to forbear from regulating the incumbent carriers' retail higher-speed IS rates in Orders 97-471, 97-928, 97-1666, 97-1667, 98-619 and 99-592, and Decisions 98-9 and 2002-37. The Commission therefore **denies** IMCAIP's request.

#### **B. Retail IS floor price for incumbent carrier higher-speed IS**

##### *Position of parties*

64. IMCAIP requested that the Commission direct each incumbent carrier to provide its retail higher-speed IS such that the minimum retail price equals the sum of the rates for essential components charged to competitors, including higher-speed access service, and the incremental costs of other components required to provide the service.
65. IMCAIP submitted that the least intrusive, most efficient and effective form of regulatory oversight required to address the retail pricing issue would be to establish and enforce a retail floor price for incumbent carriers' retail higher-speed IS. This, according to IMCAIP, would be analogous to the Commission's imputation test.
66. In response, the Companies submitted that there was no reason why the Commission, in such a vigorously contested market, should intervene to require the telephone and the cable carriers to provide IMCAIP members retail price protection in the form of price floors.
67. The CCTA submitted that the key market characteristics associated with the requirement for an imputation test were absent from the retail higher-speed segment of the Internet market. The CCTA also submitted that IMCAIP had failed to demonstrate that there was any evidence of anti-competitive pricing.
68. In reply, IMCAIP submitted that an imputation test was not restricted to monopoly regimes but that it was an important competitive safeguard, particularly where competitors, such as IMCAIP, needed access to essential facilities that were only available from the incumbent carriers.

### **Commission analysis and determination**

69. The Commission notes that IMCAIP's request would entail the Commission regulating retail higher-speed IS rates by setting an artificial floor price for higher-speed IS. Such an action would be contrary to the Commission's denial of IMCAIP's request to review and vary previous determinations in which it forbore from regulating the retail IS market.
70. Accordingly, the Commission **denies** IMCAIP's request.

### **C. Availability of a Lite IS access service**

#### *Position of parties*

71. IMCAIP requested that the Commission direct the incumbent carriers to amend their TPIA and ADSL tariffs to make Lite IS available in the form of an access service, comparable to Lite IS offered now, or in the future, by an incumbent carrier.
72. IMCAIP noted that in Order 2000-789, the Commission expressed the preliminary view that a cable carrier would be acting contrary to subsection 27(2) of the Act if its TPIA tariff included volume usage rate restrictions that differed from those applicable to its own IS. IMCAIP submitted that this preliminary view was directly applicable to its application.
73. IMCAIP submitted that the price of retail Lite IS, at \$21.95 to \$29.95 per month, by the incumbent carriers was marginally above the TPIA tariff and substantially below Bell Canada's retail higher-speed IS rates and conferred an undue preference on the incumbents and unjustly discriminated against independent ISPs in both the retail higher-speed and dial-up IS market segments. IMCAIP submitted that the slight difference between the unregulated Lite IS prices established by the incumbent cable carriers and their tariff higher-speed access services, the latter which were required by independent ISPs to compete in the retail segment of the higher-speed IS market, effectively kept independent ISPs out of the higher-speed retail IS market segment. IMCAIP submitted that the pricing of Lite IS had undermined and prevented the development of healthy and widespread competition in these markets and had fundamentally changed the dynamics of the higher-speed IS market segment.
74. IMCAIP submitted that Lite IS rates directly threatened the future of the dial-up IS market and the viability of independent dial-up ISPs. IMCAIP further submitted that Lite IS was expressly targeted at dial-up IS users, and provided them with more and better on-line services at price points only marginally higher than the monthly rates for dial-up IS.
75. IMCAIP argued that under the Commission's existing rules there was no economically viable means for independent ISPs to provide a Lite IS that could compete against the incumbent carriers' Lite IS utilizing mandatory resale, TPIA or ADSL service. IMCAIP submitted that Lite IS had accelerated the decline of the dial-up IS market. With no economically viable higher-speed offerings of their own, and increasing migration of their dial-up IS customers to higher-speed IS provided by the incumbent carriers, the independent ISPs were either consolidating or exiting the market. IMCAIP noted that the EKOS Report showed that the market share for independent ISPs had dropped from 64% in September 1997 to 14% in June 2002.

76. IMCAIP submitted that the EKOS Report confirmed that Lite IS was having its greatest impact, and would continue to have its greatest impact, on existing dial-up IS customers and "intender" households, defined as respondents to the EKOS survey who said they expected to subscribe to IS within the next year. IMCAIP noted that 43% of the dial-up IS respondents indicated they were either "somewhat likely", "very likely", or "extremely likely" to upgrade their current IS to Lite IS.
77. The Companies, TCI and the CCTA opposed IMCAIP's request to make Lite IS available as an access service. They submitted that the introduction of Lite IS was in response to a competitive market and prices were driven by market forces.
78. The Companies submitted that, in a competitive environment, it was preposterous for IMCAIP to contend that Bell Canada and the cable carriers should be required to offer IMCAIP wholesale IS at rates that guaranteed that IMCAIP could offer its own Lite IS without risk.
79. The Companies submitted that in order to continue to participate in the IS market they must be able to price their services competitively, attract new customers and retain existing customers. Lower-speed IS was merely one of a variety of new service offerings the Companies and their competitors were developing to address market needs.
80. TCI submitted that it was, at best, simplistic and, at worst, opportunistic to assert that independent ISPs could not continue in the retail higher-speed segment of the Internet market because TCI was pricing its retail IS to react to the market prices set by its largest competitors, namely, the cable carriers.
81. The CCTA stated that cable carriers were finding that the vast majority of all new broadband Internet subscribers were still choosing the regular higher-speed product rather than the Lite service.
82. The CCTA argued that IMCAIP had not established that pricing in the market was anti-competitive. The CCTA submitted that margins for higher-speed IS had actually increased relative to TPIA tariffs as a result of retail price changes and the introduction of ultra higher-speed IS. The CCTA further submitted that cable and telephone carriers were engaged in a competitive struggle on a number of fronts and that the primary focus of the cable carriers' pricing and marketing strategy was to compete with incumbent telephone carriers, not the independent ISPs. In the CCTA's view, anti-competitive pricing was not a viable pricing strategy for cable carriers.
83. The CCTA submitted that IMCAIP had not demonstrated that third-party access to higher-speed IS was unavailable. The CCTA argued that there was no regulatory justification to support a request for access tariffs for Lite IS. The CCTA noted that resale of retail IS was mandated by the Commission because the Commission considered that, absent an approved TPIA tariff, ISPs could not otherwise duplicate or offer higher-speed IS. The CCTA submitted that Lite IS exhibited a high degree of substitutability with dial-up IS, competing directly with that service.
84. In reply, IMCAIP submitted that the Commission's well-established principles for regulating the incumbent carriers' higher-speed access services required that these services be offered in accordance with a tariff and that the rates be cost-justified. IMCAIP submitted that the

incremental costs to the incumbent carriers of using their access services to provide retail Lite IS may be lower than the costs of providing regular higher-speed IS, given the lower transmission speeds and volumes associated with Lite IS.

#### **Commission analysis and determination**

85. The Commission notes that IMCAIP submitted that the pricing of retail Lite IS, marginally above the TPIA tariff and substantially below Bell Canada's higher-speed IS rates, conferred an undue preference on the incumbent carriers and unjustly discriminated against independent ISPs, contrary to subsection 27(2) of the Act.
86. The Commission notes that, in *Application by Canadian Association of Internet Providers regarding ADSL-based Internet services*, Telecom Order CRTC 99-591, 25 June 1999, the Commission considered that:

... below cost pricing (in the short-run) is not necessarily inconsistent with highly competitive and innovative markets, particularly in instances where substantial technological advances are expected to impact upon the cost of providing certain types of services. In the circumstances of this case, the Commission considers that below cost pricing by Bell's affiliates is in response to the competitive pressures and pricing initiatives by the cable companies. Contrary to CAIP's argument, the Commission considers that Bell's affiliates' pricing practices can be viewed as evidence of competition in the market place.
87. The Commission considers that the introduction by the cable carriers of lower-speed and lower priced cable modem services, rather than undermining the continuance of competition, provides further evidence that the market is rigorously competitive.
88. With respect to higher-speed access service, the Commission notes that in Decision 98-9, it found that the incumbent telephone and cable carriers had substantial market power with respect to this market, and that this market was not yet sufficiently competitive to justify forbearance with respect to the rates and terms on which these carriers provided higher-speed access services.
89. The Commission found that the incumbent carriers must provide their higher-speed access services in accordance with a tariff that is cost based.
90. The Commission notes that in Order 2000-789, it stated:

... the terms on which access is provided to ISPs and on which the carrier uses its facilities to provide its own higher speed retail Internet service must not result in a preference or discrimination that is contrary to subsection 27(2) of the *Telecommunications Act*... If an issue arises as whether a carrier uses its facilities to provide its own retail Internet service on a basis that is more favourable than that on which an ISP may use the carrier's access service, the onus would be on the carrier to establish that its actions are not contrary to subsection 27(2) of the Act.

91. The Commission considers that to the extent that the costs to an incumbent carrier to provide Lite access service are lower than the costs to provide regular higher-speed access service, an incumbent carrier could be using its facilities to provide its own retail IS on a basis that is more favourable than that on which an ISP may use the incumbent carrier's access service.
92. The Commission considers that, in the absence of an assessment of the underlying Lite access service costs, it would be premature to determine if the failure to provide a Lite access service conferred an undue preference on the incumbents contrary to subsection 27(2) of the Act.
93. Additionally, the Commission considers that a TPIA tariff for Lite access service should be filed for Commission approval if an incumbent carrier's costs to provide Lite access service are significantly lower than the costs to provide regular higher-speed access service.
94. In light of the above, the Commission considers that further costing information is required to determine whether an undue preference is being conferred and whether tariffs are required for the provision by the incumbent carriers of Lite access service. Accordingly, the Commission directs incumbent carriers with tariffs for TPIA or ADSL to file, within 60 days, cost studies based on the Commission's incremental Phase II costing approach, delineating the specific costs causal to Lite access service.

#### **D. TPIA rates**

##### *Position of parties*

95. IMCAIP requested that the Commission review and vary the TPIA rates approved in Order 2000-789 to ensure they cover their underlying costs in light of the retail Lite IS rates.
96. IMCAIP submitted that the information contained in the confidential affidavits from independent ISPs that it submitted with its application raised substantial doubt as to the correctness of the TPIA rates approved by the Commission in Order 2000-789.
97. IMCAIP submitted that the evidentiary statements of Messrs. Rifici and Mercia of Cybersurf, confirmed that there was no economically viable model for independent ISPs to offer a competitively priced higher-speed offering of their own once the costs of modems, installation, Ethernet cards, billing and collection were included with the approved TPIA rates.
98. IMCAIP stated that it understood that the incumbent cable carriers' costs causal to the provision of Lite IS were identical to those that were causal to the provision of their regular higher-speed IS. IMCAIP submitted that accordingly, if the cable carriers' Lite IS was priced above its causal costs, this constituted evidence that the cable carriers dramatically overstated the costs causal to their regular higher-speed IS in the proceeding approving the final TPIA rates in Order 2000-789, resulting in TPIA rates that are too high. IMCAIP further submitted that, alternatively, if the cable carriers' Lite IS rates were not compensatory, then they were engaging in anti-competitive predatory pricing.



99. IMCAIP noted that the Commission had rejected many aspects of the cable industry's costing methodology in the proceeding initiated by *Cable inside wire fee*, Broadcasting Public Notice CRTC 2002-51, 3 September 2002. IMCAIP submitted that the costs of the TPIA service at issue in its application were purportedly based on a more complex Phase II costing methodology.
100. The CCTA submitted that IMCAIP's assertions regarding the competency of the cable carriers in preparing cost studies, and the accuracy of the costing study results, were without merit. The CCTA noted that in Order 2000-789, the Commission approved TPIA rates based on a detailed review and assessment of the cable carriers' Phase II cost studies. The CCTA submitted that furthermore, with respect to the methodology for establishing multi-dwelling unit inside wire rates, no inferences could be drawn regarding the cable carriers' ability to conduct Phase II cost studies for the purpose of establishing tariffs for TPIA service.
101. Further to IMCAIP's concerns expressed about the cable carriers' costing methodology, the CCTA submitted that the cable industry had spent considerable resources developing the TPIA service for the Canadian market, and that the costs were attributable to a number of activities including CRTC Interconnection Steering Committee proceedings, tariff proceedings and technical trials.

#### **Commission analysis and determination**

102. The Commission notes that in Order 2000-789, it established certain, but not all, rates for TPIA using the costs of the four major cable carriers, namely, Cogeco, RCI, Shaw and Vidéotron. The Commission approved volume usage rate restrictions and monthly per end-user access rates (end-user rates) on a final basis.
103. With respect to IMCAIP's submission that there was no economically viable model for independent ISPs to offer a competitively priced service, the Commission notes that IMCAIP had previously argued that TPIA rates should be set with entrant viability as a criterion, and that the purpose of the rate making exercise should be to foster competition. The Commission notes that such an approach was rejected by the Commission in Order 2000-789.
104. The Commission has considered the parties' arguments with respect to the appropriateness of establishing rates on the basis of benchmark or entrant viability. The Commission notes that in Order 2000-789, it remained of the view, consistent with its direction to the cable carriers in *Regulation under the Telecommunications Act of cable carriers' access services*, Telecom Decision CRTC 99-8, 6 July 1999, that rates for the cable carriers' access service should be based on the appropriate incremental Phase II costs of the service plus an appropriate mark-up.
105. With respect to IMCAIP's submission that if the cable carriers' Lite IS rates were not compensatory then the cable carriers were engaging in anti-competitive predatory pricing, the Commission considers that key conditions, associated with predation, are absent.
106. The Commission notes IMCAIP's submission that if the cable carriers' Lite IS is priced above its causal costs, this constitutes evidence that the cable carriers dramatically overstated the costs causal to their regular higher-speed access service in the proceeding culminating with

the final TPIA rates in Order 2000-789. The Commission disagrees with this contention. The Commission considers that the referenced retail price points do not, in themselves, serve as evidence that costs were overstated.

107. With regard to IMCAIP's submission regarding the cable carriers' ability to conduct Phase II cost studies, the Commission notes that it approved TPIA rates based on a detailed review and assessment of the cable carriers' Phase II cost studies.
108. The Commission considers that, over time, a reassessment of costs causal to access service could, for example, reveal price decreases to the capital resources required to provide access service, or reveal increases in the capacity of required plant replacements. In addition, the Commission considers that operational efficiencies beyond those initially forecasted by the cable carriers could be realized over time. Accordingly, the Commission considers that a reassessment of underlying access costs could result in lower TPIA rates and that further review by the Commission is warranted.
109. Accordingly, the Commission directs Cogeco, RCI, Shaw and Vidéotron to file, within 60 days, updated cost studies based on the Commission's incremental Phase II costing approach for the access services which relate to the per end-user access rates approved by the Commission in Order 2000-789.
110. The Commission also notes that a mark-up is generally used to recognize the use of fixed and common resources, such as overhead support costs, which do not vary with the offering of a particular service and which are excluded from the Phase II cost study. The Commission further notes that in *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, the Commission established pricing categories for interconnection and ancillary services required by Canadian carriers and resellers interconnecting to the incumbent local exchange carrier's (ILEC's) network as well as for services developed for use by telecommunications service providers. In this regard, the Commission further directs Cogeco, RCI, Shaw and Vidéotron to file, within 60 days, their respective views on the appropriate mark-ups to be used in establishing the above-referenced per end-user access rates, with full justification.

#### **E. Mandatory resale**

##### ***Position of parties***

111. IMCAIP requested that the Commission review and vary the mandatory resale condition established in Decision 99-11, applicable to retail higher-speed IS, such that the mandatory 25% discounted resale price off the lowest retail price for higher-speed IS applies to associated modems, Ethernet cards and installation.
112. IMCAIP submitted that there was a fundamental flaw in Decision 99-11 in that there was no price constraint to prevent the incumbent cable carriers from discounting services and facilities related to their retail higher-speed IS offering, including modems, Ethernet cards, installation and other services. In IMCAIP's view, substantial doubt as to the correctness of

Decision 99-11 arose from a fundamental change in circumstances which had occurred since the original decision, namely the aggressive discounting by the incumbent carriers of related services and equipment.

113. IMCAIP stated that Shaw had begun selling modems to Shaw subscribers at \$60, something Cybersurf could not do. IMCAIP further stated that Cybersurf was subjected to minimum modem order quantities from manufacturers and that exclusive manufacturer distribution arrangements existed with RCI.
114. IMCAIP submitted that given the virtually non-existent level of interest by independent ISPs in resold service, and the cable carriers' aggressive discounting of these services and related equipment such as modems and installation, there was substantial doubt as to the correctness of the terms of the Commission's original resale condition established in Decision 99-11.
115. In the CCTA's view, IMCAIP had not demonstrated that the Commission erred in establishing a transitional resale regime or that modifications to the transitional resale regime, including resale and access tariffs for Lite service, were required. The CCTA submitted that modems and cards were readily available and subject to declining costs.
116. Vidéotron noted that in Decision 99-11, the Commission required cable carriers to discount only retail higher-speed IS, not the cable modem, Ethernet card or installation services. Vidéotron stated that the referenced equipment was not based on proprietary standards and was sold by many different competitive vendors.
117. In its response, IMCAIP submitted that many cable carriers continued to operate proprietary cable modem systems across portions of their territory.

#### **Commission analysis and determination**

118. The Commission notes that in Decision 99-11, it ordered incumbent cable carriers to make their retail higher-speed IS available on a resale basis.
119. In its 3 December 1999 letter to the CCTA and CAIP, the Commission clarified, pursuant to its determinations in Decision 99-11, that cable carriers are not required to resell cable modems to third party ISPs. The Commission stated that "modems are not barriers to entry for ISPs..." and that, "...ISPs can purchase cable modems to combine with the cable carrier's resold IS to provide IS in competition with cable carriers." The Commission further notes that in its 10 December 1999 letter denying Cogeco's application to review and vary Decision 99-11, the Commission stated: "incumbent cable carriers are not required to resell cable modems to third party ISPs. Ethernet cards are similarly excluded from the resale requirements as they involve non-proprietary technology and are easily available from many sources." The Commission further stated: "In virtually all resale situations, the underlying service provider provides, and would wish to provide, installation, servicing and disconnects of the equipment that it owns. The fact that these activities are undertaken by contractors should not matter, regardless of whether the cable carrier is providing them to an ISP or to an end-user."

120. The Commission notes that non-proprietary data over cable service interface specification (DOCSIS) cable modems and Ethernet cards are available to ISPs and are sold by different competitive vendors.
121. The Commission considers that ISPs are fully capable of installing modems and Ethernet cards and configuring customers' computers for retail higher-speed IS.
122. The Commission further considers that the record of this proceeding has not established if, and to what extent, cable carriers operate proprietary cable modem systems (i.e., non-DOCSIS) and to the extent that they did, why this would necessitate, as a general policy, extending the 25% mandatory resale discount.
123. To the extent that cable carriers operate proprietary cable modem systems and these incidental items are not competitively available, the Commission is addressing such situations on a case-by-case basis. The Commission notes that in *Application by Cybersurf seeking resale of Shaw higher-speed retail Internet service*, Telecom Decision CRTC 2003-87, 23 December 2003, the Commission ordered Shaw to make proprietary modems available to ISPs at a resale rate equal to the lowest retail price at which it sells them to its own customers.
124. In the Commission's view, IMCAIP has not put forward sufficient evidence to support its view that a fundamental change in circumstances has occurred relating to the provision of incidental equipment and services that would necessitate the extension of the 25% mandated resale discount to such services and equipment.
125. The Commission finds that IMCAIP has not demonstrated that there is substantial doubt with respect to the correctness of Decision 99-11 that the resale requirement does not apply to incidental items including cable modems, Ethernet cards and installation. Accordingly, the Commission **denies** IMCAIP's request.

#### **F. Provision of wholesale higher-speed access by Aliant Telecom**

##### *Position of parties*

126. IMCAIP requested that the Commission direct Aliant Telecom to provide its retail higher-speed IS to independent ISPs in accordance with a tariff approved by the Commission, and prohibit Aliant Telecom from promoting and marketing its retail higher-speed IS until such tariff is approved and in place.
127. IMCAIP submitted that the exclusive use by Aliant Telecom of its own higher-speed networks to provide retail higher-speed IS, while failing to provide such a service to independent ISPs, conferred an undue preference directly or indirectly on Aliant Telecom while subjecting IMCAIP to an unjust disadvantage, contrary to subsection 27(2) of the Act. In IMCAIP's view, the preference was undue and the disadvantage unjust in light of the following: (i) the dominant position of Aliant Telecom in the retail higher-speed market segment; (ii) the lack of available higher-speed access facilities in its serving territories; and (iii) the absence of a tariff access service effectively precluded independent ISPs from entering the retail higher-speed market segment.

128. The Companies submitted that, contrary to IMCAIP's mischaracterization of Aliant Telecom's offerings, Aliant Telecom offered ADSL access service under a number of tariffs which were fully compliant with the Commission's directives. The Companies noted that under the access arrangements available through these tariffs, DSL service providers (DSLSPs) could establish ADSL service in a line sharing mode over primary exchange service. The Companies further noted that DSLSPs could also establish ADSL retail service to end-customers by means of unbundled loops.
129. The Companies submitted that in Decision CRTC 2001-287, 25 May 2001 (Decision 2001-287), the Commission permitted the sub-leasing of co-location space, thereby providing DSLSPs the opportunity to reduce co-location costs by sharing the space with other co-locators. The Companies further submitted that in *Connecting to a telephone company via a co-located third party*, Telecom Order CRTC 99-1107, 25 November 1999 (Order 99-1107), the Commission allowed co-locators to interconnect with third parties for the transport of traffic out of an ILEC central office.

#### **Commission analysis and determination**

130. The Commission notes that further rate restructuring of Bell Canada's and TCI's wholesale ADSL service is being considered in the context of Bell Canada Tariff Notice 6622 and TCI Tariff Notice 72. The scope of the proceeding associated with Bell Canada Tariff Notice 6622 was expanded to include Aliant Telecom.
131. The Commission notes that Aliant Telecom, in the context of the Tariff Notice 6622 proceeding, was requested to file its proposed wholesale tariffs using a rate structure similar to that proposed in Bell Canada's Tariff Notice 6622 regarding ADSL access service. The Commission notes that Aliant Telecom filed its proposed tariffs on 22 July 2003.
132. In light of the ongoing Tariff Notice 6622 proceeding, the Commission considers that it would be inappropriate to rule on whether Aliant Telecom's failure to provide higher-speed access service would be contrary to subsection 27(2) of the Act.
133. The Commission notes that in the absence of an Aliant Telecom wholesale tariff for the provision of ADSL access, and while not necessarily a satisfactory alternative to a wholesale offering from a terms, conditions and price point perspective, Aliant Telecom offers ADSL access service under various tariffs.
134. The Commission further notes that in Decision 2001-287, it permitted the sub-leasing of co-location space thereby providing DSLSPs the opportunity to reduce co-location costs by sharing the space with other co-locators. In addition, in Order 99-1107, the Commission allowed co-locators to interconnect with third parties for the transport of traffic out of an Aliant Telecom central office.

135. With regard to IMCAIP's request that Aliant Telecom be prohibited from promoting and marketing its retail higher-speed IS until it has an approved tariff in place to provide its higher-speed access service to independent ISPs, the Commission considers that it would not be in the public interest to restrict the development of retail higher-speed IS in this way. The Commission is of the view that it would be in the public interest for retail higher-speed IS to continue to be made available to new users.
136. Accordingly, the Commission **denies** IMCAIP's request.

Secretary General

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