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BY E-MAIL (telecom@ic.gc.ca)

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**Re: Consultation regarding Proposed Order Varying
Telecom Decision CRTC 2006-15 - Comments of Cybersurf Corp.**

I. Introduction

1. Cybersurf Corp. (“Cybersurf” or the “Company”) is providing these comments in the above-cited consultation process initiated by the notice set out at pages 4312 to 4321 of the Canada Gazette Part I, Vol. 140, No. 50 issued on December 16, 2006 (the “Notice”).
2. Cybersurf’s remaining comments are divided into two parts. The first set of comments addresses when the Governor in Council should intervene to modify decisions made by the Canadian Radio-television and Telecommunications Commission (“CRTC” or “Commission”), and the second set addresses what if any changes should be made to Telecom Decision CRTC 2006-15 (“Decision 2006-25” or the “Decision”) in the present case.

II. The Governor in Council’s Power to Vary, Rescind or Refer Back Decisions Made by the CRTC Should only Be Used in Rare Circumstances and Where the Power Is Used a Referral Back to the CRTC Should Be Employed Except in the Most Exceptional of Cases

3. Section 12 of the *Telecommunications Act* (“Act”) authorizes the Governor in Council to vary or rescind a Commission decision or to refer it back to the Commission for reconsideration of all or a portion of it.
4. Cybersurf is of the view that this power should only be used very sparingly, and where it is to be used at all, referring a decision back to the Commission for reconsideration of all or a portion of it is preferable to a variance or rescission of a decision by the Governor in Council. The power to vary or rescind a Commission decision should be reserved for the clearest of cases, where there is no risk that such an action could lead to a non-desirable policy outcome.

5. The Commission only makes its determinations after conducting public processes governed by applicable laws (such as the *Act*) and by the rules of natural justice and procedural fairness. The Commission's decisions are also made with the benefit of the knowledge of the industry, technical expertise and institutional memory that the Commission and its predecessors have acquired in telecommunications regulation over the course of a very lengthy period of time. The Commission's processes are also suited to the development of proceeding records that are well-developed and take into account all relevant viewpoints and levels of detail of information required for sound decision-making. Finally, the Commission makes its decisions with a view to advancing the public interest broadly defined, and in so doing, it has been promoting competition at the retail level in local telephony for a number of years.

6. This is not to say that the Commission's processes or focus are perfect or that every determination that the Commission makes is consistent with government policy. For example, a much greater regulatory emphasis needs to be placed on the facilitation of access to the wholesale services of dominant carriers in order to promote greater competition at the retail level. In this regard, Cybersurf is encouraged by the launch of the proceeding initiated by Telecom Public Notice CRTC 2006-14. Similarly, the Commission's enforcement tools need to be strengthened. Other changes institutional changes may also be desirable. However, the variance, rescission or referral back of a decision is not a substitute for institutional reform or for other proceedings that may need to be conducted. The fact is that the Commission's hearing processes are more transparent, neutral and procedurally appropriate to the types of determinations that the Commission is called upon to make than any subsequent government review process.

7. For this reason, a variance or rescission of a Commission decision should only be considered as a last resort, where the risk of unintended policy consequences arising from such action are minimal and no additional evidence is required to serve as a comprehensive foundation for the variance or rescission.

8. In other cases where the government believes that a Commission determination runs counter to government policy, the appropriate action is for the Governor in Council to refer the decision back to the Commission for reconsideration. However, even in these cases caution and restraint are appropriate. A decision that appears to run counter to a government policy objective may be advancing that policy objective in a longer time frame for other legitimate reasons or may be advancing other equally or more important policy objectives.

III. The Governor in Council Should not Vary, Rescind or Refer Back Decision 2006-15

9. Cybersurf is of the view that the Governor in Council should not vary, rescind or refer back Decision 2006-15 for a number of reasons.

10. First, the Decision was made in response to a lengthy proceeding in which the evidence of parties was solicited and examined. Second, the Decision is internally consistent. That is to say that no elements of the Decision run counter to other elements of the Decision. Third, there is a significant risk that the changes set out in the proposed order to vary the Decision ("Proposed Order") will actually lead to a greater remonopolization of the market for local

telecommunications services, or to a duopoly market structure, rather to true competition. This is not what the Commission or the Governor in Council intend. Given this risk and the fact that the Commission's Decision was made following a thorough review of participants' evidence and positions, the Governor in Council should not substitute its own determination for the Decision.

11. The Commission and the current government are not in disagreement with respect to the desirability of the moving the markets for local telephone services towards true, viable and sustainable competition as quickly and efficiently as possible. The Commission and the government merely differ on how this objective should be achieved. Before rendering the Decision the Commission studied the relevant issues thoroughly and obtained evidence and comments from all interested parties willing to come forward and participate, including the ILECs, the cable industry, independent competitors, large business users, consumer groups and other parties. The Decision that emanated following this fair and transparent process is well-reasoned.

12. The fact is that the Commission's policies to promote local competition have started bearing fruit. This is evidenced by the fact that the incumbent local exchange carriers ("ILECs") are losing market share. That is precisely the intended effect of Commission determinations favouring competition. It is premature for the ILECs to attempt to dismantle the regulatory framework leading to this result at such an early stage simply because they are suffering the very consequences of the establishment of greater competition in the market for local exchange services.

13. The Commission's Decision was designed to ensure that ILECs do not unduly discriminate against competitors in order to disadvantage them. Hence the Decision contains provisions requiring an ILEC seeking to obtain forbearance in a relevant market to demonstrate that:

(a) The ILEC has, for the six months prior to the forbearance application, met individual standards for each of the 14 specified competitor quality of service (Q of S) indicators of the rate rebate plan (RRP) for competitors, when the results are averaged across the six-month period;

(b) The ILEC has put in place the necessary Competitor Services tariffs. In the case of an application for forbearance from regulation of residential local exchange services, the ILEC has an approved Competitor Services tariff for bundled asymmetrical digital subscriber line (ADSL) available over loops not used for primary exchange service (dry loops) as well as in conjunction with primary exchange service (PES), and in the case of an application for forbearance from regulation of business local exchange services, the ILEC has an approved Competitor Services tariff for bundled ADSL available both over dry loops and in conjunction with PES as well as approved competitor Ethernet access service and transport service tariffs;

(c) The ILEC has, where the Commission has required it, implemented competitor access to its operational support systems in accordance with the requirements of Telecom Decision CRTC 2005-14.

14. These requirements are designed to ensure that competition in relevant local markets will not be limited to two or possibly three parties who have their own networks and do not rely on each other for much in the way of wholesale services in order to compete among themselves. The focus on Q of S for competitors, the availability of Competitor Services tariffs and access to operational support systems is designed to make competition more widespread and to recognize that multiple competitors of varying scale and scope can have an important role to play in the evolution and sustainability of vibrant competition in the provision of local exchange services.

15. By contrast, the amendments that are being proposed by the government would explicitly allow forbearance in business local services even if the market structure is duopolistic and the same result would occur implicitly in the case of residential local services. This is because it is far from clear that the infrastructure of a wireless competitor will be used to a significant degree to provide services that are in the same relevant market as the services offered by two landline competitors to a significant degree. In fact, this is an issue that the Commission is still considering and on which it has not yet reached a final conclusion.

16. The removal of the forbearance pre-conditions for the availability of certain Competitor Services and access to ILEC operational support systems and the weakening of the pre-condition relating to Q of S proposed by the government would increase the likelihood that only a duopolistic type of sustainable competition in certain geographic areas would develop in the provision of local exchanges services. Such an outcome would be much poorer for consumers and for the efficiency and productivity of the Canadian economy as a whole than an environment involving multiple competitors. Accordingly, such a result would not be in the public interest.

17. All of the changes described above and the other modifications proposed by the government to the Decision are being tendered without the benefit of having been supported by evidence and tested by the type of thorough process that the Commission employs in its decision-making. In Cybersurf's view, if the government is determined to put forward these sorts of ideas for possible implementation, it should do so in the context of a referral back of the Decision to the Commission with a direction for the Commission to study these matters. However, even this is not necessary. The Commission has made its determinations in the Decision carefully and with due consideration to the evidence and submissions of interested parties and with a view to promoting the same pro-competitive policy objectives that the government wishes to implement.

18. The Commission has even agreed to review some of its own findings in the Decision in a process that was started on September 1, 2005 by way of Telecom Public Notice CRTC 2005-12. Consideration of the Proposed Order now threatens to delay the outcome of that proceeding and perhaps even to make it moot, even though the Commission's processes are much more appropriate to the consideration and resolution of forbearance-related issues.

19. In all of the circumstances, Cybersurf submits that the Proposed Order should be withdrawn and the Decision should be allowed to stand. In the alternative, should the government be determined to have the views expressed in the Proposed Order given further consideration, Cybersurf believes that the appropriate manner for achieving that objective is for those issues to be brought to the Commission's attention as part of a referral back of the Decision.

Yours very truly,

A handwritten signature in purple ink, appearing to read "Christian S. Tacit", written over a light blue rectangular background.

Christian S. Tacit
Vice-President Law and General Counsel