



**Canadian Network Operators Consortium Inc.
Consortium des Opérateurs de Réseaux Canadiens Inc.**

February 11, 2011

FILED VIA ACCESS KEY

Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Gatineau, Quebec
K1A 0N2

Dear Mr. Morin,

Subject: *Review of billing practices for wholesale residential high-speed access services, Telecom Notice of Consultation CRTC 2011-77, 8 February 2011 – Canadian Network Operators Consortium Inc. Request for Broadening of Proceeding and Change to Procedure*

Introduction

1. By way of this letter, Canadian Network Operators Consortium Inc. (“CNOC”) is requesting that the Commission expand the scope of the proceeding announced in Telecom Notice of Consultation CRTC 2011-77 (“TNC 2011-77” or the “Notice”) to include a comprehensive review of the regulatory framework applicable to all wholesale high-speed access services (“WHSAS”) provided by incumbent local exchange carriers and cable carriers (collectively “incumbents”) to their competitors and to include from the outset, in the expanded proceeding, an online consultation and a public hearing, and certain additional procedural steps.

The Canadian competitive landscape is fragile and suboptimal

2. The Commission’s *Navigating Convergence Report*¹ has made a number of important observations related to the limited nature of competition for telecommunications and broadcasting services offered to consumers:

“Access to content and services is intermediated in Canada by two key industry groups, cable companies and ILECs offering fixed-line data, voice and subscription television. Across the country, any given residential market is served by one or both and only rarely by a third wired-facilities-based provider.”

¹ *Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications, Convergence Policy, Policy Development and Research, Canadian Telecommunications and Radio-television Commission, February 2010, at paragraphs 113, 116, 120 through 122, 126 and 129.*

ILECs controlled 82.1% of wireline local and access revenues in 2008, with another 18.6% accruing to cable BDUs. Since ISP services are generally provided over the same infrastructure owned by those two groups, it is not surprising that just 6% of residential Internet access revenue is controlled by resellers, utility telecommunications companies and other carriers.

...

The high concentration of residential telecommunications and video distribution revenue and access points in the hands of largely two main providers in most regions—a cable company and telecommunications company—has potential implications for the evolution of a competitive marketplace for these services. While the threat of competition has a disciplining effect on incumbent behaviour, ***the reality of non-facilities-based competition is such that for the majority of consumers, alternatives are not considered compelling.*** Without the flexibility to meaningfully reduce prices below those offered by the incumbent facilities-based entities or ***employ other meaningful differentiators,*** alternative providers are unlikely to gain any significant traction in the short-term.

Though the Commission has pursued a regime of facilities-based competition that unbundles or makes available for resale the telecommunications company provided and cable company owned network elements which are required to offer competitive services, ***it seems unlikely that in the short- to mid-term, the most sophisticated bundles of Internet/phone/television (the "triple play") will be offered by any other than the incumbent facilities-based providers.***

...

As Canadian consumers respond positively to bundled offerings, competitor inability to offer triple- and quad-play services has the potential to entrench the dominant position held by incumbent facilities-based providers. At year-end 2008, approximately 25% of residential accounts included service bundles with at least two of local, Internet, video or mobile services...

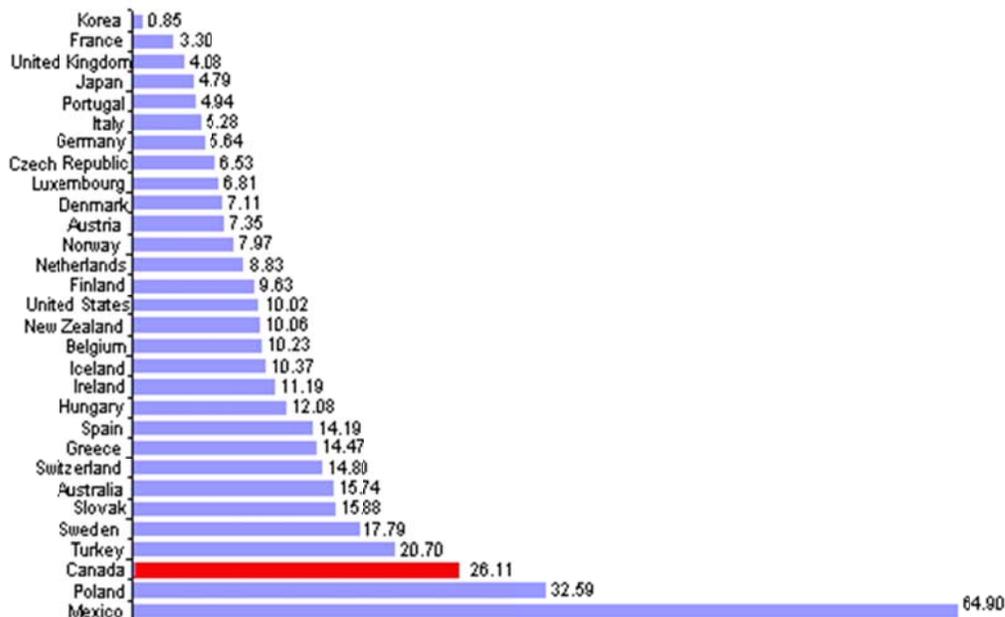
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Although it requires further study, it appears that bundling strategies are having the effect of enabling service providers to maintain price level. ... with the exception of Internet pricing (which has fallen slightly), telephone and BDU pricing has been on an upward trajectory in comparison with the overall consumer price index.

...

Observers have asserted that the concentration of broadband revenues accruing to ILECs and cable providers has the effect of keeping consumer prices higher than they might otherwise be. This is borne out in cross-OECD comparisons of broadband pricing. Among the most dramatic of the various comparisons is that of average broadband monthly price per advertised Mbps as measured in U.S. dollars, adjusted to purchasing power parity (see figure 8).

Figure 8. Average broadband monthly price per advertised Mbps, Oct 2008, U.S.\$ PPP



Source: OECD” (Emphasis added.)”

3. As a further example, of the poor state of broadband competition in Canada, in 2009, ILECs (excluding their out of territory operations) and cable carriers accounted collectively for 93.8% of residential high-speed Internet access services (“IS”) revenues.² Therefore, all other ISPs accounted for the remaining 6.2% of residential IS.

4. While the competitive situation is poor in the markets for services offered to residential consumers, the situation is even worse in the markets for services provided to small and medium sized businesses. In the absence of a cable network footprint, most businesses only have a choice of the incumbent telephone company as a facilities-based service provider, and alternative options for broadband connections having speeds above 2 Mbps are very scarce.

5. It is therefore not surprising that the fragile nature of competition in the provision of retail IS in both residential and business markets was also acknowledged by the Commission in Telecom Regulatory Policy CRTC 2010-632 (“TRP 2010-632”), where the Commission stated:³

“The Commission concludes that, without a speed-matching requirement for wireline aggregated ADSL access and TPIA services, it is likely that competition in retail Internet service markets would be unduly impaired. In the Commission’s view, an ILEC and cable carrier duopoly would likely occur in the retail residential Internet service market, and competition might be reduced substantially in small-to-medium-sized retail business Internet service markets. The Commission considers that, in such circumstances, retail Internet service competition would not continue to be sufficient to protect consumers’ interests.”

² CRTC 2010 Communications Monitoring Report, p. 138.

³ TRP 2010-632, at paragraph 55.

The current regulatory framework is outdated and needs to be replaced

6. The current regulatory framework applicable to WHSAS is ill-equipped to remedy the situation because it is still shackled by two outdated regulatory principles for the regulation of these services.

7. First, the Commission has historically treated incumbent WHSAS as if they are only used by competitors to deliver IS to their end-users. While that may have been true in the late 1990s, the situation is vastly different now.

8. Last-mile broadband connections provided by the incumbents on a wholesale basis to their competitors can now be used to provide a wide variety of services. These include voice, data, video, Internet access and a range of services that never touch the Internet!

9. In other words, incumbent wholesale high-speed services, including the last-mile access, constitute the broadband platform that competitors need to offer almost all telecommunications and broadcasting services to consumers.

10. The second problem, reinforced by the first, is that the Commission has not viewed wholesale customers of the incumbents as being of equal stature to the incumbents when it comes to competitive issues. Instead, the CRTC has a repeated tendency to treat competitors as mere resellers of incumbent retail Internet access services. This is also an outdated approach to WHSAS regulation, which allows incumbents to confer undue preferences upon themselves with respect to the manner in which they use their last mile broadband access connections to deliver services to consumers relative to the manner in which they allow competitors to sue those connections.

11. In the 21st century, competitors employ their own facilities and resources in combination with incumbent WHSAS to build networks that can offer a wide variety of services to consumers, including but not limited to, IS.

12. Both of these outdated regulatory principles encourage the Commission to regulate incumbent WHSAS by analogy to the terms and conditions under which the incumbents' retail IS are provided. The net result is a stifling of the ability of competitors to innovate and differentiate their retail services from those of the incumbents. The Commission's Telecom Decisions CRTC 2010-255, 2010-802 and 2011-44 ("UBB Decisions") are not surprising in this context, since they are premised on the two outdated regulatory principles just discussed.

13. The application of these outdated principles:

- Is not competitively or technologically neutral;
- Artificially favours incumbents;
- Does not lead to rates for WHSAS that are just and reasonable; and

- Indirectly results in the regulation of competitor retail IS and other retail services that have been forborne from regulation.

14. These outcomes are contrary to the *Telecommunications Act*⁴ (“Act”) and the Policy Direction⁵.

15. The continued application of those outdated principles will continue preventing competitors from being able to innovate and differentiate the services they offer to consumers from those of the incumbents, leading to a further undue lessening of competition in markets for telecommunications and broadcasting services.

The scope of TNC 2011-77 needs to be broadened to address the regulatory framework applied to WHSAS

16. The recent public outcry against the UBB decisions is, in effect, also an outcry against the continued application of an outdated wholesale regulatory framework, yet the questions on which the Commission is seeking comments in TNC 2011-77 do not address the broader regulatory principles required for a proper determination of issues relating to usage-based billing (“UBB”) and other billing practices of the incumbents for WHSAS.

17. If the Commission does not ask the right questions, it cannot possibly hope to get the right answers. If it limits this proceeding to a review of billing practices for WHSAS employed in the provision of residential services by competitors, the situation will be analogous to a rearrangement of deck chairs on the Titanic before it sank. In the absence of a proper regulatory framework, any solution to the issues raised in the current proceeding will only delay the inevitable sinking of the competitive ship.

18. For these reasons, CNOC urges the Commission to expand this proceeding by conducting a comprehensive review of the regulatory framework applicable to all WHSAS (not just those used for the delivery of services to residential consumers) that examines the following issues:

- Should WHSAS be regulated as a broadband platform that can support many types of Internet and non-Internet-based services instead of being regulated by comparison to (or so as to mimic) the retail Internet services of the incumbents?
- Should WHSAS be configured in a manner that allows competitors to innovate and differentiate themselves in the marketplace by choosing the attributes of the services provided to consumers, such as speed, throughput, quality of service, type of service, aggregation, bundling, etc., and if so, how can this best be achieved?
- Should WHSAS be priced so as only to allow incumbents to recover the associated costs of providing the services plus a reasonable and consistent mark-up that recognizes the essential nature of these services, without the application of any subjective principles, such as value of service pricing, etc.?

⁴ S.C. 1993, c. 38, as amended.

⁵ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (“Policy Direction”).

- How can the regulatory framework for WHSAS be made more forward looking, by for example, ensuring that incumbents provide competitors fairly priced access to new network services, facilities and functions as soon as they become available and are deployed by the incumbents to provide services to their own end-users?
- Are there any new WHSAS that would be appropriate for the Commission to require the incumbents to provide at this time, such as, without limitation, an ADSL-CO service and a service that provides access to incumbent fibre-to-the-premises (“FTTP”) facilities?

19. *A comprehensive review of all of these issues is the only means by which the Commission’s stated objective of ensuring that competitors continue to have the “flexibility to bring pricing discipline, innovation, and consumer choice to the residential retail Internet service market.” will be achieved.*

Changes to the procedure of this proceeding are also required

20. Given the significance of this proceeding, and in order to ensure that it is conducted as efficiently as possible, CNOC urges the Commission to establish online consultations and an oral public hearing as part of this proceeding at the outset. Having parties comment on these procedural matters in late March and April would only lead to further unnecessary delays, to the further detriment of competition.

21. Given the important issues at stake in this proceeding, if the Commission broadens the scope of this proceeding as requested herein, CNOC also urges the Commission to modify the structure the proceeding to accommodate the following steps:

- (a) Evidence stage;
- (b) Interrogatory stage;
- (c) Interrogatory deficiency stage;
- (d) Oral hearing; and
- (e) Written reply

22. CNOC also requests that the Commission make its determination in this proceeding no later than some time during the fourth quarter of this year. No other proceedings currently underway should be stopped or delayed as a result of this proceeding, but an implementation phase will be necessary for all WHSAS after the Commission makes its determinations in this proceeding.

The relief requested by Public Interest Advocacy Centre (“PIAC”) and Consumers Association of Canada (“CAC”) is not sufficient in some respects and overly broad in others

23. In a submission dated yesterday, PIAC and CAC invited the Commission to remove subparagraph (i) of paragraph 12 of the Notice, which states that “[a]s a general rule, ordinary consumers served by Small ISPs should not have to fund the bandwidth used by the heaviest retail Internet services consumers”. PIAC and CAC also recommend the removal of subparagraph (ii) of paragraph 13, which requires new proposals provided in this proceeding to “[r]espect the principle that ordinary consumers served by Small ISPs should not fund the bandwidth used by the heaviest retail Internet service consumers”.

24. CNOC agrees. As noted by PIAC and CAC:

“These statements assume the "cause" of Internet congestion is a user with a high bandwidth usage, based on a simple count of bits transferred, with no relation whatever to use or capacity at peak times. They assume that the "fix" for any capacity problems is an economic ITMP, rather than a capacity increase or a technical fix. They assume a billing method that penalizes individuals, rather than encouraging aggregate use shifts. It is bordering on a fettering of the Commission's jurisdiction and inappropriate.”

25. CNOC urges the Commission to remove the two subparagraphs discussed above and to make it clear that alternative models for the recovery of WHSAS usage-based charges on an aggregated basis are within the scope of this proceeding. This approach would be entirely consistent with consideration of the broader framework issues raised herein.

26. PIAC and CAC also urge the Commission to allow comments with respect to the application of UBB in retail markets. CNOC understands this concern in light of the undue lessening of competition caused by the currently outdated framework for the regulation of WHSAS. However, the review of the framework proposed by CNOC would be significantly preferable to regulatory intervention in forborne retail markets. If the wholesale regulatory framework is robust and is applied fully in a consistent manner, competition at the retail level will thrive and consumers will have the choice of whether or not to subscribe to usage plans with a UBB component. The concern expressed by PIAC and CAC merely highlights the need for a review of the regulatory framework applicable to WHSAS.

Conclusion

27. In conclusion, CNOC requests that the Commission expand the scope of this proceeding and make corresponding changes to the procedure, all as described herein.

Yours very truly,

William Sandiford
Chair of the Board and President

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Lynne Fancy (via email)
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