

Telecom Notice of Consultation CRTC 2011-77: Review of billing practices for wholesale residential high-speed access services

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1. Telecom Notice of Consultation CRTC 2011-77 describes this consultation as “a review of its regulatory approach with regard to the terms upon which large incumbent telephone and cable carriers provide their services to wholesalers, who, in turn, provide high-speed Internet access to retail residential customers.” (preamble)
2. One of the Commission’s stated principles for this review is that “smaller ISPs should continue to be in a position to offer competitive and innovative alternatives.” It also notes that “It is in the best interest of consumers that Small ISPs, which offer competitive alternatives to the incumbent carriers, should continue to do so.” (paragraph 7ii) Additionally, “The objective of this review is that Small ISPs continue to be afforded the flexibility to bring pricing discipline, innovation, and consumer choice to the residential retail Internet service market.” (paragraph 11)
3. It is interesting to note the CRTC’s choice of words in describing ISPs who provide retail services to Canadians through a wholesale arrangement with incumbent telephone and cable carriers as “small” ISPs. This descriptor is supported by current market share data,² but implies that such ISPs will always be small. It is not consistent with objectives to encourage the long term viability of such ISPs so that they may continue to provide competitive alternatives to the incumbent telephone and cable carriers. This submission uses the terminology of Telecom Decision CRTC 2011-44, describing ISPs who are seeking wholesale access to Internet access services as “competitors.” The companies providing this wholesale access are referred to as “incumbents.”
4. Canadian telecommunication policy objectives are set out in the 1993 Telecommunications Act.³ Objectives of particular relevance to this consultation on the wholesale residential high-speed access market include:
7 (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications

¹ I offer these final arguments based on my observations as a party to the proceedings, and drawing on my research on Canadian and international retail and wholesale broadband markets. I attended the Phase I presentations.

² According to the 2011 CRTC *Communications Monitoring Report*, incumbent telephone carriers had a 37.6% share of the high-speed residential Internet market in 2010. Cable BDUs had a 56.4% share, leaving 6% of the market to all other high speed Internet service providers.

³ Canada (1993). Telecommunications Act, S.C., 1993, C. 38.

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services

5. In order to foster these policy objectives, the CRTC must apply the 2006 Policy Direction⁴ and “rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives.” Market forces encourage strong competition between telephone and cable incumbent high-speed Internet providers, but as Commissioner Katz noted in the hearing, “the market isn't as competitive at the consumer level as it should be.”⁵
6. Although this consultation was triggered in response to Telecom Decision 2011-44 regarding usage-based billing for wholesale broadband services, the underlying issue and the issue of most importance in advancing Canada’s telecommunications policy objectives as noted above, is that of creating a more competitive market for retail Internet services in Canada. The CRTC can influence the retail Internet services market by enabling a more competitive wholesale market.
7. As such, in assessing the evidence provided in written submissions, the oral hearing and online consultation, the Commission must focus on the issue of fostering competition in the wholesale Internet access market. In particular, it should heed the guidance of Order in Council 2009-2007 in which “the Governor in Council notes that it is critical that the regulatory regime provide a cohesive, forward looking framework that provides the proper incentives for continued investment in broadband infrastructure, encourages competition and innovation and leads to consumer choice.”⁶
8. The incumbent carriers argue that the retail Internet services market in Canada is competitive. It is true that the majority of Canadians do have the choice of a cable or incumbent telephone company as their Internet service provider.⁷ However, the existence of competition between two incumbents does not ensure that such competition is *effective competition*.
9. The Australian Competition & Consumer Commission suggests that *effective competition* is characterized by rivalry in pricing and services, requires low barriers to entry for new providers, and enables competitors to hold “a

⁴ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, P.C. 2006-1534, 14 December 2006

⁵ Transcript of Proceeding Volume 5, 18 July 2011, paragraph 7000.

⁶ Privy Council (2009). *Order in Council 2009-2007*. p. 2.

⁷ As of 2010, 85% of Canadians could get DSL Internet service and 82% could get cable Internet service. (CRTC 2011, Communications Monitoring Report)

reasonably sustainable market position.”⁸ The OECD observes that “the fastest connections, lowest prices and most innovative services are in areas where there is a range of consumer choices for broadband.”⁹ OECD data¹⁰ shows that Canadian broadband speeds are slower than the OECD average and prices are higher. Taking the availability of fibre-to-the-home services as an indicator of innovation, with less than 1% of broadband Internet subscribers using a fibre connection, Canada is not a leader in providing innovative services.

10. Competition in the provision of Internet services takes two forms. Facilities-based competition exists between different infrastructures, and is often held to be the most desirable form of competition. As the Canadian market demonstrates however, facilities-based competition, as is found between telco and cable incumbents, has not resulted in an effective competitive environment when assessed on the basis of innovation, service prices and speeds.
11. The second form of competition is service-based competition, created when incumbents provide competitors with access to the incumbents’ infrastructure. Rather than building new infrastructure, competitors compete by offering their services on an incumbent’s network. Canada’s wholesale Internet access market allows for service-based competition on both telephone and cable networks.
12. Evidence provided to the CRTC in a number of hearings (e.g. Telecom Public Notice 2006-14, TNC 2009-261) and appeals (e.g. Applications to Review and Vary Telecom Decision 2008-17) suggests that there are many barriers to companies that wish to enter the Internet services market as service-based competitors. I have documented some of these barriers in publications with colleague Annemijn van Gorp.¹¹ As noted above, with just 6% of the market, non-incumbent/competitor ISPs in Canada have had minimal impact on consumer choice, pricing and the development of innovative services.
13. Evidence presented at this hearing does suggest that Telecom Decision CRTC 2010-632 has had an impact in making it easier for competitor ISPs to provide

⁸ Australian Competition & Consumer Commission (2009). *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR: Final Decision*. Canberra: Commonwealth of Australia. p. 38.

⁹ Organisation for Economic Co-operation and Development (2008). *Broadband Growth and Policies in OECD Countries*. Paris: OECD. p. 49.

¹⁰ Organisation for Economic Co-operation and Development. *OECD Broadband Portal*. www.oecd.org/sti/ict/broadband. (September and December 2010 data)

¹¹ See Middleton, C. A., & van Gorp, A. F. (2009). *How Competitive Is the Canadian Residential Broadband Market? A Study of Canadian Internet Service Providers and Their Regulatory Environment*. Paper presented at the Telecommunications Policy Research Conference, Arlington, VA. and van Gorp, A., & Middleton, C. (2010). The Impact of Facilities and Service-Based Competition on Internet Services Provision in the Canadian Broadband Market. *Telematics and Informatics*, 27(3), 217-230.

services using TPIA (third party Internet access to cable infrastructure). Evidence at this hearing also demonstrates that competitors are very keen to build their businesses but they continue to be constrained by the conditions of the wholesale Internet access market.

14. The CRTC is familiar with the “stepping stone” or “ladder of investment” approach to developing a competitive Internet access market. This approach encourages competition by creating an environment in which new entrants (competitors) initially establish their business by making use of the facilities of incumbent carriers. Over time, as the competitors establish a solid customer case, they can generate sufficient revenues to invest in their own network assets, and reduce their use of incumbents’ infrastructure.
15. In Canada, we would see evidence of competitors moving up the ladder of investment if they discontinued their use of aggregated wholesale services (e.g. Bell’s GAS – Gateway Access Service) and instead invested in their own DSLAM equipment at the incumbents’ central offices or installed their own fibre optical networks. Competitors that operate their own DSLAMs have control over the speeds and services they can offer their customers, and are not subject to the incumbents’ imposition of usage-based billing or Internet traffic management activities on their wholesale networks.
16. As noted in the hearing, some competitive ISPs in the Canadian marketplace do operate their own network equipment and are moving up the ladder of investment to establish themselves as stronger competitors to the incumbents. However, this is a slow process.¹² The service-based competitive environment in Canada is still in need of regulatory support and encouragement to ensure that competitors can continue to offer Canadians with viable alternatives for Internet service provision.
17. Canada does not have a national policy objective to define the type of high-speed Internet service that should be available to Canadians. The Federal Government’s 2010 Consultation Paper on a Digital Economy Strategy¹³ observes that next generation¹⁴ broadband infrastructure is being developed worldwide and suggests that investment in next generation infrastructure in Canada will primarily be driven by the private sector.

¹² Comparisons can be made to Australia and the UK. In both these countries, service-based competition has enabled competitive ISPs to invest far more extensively in network infrastructure than has been the case in Canada. For Australian data, see pp. 37-38 in Australian Communications and Media Authority (2010). *ACMA Communications Report 2009-10*. Melbourne: Australian Government. For UK data, see pp. 311-313 in Ofcom (2010). *Communications Market Report*.

¹³ Government of Canada (2010). *Improving Canada’s Digital Advantage. Strategies for Sustainable Prosperity – Consultation Paper on a Digital Economy Strategy for Canada*.

¹⁴ This term is used to describe broadband networks that provide much higher capacity than the current generation (DSL, DOCSIS2.0 cable) offers. Many countries have strategies in place to encourage the development of fibre optical networks as part of national broadband strategies. On this point, see OECD (2011). *National Broadband Plans. OECD Digital Economy Papers, No. 181*. OECD Publishing. <http://dx.doi.org/10.1787/5kg9sr5fmqwd-en>.

18. As Canadian Internet service providers build out next generation networks, it is essential that the regulatory environment continue to promote competition and ensure that Canadians have a choice of differentiated, innovative service offerings. In order for this to happen, competitive ISPs must remain in the market. The conditions in place in the wholesale market today will influence the nature of competition in provision of next generation Internet services tomorrow. It is essential that the CRTC preserve the viability of competitive ISPs so that they may continue to challenge incumbents and encourage the development of better Internet services for all Canadians.
19. This submission has focused on the nature of competition in the Canadian wholesale Internet service market, arguing that fostering service-based competition is essential in creating effective competition in the retail Internet service market. In assessing the evidence provided through the TNC2011-77 process, the Commission must focus on the competitive impacts of the various approaches proposed for wholesale Internet billing. The decision rendered by the Commission must allow competitors the opportunity to continue to differentiate their services delivered using the wholesale access services of the incumbents, and enable them to continue to develop their customer bases so that they can maintain their competitive offerings in the retail marketplace.

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