
**BEFORE THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF AN APPLICATION BY
THE CONSUMERS ASSOCIATION OF CANADA, THE PUBLIC
INTEREST ADVOCACY CENTRE AND THE COUNCIL OF SENIOR
CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA**

(APPLICANTS)

**REGARDING MOBILE WIRELESS DATA BILLING PRACTICES
PURSUANT TO SECTIONS 24, 27, 34, 48, 55, 56 and 60
of the *TELECOMMUNICATIONS ACT***

and

**PART 1 and SECTION 3 of the *CRTC RULES OF PRACTICE AND
PROCEDURE***

DIRECTED TO

ROGERS COMMUNICATIONS PARTNERSHIP

(RESPONDENT)

9 January 2014

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1. NATURE OF APPLICATION

1. The Consumers' Association of Canada ("**CAC**"), the Council of Senior Citizens' Organizations of British Columbia ("**COSCO**"), and the Public Interest Advocacy Centre ("**PIAC**", collectively with CAC and COSCO, "**CAC-COSCO-PIAC**") file this Application under sections 24, 27, 34, 48, 55, 56 and 60 of the *Telecommunications Act*¹, as well as Part 1 and s. 3 of the *CRTC Rules of Practice and Procedure*², regarding the billing practices of Rogers Communications Partnership ("**Rogers**" or the "**Respondent**"), in respect of access by Rogers' mobile wireless customers to mobile over-the-top ("**OTT**") TV services such as TELUS's Optik TV or Netflix.
2. CAC is an independent, non-profit, volunteer-based charitable organization with a mandate to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems.³ COSCO is the largest federation of senior citizens' organizations in the province of British Columbia and is the umbrella organization of 79 seniors' organizations and a significant number of individual associate members.⁴ PIAC is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services.⁵
3. Rogers Anyplace TV service allows Rogers' wireless customers to access television content from their smartphones through a proprietary mobile application.
4. Rogers offers its Anyplace TV service to its wireless customers at a rate of \$5 for 10 hours of viewing per month. Additional hours are offered at \$1 per hour per month.
5. The consequences of Rogers' data billing practices for its Anyplace TV are such that Rogers appears to be preferring its own mobile OTT service by exempting

¹ S.C. 1993, c. 38.

² SOR/2010-277.

³ See Consumers' Association of Canada, online: <http://www.consumer.ca/index.php4>.

⁴ See Council of Senior Citizens' Organizations of BC, online: <http://coscobc.ca/>.

⁵ See Public Interest Advocacy Centre, online: <http://www.piac.ca>.

customers from their normal wireless plan's data charges and monthly data allotment.

6. A consequence of this preference is that the pricing of Anyplace TV is at an effective rate that is significantly less than the rate charged for other data, including data for competing OTT services. As a consequence, Rogers wireless customers who wish to consume mobile OTT services can either pay for the Anyplace TV service add-on, or pay significantly higher data and overage rates for consuming competitors' OTT service.
7. A further consequence is that Rogers' wireless customers, when presented with competitive choices for other OTT services, may avoid consuming those services, not on the basis of the content or of other attributes of these competitors' services, but on the basis that Rogers has made mobile consumption of its own Anyplace TV service much more attractive by exempting the first ten hours of data consumption from the customer's monthly data allotment and by making the effective rate of that data significantly lower than the rate for other data.
8. As a further consequence of this preference, the rates charged by Rogers for mobile wireless customers to consume data to view competing OTT services are significantly higher than rates Rogers applies to consume data to view Rogers' own OTT offering. Rogers therefore unjustly discriminates against competing OTT services.
9. Rogers is not alone in this practice. This application is being submitted concurrently with our comments in relation to an application filed 20 November 2013 against Bell Mobility⁶ regarding its treatment of competitive OTT services. We are also filing an application today against Videotron regarding its treatment of access by its mobile wireless customers to competitive OTT services.⁷

⁶ See Part 1 Application by Benjamin Klass requesting fair treatment of Internet services by Bell Mobility, Inc., pursuant to CRTC 2010-445 and CRTC 2009-657, and *The Telecommunications Act*, s.24 & subsection 27(2), dated 20 November 2013.

⁷ See Part I application by CAC-COSCO-PIAC regarding the mobile wireless data billing practices of Videotron, dated 9 January 2013.

10. CAC-COSCO-PIAC therefore request that the Commission:
- (i). Declare that Roger's practice of offering preferential rates to subscribers of its own mobile OTT service compared to consumers of mobile OTT services offered by competitors constitutes an undue preference, and subjects Rogers' retail mobile wireless customers who wish to have access to competing OTT services, and competing OTT service providers, to an undue and unreasonable disadvantage, in violation of section 27(2) of the *Telecommunications Act*; and
 - (ii). Direct Rogers to change its mobile wireless data billing rates to remove the discrimination and preference.
11. In light of the apparently widespread character of the unjust discrimination engaged in by major telecommunications service providers against their mobile wireless customers and competing OTT service providers, we encourage the Commission to consider initiating a public notice, as recommended in an intervention we filed today in relation to an application⁸ by Benjamin Klass on 20 November 2013 against the Bell companies, and as previously requested.⁹
12. We recommend that all mobile wireless service providers be made parties to such a public notice, to ensure that Canadian consumers can enjoy consistent rules regarding access to OTT services from mobile wireless service providers, regardless of the OTT service provider these consumers select.

2. FACTS

(a) Rogers' Anyplace TV

13. At issue in this Application are terms and conditions associated with access by Rogers' mobile wireless customers to OTT services.

⁸ Application No. No. 2013-1664-6; Commission File No. 8622-B92-201316646.

⁹ PIAC procedural letter, 22 November 2013.

14. Rogers launched Anyplace TV in December 2012.¹⁰ This service was first launched as “Rogers On Demand Online” and primarily as an extension of service for Rogers cable customers, and included the ability to remotely control a customer’s personal video recorder.¹¹ By July 2013, Rogers was emphasizing its Anyplace TV as a mobile application in press releases, and marketing materials.¹²
15. Anyplace TV is offered as a registered service to those that subscribe to any Rogers service (e.g., cable, Internet, mobile). Non-Rogers customers streaming from a location in Canada can watch Rogers’ “All Access” videos with no registration required. Many of Rogers videos are available exclusively for Rogers customers (Wireless, Home Phone, Hi-Speed Internet or Cable TV) to watch. Certain “Premium” content is only available if a customer subscribes to it as part of a Rogers Cable TV subscription at home.¹³
16. Anyplace TV for mobile customers allows Rogers wireless customers to access television content from their smartphones through a proprietary mobile application. The application may be downloaded free from the Apple or Android mobile stores which sell applications to mobile phone users¹⁴.
17. Anyplace TV allows customers to view television programming on up to 45 channels, including TV shows, live streamed sports and movies that are available through the application.¹⁵
18. As shown in Figure 1, customers are able to view this content for the cost of \$5 per month for 10 hours of programming when viewed through Rogers’ mobile network. Overage fees are set at \$1 per hour per month according to advertising material available through the Rogers website. As part of a special promotion,

¹⁰ Rogers, “Rogers unveils evolution of NextBox 2.0 experience with extension to tablet,” press release of Rogers Communications, 4 December 2012.

¹¹ *Ibid.*

¹² Rogers, “Rogers expands its Anyplace TV mobile lineup with more live premium sports and prime-time TV,” press release of Rogers Communications, 19 July 2013.

¹³ Online: <http://www.rogersondemand.com/help/faq>.

¹⁴ Online: <http://www.rogers.com/web/content/AnyplaceTV>

¹⁵ The content available to customers through the Anyplace TV application includes programming from: Citytv, CityNews, CBC, Kids CBC, OMNI, Teletoon, Treehouse, YTV, and the Weather Network. Live sports available include Blue Jays games, Hockey Night in Canada broadcasts, English Premier League games as well as some Europa and Champions League games. The movies available through the application are not apparent from Rogers advertisements and web content.

Rogers offers to waive any overage fees incurred by customers for Anyplace TV viewing until April 1, 2014.

Figure 1 – Pricing details for Anyplace TV



19. It appears, based on Rogers' marketing materials, that data used to consume Anyplace TV is treated differently in terms of pricing and effect on the customer's regular monthly data allotment. Specifically, it appears as though Anyplace TV usage is not subject to the customer's monthly data allotment or regular data rate. In contrast, consumers who want to access competitive OTT services must pay Rogers' regular data rates and are subject to regular monthly data allotments (and the resulting overage fees when these allotments are exceeded).
20. A Rogers wireless data plan is required to access Anyplace TV from a smartphone or tablet through a mobile wireless network (not Wi-Fi). The range of content available to the consumer appears to vary depending upon whether or not the consumer has a Rogers cable television subscription¹⁶

¹⁶ Online: <http://www.rogers.com/web/content/AnyplaceTV>, "Full Details".

Full Details

Offers available for a limited time and subject to change without notice.

1. Compatible device (listed above) and Rogers wireless data plan required. Rogers Anyplace TV app downloadable from applicable app stores. A recurring \$5/mo charge will apply if using the Rogers wireless network for 10 hours content viewing during applicable month (no carry over) and overage of \$1/hr applies thereafter (overage waived for limited time). Data usage may apply to some advertising appearing with on demand content viewed through the app. Some content availability dependent on customer's cable subscription.

2. Free mobile video with new activation (or hardware upgrade) on any 1, 2, or 3-yr talk, text and internet plan. Regular recurring \$5/mo charge credited to customers account each month. Device Savings Recovery Fee and/or Service Deactivation Fee (as applicable) will apply. Includes 10 hours content viewing each month (no carry over) and overage of \$1/hr applies thereafter (overage waived for a limited time). Compatible device and Rogers wireless data plan required.

(b) How Rogers charges different rates for different data

21. According to Roger's "How Big is a Gig" webpage, SD (standard definition) video consumes 0.28 GB of data per hour, and HD (high definition) video consumes 1.11 GB of data per hour.¹⁷
22. Assuming that a customer watches HD TV, consumption at a rate of 1.11 GB / hour for 10 hours results in approximately 11 GB of consumption. For SD viewing, 10 hours of viewing would result in approximately 2.8 GB of consumption.
23. \$10 for 11 GB of data results in a per GB rate of \$0.90 / GB. \$10 for 2.8 GB of data results in a rate of \$3.57 / GB. We expect that, in reality, programming viewed by a consumer will be neither all HD or SD, with the result that it is reasonable to assume that the rate / GB incurred by the consumer for Anywhere TV will be somewhere between \$0.90 and \$3.57.
24. In any case, compared to Rogers' other wireless data plans, excerpted below in Figures 2 and 3, which summarize usage rates under Rogers' other wireless plans, it appears Anyplace TV customers receive a substantial discount on wireless data they consume for this service, compared to those who do not subscribe to the service, including, notably, those who wish to consume competing OTT services.

Rogers Anyplace TV app downloadable from applicable app stores. Data usage may apply to some advertising appearing with on demand content viewed through the app. Some content availability dependent on customers cable subscription. Visit rogers.com/mobiletv for details and compatible devices. Visit www.rogers.com/freedomadvantage for more information on Smartphone Freedom Advantage. © 2013 Rogers Communications.

¹⁷ Online: <http://www.keepingpace.ca/howbigisagig.html> (conversion from 20 G to 1 G applied by PIAC).

Figure 2 – Rogers' Tablet & Mobile Internet Plans¹⁸

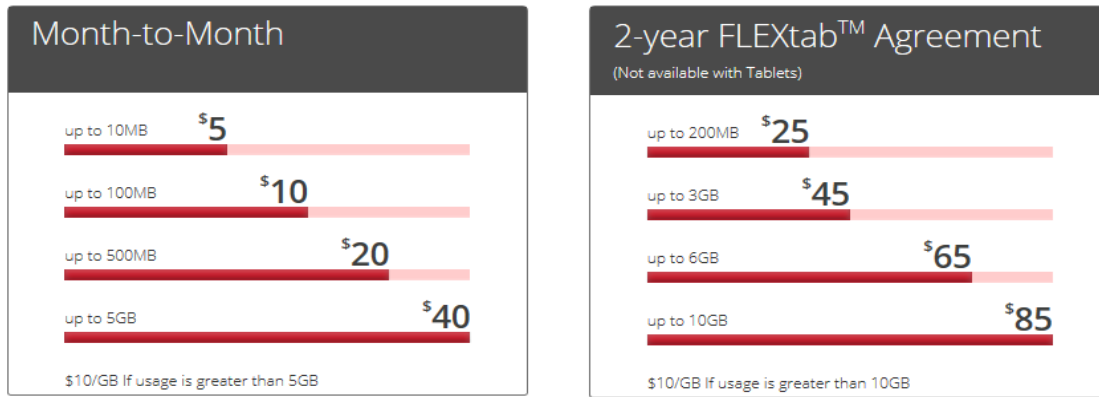
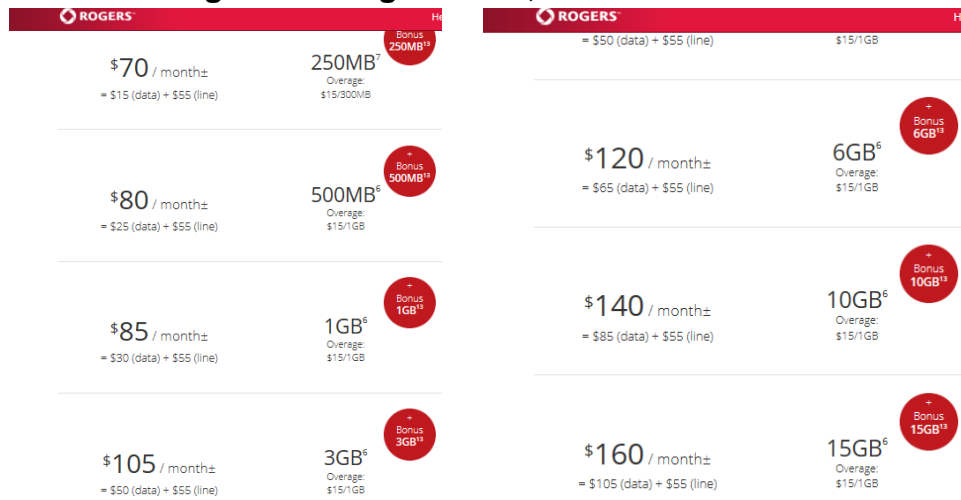


Figure 3 – Rogers' Talk, Text & Internet Plans¹⁹



25. As Figures 2 and 3 illustrate, 11 GB of data would cost significantly more than the \$10 / month offered to Anyplace TV subscribers.
26. Although it is challenging to arrive a \$ / GB price, based on Rogers' marketing materials, it appears that generally 11 GB of data consumed under one of Rogers' data plans would ordinarily cost between \$90 and \$180 depending on the plan chosen. This is for data *only*, and does not include voice costs. This is broken down in Figure 4 below.

¹⁸ Online: http://www.rogers.com/web/content/mobile-plans?asc_refid=plans-pricing.
¹⁹ http://www.rogers.com/web/content/allplans?asc_refid=plans-pricing

Figure 4 – Comparative Rogers Data Pricing for 11 GB

Plan Type	Plan rate	Overage \$ / GB	Data Cost	Total Cost
Mobile Internet plan: Month-to-month	\$40 5 GB plan	\$10 / GB	\$90 (\$40 for 5 GB plan, plus \$50 data overage for 5 GB)	
Mobile Internet plan: Flextab	\$85 10 GB plan	\$10 / GB	\$95 (\$85 for plan plus \$10 for 1 GB overage)	
Talk, Text & Internet (example 1)	\$85 1 GB plan (\$30 for data; \$55 for line)	\$15 / GB	\$180 (\$30 plus \$150 for 10 GB overage)	\$235 (\$85 for plan, plus \$150 in data overage for 10 GB)
Talk, Text & Internet (example 2)	\$140 10 GB plan (\$85 for data; \$55 for line)	\$15 / GB	\$100 (\$85 plus \$15 for 1 GB overage)	\$155 (\$140 for plan, plus \$15 in data overage for 1 GB)
Talk, Text & Internet (example 3)	\$160 for 15 GB plan (\$105 for data; \$55 for line)	\$15 / GB	\$105	\$160

27. As Figure 4 illustrates, a Rogers customer can purchase 11 GB in a variety of ways. Either the customer can purchase a Talk, Text and Internet Plan or a mobile Internet plan that is under 11 GB and then pay overage fees per GB, or the customer can purchase a plan that exceeds the 11 GB. In any scenario, though, to consume the amount of data being offered by Rogers for its own Anyplace TV service for \$5 costs at least \$90 per month, but could cost as high as \$180 per month.
28. On the other hand, if a Rogers wireless customer subscribes to Anyplace TV, the effective cost for 11 GB of data is, as explained above, \$5.
29. It is that price differential, and different effect on the customer's monthly data allotment, that gives rise to an undue preference by Rogers to its Anyplace TV customers and to itself, and unjustly discriminates against competing OTT services.

3. GROUNDS OF APPLICATION

30. The offering and provision by Canadian carriers of mobile wireless data services are subject to the Commission's powers and duties under section 24 and subsections 27(2), 27(3), and 27(4) of the *Telecommunications Act*.²⁰
31. Section 27(2) *Telecommunications Act* prohibits unjust discrimination and undue preference.

(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

32. The Commission's subsection 27(2) analysis is conducted in two phases²¹:
- The Commission has stated that "two essential elements must be present. The first is discrimination, preference, advantage, prejudice or disadvantage... and the second is the absence of justification... The burden of proof with respect to the first element rests with the Applicant, and the second with the respondent."
33. The initial burden is on the applicant to demonstrate that the conduct is preferential or disadvantages a person.²² Pursuant to subsection 27(4) of the *Telecommunications Act*, the respondent Canadian carrier then has the burden of proving that any such preference or disadvantage is not undue or unreasonable.²³

²⁰ Telecom Decision CRTC 2010-445 - Modifications to forbearance framework for mobile wireless data services (30 June 2010) at para. 8; see also Telecom Decision CRTC 2012-556 – *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services* (11 October 2012).

²¹ The Commission's approach in relation to allegations that a Canadian carrier has breached what is now section 27(2) was set out in Telecom Decision CRTC 77-16 (*Challenge Communications Ltd. v. Bell Canada*). More recently, See e.g., Telecom Decision CRTC 2013-40 - *Ice Wireless Inc. and Iristel Inc. – Request for a cease and desist order in Northwestel Inc.'s serving territory* (1 February 2013) at para. 14.

²² Telecom Regulatory Policy CRTC 2009-657 - *Review of the Internet traffic management practices of Internet service providers* (21 October 2009) at para. 48.

²³ *Telecommunications Act*, s. 27(4).

34. The manner in which Rogers bills its mobile wireless service customers for wireless data for services which compete with its Anyplace TV:
- (i). unduly or unreasonably disadvantages competing OTT services; and
 - (ii). unduly or unreasonably disadvantages Rogers mobile wireless service customers who may wish to avail themselves of alternative mobility TV.
35. A consequence of Rogers' preferential mobile wireless data rate scheme is that competing OTT service providers who wish to offer their OTT services to Rogers' 8 million postpaid²⁴ customers and customers who wish to consume in a similar manner OTT services from a different service provider face a significant price difference, therefore impairing competition.
36. A further consequence is that Rogers mobile wireless customers, when presented with competitive choices for other OTT services, are likely to be discouraged from consuming those services, not on the basis of deficiencies in relation to the content or of other attributes of these competitors' services, but because the relative price of the data to view those services is significantly higher than Rogers' own mobile OTT content. In so doing Rogers unduly favours its own service, which discourages its mobile customers from using competing sources of content.

Canada's telecommunications policy objectives

37. As the Commission is aware, Parliament in the *Telecommunications Act* has directed the Commission to exercise its powers and perform its duties "with a view to implementing the Canadian telecommunications policy objectives".²⁵
38. Canada's telecommunications policy objectives are set out in section 7 of the Act. These objectives include the following:

- | |
|---|
| <ul style="list-style-type: none">a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada |
|---|

²⁴ Figures obtained from CWTA website, as of 3Q 2013, available at <http://cwta.ca/facts-figures/>, see table titled "Number of subscribers". See also Rogers Communications Inc. 2013 3Q Results available at: http://www.rogers.com/web/Rogers.portal?nfpb=true&pageLabel=IR_LANDING, table titled "Results of our Business Segments [:] Wireless.

²⁵ *Telecommunications Act*, section 47.

- | |
|---|
| <p>c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications</p> <p>[...]</p> <p>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;</p> <p>g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;</p> <p>h) to respond to the economic and social requirements of users of telecommunications services</p> |
|---|

39. Rogers' mobile wireless data rate scheme appears to be designed to favour its own Anyplace TV OTT service to the detriment of its customers, its competitors and, more generally, of competition in the OTT marketplace. This is inconsistent with several of Canada's telecommunications policy objectives.
40. Rogers' practice harms consumer choice regarding OTT services and imposes unreasonable barriers on the development of competitive alternatives to Rogers' own OTT service. In doing so Rogers' policy does not promote the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada. Instead, Rogers' practice promotes Rogers' own economic interests and programming service choices, to the detriment of other voices.
41. By preferring its own content by its offering, Rogers' mobile wireless data rate scheme undermines the deployment of affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada. By preferring the usage and billing treatment of its own mobile OTT service data plans, Rogers shields its own OTT service from competitive forces and undermines the affordability of mobile OTT services for consumers.
42. Similarly, Rogers' practice does not enhance, and indeed undermines the efficiency and competitiveness of Canadian telecommunications services. For Rogers' OTT competitors, the substantial obstacles – notably in the form of significantly higher data charges Rogers' 8 million postpaid wireless subscribers will face if they want to obtain OTT services from competitors - result in reduced competitiveness and a less efficient marketplace. The harm to competitiveness of the marketplace of such price discrimination is multiplied if one also considers these price differences in light of the fact that substantial and increasing numbers

of consumers are bound by long term contracts and bundling schemes imposed by service providers such as Rogers.

43. Rogers' practice of preferentially pricing its own Anyplace TV service discriminates against users of competing OTT services. This does not foster increased reliance on market forces for the provision of telecommunications services and, if allowed to continue, would undermine the efficiency and effectiveness of regulation. While the *Telecommunications Act* directs the Commission to promote competitiveness in the marketplace for telecommunications services, Rogers' practice imposes a significant barrier on choice in relation to OTT services and produces precisely the opposite effect the Commission has been directed to pursue: less competition for Rogers' mobile wireless customers' OTT business and less choice for these consumers. This is not effective or efficient regulation.
44. As Rogers mobile wireless service customers are disincented from considering competitive alternatives for OTT services by the rating barriers created by Rogers, we expect that such practices could stifle innovation in the growing smartphone sector.
45. Finally, it is clear in our view that mobile wireless practices such as that which is the subject of this application do not respond to the economic and social requirements of users of telecommunications services. The scheme at issue in this proceeding may advance the interests of Rogers but it does so to the detriment of competitors in the OTT marketplace and, ultimately, to the detriment of consumers.

4. NATURE OF DECISION SOUGHT

46. In offering preferential rates to subscribers of its own mobile OTT service, Rogers has granted an undue preference to itself, and unjustly and unreasonably discriminated against these competitors and their customers, in violation of Section 27(2) of the *Telecommunications Act*.
47. Rogers' practice regarding access by its mobile wireless customers to competing OTT services is inconsistent with several of the objectives of Canada's telecommunications policy and is contrary to the directives issued to the Commission in the Policy Direction.

48. Therefore, CAC-COSCO-PIAC request that the Commission:
- (i). Declare that Roger's practice of offering preferential rates to subscribers of its own mobile OTT service compared to consumers of OTT services offered by competitors constitutes an undue preference, and subjects Rogers' retail mobile wireless customers who wish to have access to competing OTT services, and competing OTT service providers, to an undue and unreasonable disadvantage, in violation of section 27(2) of the *Telecommunications Act*; and
 - (ii). Direct Rogers to change its mobile wireless data billing rates to remove the discrimination and preference.
49. In light of what appears to be a widespread practice, among wireless service providers, of unjust discrimination against these wireless service providers' customers and competing OTT service providers, we repeat our request for a notice of consultation, as described in paragraph 11 above.
50. Finally, we request our costs of making this Part 1 application in accordance with s. 56 of the *Act*.

5. SERVICE LIST

51. Electronic service of this application has been made to the respondent, Rogers, as well as the following parties:
- (i). Videotron
 - (ii). Bell

6. NOTICE

52. This application is made by the Public Interest Advocacy Centre, c/o Geoffrey White, c/o Public Interest Advocacy Centre, One Nicholas Street, Suite 1204, Ottawa, Ontario K1N 7B7.

53. A copy of this application may be obtained by sending a request to piac@piac.ca. A copy of this application has also been posted to PIAC's website at <http://www.piac.ca>.
54. TAKE NOTICE that pursuant to section 25, and, as applicable section 26 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, any respondent or intervener is required to mail or deliver or transmit by electronic mail its answer to this application to the Secretary General of the Canadian Radio-television and Telecommunications Commission ("Commission"), Central Building, 1 Promenade du Portage, Gatineau (Québec) J8X 4B1, and to serve a copy of the answer on the applicant within 30 days of the date that this application is posted on the Commission's website or by such other date as the Commission may specify.
55. Service of the copy of the answer on the applicant may be effected by personal delivery, by electronic mail, or by ordinary mail. In the case of service by personal delivery, it may be effected at the address set out above.
56. If a respondent does not file or serve its answer within the time limit prescribed, the application may be disposed of without further notice to it.

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