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1 September 2015

John Traversy
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

VIA GCKEY

Dear Mr. Traversy,

Re: Part I Application under the *Telecommunications Act* regarding Videotron's billing practice for telecommunications service to consume its "Unlimited Music" service

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, the "Applicants" or "**CAC-COSCO-PIAC**") submit the enclosed Part I application to the Commission regarding the billing practices of Québec Média and its wholly owned subsidiary Vidéotron (collectively "**Vidéotron**") in respect of Videotron's "Unlimited Music" service.
2. Electronic service of this application has been made to the Respondent by e-mail. A copy of the application will be posted to www.piac.ca.

Yours truly,

[original signed]

John Lawford, Barrister & Solicitor
Counsel to CAC-COSCO-PIAC

[original signed]

Geoffrey White, Barrister & Solicitor
Counsel to CAC-COSCO-PIAC

cc: Vidéotron (regaffairs@quebecor.com)
Bruce Cran, CAC (bcranbiz@me.com)
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Encl.

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

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

(APPLICANTS)

QUÉBECOR MÉDIA INC., and VIDÉOTRON

(RESPONDENTS)

**REGARDING VIDÉOTRON'S MOBILE WIRELESS DATA BILLING
PRACTICES FOR "UNLIMITED MUSIC"**

1 September 2015

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1. INTRODUCTION and SUMMARY

1. The Consumers' Association of Canada ("**CAC**"),¹ the Council of Senior Citizens' Organizations of British Columbia ("**COSCO**"),² and the Public Interest Advocacy Centre ("**PIAC**"),³ collectively with CAC and COSCO, the "**Applicants**" or "**CAC-COSCO-PIAC**") file this Application under the *Telecommunications Act*⁴ and pursuant to the *CRTC Rules of Practice and Procedure*,⁵ regarding the billing practices of Québecor Média and its wholly owned subsidiary Vidéotron (collectively "**Vidéotron**" or the "**Respondent**"), in respect of Vidéotron's "Unlimited Music" service.
2. Vidéotron's recently announced "Unlimited Music" service allows certain of Vidéotron's wireless customers to access certain audio streaming services and content from their smartphones without incurring data charges.⁶
3. Vidéotron offers its "Unlimited Music" service to its wireless customers, as of 27 August 2015, who subscribe to a "Premium Plan", generally those with a 2 GB data allowance or more "without using their Mobile plan's data allowance."
4. In short, the Applicants argue that Vidéotron is exempting certain subscribers from paying fees for certain types of data, contrary to the *Telecommunications Act*, the ITMP Framework (Telecom Regulatory Policy CRTC 2009-657),⁷ and the Commission's "Mobile TV" decision (Broadcasting and Telecom Decision CRTC 2015-26).⁸

¹ 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. See Consumers' Association of Canada, online: <http://www.consumer.ca/index.php4>.

² 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. See Council of Senior Citizens' Organizations of BC, online: <http://coscobc.ca/>.

³ 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. See Public Interest Advocacy Centre, online: <http://www.piac.ca>.

⁴ S.C. 1993, c. 38.

⁵ SOR/2010-277.

⁶ See Vidéotron Mobile press release "Agreement with leading music streaming players : Vidéotron Mobile's new Unlimited Music service lets customers listen to music without using data" (27 August 2015). Online: <http://corpo.Vidéotron.com/site/press-room/press-release/846>

⁷ Telecom Regulatory Policy CRTC 2009-657 - *Review of the Internet traffic management practices of Internet service providers* (21 October 2009).

⁸ Broadcasting and Telecom Decision CRTC 2015-26 - Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv (29 January 2015).

5. More specifically, the Applicants argue that Vidéotron is acting as a Canadian carrier providing telecommunications services in regard to the provisioning of providing mobile wireless services to its subscribers, including access to streaming of online services. Vidéotron is therefore subject to the *Telecommunications Act* and policies made pursuant to that Act, including subsection 27(2) of that Act which forbids undue preference and unjust discrimination.
6. The Applicants argue that the consequences of Vidéotron's data billing practices for its "Unlimited Music" service are such that Vidéotron is preferring itself by exempting certain Vidéotron customers from their normal wireless plan's data charges and monthly data allotment. As detailed below, Vidéotron favours its own mobile service by making it more attractive and less expensive to use at the expense of all other internet use and in particular any other non-covered audio content, streamed or otherwise.
7. The Applicants argue that Vidéotron's billing practices in respect of its "Unlimited Music" service subjects their subscribers who consume other audiovisual content that is unaffiliated with "Unlimited Music" service that are subject to data charges, and these other services, to an undue and unreasonable disadvantage, in violation of subsection 27(2) of the *Telecommunications Act*.
8. The Applicants also argue that Vidéotron's billing practices in respect of its "Unlimited Music" service subjects their lower-tier subscribers to penalties, in the form of potential data charges for consumption of music streaming services, for not moving to higher tier packages.
9. The Applicants argue that it is that price differential, and different effect on the customer's monthly data allotment, that gives rise to an undue preference by Vidéotron to its wireless subscribers who have access to "Unlimited Music", and unjustly discriminates against competing wireless service providers who adhere to the Commission's ruling in *Mobile TV*.
10. The Applicants argue that the facts and principles raised by Vidéotron's billing practices in respect of "Unlimited Music" are fundamentally similar to those which led to the Commission's "*Mobile TV*" decision. In *Mobile TV*, the Commission ruled that a similar billing practice was a violation of subsection 27(2) of the *Telecommunications Act*.
11. The Applicants also argue that Vidéotron is with the challenged billing behaviour picking winners and losers in terms of online content. If this practice which is sanctioned it will allow Vidéotron and other telecommunications service providers not just to pick winners and losers in terms of online content, therefore retrenching the absolute power of network owners, but it will allow network owners to shut out already marginalized citizens who struggle to be connected.

12. The Applicants further argue that the removal of data caps for certain services calls into question the need for economic internet practice management practices in the first place.
13. The Applicants therefore request that the Commission:
 - (i). Declare that Vidéotron's practice of offering preferential rates to subscribers of its selected audio-streaming services compared to consumers of non-selected subscription streaming audio or non-subscription audio (or any internet data) constitutes an undue preference, and subjects Vidéotron's retail mobile wireless customers who wish to have access to non-selected subscription streaming audio or non-subscription audio (or any other internet data), and competing wireless service providers, to an undue and unreasonable disadvantage, in violation of section 27(2) of the *Telecommunications Act*;
 - (ii). Declare that Vidéotron's practice of offering preferential rates to subscribers of its "Unlimited Music" service compared to consumers of other online services offered by competitors constitutes a violation of *Mobile TV* decision; and
 - (iii). Direct Vidéotron to change its mobile wireless data billing rates to remove the discrimination and preference.
14. The more detailed facts and arguments follow.

2. ALLEGED FACTS

15. Vidéotron is a Canadian carrier providing telecommunications services, including mobile wireless services.
16. The data connectivity required to access the "Unlimited Music" service cannot be established unless the subscriber obtains a telecommunications service from Vidéotron.
17. Vidéotron's most recent (30 June 2015) mobile wireless subscriber line count is 702,900.⁹
18. In a press releases dated 27 August 2015 Vidéotron announced the launch of its "Unlimited Music service".¹⁰ The full press release is included as Appendix "A".

⁹ See Vidéotron Ltd., "Quarterly Report 2015 Fiscal Year: Six-month Period: January 1, 2015-June 30, 2015" (3 August 2015) online:
<http://www.quebecor.com/sites/default/files/6K_Videotron_4.pdf> at 5.

19. The title of the press release conveys the essence of the "service": "Agreement with leading music streaming players: Videotron Mobile's new Unlimited Music service lets customers listen to music without using data".¹¹
20. Vidéotron is currently offering "Unlimited Music" "to all customers who have an LTE SIM card or an LTE device runnion iOS or Android that is also configured for [Vidéotron's] our LTE network."¹²
21. In short, "Unlimited Music" allows *certain* Vidéotron wireless customers the ability to listen to *certain* subscription-based streaming audio services without metering the data usage of those services, based on these eligibility criteria: (i) subscription to certain wireless plans that have at least a 2 GB data allowance already built in; (ii) subscription to a certain level of service (namely LTE speed) service; and (iii) possession of an LTE-capable smartphone, that is configured to Videotron's LTE network. Alternatively, customers must subscribe to a bundle combining Internet and mobile services including at least 1 GB of mobile data.
22. That essence is captured in the following screen-grab from Vidéotron's website:

Figure 1 – Screen-grab from Vidéotron's "Unlimited Music" webpage¹³



23. What is missing from the above screen-grab are two important caveats. The first important caveat is that only music from certain music streaming services are available (specifically, Stingray, Rdio, Google Play, Deezer and Spotify). Vidéotron refers in the press release to these streaming services as "partners" with whom Vidéotron has concluded "agreements". One Vidéotron executive is reported as stating that "No money is being exchanged between Vidéotron and the streaming music providers".¹⁴

¹⁰ Vidéotron press release: "Agreement with leading music streaming players: Videotron Mobile's new Unlimited Music service lets customers listen to music without using data" (27 August 2015), online: <<http://corpo.videotron.com/site/press-room/press-release/846>>.

¹¹ *Ibid.*

¹² Vidéotron, online: <<http://support.videotron.com/residential/mobile/optional-services/entertainment/unlimited-music>>.

¹³ Online: <<http://www.videotron.com/unlimitedmusic>> (last accessed 31 August 2015).

¹⁴ CARTT, *supra*.

24. Vidéotron is reported to be "open to partner with any streaming music service"¹⁵, and has said in the media that such openness distinguishes the billing practice which the Applicants seem to impugn from the billing practice at issue in *Mobile TV*:

"From a music perspective, we're not discriminating one platform versus the other," Ms. Collin [Vidéotron's Senior Vice-president of Strategy and Marketing] said in an interview. "All platforms are welcome to join the program. Hopefully the CRTC will see this the way we are seeing this."

25. The second important caveat is that only certain Vidéotron subscribers can use the "Music Unlimited" service and do so without incurring data usage or the related charges and overages associated with it.

26. Those key conditions are as follows:¹⁶

- (i). "Premium Plan" subscription with at least 2 GB of data, the least expensive of which involves a monthly service fee of \$64.95
- (ii). Alternatively, an Internet + Mobile package with at least 1 GB of mobile data.¹⁷
- (iii). The plan is exclusively Canada-wide; Canada-USA plans are excluded
- (iv). The subscriber must have an LTE SIM card or an LTE device (older 3G-only devices are not eligible)
- (v). The device must run an iOS or Android operating system that is also configured for Videotron's LTE network (phones such as Windows or Blackberry are not eligible)
- (vi). applies to music streaming only;

¹⁵ *The Globe and Mail* (Josh O'Kane), "Vidéotron bets on mobile streaming future, eyes new users with 'Unlimited Music'" (27 August 2015).

¹⁶ "Unlimited Music allows users to stream music without using their Mobile plan's data allowance. Unlimited Music applies to Residential customers subscribing to Videotron Mobile with a Premium All-Inclusive Canada plan (with a minimum monthly service fee of \$64.95). All-Inclusive Canada-US plans are excluded from this offer. Customer must have an LTE SIM card or an LTE device running iOS or Android that is also configured for our LTE network. Unlimited Music applies to music streaming only and excludes the downloading of songs and other non-musical content (such as videos) via the mobile provider apps listed here: videotron.com/musiqueillimitee. This list is subject to change without prior notice. Unlimited Music is only available via Videotron's network and its Canadian partner networks. Certain conditions apply."
<http://www.videotron.com/unlimitedmusic#conditions/conditions-1>

¹⁷ <http://www.newswire.ca/news-releases/agreement-with-leading-music-streaming-players---videotron-mobiles-new-unlimited-music-service-lets-customers-listen-to-music-without-using-data-523091451.html>

- (vii). Excludes the downloading of songs and other non-musical content (such as videos) via the mobile provider apps listed here: videotron.com/musiqueillimitee
- (viii). The list is subject to change without prior notice.
27. Vidéotron's current inclusion of "Unlimited Music" in certain plans is reflected in the following graphic from Vidéotron's website.

Figure 2 – Screen-grab from Vidéotron's "Mobile Plans" webpage¹⁸

	BASIC For those who like to start off on the right foot.		PLUS For those who settle for more!		PREMIUM For those who want only the bare maximum.		
Price per month	\$31 ⁰⁵ <small>/month + tax</small>	\$41 ⁰⁵ <small>/month + tax</small>	\$46 ⁰⁵ <small>/month + tax</small>	\$54 ⁰⁵ <small>/month + tax</small>	\$64 ⁰⁵ <small>/month + tax</small>	\$74 ⁰⁵ <small>/month + tax</small>	\$84 ⁰⁵ <small>/month + tax</small>
Unlimited music ⁶					✓	✓	✓
Monthly service fee <small>When you activate your own mobile device (without an agreement)⁷</small>	\$28 ⁰⁵ <small>/month + tax</small>	\$37 ⁰⁵ <small>/month + tax</small>	\$42 ⁰⁵ <small>/month + tax</small>	\$49 ⁰⁵ <small>/month + tax</small>	\$58 ⁰⁵ <small>/month + tax</small>	\$67 ⁰⁵ <small>/month + tax</small>	\$76 ⁰⁵ <small>/month + tax</small>
Data add-ons	50 MB Flexible-rate data		500 MB	1 GB	2 GB	4 GB	6 GB
Call anytime, anywhere in Canada in minutes	100 minutes + unlimited evenings after 5pm and weekends	unlimited	unlimited	unlimited	unlimited	unlimited	unlimited
Included features	Unlimited Canadian and international messaging (text, photo, video), Call Display and Voicemail (35 voice messages)						

28. It is a fact, based on Vidéotron's admission in its marketing materials above that data used to consume "Unlimited Music" is treated differently in terms of pricing and effect on the customers regular monthly data allotment. Specifically, "Unlimited Music" usage is not subject to the customer's monthly data allotment or regular data rate. In contrast, customers who want to access music and audio streaming from other services that are not affiliated with Vidéotron or included in its "Unlimited Music" service must pay Vidéotron's regular data rates and are subject to regular monthly data allotments (and the resulting overage fees when these allotments are exceeded). In one media report Myrienne Collin, Vidéotron's Senior Vice-president of Strategy and Marketing is reported

¹⁸ Online: < <http://www.videotron.com/residential/mobile/mobile-plans> > (last accessed 31 August 2015).

to have stated that "someone streaming music for an hour a day can end up using their 2 GB of data by the end of the month just through audio streaming."¹⁹

29. In exceeding their data allotment, Vidéotron subscribers may face certain significant data overage charges, limited by the *Wireless Code*²⁰ to \$50 (or \$100 while roaming). Vidéotron's per MB overage rate ranges from \$0.05 / MB to \$0.15 per MB, depending on the subscriber's plan and roaming status.²¹
30. In several media reports Vidéotron representatives have been quoted as stating a belief that the differential billing practice complies with the relevant rules.
31. As reported in CARTT:

But the company argues this move doesn't go against CRTC regulations because it doesn't offer any undue preference to itself. "Any other player that wants to offer, we'd be happy to accept them," said Vidéotron CEO Manon Brouillette. "All regulatory verifications have been made."

[...]

A regulatory affairs analyst with Vidéotron said they haven't consulted the CRTC about the deal, but they're confident it does not go against the rules.²²

32. As reported by the *Globe and Mail*:

Myrienne Collin, Videotron's senior vice-president of strategy and marketing, said the program is fundamentally different than those quashed by the CRTC because they're open to partner with any streaming music service. She said the newly launched Apple Music, for instance, should become data-free on Videotron within a few months.

"From a music perspective, we're not discriminating one platform versus the other," Ms. Collin said in an interview. "All platforms are welcome to join the program. Hopefully the CRTC will see this the way we are seeing this."

33. Other Vidéotron representatives appeared to anticipate their differential billing practice would be challenged.
34. As reported by the *Globe and Mail*:

¹⁹ CARTT.ca, (Steve Faguy) "Vidéotron launches Unlimited Music, but expect net neutrality advocates to object" (28 August 2015), online: <<https://cartt.ca/article/vid%C3%A9otron-launches-unlimited-music-expect-net-neutrality-advocates-object>>.

²⁰ Telecom Regulatory Policy CRTC 2013-271, The Wireless Code (3 June 2013).

²¹ Vidéotron, "Internet on your mobile", online: <<http://www.videotron.com/residential/mobile/options#tab/cat2380093>> (last accessed 31 August 2015).

²² *Ibid.*

"From a music perspective, we're not discriminating one platform versus the other," Ms. Collin said in an interview. "All platforms are welcome to join the program. Hopefully the CRTC will see this the way we are seeing this."²³

35. As reported in *The Wire Report*:

Collin [Videotron's senior vice-president of strategy and Marketing] said Videotron is confident that the CRTC will view the launch of its new music service "as one of the numerous advantages of competition in mobile," and that the regulator will see the service as being in line with its own customer-focused approach.

[...]

When asked whether Videotron was prepared to defend its music service in court, as Bell has done with its mobile-TV service, Jean Péladeau, analyst for regulatory affairs in telecom for Quebecor, was non-committal.

"We could make a different call if we go that far," he said in an interview.²⁴

36. In the next section the Applicants argue that Vidéotron's billing practices for "Unlimited Music" constitute an undue preference and unjust discrimination contrary to subsection 27(2) of the *Telecommunications Act*, and that the Commission should direct Vidéotron to change its mobile wireless data billing rates to remove the discrimination and preference. The Applicants also argue that this case is fundamentally similar to the one in *Mobile TV* decision and that a similar result should follow.

3. GROUNDS OF APPLICATION

Vidéotron's exemption of certain data for certain users violates ss. 27(2) of the Act

37. 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*.²⁵
38. Section 27(2) *Telecommunications Act* prohibits unjust discrimination and undue preference.

²³ *The Globe and Mail* (Josh O'Kane), "Videotron bets on mobile streaming future, eyes new users with 'Unlimited Music'" (27 August 2015).

²⁴ *The Wire Report*, "Net-neutrality advocates cry foul over Videotron music service" (27 August 2015), online: < <http://www.thewirereport.ca/news/2015/08/27/net-neutrality-advocates-cry-foul-over-videotron-music-service/30002>>.

²⁵ 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).

(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.

39. The Commission's subsection 27(2) analysis is conducted in two phases:

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."²⁶

40. The initial burden is on the applicant to demonstrate that the conduct is preferential or disadvantages a person.²⁷ 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.²⁸

41. The manner in which Vidéotron bills its mobile wireless service customers for wireless data for certain music streaming services:

- (i). unduly or unreasonably disadvantages competing music streaming services;
- (ii). unduly or unreasonably disadvantages Vidéotron mobile wireless service customers who may wish to avail themselves of alternative music streaming services;
- (iii). unduly or unreasonably disadvantages Vidéotron mobile wireless service customers who may wish to avail themselves of any internet service or application requiring data that is not a chosen music streaming service;
- (iv). unduly or unreasonably disadvantages subscribers of Vidéotron's wireless services that are not eligible for "Unlimited Music" by denying them the same type of access to online content, and also, regressively making lower-tier customers incur higher data consumption and higher data bills for consumption of the same music; and
- (v). unduly or unreasonably disadvantages competing mobile wireless service providers who adhere to *Mobile TV* and to the ITMP Framework (explained below); and unduly prefers Vidéotron in so doing.

²⁶ 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, see also *Mobile TV*.

²⁷ Telecom Regulatory Policy CRTC 2009-657 - *Review of the Internet traffic management practices of Internet service providers* (21 October 2009) at para. 48.

²⁸ *Telecommunications Act*, s. 27(4).

42. A consequence of Vidéotron's preferential mobile wireless data rate scheme is that competing music streaming service providers who wish to offer their services to Vidéotron's 702,900 wireless customers and customers who wish to consume in a similar manner music streaming services from a different service provider face a significant price difference, therefore impairing competition.
43. A further consequence is that Vidéotron mobile wireless customers, when presented with competitive choices for other music streaming 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 the music that is provided through online streaming services associated with Vidéotron's "Unlimited Music" service. In so doing Vidéotron unduly favours its own service, which discourages its mobile customers from using competing sources of content.
44. It is irrelevant that, as reported "No money is being exchanged between Vidéotron and the streaming music providers"²⁹. It is also irrelevant that Vidéotron appears "open to partner with any streaming music service"³⁰.
45. Finally, Vidéotron's preference of certain music services over any other internet data service or application - because the relative price of the data to view those other services or use those other applications is unduly preferential to those services and to Vidéotron itself, to the extent that this exemption encourages consumers to become its customers or to encourage consumers to subscribe to a particular type of Videotron mobile service at a particular price.

Vidéotron's exemption of certain data for certain users violates the ITMP Framework

46. In Telecom Regulatory Policy CRTC 2009-657 the Commission made a number of determinations about the use of "economic approaches" to internet traffic management, which Vidéotron's billing practices in respect of "Unlimited Music" challenge.
47. "Economic approaches" to internet traffic management link rates for Internet service to end-user consumption.
48. In Telecom Regulatory Policy CRTC 2009-657 the Commission stated:

²⁹ CARTT, *supra*.

³⁰ *The Globe and Mail* (Josh O'Kane), "Videotron bets on mobile streaming future, eyes new users with 'Unlimited Music'" (27 August 2015).

- "Application-specific ITMPs degrade or prefer one application, class of application, or protocol over another and may therefore warrant investigation under subsection 27(2) of the Act."³¹
 - "In contrast, economic ITMPs would generally not be considered unjustly discriminatory, as they link rates for Internet service to end-user consumption. Economic ITMPs also provide greater transparency to users than technical ITMPs, as they are reflected in monthly bills. Furthermore, these practices match consumer usage with willingness to pay, thus putting users in control and allowing market forces to work."³²
 - "The Commission acknowledges the unique capacity constraints of mobile wireless networks and notes that such constraints, combined with the rapid growth of mobile wireless data services, are likely to lead to congestion as mobile wireless data traffic increases in volume."³³
 - "the Commission expects ISPs using mobile wireless data services to offer Internet access services in accordance with the determinations of this decision."³⁴
49. The Applicants argue that Vidéotron appears to be using economic ITMPs broadly throughout its wireless business, and that its exemption from data limits (and therefore overage charges) for certain subscribers ("Premium" plan subscribers) who consume certain data (streaming music) from certain affiliated partners ("Unlimited Music"), using certain apps, departs from the Commission's recognition of economic ITMPs as being transparent, and as matching consumer usage with willingness to pay.
50. Furthermore, Vidéotron's exempting of certain subscribers who consume certain data from certain affiliated partners, using certain apps, from data limits (and therefore overage charges) raises questions about whether Vidéotron's use of data caps is necessary for traffic management at all given Vidéotron appears to be capable of provisioning unlimited audio music streaming on its network, to a currently unknown (at least publicly) number of subscribers which the Applicants believe must be significant.
51. In this regard the Applicants refer to the submissions made by the Affordable Access Coalition (the "**AAC**") in response to Telecom Notice of Consultation CRTC 2015-134 – *Review of Basic Telecommunications Services*. The AAC there noted that that the AAC's research indicated that data caps specified by major Canadian ISPs today often have low data allowances that can easily be exceeded using the connection at its advertised speed for a relatively brief period of time.

³¹ Telecom Regulatory Policy CRTC 2009-657 at para. 40.

³² *Ibid.*

³³ *Ibid.*, at para. 112.

³⁴ *Ibid.*, at para. 116.

Facts and principles substantially similar to *Mobile TV* decision

52. The Applicants argue that the facts and principles of this case are fundamentally similar to those which led to the "*Mobile TV*" decision (Broadcasting and Telecom Decision CRTC 2015-26).³⁵
53. In *Mobile TV* the Commission concluded that Videotron (as well as Bell Mobility)
- in providing the data connectivity and transport required for consumers to access the mobile TV services at substantially lower costs to those consumers relative to other audiovisual content services, have conferred upon consumers of their services, as well as upon their services, an undue and unreasonable preference, in violation of subsection 27(2) of the *Telecommunications Act*.³⁶
54. The Applicants allege that the facts and principles at issue in this application are substantially the same as in *Mobile TV*, and that the Commission should direct Vidéotron to comply with *Mobile TV*. The Applicants, referencing the key findings in the *Mobile TV* decision (paragraphs 46-48), argue that the Commission should make the following findings.
- Vidéotron is, as it was in the result of *Mobile TV*, a Canadian carrier providing telecommunications services.
 - The data connectivity required to access the "Unlimited Music" service cannot be established unless the subscriber obtains a telecommunications service from Vidéotron.
 - There is a significant difference in cost to the consumer of accessing, by means of Vidéotron's wireless network, music streaming content not affiliated with Vidéotron's "Unlimited Music" service, when compared to accessing music through "Unlimited Music", up to \$50 per month.
 - The amount of time spent by a Vidéotron subscriber to a "Premium" plan using the "Unlimited Music" service does not count toward the data cap of the subscriber's wireless plan. Rather, subscribers who are eligible for "Unlimited Music" pay one of a series of set charges to be able to access the service on their mobile devices, which charge is not based on the number of gigabytes of data consumed. In contrast, other content services, even those offering audio content or audio streaming services that are substantially similar to those offered by through "Unlimited Music") count towards a subscriber's data cap (for example, on a "Basic" or "Plus" plan, a customer could reach the respective data

³⁵ Broadcasting and Telecom Decision CRTC 2015-26 - Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv (29 January 2015).

³⁶ *Mobile TV* at para. 61.

caps, in one of Vidéotron's executive's own admissions, after streaming only an hour of audio content a day.

- It is the subscriber's mobile wireless plan that provides the basis for the data connectivity required for an end user to access the "Unlimited Music" service. Notwithstanding this, given that access to the "Unlimited Music" services is, for those Vidéotron who are eligible in the first place for it, exempt from the standard data plans, and no charge appears to be imposed to access the service, the charge to consumers to access content from other music streaming services (and indeed any other form of internet content) on their mobile devices is significantly higher than the charge to access their respective mobile TV services.
 - As a result Vidéotron subscribers have a significant economic incentive to access music content through the Vidéotron music streaming service rather than through other content services, and if they are not eligible for "Music Unlimited" because they are lower-tier subscribers, to move to "Premium Plans". Conversely, Vidéotron subscribers who consume other data and unaffiliated music streaming services are subject to a corresponding disadvantage by having to pay more to access content on their mobile devices and by facing a data cap. This incentive also provides Vidéotron's music streaming service with an advantage and other data services a corresponding disadvantage.
55. The Applicants also note that Vidéotron's billing practices for "Unlimited Music" go to the heart of the concerns the Commission expressed in *Mobile TV* about cultivating the internet's promise of innovation from the edges, available for all citizens. In *Mobile TV* the Commission stated that it "earnestly hopes" citizens will continue to have "full access" to the "rapid and uncontrolled innovation in computer communications" and whether it will "continue to come from the edges of networks, without permission" from network owners who used to possess "absolute power".³⁷

³⁷

Mobile TV at paras. 2-4:

2. An essential consideration when examining the evolution of the Internet is how best to foster and secure the environment for innovation. Innovation is at the heart of the Internet. The Internet has given people the freedom to innovate without permission. It has dissociated certain elements that previously had been inextricably joined:

- the ownership of networks and the uses to which networks are put; and
- the costs of running networks, which are measured in billions of dollars, and the costs of developing services and products that are delivered through networks, which can be measured in millions.

3. Dissociating the ability to innovate from the ownership of networks, and the costs of innovation from the costs of maintaining networks, has led to unprecedented innovation. The Internet has pushed innovation from the core of networks to the edges, from large carriers to innovators such as Tim Berners-Lee, inventor of the World Wide Web. This shift has reduced the power of network owners, which used to be absolute. It has also created some problems, some of which will be explored further in this decision.

4. At the core of the debate over "net neutrality" is whether innovation will continue to come from the edges of networks, without permission. Will there continue to be rapid and uncontrolled innovation in computer communications? Will citizens have full access to that innovation? The Commission

56. In the case of Vidéotron's billing practices for "Unlimited Music", Vidéotron, a network owner, is engaged in a practice which if sanctioned will allow it and other telecommunications service providers not just to pick winners and losers in terms of online content, therefore retrenching the absolute power of network owners, but it will allow network owners to shut out already marginalized citizens who struggle to be connected.
57. As a last point regarding *Mobile TV*, the Applicants note that although that decision is currently under review by the Federal Court of Appeal (the "FCA"),³⁸ until such time as the FCA rules otherwise, a valid decision of the CRTC and one that governs this particular matter. The possibility that the FCA may overturn *Mobile TV* cannot and should not be used by Vidéotron to undermine the Commission's decision in that matter, nor the application of Subsection 27(2) of the *Telecommunications Act*, nor to deny the relief sought by the Applicants.

**"Unlimited Music" from certain providers only for certain subscribers is inconsistent
Canada's telecommunications policy objectives**

58. 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".³⁹
59. Canada's telecommunications policy objectives are set out in section 7 of the Act. These objectives include the following:

- | |
|---|
| <p>(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;</p> <p>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</p> <p>c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications</p> <p>[...]</p> |
|---|

earnestly hopes so. However, due to the limited capacity of their networks, carriers have legitimate interests in the management of these networks. Will they be able to develop networks that can bear the traffic generated by this innovation? Will they, in turn, be empowered to innovate?

³⁸

Bell Mobility Inc. v. Benjamin Klass et al., (FCA), Court File No. A-193-15.
Telecommunications Act, section 47.

³⁹

- 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;
- h) to respond to the economic and social requirements of users of telecommunications services

- 60. Vidéotron's mobile wireless data rate scheme appears to be designed to favour its own "Unlimited Music" service and its affiliated partners to the detriment of its lower-tier customers, its competitors and, more generally, of competition in the music streaming marketplace. This is inconsistent with several of Canada's telecommunications policy objectives.
- 61. Vidéotron's 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, Vidéotron's practice promotes Vidéotron's own economic interests and music streaming service choices, to the detriment of other voices.
- 62. By preferring certain content provided through select streaming partners, Vidéotron's 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 making the streaming content of its partners less expensive than it would be when consumed outside of the streaming services affiliated with "Unlimited Music", Vidéotron has embarked on putting itself in the shoes of picking winners and losers in terms of music streaming services, and not letting customers make those determinations.
- 63. Furthermore, in penalizing lower-tier customers who are not eligible for "Unlimited Music" and therefore the data exemption, this undermines the affordability of mobile wireless services for consumers. Excluding lower-tier subscribers from "Unlimited Music" acts as a penalty, especially on low-income Canadians, and not as an incentive to customers to move to higher tier "Premium" plans. It does so by putting out of reach for low-income consumers the benefit of unlimited music streaming, and it also regressively penalizes those consumers who though they may not choose to purchase the more expensive plans which entitle the customer to subscribe to "Unlimited Music", will incur data overage charges on their lower-tier plans while consuming online content, including perhaps the very same music content from affiliated music streaming services or from non-affiliated music streaming sources. For example, those on ineligible mobile wireless plans (*i.e.*, below "Premium" which is an all-inclusive Canada plan with at least 2 GB of data or an Internet + Mobile package with at least 1 GB of mobile data) could unwittingly end up incurring *higher* charges than what the premium subscribers pay. As the Vidéotron executive's reported comment above about how "someone streaming music

for an hour a day can end up using their 2 GB of data by the end of the month just through audio streaming" reveal, subscribers to lower-tier Vidéotron mobile wireless services could easily incur data overage charges.

64. Additionally, given the lower-tier subscribers do not have the same "unlimited" data as the premium subscribers, the data caps are likely to act as a disincentive to access the applications they desire.
65. Similarly, Vidéotron's practice does not enhance, and indeed undermines the efficiency and competitiveness of Canadian telecommunications services. For Vidéotron's competitors, the substantial obstacles – notably in the form of significantly higher data charges for Vidéotron's 702,900 wireless subscribers face if they want to obtain music streaming services from competitors - result in reduced competitiveness and a less efficient marketplace. The harm to competitiveness of the marketplace of such 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 Vidéotron.
66. Vidéotron's practice of preferentially pricing its own "Unlimited Music" service discriminates against users of competing music streaming services (and indeed against providers of *all other* non-affiliated online content). 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, Vidéotron's practice imposes a significant barrier on choice in relation to other online services and produces precisely the opposite effect the Commission has been directed to pursue.
67. As Vidéotron mobile wireless service customers are disincented from considering competitive alternatives for other online music services but indeed all other online services by the rating barriers created by Vidéotron, the Applicants expect that such practices could stifle innovation in the growing smartphone sector.
68. Finally, it is clear in the Applicants' 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. While Vidéotron's media messaging frames "Unlimited Music" as a response to consumer frustration over data caps, it does so selectively for music and for only certain affiliated music streaming services, and ignores broader consumer frustration with data caps generally, noted above.

4. NATURE OF DECISION SOUGHT

69. In offering preferential rates to certain of its mobile wireless subscribers, preferential data rates for subscribers to its "Unlimited Music" service, and in charging higher rates for access to competing online content, or the exact same content for Vidéotron who happen to not be "premium" subscribers, Vidéotron 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*.
70. Vidéotron's practice regarding access by its mobile wireless customers to competing online 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.
71. The facts and principles at issue in this application are substantially similar to those which led to the *Mobile TV* decision.
72. Therefore, the Applicants request that the Commission:
 - (i). Declare that Vidéotron's practice of offering preferential rates to subscribers of its "Unlimited Music" service compared to consumers of other online services offered by competitors constitutes an undue preference, and subjects Vidéotron's retail mobile wireless customers who wish to have access to competing online services, and competing music streaming service providers, to an undue and unreasonable disadvantage, in violation of section 27(2) of the *Telecommunications Act*,
 - (ii). Declare that Vidéotron's practice of offering preferential rates to subscribers of its "Unlimited Music" service compared to consumers of other online services offered by competitors constitutes a violation of *Mobile TV* decision; and
 - (iii). Direct Vidéotron to change its mobile wireless data billing rates to remove the discrimination and preference.
73. Finally, the Applicants request their costs of making this Part 1 application in accordance with s. 56 of the *Act*.

5. CONCLUSION

74. Vidéotron appears to be alone in the practice of not charging for certain online data, for now. However, the Applicants submit that the rest of the Canadian telecommunications industry would immediately join Vidéotron in similar offers were such unjust discrimination allowed. The result would be to undercut subsection 27(2) of the *Telecommunications Act*, compromise the Commission's policy in respect of internet practice management practices, and result in telecommunications service providers influencing and even controlling the online services which Canadians can access.

End of document

Appendix "A" – Vidéotron press release announcing "Unlimited Music"



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PRESS RELEASE

For immediate release

Agreement with leading music streaming players

Vidéotron Mobile's new *Unlimited Music* service lets customers listen to music without using data

Montréal, August 27, 2015 – In another innovative move, Vidéotron is offering its mobile customers its **free** new *Unlimited Music* service. The introduction of the mobile service follows a string of announcements about Vidéotron's other services in recent weeks, including the new illico 4K UHD set-top box and achievement of Internet download speeds exceeding 1 Gbps. Now, for the first time in Canada, a carrier is letting customers stream music via the most popular services without using up any of their data plan.

As of today, users of Stingray, Rdio, Google Play, Deezer and Spotify can listen to their favourite tracks anywhere, anytime or discover new artists without worrying about data usage. In the coming weeks and months, other popular services will be added to the list, including Songza.

"Music streaming is growing quickly around the world," said Myrienne Collin, Senior Vice President, Strategy & Marketing of Vidéotron. "The numbers tell the story: more and more consumers are making their mobile device the nerve centre of their entertainment system and their constant electronic companion. We want to get ahead of our customers' needs once again by bringing them a unique, innovative service: *Unlimited Music* will help make the connection between fans of music from Québec and around the world, and the major music streaming players. We are proud to be able to offer our customers this service thanks to our agreements with key industry players, and this is just the beginning. This launch, a ground-breaker in Canada, reaffirms our commitment to offering the most innovative mobile service anywhere."

Big-name partners

Unlimited Music involves the largest players in music streaming, a fast-growing, worry-free model that is democratizing the way people listen to music.

"Vidéotron's new innovative service is a great way for listeners to enjoy Rdio's vast catalogue of over 35 million songs in free ad-supported streaming stations or on-demand subscription without data restrictions. We're extremely excited about this partnership," said Scott Bagby, President of International, Rdio.

"We are very excited about this collaboration with Vidéotron, with whom we have a longstanding relationship," said Eric Boyko, CEO of Stingray. "Music is part of our lives from morning to night. With the free Stingray Music app, music-lovers who subscribe to Vidéotron Mobile will be able to enjoy a selection of exclusive channels for Vidéotron Mobile subscribers. It is the only app that delivers music selected specially for them by a team of experts."

***Unlimited Music* on Vidéotron's powerful LTE mobile network**

Combined with Vidéotron's LTE mobile network, which covers nearly 90% of Québec's population and supports speeds of up to 150 mbps, the *Unlimited Music* service enables Vidéotron Mobile customers to use their devices to their full potential, at no extra charge.

Unlimited Music will be offered free of charge to music-lovers and heavy data users who subscribe to a Premium plan (an All-inclusive Canada plan with at least 2 GB of data) or to an Internet + Mobile package with at least 1 GB of data.

Exclusive channels for Videotron Mobile customers in the Stingray Music app
We are also announcing that Stingray is launching exclusive channels for Videotron Mobile customers today as part of the free Stingray Music app. Customers who download the app will have access to an exclusive selection of themed channels in addition to the 1,000 recently launched Vibes channels featuring nearly 100 musical styles. Stingray Music channels were all developed by music experts. Their distinguishing characteristics include the large amount of Canadian and French-language music they carry.

***Unlimited Music* will get bigger**

Vidéotron, the Canadian pioneer in the field, will continue working to expand the list of partners involved in *Unlimited Music*. Any music streaming provider that is interested in being part of the service can let Videotron know in order to offer consumers the best of music streaming.

Vidéotron (www.videotron.com), a wholly owned subsidiary of Quebecor Media Inc., is an integrated communications company engaged in cable television, interactive multimedia development, Internet access, cable telephone and mobile telephone services. Videotron is a leader in new technologies with its illico interactive television service and its broadband network, which supports high-speed cable Internet access, analog and digital cable television, and other services. As of June 30, 2015, Videotron was serving 1,747,700 cable television customers, including 1,515,700 Digital TV subscribers. Videotron is also the Québec leader in high-speed Internet access, with 1,539,100 subscribers to its cable service as of June 30, 2015. As of the same date, Videotron had 702,900 subscriber connections to its mobile telephone service and was providing cable telephone service to 1,337,700 Québec households and organizations. For the tenth consecutive year, Videotron was ranked as Québec's most respected telecommunications company, based on a Léger survey.

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END OF APPENDIX "A"