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21 September 2016

Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

VIA GCKEY

Dear Ms. May-Cuconato,

Re: CRTC File #1011-NOC2016-0192: *Examination of differential practices related to Internet data plans*, Telecom Notice of Consultation CRTC 2016-192, 17 May 2016 (as amended) – Further Intervention of the Equitable Internet Coalition

1. In accordance with the procedure established by the Commission in the above-referenced notice of consultation, the Equitable Internet Coalition[1] attaches its further intervention.

Yours truly,

[original signed]

John Lawford, Barrister & Solicitor
Counsel to the Coalition

[original signed]

Geoffrey White, Barrister & Solicitor
Counsel to the Coalition

cc: Suneil Kanjeekal, CRTC (by email)
Josiane Lord, CRTC (by email)
Eric Macfarlane, CRTC (by email)
Tannis Braithwaite, BCPIAC
Bruce Cran, CAC (by email)
Gudrun Langolf, COSCO (by email)
Herb John, NPF (by email)

Attachment 1: Second Report of Dr. Barbara Cherry

End of document

[1] Consumers' Association of Canada (**CAC**); Council of Senior Citizens Organizations of British Columbia (**COSCO**); National Pensioners Federation (**NPF**); and Public Interest Advocacy Centre (**PIAC**). Since the filing of the first intervention the British Columbia Public Interest Advocacy Centre (**BCPIAC**) has joined the Coalition.

CONSUMERS' ASSOCIATION OF CANADA
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The "Equitable Internet Coalition"

FURTHER INTERVENTION

Telecom Notice of Consultation CRTC 2016-192 (as amended)

Examination of differential pricing practices related to Internet data plans

21 SEPTEMBER 2016

Contents

Part I. Introduction and Summary

1. The Equitable Internet Coalition[1] provides this further intervention in *Examination of differential pricing practices related to Internet data plans*, Telecom Notice of Consultation CRTC 2016-192, as amended ("**TNC 2016-192**").

2. Submitted with this further intervention is a second report from Professor Barbara Cherry, titled *Interrelationship of Common Carriage Regulation and Reliance on Market Forces* (the "**second Cherry Report**").

3. TNC 2016-192 is an examination of "differential pricing practices related to Internet data plans" by Internet Service Providers ("**ISPs**"). The Commission has defined ISPs as "service providers offering retail internet access services over wireline or wireless networks including the commercial mobile networks operated by Wireless Carriers."[2]

4. The examination is to take place in light of the *Telecommunications Act*[3] (the "**Act**"), specifically to "determine which differential pricing practices, if any, constitute an undue or unreasonable preference, a disadvantage, or unjust discrimination under subsection 27(2) of the Act".[4] TNC 2016-192 is concerned with (i) defining differential pricing practices for wireline and wireless networks; (ii) identifying and weighing benefits and concerns with differential pricing practices; and (iii) identifying whether the Commission should implement regulatory measures. The Commission has stated that the expected outcome of the process commenced by TNC 2016-192 is "that Canadians and Internet service providers alike will benefit from a clear and transparent regulatory policy regarding differential pricing practices for Internet data plans."[5]

5. At the core of this proceeding is determining whether or not differential pricing practices—that is, *price discrimination*—should be permitted in certain cases. The Commission appears interested in hearing whether or not there are certain circumstances in which differential pricing practices should be permitted.[6] Potential factors that the Commission has identified as being potentially relevant to allowing differential pricing practices are the ISP making the differential pricing practice applicable to all applications or services; or

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1 Consumers' Association of Canada (**CAC**); Council of Senior Citizens Organizations of British Columbia (**COSCO**); National Pensioners Federation (**NPF**); and Public Interest Advocacy Centre (**PIAC**). Since the filing of the first intervention the British Columbia Public Interest Advocacy Centre has joined the Coalition. BC-PIAC is a non-profit, public interest law office. Its creation in 1981 reflected the fundamental belief that it should not only be the rich and powerful that are represented before our courts and regulators. For those bodies to function as they should, they must hear from all of those affected by their decisions. Our task is to provide representation to groups that would not otherwise have the resources to effectively assert their interests. Online: http://bcpiac.com/

2 See requests for information (CRTC)20MAY16-2 TNC 2016-192, footnote 1.

3 *Telecommunications Act* (S.C. 1993, c. 38).

4 TNC 2016-192 at para. 24.

5 *Ibid*., headnote.

6 *Ibid*., Consultation question 13.

there being a "societal benefit" to allowing differential pricing practices. TNC 2016-192 asks many questions, and is about many issues, but in the Equitable Internet Coalition's view fundamentally this proceeding is about *access* and *innovation* and the role of data allowances or **"**caps" in the user experience.

6. In short, the Equitable Internet Coalition believes differential pricing practices obstruct fair and open access to the Internet, and therefore that the Commission should, as other telecommunications regulators are doing, intervene to preserve the openness of the Internet.

7. The Equitable Internet Coalition's further intervention is structured as follows.

8. In Part II the Coalition (i) recaps its first intervention; and (ii) summarizes the first round of interventions, including interventions filed by individual Canadians, with emphasis on the key issues in this proceeding.

9. In Part III the Coalition explores the origins and role of the provisions of the Act critical to the Commission's determination of the issues in this proceeding. Specifically, the Coalition addresses (i) the concept of common carriage under section 27(2); (ii) the role of carriers in content under section 36; (iii) the Commission's broader role in respect of the Canadian telecommunications policy objectives in section 7; and (iv) the role of economic efficiency in Canadian telecommunications policy.

10. In Part IV the Coalition argues that ISPs, by virtue of their role of common carriers, play a powerful gatekeeping role and have the technical means and economic incentive to pose a threat to Internet openness.

11. In Part V the Coalition (i) presents its revised definition of discriminatory differential pricing practices; (ii) develops and presents an analytical framework for assessing whether or not a differential pricing practice is presumptively contrary to subsection 27(2) and the policy objectives of the Act; (iii) categorizes the types of differential pricing practice currently observed in the market, by design; and (iv) applies, by way of example, the proposed analytical framework to some of the types of differential pricing practices observed in the market today.

12. Where necessary the Coalition critically examines some of the major parties' arguments in favour of and against differential pricing practices. The Coalition concludes that discriminatory differential pricing practices, in all but limited cases, are not and should not be permitted under Canadian telecommunications law.

13. In Part VI the Coalition concludes by (i) summarizing its position on discriminatory differential pricing practices, and (ii) recommending questions the Commission may wish to ask parties at the public hearing this fall.

Part II. Recapitulation and Summary of First Interventions

14. In this part of its further intervention the Equitable Internet Coalition (i) recaps its own positions, and (ii) provides several summary observations about the first round interventions filed by individual Canadians, civil society groups, and service providers.

(i) Recap of Equitable Internet Coalition's first intervention

15. In the Equitable Internet Coalition's first intervention the Coalition argued that differential pricing practices are not a sign of, or response to, competition, but instead they may be a symptom of a *lack of competition, manifested in the existence of data caps in the first place.* The Coalition also argued that even in competitive markets, data cap practices adverse to the interest of customers can occur.

16. The Coalition argued that data caps are an un-necessary evil. They penalize customers for consuming digital content, they instil what Nokia labels "fear" about financial penalties, and their existence is used to justify differential pricing practices. Because of that, the Coalition argued that data caps should be the focus of TNC 2016-192, not differential pricing practices. The Coalition argued that the Commission should put the onus on the industry to justify the practice of imposing data caps in the first place given increasing evidence that data caps appear not to be designed for genuine technical issues such as congestion. The Coalition argued that in the event that the Commission finds that data caps continue to perform a legitimate technical role, then the Commission should require the discriminating carriers, or those wishing to discriminate, to justify the discrimination, pursuant to subsection 27(4) of the Act.[7]

17. The Coalition expressed its key concern about differential pricing practices as being about *discriminatory* differential pricing practices. The Coalition provided the following definition:

> ***Discriminatory differential pricing is "economic measures (pricing differences, actual or effective) that result in some types of data being offered at higher or lower prices compared to data excluded from the differential pricing scheme."***

18. As PIAC, CAC and COSCO argued in the "Unlimited Music" proceeding, unjust discrimination is, in plain and simple terms, *when a good deal for some means a bad deal for others.*[8]

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[7] Pursuant to subsection 27(4) of the *Telecommunications Act*, the burden of establishing before the Commission that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that confers the preference and subjects the person to a disadvantage:

> Burden of proof
> (4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

[8] Reply Submission of CAC-COSCO-PIAC, CRTC File #8661-P8-201510199

19. The Coalition argued that discriminatory differential pricing practices are a solution to a problem that should not exist, and the harms of differential pricing practices far outweigh the benefits.

20. The Coalition argued that differential pricing practices, including zero-rating, should not be permitted, with very limited exceptions. The Coalition argued that the Act, even in the current state of retail Internet service forbearance, provides a very limited basis upon which differential pricing practices could be permitted, and that the Commission's past approach to unjust discrimination illustrates that the Commission has opposed carriers putting barriers in place between customers and either content or service from competitors that cannot be justified on the basis of technical, operational or financial necessity. The Coalition argued that the Commission, like ISPs, should not be in the business of preselecting what categories of online content should be favoured.

21. The Coalition also argued that the approach taken by the Federal Communications Commission ("**FCC**") in the United States, described in the first Cherry Report, may provide a model for the Commission. However, the Commission must above all respect the limits placed upon the practice by the Act.

22. The Coalition argued that the Federal Court of Appeal's strong endorsement of *Mobile TV* makes it clear that section 27(2) of the Act is the primary analytical framework in which differential pricing practices must be examined, even where the content being delivered by telecommunications may be "broadcasting" in some senses. The Coalition also emphasized the Canadian telecommunications policy objectives in section 7 of the Act as an important consideration.

23. The Coalition indicated it is wary to begin accepting exceptions to its proposal that all data be priced without discrimination, as defined by the Coalition.

24. The Coalition argued that there is a greater good served by keeping both the Commission and ISPs out of content shaping—which is exactly what differential pricing practices are—shaping which content is preferred and which content is not.

(ii) Summary observations from first round of interventions

25. In this section the Coalition summarizes the interventions by individuals, then the other main parties to the proceeding.

Individual interveners are clearly opposed data caps and differential pricing

26. PIAC reviewed 75 individual interventions posted in relation to this proceeding.

27. Through the individual interventions, Canadians spoke out overwhelmingly against zero-rating specific applications or content: forty-three interventions spoke out in opposition to

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Part I Applications under the *Telecommunications Act* regarding Vidéotron's "Unlimited Music" service, 27 January 2016, at para. 30.

zero-rating specific applications;[9] one foreign academic spoke out in favour.[10] The interveners valued the neutrality of the internet as a content platform, and want internet service providers to have no role shaping the content they access.[11] Interventions also overwhelming opposed zero-rating in general, with just two interventions supporting broad exemptions that treat competitors equally.[12] In the few interventions which addressed the issue, interventions were more willing to tolerate differential pricing for all content which reflected actual capacity constraints, such as time-of-day billing.[13] Many individual interventions were vehemently opposed to sponsored data.[14]

28. Thirty-one interveners also rejected the premise that internet usage should be limited based on monthly data caps and usage based billing.[15] Many challenged the logic of billing for monthly usage when costs were driven by capacity limits. Jennifer Springs explained:

> Internet traffic does not have a unit cost. It does not cost an ISP to transmit a bit. Instead, ISPs have as the vast majority of their costs capital expenses: building networks and installing equipment to transmit bits of data. … The problem ISPs face is network congestion: if too many users send or receive too many bits simultaneously, the network equipment cannot process all of the requests and data flowing to and from each customer slows down. …
>
> The goal of data caps is for customers to self-regulate their usage in the hopes that such self-regulation limits instances of congestion. However, data caps are inherently flawed because they only limit data across a large period of time (eg: a whole month), whereas network congestion tends to occur a[t] specific intervals (eg: evenings). If all the users on a specific network decide to engage in Internet activity that saturates their connection simultaneously, they will still cause network congestion, even if they were only doing it for short bursts each day and transmitting, in total, less than their monthly caps.[16]

29. No individual interveners spoke out in support of data caps.

30. Many individual interveners complained they were paying too much for Internet.[17] They highlighted these concerns by noting that internet was being offered at substantially lower prices in bundle deals and to new customers.[18]

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9 Interventions 2, 3 17, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 36, 38 39, 40, 41, 42, 43, 46, 48, 49, 50, 57, 63, 73, 74, 76, 81, 79, 28, 20, 1, 91, 92, 105, 35, 93/98, and 133.

10 Intervention 104.

11 Interventions 2, 3, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 33, 34, 36, 41, 42, 43, 45, 46, 50, 57, 61, 73, 76, 78, 79, 28, 27, 20, 92, and 35.

12 Interventions 3, and 32.

13 Interventions 11, 34, and 45.

14 Interventions 2, 3, 11, 17, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 31, 34, 36, 38, 39, 40, 41, 42, 43, 45, 46, 48, 49, 50, 57, 63, 73, 74, 76, 81, 79, 28, 20, 1, 91, 92, and 35.

15 Interventions 5, 12, 19, 31, 34, 36, 38, 44, 45, 58, 66, 57, 62, 69, 61, 72, 73, 75, 76, 77, 78, 81, 83, 27, 85, 91, 107, and 93/98.

16 Intervention 62.

17 Interventions 10, 25, 33, 47, 48, 52, 54, 56, 59, 60, 71, 69, 67, 64, 70, 81, 80, 83, 84, 27, 85, 87, 107, 106, 100, and 53.

18 Interventions 33, 47, 60, and 100.

31. Individuals did not see zero-rating as a solution to the high cost of their internet services. They see the problem as an underlying lack of competition.[19] Many called for internet – or at least wholesale transmission - to be provided as a public utility.[20]

32. Other interveners raised more specific objections related to usage-based billing. Several participants raised concerns about the accuracy of data metering.[21] Jason Chartrand notes that zero-rated internet services discriminate against the deaf because the deaf use a lot of data but cannot take advantage of the subsidized services like music streaming.[22] James Micallef complained that mobile services were being marketed as "Unlimited" when there were in fact caps.[23]

33. The concerns raised by the individual interveners touch on many of the policy of objectives set out in the *Telecommunications Act*, including the affordability of telecommunications service, the efficiency of Canada's telecommunications system, the competitiveness of downstream markets, responding to users' economic and social requirements, and protecting individual privacy.[24] In short, the individual interveners submit that the policy objectives of Canada's Telecommunications Policy would be undermined by permitting differential pricing.

Civil society groups oppose data caps and argue differential pricing cannot be addressed without addressing data caps.

34. The CMCR Project, OpenMedia, and Internet Society opposed data caps. Echoing the opinions expressed by individual interveners, these groups submitted that differential pricing is a "work-around" for the artificial scarcity created by data caps.[25] They argued that data caps are not technically or economically efficient methods of addressing network capacity constraints. [26] Rather, in their submission, data caps are primarily a method of price discrimination intended to maximize revenues.[27] These interveners argued that data caps discourage investment in capacity and restrict internet usage.[28] The pointed to the encouragement of data use through differential pricing as evidence that data caps and overage fees are unreasonable.[29]

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19 Interventions 47, and 57.
20 Interventions 19, 22, 26, 39, 43, 58, 68, 64, 75, 27, 86, and 92.
21 Interventions 58, 67, and 53.
22 Intervention 29.
23 Intervention 12.
24 *Telecommunications Act*, SC 1993, c 38, s 7(b, c, h, i).
25 Internet Society Intervention at paras 2, 13; OpenMedia Intervention at paras 35-36; CMCR Project at para 176.
26 Internet Society Intervention at para 2. OpenMedia Intervention at paras 10, 40-41, 58.
27 Internet Society Intervention at para 13.
28 OpenMedia Intervention at paras 46, 77-78.
29 CMCR Intervention at para 177; OpenMedia Intervention at para 46; Internet Society Intervention at para 15.

Most civil society groups opposed any differential pricing

35. CIPPIC, the Internet Society, Media Access, OpenMedia, the CMCR Project all oppose differential pricing. They present similar concerns about ISPs playing a gatekeeping role; reduced competition; lack of consumer choice; greater barriers to market entry for small/independent/innovative/new app providers and ISPs, and threats to consumer privacy.

36. Professor van Schewick and OpenMedia also posited that differential pricing practices will incentivize ISPs to keep prices for Internet use high and data caps low. Van Schewick provides an example of how when zero rating became prohibited in the Netherlands, a prominent ISP increased caps for its consumers from 5GB to 10GB per month at no extra charge. Tbaytel—a SILEC—explains the extent to which differential pricing practices will hinder its ability to compete against larger, more powerful service providers, and that this will negatively impact its own customers.

Most Telecommunications Service Providers and Content Providers support non-exclusive differential pricing

37. Many service providers expressed support for non-exclusive differential pricing claiming it makes the internet more affordable, provides peace of mind for consumers, allows consumers to explore new content, and encourages greater engagement in the digital economy.[30] A few interveners appeared to support any differential pricing.[31] Most interventions opposed exclusive differential pricing, arguing it could be used to favour vertically integrated ISPs own content and would generally make downstream markets less competitive.[32] Some interveners provided examples of other kinds of differential pricing that they believed were acceptable, including time-of-day pricing, and zero-rating of customer service applications such as data usage monitors.[33]

Interveners did not agree on any proposed regulatory intervention

38. AT&T and TELUS argue that differential pricing is generally in the public interest and should be supported.[34] Nevertheless, these parties suggest some minimal ongoing oversight may be required.[35]

39. Most internet service providers and content creators submitted that certain differential pricing practices, such as zero rating of affiliated content, can be harmful and should be

30 See Bell Intervention at 39-40 and Sandvine Intervention at 44-45.
31 Specifically Bell, TELUS, AT&T, the CMPA, and Facebook.
32 See the interventions of Corus, IBG/GDI, Rock 95 Broadcasting et al, Cogeco, Rogers, BCBCA, CIPPIC, Internet Society, Media Access, OpenMedia, Palmorex Media, Barbara van Schewick, CMCR Project, Competition Bureau, CNOC, Distributel, Teksavvy, Xplornet, Quebecor (para 23), SaskTel, and Tbaytel.
33 For example, see Shaw Intervention at paras 25-26.
34 CRTC Public Process 2016-192 TELUS Intervention at para 5; AT&T Canada Intervention at paras 16-17.
35 TELUS Intervention at paras 5, 64-71; AT&T Canada Intervention at paras 16-17.

prohibited.[36] Many civil society groups advocated for the creation of a differential pricing practices framework which would also prohibit such conduct. [37]

40. Finally some civil society groups argued that the Commission should establish "bright line" prohibitions against differential pricing practices.[38] Many members of this group also suggest reframing of ITMP framework in order to incorporate differential practices at issue in this proceeding.

[36] Included in this group are: Cogeco; Rogers; Shaw; Canadian Media Producers Association; Facebook; the Competition Bureau; Bell; CNOC; TekSavvy; Eastlink ; Quebecor, and the Information Technology and Innovation Foundation.

[37] Included in this group are: the British Columbia Broadband Association (the Commission must differentiate between differential pricing practices and necessary network management tools like data caps); the Internet Society; OpenMedia; Professor Barbara van Schewick; and the Canadian Media Concentration Research Project.

[38] This group includes Rock 95 Broadcasting et al.; The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC); and Media Access.

Part III. The legislative and policy framework

41. In this section the Coalition explores the origins and role of the provisions of the Act critical to the Commission's determination of the issues in this proceeding. Specifically, the Coalition addresses

    (i) the Commission's role in respect of the Canadian telecommunications policy objectives in the Act, and under the Policy Direction;[39]
    (ii) the concept of unjust discrimination, undue or unreasonable preference and disadvantage under section 27(2) of the Act; and
    (iii) the role of, and limits on, market forces in Canadian telecommunications law and policy

(i) The Commission's role in respect of the policy objectives, and the Policy Direction

42. Section 47 of the Act directs that the Commission exercise and perform its duties under the Act with a view to implementing the Canadian telecommunications policy objectives in section 7 of the Act, and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and in accordance with any orders made by the Governor in Council under section 8, or ministerial orders under s. 15.

43. The section 7 Canadian telecommunications policy objectives are multi-faceted, and often in tension, requiring the Commission to make choices. As Professor Cherry notes in her second report, the policy objectives are achieved through enforcement of the various requirements placed on carriers in the Act. These requirements include longstanding prohibitions and legal principles from the common law relating to a common carrier's prices, terms and conditions of service that evolved from the conduit (transmission) function of the service offered to the public and policy considerations related to the provision of an essential service or facility to customers and communities.[40]

44. Section 27 contains various requirements relating to rates and the charging of rates, and the concept of unjust discrimination, undue or unreasonable preference. The Commission has, in respect of the offering and provisioning of retail internet service and mobile wireless data services, forborne from much of section 27, notably, it has unconditionally refrained from exercising its powers under subsections 27(1) and 27(5) – dealing with the requirements that rates be just and reasonable), and subsection 27(6), which provides

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39 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy* if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,*Objectives*, P.C. 2006-1534, 14 December 2006.

40 Second Cherry Report at 1.

very limited circumstances[41] (pre-forbearance) in which a Canadian carrier could have provided telecommunications services "at no charge or at a reduced rate", *i.e*., engaged in differential pricing.

45. Crucially, however, the Commission has not refrained from exercising its powers under subsections 27(2), (3) and (4), which the Coalition addresses below.

46. Section 8 of the Act authorizes the Governor in Council to issue to the Commission, by order "directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives."

47. The Policy Direction, issued pursuant to section 8 of the Act, states that the Commission, in exercising its powers and performing its duties under the Act, shall implement the policy objectives set out in section 7 of the Act, in accordance with paragraphs 1(*a*), (*b*), and (*c*) of the Policy Direction. Paragraph 1(c) deals with the Commission's practices and processes, and is not directly relevant to this proceeding.

48. Paragraph 1(a) requires the Commission to "(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives", and "(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives".

49. As Professor Cherry notes in her second report, "Importantly, the Policy Direction does not state that reliance on market forces is itself an objective that overrides or trumps the other policy objectives in section 7 of the *Act*. Rather, telecommunications is still clearly governed by the industry-specific regime under the *Act*."[42]

50. In the event that the Commission, having regard for paragraph 1(a), relies on regulation, paragraph 1(b) contains four requirements concerning *how* the Commission must regulate. The requirements relevant to this proceeding are the requirement to (i) specify the telecommunications policy objective advanced by the regulatory measures, and demonstrate how the measures comply with the Policy Direction; (ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry; and (iii) with respect to regulatory measures that are of a social or non-economic nature, they should, to the greatest extent possible, be symmetrical and competitively-neutral manner.

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41 The two exceptions are for the carrier's directors, officers, employees or former employees; or, with Commission approval, for charitable organizations or disadvantaged persons or other persons.

42 Second Cherry Report at 3.

(ii)The concept of unjust discrimination, undue or unreasonable preference and disadvantage under section 27(2) of the Act

51. Ever since the Commission decided in Telecom Decision. CRTC 77-16, *Challenge Communications Ltd. V. Bell Canada*[43] that: "Under s. 321 (2)(a) [of the *Railway Act*, R.S.C. 1970, c. R-2], discrimination entails treating certain persons differently from others in substantially similar conditions", the analysis of this predecessor section and the present subsection 27(2) of the Act has focused squarely on whether the discrimination, preference, or disadvantage is unjust, undue or unreasonable.

52. As the wording of subsection 27(2) is so crucial, the Coalition reproduces it here:

> 27(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.

53. Significantly, the subsection prohibits all three of: unjust discrimination; undue or unreasonable preference; and undue or unreasonable disadvantage. Each element, if satisfied, independently leads to the prohibition of the act complained of under subsection 27(2). The respondent bears the onus of proof (to show discrimination is not unjust, the preference not undue or unreasonable, and the disadvantage not undue or unreasonable) which is applied by subsection 27(4) – after the applicant has demonstrated the "difference" in "substantially similar circumstances."

54. Further, the discrimination, preference or disadvantage can be in relation to a rate charged for, or provision of, a service.

55. No party in this proceeding has argued that zero-rating or paid prioritization or "sponsored content" does not create a "difference" between customers, content providers or ISPs who enjoy this arrangement and those that do not.

56. Therefore the Coalition turns to the characterization of discrimination, preference and disadvantage, noting crucially that it is for the companies supporting these practices to justify them, not for critics to show there unjustness, undue or unreasonable preference or disadvantage.

57. The Commission has, however, provided some key guidance around the concepts of unjust discrimination; undue or unreasonable preference or disadvantage.

58. First, the inquiry is to be made with "regard for the public interest, broadly defined."[44]

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[43] Affirmed on appeal: *Bell Canada* (appellant) (respondent) v. *Challenge Communications Limited* (respondent) (applicant), [1979] 1 F.C. 857 (C.A.).

[44] Ryan, M., Canadian Telecommunications Law and Regulation, at p. 6-11, §605, citing Telecom Decisions 85-19, 90-3 and 94-2. See also Telecom Decision. 89-5, *Paradyne Canada Limited – Attachment of Subscriber-Provided Terminal Equipment to Dataroute Service*.

59. Second, in Telecom Decision CRTC 2004-47, *Access to Pay Telephone Service*, the Commission stressed that in deciding whether a preference was undue it would "make a polycentric decision that balances multiple objectives and competing interests."[45] To do so, it would have regard to the policy objectives in section 7 of the Act as required by subsection 47(a) of the Act.

60. Third, in several decisions interpreting section 9 of the *Broadcasting Distribution Regulations*,[46] which contains similar language regarding undue or unreasonable preference or disadvantage to subsection 27(2) - but without the prohibition of unjust discrimination – the Commission has on numerous occasions and most recently stated that "undue" or "unreasonable" preference or disadvantage means that the party complaining of the treatment, or another person, must suffer a "material adverse impact."[47]

61. Fourth, the intention of the party discriminating or preferring or disadvantaging another party is irrelevant: "The Commission's assessment of whether or not a preference is undue or a discrimination unjust has always been made in light of the public interest. The Commission has generally not considered it necessary to examine the intention of the parties in order to determine whether the preference or disadvantage is undue, but rather has considered the consequences of the conduct in question, in light of the Act and associated regulations and policies."[48] [Emphasis added.]

62. Finally, the inquiry into the discrimination is a factual one, meaning the determination of unjustness, undueness or unfairness is pronounced on a case-by-case basis. (See subsection 27(3) and numerous examples cited in Ryan, *op. cit.*).

63. It is the Coalition's view that given the above lenses of: the public interest; the policy objectives of the Act; the "material adverse impact" analysis, and the effects of the differential pricing practice rather than its design or intent, it would be unlikely that any examples of zero-rating and paid prioritization would be permitted. However, under the legal tests, the inquiry is still fact-driven; as a result, the Commission will find it difficult to design a framework to guide the parties in this proceeding without another layer of inquiry built on top of this legal foundation. It is for this reason that in Part V below the Coalition proposes the "analytical framework for assessing differential pricing practices".

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45 Telecom Decision CRTC 2004-47 (15 July 2004) at para. 134.

46 *Broadcasting Distribution Regulations*, SOR/97-555.

47 See, for example, Broadcasting Decision 2016-82, *Complaint against Videotron G.P. concerning the distribution of the Category B service Avis de Recherche*, at para. 28: "To determine whether a preference or disadvantage is undue, the Commission considers whether the preference or disadvantage has had or is likely to have a material adverse impact on the complainant or on any other person. It also considers the impact the preference or disadvantage has had or is likely to have on the achievement of the objectives of the Canadian broadcasting policy set out in the Act."

48 Broadcasting Decision CRTC 2002-299, at para. 183. See also Second Cherry Report at 4: "Yet, section 27(2) of the Act requires no showing of carrier intent (or scienter) but rather prohibits certain behavior or practices (whether intended or in effect)."

(v) The role of, and limits on, market forces in Canadian telecommunications law and policy

64. Some interveners have argued that differential pricing practice is a response to, and indication of, competition in the marketplace, or have justified certain differential pricing practices, other than those in respect of affiliated content, on the basis that they enhance competition.

65. The Competition Bureau for example, while opposed to zero-rating of affiliated content, argues that "When an ISP is not affiliated with the content owner, differential pricing does not harm competition and can benefit consumers. This type of differential pricing benefits some and injures others but, on balance, increases the overall efficiency of the economy." [49] The Competition Bureau's lens for assessing differential pricing practices is whether or not the practice maximizes economic efficiency, and the Bureau has emphasized paragraph 7(c) of the Act (enhance the efficiency and competitiveness of Canadian telecommunications) as the focus of enquiry. The Coalition believes this approach overemphasizes the role that market forces and competition are supposed to play in Canadian telecommunications policy. Indeed the Bureau explicitly says its intervention is focussed on providing the Commission with insight about the "potential competitive implications of differential pricing", and notes that its submission is based on "economic theory".[50]

66. Similar to the Competition Bureau, TELUS, supported by its expert Dr. Eisenbach, emphasizes economic efficiency as the major concern in this proceeding. TELUS argues that differential pricing is "competitively sound and efficient", and then compares the telecommunications industry to the airline industry and the retail industry to argue that "price discrimination in this [Internet data pricing] market will benefit consumers and enhance competition through service differentiation among competitors." [51] TELUS also asserts that "The analysis of whether a discriminatory or preferential practice is undue should centre on the economic effects of the practice."[52] The narrow economics approach completely ignores the other telecommunications policy objectives, as well as the legal status of common carriers, and the legal obligations set forth in section 27 of the Act.

67. Regarding "efficiency", the Act only mentions "efficiency" four times, two of which are in relation to the title of Canada's anti-spam legislation. The other two mentions are in two of the nine Canadian telecommunications policy objectives: subsection 7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications, and subsection 7(f) "to foster increased reliance on market forces for

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49 Competition Bureau Intervention, Telecom Notice of Consultation CRTC 2016‑192, 28 June 2016, at para. 16.

50 Competition Bureau Intervention, Telecom Notice of Consultation CRTC 2016‑192, 28 June 2016, at paras. 1 and 3.

51 Intervention of TELUS, TNC 2016-192, 28 June 2016 at para. 22.

52 Intervention of TELUS, TNC 2016-192, 28 June 2016 at para. 43.

the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective".

68. The Policy Direction also speaks of efficiency, but in the context of market forces serving as a means to effect the ends (the nine telecom policy objectives in the Act).

69. As Professor Cherry notes in her second report "By its own terms, fostering increased reliance on market forces under subparagraph (f) is only *one* of many objectives under section 7 of the Act" and "by it own terms, the Policy Direction also recognizes the need for some continued reliance on regulation, consistent with section 7(f) of the *Act*."[53] As Professor Cherry notes, "the Policy Direction [...] elevates the importance of competition as the preferred *means* for meeting policy objectives of the *Act*, in this case, to minimize interference with competitive market forces when regulatory measures are still required."[54]

[53] Second Cherry Report at 2 and 3.
[54] Second Cherry Report at 3.

Part IV. The gatekeeping function of ISPs as common carriers

70. Much of the argumentation in this proceeding by proponents of differential pricing practices focuses on how those practices are good for consumers, or enhance competition and economic efficiency. These arguments, as flawed as they are on their own (see Part III, section (v)), are also flawed because they completely ignore common carriage law, which is the underpinning of Canadian (and American) telecommunications law.

71. As Professor Cherry notes, subsection 27(2) of the Act contains:

> longstanding prohibitions on a common carrier's prices, terms and conditions of service that derive from the common law and have been codified in the *Telecommunications Act.* These prohibitions are legal principles that evolved from the conduit (transmission) function of the service offered to the public and policy considerations related to the provision of an essential service or facility to customers and communities.[55]

72. The FCC has clearly endorsed the "edge theory" or "virtuous circle" conceptualization of the open internet (also known as "net neutrality"). Under this conception, "innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge".[56]

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55 Professor Barbara Cherry, *Interrelationship of Common Carriage Regulation and Reliance on Market Forces*.

56 FCC, In the Matter of Protecting and Promoting the Open Internet, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 26 February 2015, GN Docket No. 14-28, at para. 7, online: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf ("Open Internet Order 2015").

See also paras. 20 and 76-77(footnotes omitted).

Para. 20

> The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls. Such conduct would, as the Commission concluded in 2010,"reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure."23 In other words, when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.

Paras. 76-77

> The record also supports the proposition that the Internet's openness continues to enable a 'virtuous [cycle] of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.'

73. In its Open Internet Order (2015), the FCC explicitly found that broadband providers (ISPs and WSPs) perform a gatekeeping role:

> Broadband providers function as gatekeepers for both their end user customers who access the Internet, and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider's end-user subscribers. As discussed in more detail below, broadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users.[57]

74. The CRTC also appears to have adopted this theory in the ITMP Framework decision, in which the Commission stated:

> 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.[58]

75. Then in the headnote of the Mobile TV decision,[59] a decision upheld by the Federal Court of Appeal,[60] the Commission stated that "This decision will favour an open and non-discriminatory marketplace for mobile TV services, enabling innovation and choice for Canadians."

76. The FCC has gone further, however, and found that: "the Internet's openness is critical to its ability to serve as a platform for speech and civic engagement, and […] it can help close the digital divide by facilitating the development of diverse content, applications, and services."[61] The FCC, finding that ISPs' gatekeeping function and power exists, regardless of competition in the ISP market, concluded that "Without multiple, substitutable paths to

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57 Open Internet Order 2015, at para. 78 [footnotes omitted].

58 *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 20019 [the "**ITMP Framework decision**"], at paras. 2-3.

59 Broadcasting and Telecom Decision CRTC 2015-26, *Mr. Benjamin Klass, and the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia and the Public Interest Advocacy Centre*, 29 January 2015 at para. 66.

60 *Bell Mobility Inc. v. Klass*, 2016 FCA 185 (CanLII).

61 Open Internet Order 2015, at para. 77 [footnotes omitted].

the consumer, and the ability to select the most cost-effective route, edge providers will be subject to the broadband provider's gatekeeper position."[62]

77. Many interveners opposed to differential pricing have argued that gatekeeping is undesirable from a social perspective,[63] and from an innovation[64] perspective. Rogers', Canada's second largest ISP and largest WSP, states categorically that "Differential pricing does give ISPs the ability to act as gatekeepers in every case."[65]

78. The Equitable Internet Coalition submits that the Commission has sufficient evidence to support a finding of, and should explicitly recognize, the gatekeeper function of ISPs and find also that these ISPs have both the technical means and the economic incentive to "engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users".

79. In the next section the Equitable Internet Coalition builds upon the legislative and policy framework of Part III, and the recognized gatekeeping function of ISPs, as described in this Part IV, to propose an analytical framework for assessing discriminatory differential pricing practices.

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62 Open Internet Order 2015, at para. 80 [footnote omitted].

63 See for example Corus, First Intervention, TNC 2016-192, at para 13; CIPPIC, First Intervention, TNC 2016-192, at para 18; Barbara van Schewick, First Intervention TNC 2016-192, at 7; Canadian Media Concentration project, First Intervention, TNC 2016-192, at para 200; Canadian Network Operators Consortium, First Intervention, TNC 2016-192, at para 27; Xplornet First Intervention, TNC 2016-192, at para 29-30.

Note also Federal Communications Commission, FCC 15-24, 12 March 2015, online: <https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf> ("The record before us also overwhelmingly supports the proposition that the Internet's openness is critical to its ability to serve as a platform for speech and civic engagement …" at paras 76-77);

64 See for example Rock 95 Broadcasting et al, First Intervention TNC 2016-192, at para 17-20; CIPPIC, First Intervention TNC 2016-192, at para 12; Internet Society –Canada Chapter, First Intervention TNC 2016-192, at para 18,25; OpenMedia, First Intervention TNC 2016-192, at para 43; Barbara van Schewick, First Intervention TNC 2016-192, at 4; CMRC, First Intervention TNC 2016-192, at para 190.

The Coalition notes that in their responses to the second interrogatories, content providers did not report refraining from launching services or reducing offerings due to differential pricing, or having lost customers or traffic due to zero rating. However, the responding content providers (Google Music, Deezer, Stingray, and Facebook) have large established client bases who access the services via fixed and mobile network. Furthermore, zero-rating is not yet wide-spread enough to impact general data caps. Finally, in the case of the music streaming services, the responding interveners' services use too much data to be affordable for users without unlimited data plans or near-constant access to Wi-Fi. See Mario Aguilar, *How Much Data Does Your Streaming Music App Eat Up?*, 22 October 2014, online: <http://gizmodo.com/how-much-data-does-your-streaming-music-app-eat-up-1649466894>.

65 Rogers, First Intervention, TNC 2016-192, at para. 42.

Part V. The Coalition's proposed approach

80. In this consultation the Commission has asked "How should the benefits and [of differential pricing practices] be weighed and how might they inform whether any specific Internet access differential pricing practice contravenes subsection 27(2) of the Act?"[66]

81. In this part of its further intervention the Equitable Internet Coalition:

    (i) presents its revised definition of discriminatory differential pricing practices;

    (ii) develops and presents an analytical framework for assessing whether or not a differential pricing practice is presumptively contrary to subsection 27(2) of the Act;

    (iii) categorizes the types of differential pricing practice currently observed in the market; and

    (iv) by way of example, applies the proposed analytical framework to two types of differential pricing practices observed in the market today.

82. Applying the framework reveals that of the current types of differential pricing practices, few should be considered acceptable in accordance with Canadian telecommunications law and policy.

(i) The Equitable Internet Coalition's revised definition of discriminatory differential pricing practices

83. In its first intervention the Equitable Internet Coalition expressed concerns about discriminatory differential pricing practices, and wariness about accepting any exceptions to its proposal that all data be priced without discrimination, as defined by the Coalition. The Coalition stated its belief that in addition to the more straightforward bans on differential pricing practices, as seen in the Netherlands and India, the approach taken by the FCC in the US may be helpful to the Commission's analysis.

84. In its first intervention the Coalition provided this definition of discriminatory differential pricing:

> **Coalition's original definition:** ***Discriminatory differential pricing is defined as "economic measures (pricing differences, actual or effective) that result in some types of data being offered at higher or lower prices compared to data excluded from the differential pricing scheme."***

66 TNC 2016-192, Consultation question 6.

85. The Coalition did not, however, provide a definitive position on differential pricing practices and instead said it would address various approaches to differential pricing practices in further stages of the proceeding.[67]

86. Having considered the various interventions, and the various forms of differential pricing practices in the market, the Coalition revises its definition to reflect that not all differential pricing practices are necessarily discriminatory, and to reflect the Coalition's opinion that the assessment is necessarily done in reference to subsection 27(2) of the Act, the Canadian telecommunications policy objectives, and the Policy Direction:

> ***Differential pricing practices are "economic measures (pricing differences, actual or effective) that result in some types of data being offered at higher or lower prices compared to data excluded from the differential pricing scheme." Discriminatory differential pricing practices are differential pricing practices by a Canadian carrier that violate subsection 27(2) of the Telecommunications Act.***
>
> ***Unjust discrimination, and undue or unreasonable disadvantage or preference under subsection 27(2) of the Act will be assessed on a case-by-case basis, using a polycentric approach within the broader policy framework imposed by section 7 of the Act, and the Policy Direction.***
>
> ***The burden of proof is on the Canadian carrier that discriminates, gives the preference to or subjects the person to the disadvantage.***

87. The Coalition believes its proposed framework, described below, will be a useful tool in assessing whether differential pricing practices are discriminatory under section 27(2) of the Act.

88. On the basis of that framework, the Coalition believes that the threshold for engaging in differential pricing practices will be high. In keeping with subsection 27(4) of the Act, the onus will be on those engaged in differential pricing practices to justify it.

(ii) A proposed analytical framework for assessing differential pricing practices

89. In its first intervention the Coalition argued that the Commission's approach to applying subsection 27(2) should be informed by its previous approach, and the purpose of subsection 27(2). The Coalition submitted that approaches taken in previous decisions under subsection 27(2) and predecessor provisions would forbid pricing differences, actual or effective) that result in some types of data being offered at higher or lower prices compared to data excluded from the differential pricing scheme. In particular, the Coalition noted the Commission's "polycentric approach" described in *Access to pay telephone service*, and the recognition therein of the importance of applying human rights principles

[67] Equitable Internet Coalition, First Intervention, TNC 2016-192, 28 June 2016 at para. 62.

and recognizing the central role of equality within the broader policy framework imposed by section 7 of the Act.[68]

90. In the Commission's 22 July 2016 requests for information, the major parties engaged in differential pricing practices were asked to produce detailed descriptions and justifications for what is "in" and what is "out" in terms of their differential pricing practices. In response, most failed to provide justification. Some parties cited competition as a reason for engaging in differential pricing practices.

91. The Coalition believes it would be constructive to develop an analytical framework for assessing differential pricing practices under subsection 27(2) of the Act, with a view to achieving the Canadian telecommunications policy objectives. This proposed analytical framework is intended to allow the Commission to provide more granular, advance guidance to ISPs considering the creation of differential pricing practices.

92. In prescribing this framework the Coalition submits that market forces and competition alone are insufficient to protect the open internet from the economic incentives ISPs have in their gatekeeping role. The Coalition notes that one of the major assumptions of the proposal by the Canadian Network Operators Consortium Inc. ("**CNOC**") proposal that "ISPs should be permitted to apply differential pricing practices to broad categories of content or applications, or to all content or applications uniformly, but not to specific applications or content" comes with a major assumption.[69] CNOC "assumes the existence of a retail Internet service market that is competitive and characterized by a range of competitive offers (including unlimited usage offers) that are available to end-users",[70] which is a major, questionable assumption, given the present state of the retail internet services market in Canada. The Coalition's proposal actually works to enable

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68 Telecom Decision CRTC 2004-47 (15 July 2004) at para. 135.

69 CNOC, First Intervention, TNC 2016-192, 28 June 2016 at para. ES6.

70 CNOC(CRTC)22Jul16-1 TNC 2016-192. See also CNOC's first intervention at paras. 5 and 27:

Para 5:

> CNOC's proposal also hinges upon capacity-based billing ("CBB") rates being properly set such that competitive ISPs have a plausible business case and have an equal footing with the incumbent telephone and cable carriers with respect to being able to offer differential pricing practices to end-users.

Para 27:

> 27. For ISPs, the following potential risks are associated with zero-rating and sponsored data if CNOC's proposal is not adopted:
> …
> b. Unless wholesale CBB rates are properly set, competitive ISPs will be unable to compete fully with the incumbents when it comes to providing zero-rating and sponsored data programs. If the Commission chooses to allow zero-rating and sponsored data, it is imperative that it sets CBB rates at levels that allow competitors to have a plausible business case and an equal footing with the incumbent telephone and cable carriers with respect to offering these differential pricing practices.

market forces by encouraging competition between service providers based on the quality of their networks, and not on the basis of content.

93. Furthermore, as the FCC found in its Open Internet Order (2015), ISP's gatekeeping position exists even when there is competition in the ISP market: As gatekeepers, ISPs "have significant bargaining power in negotiations with edge providers and intermediaries" and this power exists "regardless of the competition in the local market for broadband Internet access, [because] once a customer chooses a broadband provider, that provider has a monopoly on access to the subscriber".[71]

94. The Coalition's proposed analytical framework for evaluating the differential pricing practices of ISPs accepts the gatekeeper view of ISPs described above and thus its criteria reflect that conceptualization. The proposed analytical framework, which may be used to determine whether or not a given differential pricing practice, or if appropriate a category of differential pricing practices, complies with the requirements of the Act, ultimately should *not* be determinative of whether a differential pricing practice, or a category of differential pricing practices, is congruent with the Canadian telecommunications policy objectives or in accord with the non-discrimination requirements of subsection 27(2) of the Act. The Commission, even after adopting such a framework, still should take complaints from any party that alleges the differential pricing practice is in violation of the Act so that the unique circumstances and facts of each situation can be assessed. Furthermore the Commission should also require the respondent to meet their statutory burden of proof.

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[71] Open Internet Order 2015 at para. 80 (footnote omitted). More fully:

> Broadband providers' networks serve as platforms for Internet ecosystem participants to communicate, enabling broadband providers to impose barriers to end-user access to the Internet on one hand, and to edge provider access to broadband subscribers on the other. This applies to both fixed and mobile broadband providers. Although there is some disagreement among commenters, the record provides substantial evidence that broadband providers have significant bargaining power in negotiations with edge providers and intermediaries that depend on access to their networks because of their ability to control the flow of traffic into and on their networks.125 Another way to describe this significant bargaining power is in terms of a broadband provider's position as gatekeeper—that is, regardless of the competition in the local market for broadband Internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber.126 Many parties demonstrated that both mobile and fixed broadband providers are in a position to function as a gatekeeper with respect to edge providers.127 Once the broadband provider is the sole provider of access to an end user, this can influence that network's interactions with edge providers, end users, and others. As the Commission and the court have recognized, broadband providers are in a position to act as a "gatekeeper" between end users' access to edge providers' applications, services, and devices and reciprocally for edge providers' access to end users. Broadband providers can exploit this role by acting in ways that may harm the open Internet, such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users. Without multiple, substitutable paths to the consumer, and the ability to select the most cost-effective route, edge providers will be subject to the broadband provider's gatekeeper position. […] [footnotes omitted]

Stage 1 – Identify the key policy objectives

95. In stage 1 of the proposed analytical framework the Commission would identify the key policy objectives to be considered in the analysis.

96. In TNC 2016-192 the Commission has emphasised that in any regulatory policy or framework resulting from this proceeding, it would consider, in particular, the following:

> 7(*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;
>
> 7(*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;
>
> 7(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
>
> 7(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;
>
> 7(*g*) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services; and
>
> 7(*h*) to respond to the economic and social requirements of users of telecommunications services.

97. In the Mobile TV decision, the Commission ordered the removal of one form of differential pricing practice relating to affiliated content. In doing so, the Commission considered that its finding advanced the policy objectives set out in subsections 7(*a*), (*b*), (*c*), (*f*) and (*h*) of the Act.[72]

98. While the Equitable Internet Coalition recognizes the need to consider all of the Canadian telecommunications policy objectives, the Coalition believes that subsections 7(a), (b) and (h) are the most relevant given the central role access to the internet plays for almost all Canadians; given the gatekeeping function of ISPs, the way differential pricing practices are being used; and given the dependence of differential pricing practices on the existence of data caps. The Coalition also believes that efficiency and competitiveness of Canadian telecommunications, and reliance on market forces should not trump the open internet, and the economic and social requirements of users. Furthermore, the Coalition reiterates its call for examination of data caps in the first place, to explore whether the widespread use of data caps which has led to the practice of differential pricing practice are fulfilling a legitimate purpose and should be permitted.

99. The Coalition also believes that paragraph 7(i), which is "to contribute to the protection of the privacy of persons", is also relevant in this proceeding given the documented push toward big data, and the possible exchange of personal information as consideration for

[72] Mobile TV at para. 66.

some of the differential pricing practice arrangements. The Coalition notes that in the ITMP Framework decision the Commission explicitly required that personal information used for traffic management purposes could not be further disclosed for other purposes. The same privacy considerations apply in this area, and the Commission should limit personal information use for any approved differential pricing practice only to the identification of the user for that purpose (*e.g.*, zero-rating of certain traffic) and not allow third party disclosures, including to a differential pricing "partner" or participant app, service or website.

Stage 2 – Assessment of effects on the 4 "Cs": customers, content, carriers, & competition

100. In stage 2 of the proposed analytical framework the Commission would focus on the actual effects of the differential pricing practice in question on *customers*, *content (including third party content and application creators)*, *carriers* and *other carriers (competitors)*, with reference to what the Coalition submits are the key policy considerations. The Coalition's proposed framework addresses all these types of players because of the broadband providers' gatekeeping function – as explained in Part IV above.

101. This analysis would go beyond the design of the differential pricing practice, which on its face may appear to be non-discriminatory, to assess whether or not the effects give rise to a violation of subsection 27(2) of the Act, or run counter to the telecommunications policy objectives.

102. In what follows, the Coalition lists a series of factual enquiries that the Commission could make about a given differential pricing practice, or if appropriate about a category of differential pricing practice, should it wish to produce an *ex ante* regulatory policy.[73] The Coalition also believes these are the factors that a Canadian carrier would need to address in response to a complaint about discriminatory differential pricing.

103. Not all factors may be applicable to a given differential pricing practice, and the list is not meant to be exhaustive. The results from the factual enquiries would inform a determination on whether or not there has been a violation of subsection 27(2) of the Act or a violation of the Canadian carrier's conduit function.

(I) Effects on customers

- Is the differential pricing practice available to all customers (all tiers, all plans, all abilities)?
- If the differential pricing practice is offered only to certain classes of customers, upon what basis is the discrimination between customers made?
- Is a customer free to choose the type of content they wish to consume, without consequence?

[73] These factors build on consultation question 13 in TNC 2016-192.

- How low or high, relative to the market and international benchmarks, are the data caps of the ISP offering the differential pricing practice?

(II) Effects on content (edge providers)

- What are the impacts of the differential pricing practice on edge providers?
- Does the differential pricing practice prefer one type or category of data or audio-visual content? What is the justification?
- Does the differential pricing practice permit access to all edge services or only to some? If to all, is it limited to a set amount of data? What is the rationale for the limit?
- Are applications of a given type or within a given category treated the same? (the "**CNOC principle**"[74])
- Does the differential pricing practice prefer the ISP's affiliated content?
- Does the differential pricing practice prefer certain non-affiliated content? If so, is there a payment by the third party to the ISP? If not, is there an exchange of consideration, value or other benefit (for example, subscriber information) between the third party and the ISP?
- Are there any technical requirements that effectively exclude certain content within that category?
- Are there any other requirements that effectively exclude certain content within that category?
- What outreach/efforts/resources are committed by the ISP to seeking out and technically adding qualifying applications to its offer?
- Can/do all start-up content or application providers benefit from the program?

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[74] CNOC(CRTC)22Jul16-1 TNC 2016-192:

> With respect to establishing specific categories of service/application definitions for the purpose of applying differential pricing, CNOC is of the view that the process for achieving this must be fluid in nature in order to respond to the rapid evolution of Internet services and applications. Put another way, it would not be appropriate to establish static and rigid definitions of service/application categories that may be applicable today but will not apply to new types of Internet services and applications that will, without a doubt, be in introduced in the future.
>
> Under this approach, the process to define appropriate service/application categories would be guided by the criteria set out in the following principle:
>
> A service/application category must include all retail services and applications that provide services and applications that are completely or significantly substitutable with each other.
>
> The requirement to include all retail services and applications that "are completely or significantly substitutable with each other" will ensure that all services and applications that offer comparable types of functions or capabilities are included in a service/application category. This would have the effect, for example, of requiring an ISP that wishes to apply differential pricing to video streaming services to apply differential pricing to all services and applications that offer video streaming, while excluding other services such as those that offer video downloads, which are not significantly substitutable with video streaming.

- What is the effect of the differential pricing practice upon freedom of expression?

(III) Effects on carriers

Effects on the discriminating carrier

- What is the impact of the differential pricing practice on the ISP's own traffic?
- What is the impact of the differential pricing practice on the ISP's business?
- What is the effect of the differential pricing practice on all users of the ISP?
- What is the effect of the differential pricing practice on non-participating users of the ISP?
- What data caps are employed by the ISP offering a differential pricing practice? Have they gone up, down? What is the trend?

Effects on competitors (telecom competition)

- Is the differential pricing practice a major source of competitive advantage or revenue?
- Are other ISPs disadvantaged by the differential pricing practice?
- Can other ISPs replicate the differential pricing practice?
- What is the effect of the differential pricing practice on telecommunications competition?
- Can start-up ISPs replicate the differential pricing practice?

104. The Commission would then consider the overall effects of the differential pricing practice on customers, content, carriers and competition, which may be more significant or less significant, depending on the nature of the differential pricing practice in question.

105. The Commission may wish to rank these factors to make its analytical framework analysis more robust. It may also wish to consider different scoring or ranking methods to assist parties that wish to engage in different forms of differential pricing practices. The Coalition, however, has not ranked or otherwise scored the potential criteria on the basis that the factors may be more appropriately weighted and assessed on a case-by-case analysis of the facts.

Stage 3 – Assessment of Policy Considerations, Compliance with Policy Direction

106. In stage 3 of the proposed analytical framework the Commission would, having identified the key policy considerations in stage 1, and then identified the effects of the differential pricing practice in stage 2, consider whether there are any policy reasons that would support allowing the discriminatory differential pricing practice. These factors could be assessed by examining the following issues:

- Does the discriminatory differential pricing practice enhance telecommunications access?
- Does the discriminatory differential pricing practice enhance telecommunications affordability?

- Does the discriminatory differential pricing practice support the Canadian broadcasting policy objectives?[75]
- Does the differential pricing practice enable achievement of any of the telecommunications policy objectives?

107. Depending on the overall effects of the differential pricing practice, the above policy considerations may be used to provide justification for an otherwise impugned practice, however there must be a balancing of the policy objectives against the negative effects of the differential pricing practice in question.

108. Finally, to the extent that the Commission engages in regulatory measures to prevent unlawful discriminatory differential pricing practices, the Commission would consider the Policy Direction. In this regard the Commission would ask the following questions:

- Is preventing the unlawful exemption from (or reduction of) data charges efficient and proportionate to its purpose, and does it interfere with the operation of market forces to the minimum extent necessary?
- Does preventing the exemption from (or reduction of) data charges deter economically efficient competitive entry into the market, or promote economically inefficient entry, contrary to subparagraph 1(*b*)(ii) of the Policy Direction?

109. The Coalition notes that in the Mobile TV decision,[76] upheld by the Federal Court of Appeal,[77] the Commission answered a resounding "yes" to these questions.

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[75] As the Coalition argued in its first intervention, at para. 157: The Coalition believes that the broadcasting policy objectives are best served by rules and Commission policies that ensure equitable treatment of online content so that it can be discovered, rather than bending or breaking the telecommunications rules to favour Canadian content. This is consistent with the Commission's determination in a case of zero-rating. See 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* where the Commission said this at para. 60 regarding the interaction of the two acts in relation to such preference:

> Although section 28 of the *Telecommunications Act* applies in the present case to the extent that the preference and disadvantage relate to the transmission of programs, the Commission notes that the broadcasting policy set out in the *Broadcasting Act* is not in itself determinative of the issue. The favourable terms offered by Bell Mobility and Videotron for the transport and data connectivity required for their own mobile TV services might support certain objectives of the broadcasting policy. However, the disadvantage to consumers in accessing other Canadian programs on their mobile devices, and to these other programs, could not be said to further these objectives. Accordingly, the Commission considers that the preference or disadvantage cannot be justified in regard to the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.

(iii) The types of differential pricing practice currently in the market

110. In the Commission's 17 May 2016 requests for information, the major parties ISPs and application service providers ("**ASPs**") were asked to provide examples of differential pricing practices in the market.

111. The Equitable Internet Coalition notes that while many of the consulted ISPs and ASPs indicated they were engaged in, or interested in, differential pricing practices, the Commission generally only sought the views of large, established content providers, not the views of small innovators who could potentially be excluded from differential pricing practices, and who might instead advocate for content-neutral telecommunications rules.

112. Leaving that concern aside, to demonstrate how the Coalition's proposed analytical framework could be applied, the Coalition has categorized the main *types* of differential pricing practice, according to their *design*. The Coalition emphasizes that these categories are value neutral and non-judgmental—they simply describe, in summary form, the design of the main differential pricing practices observed in the market today. The categories do not describe the differential pricing practices' effects, nor do the categories assign any value to the effects, for that is the purpose of the Coalition's proposed analytical framework.

Table 1 – Categorization of current differential pricing practices

Type	Select Examples
Zero-rating: Customer care functions— Programs where data associated with access to account management and customer support is not counted.	TELUS overage acceptance web pages including information about the Wireless Code TELUS branded account management applications and websites Mobilicity does not rate usage when customers access its customer care webpages.

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[76] Broadcasting and Telecom Decision CRTC 2015-26, *Mr. Benjamin Klass, and the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia and the Public Interest Advocacy Centre*, 29 January 2015 at para. 67.

> Consistent with subparagraph 1(*a*)(ii), the Commission considers that eliminating the unlawful practice with respect to data charges in relation to the mobile TV services is efficient and proportionate to its purpose, and interferes with the operation of market forces to the minimum extent necessary to meet the policy identified above. As set out above, the Commission considers that eliminating the exemption from data charges is one way to address the undue and unreasonable preference or disadvantage. Further, the Commission considers that the elimination of the unlawful practice with respect to data charges neither deters economically efficient competitive entry into the market, nor promotes economically inefficient entry, consistent with subparagraph 1(*b*)(ii) of the Policy Direction. Quite the reverse, in removing a significant impediment to competition, it will allow for efficient competitive entry into the market.

[77] *Bell Mobility Inc. v. Klass*, 2016 FCA 185 (CanLII).

Zero-rating: Cloud services (backup or other cloud applications)- where ISPs allow backup to or services from favoured providers of cloud services and do not count data usage for those cloud services (but do for others).	Certain European ISPs zero-rate their own cloud-storage applications[78]
***Zero-rating:* ISP marketing**—Whereby ISPs do not count data associated with visiting the ISPs webpage.	TELUS branded websites (TELUS, Koodo, Public Mobile, PC Mobile)
***Zero-rating:* Affiliated content exemptions**—Programs where an ISP favours content affiliated with it by not counting data usage associated with that content, or offering a lower price for data associated with consuming that content.	Bell's "Mobile TV" app, since withdrawn.
***Zero-rating:* specific content exemptions** — Programs where data to consume specific content, as selected by the ISP, is not counted.	Vidéotron's "Unlimited Music" offering in relation to music streaming applications like 8TRACKS, Analekta, Bandcamp, Deezer, Digitally Imported, Google Play, Groove, Jango, Jazz Radio, RadioTunes, RockRadio, Slacker, Spotify and Stingray, without incurring data charges as part of their Unlimited Music offering.[79] TELUS exempts data charges when customers access the Montreal Centre des sciences IMAX theatre page.
***Zero-rating:* software upgrades**—Whereby the data associated with mobile device software upgrades is not counted.	TELUS firmware over the Air (FOTA) software updates are provided for customers using Samsung, LG, Windows, Blackberry, Sony, Apple or Huawei (HTC) phones. TELUS exempts data charges when customers get FOTA software updates. Exemptions apply to on Internet data charges for domestic use only.
***Zero-rating:* network management functions**— Whereby the data associated with provisioning certain functions associated with wireless functionality are not billed.	TELUS DNS – Network signalling traffic
***Zero-rating:* category exemptions** — Programs where data to consume a certain type of content, as selected by the ISP, is not counted.	Vidéotron's "Unlimited Music" T-Mobile's "Binge On"- video streaming
***Sponsored content*: specific content**—Whereby a third-party pays an ISP for connectivity such that the end user may have that connectivity for a lower price or free, subject to restrictions in terms of the content that may be consumed within that plan.	Facebook FreeBasics.

78 Barbara van Schewick, Europe Is About to Adopt Bad Net Neutrality Rules. Here's How to Fix Them, 21 October 2015, online: https://medium.com/@schewick/europe-is-about-to-adopt-bad-net-neutrality-rules-here-s-how-to-fix-them-bbfa4d5df0c8#.5xaq8esps.

79 Québecor Média(CRTC)18May2016-1.

Sponsored content: specific subscription services—Whereby the WSP pays for or otherwise arranges for free access for its end-users to certain subscription services.	Rogers waives or discounts subscription fees for certain applications.[80]

113. This categorization is not meant to be exhaustive.

114. In the next section the Coalition provides examples of how its proposed analytical framework would be applied to differential pricing practices observed in the market.

(iv) Applying the Coalition's analytical framework to two types of differential pricing practice in the market

115. In this section the Coalition provides a preliminary, illustrative application of its proposed analytical framework to two categories of differential pricing practice identified in the previous section. To apply the analytical framework to each category would require a very lengthy discussion, which the Coalition does not believe is the best use of resources given the Coalition believe its proposed framework may benefit from input through the course of this proceeding.

116. The Coalition notes that there is widespread opposition, from diverse stakeholders, to differential pricing practices in respect of affiliated content or services. The Coalition therefore does not address "zero-rating: affiliated content exemptions", at this time.

117. The Coalition also notes that the Mobile TV decision also has placed, thus far, an important limit on "zero-rating: affiliated content exemptions".[81]

118. The two categories the Coalition will assess are "zero-rating: category exemptions", and "zero-rating: customer care functions".

119. The Coalition has selected these two categories for two reasons. First, because TNC 2016-192 is partly a direct response to an application by CAC, COSCO and PIAC regarding Vidéotron's "Unlimited Music" service. Second, because the Coalition believes these two categories are, on their face, likely to have far different implications for the open

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80 Rogers, First Intervention, TNC 2016-192, 28 June 2016 at para. 26.

81 Mobile TV at para. 61. The Commission found that

> 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*. In addition, they have subjected their subscribers who consume other audiovisual content services 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*.

internet principle which the Coalition believes the Commission should adopt, and thus can be used to illustrate different considerations and different situation when, and why, differential pricing practice may be more acceptable under the Act.

120. The Coalition provides these two illustrative examples without prejudice to Coalition members' initial application and arguments in respect of Vidéotron's "Unlimited Music", and without prejudice to Coalition members' right to challenge differential pricing practices on a case-by-case basis. As the Commission has yet to settle on any framework it is impossible for the Coalition to know the case to be met.

Illustrative example 1: Zero-rating: category exemptions

121. In CAC, COSCO and PIAC's application, the full record of which has been placed on the record of TNC 2016-192,[82] the groups argued that Vidéotron's billing approach to Unlimited Music, which zero-rated certain types of content (music), from certain edge providers (other were de facto excluded by technical requirements) goes against the Commission's findings in Mobile TV, which CAC-COSCO-PIAC argued stands for the principle that billing practices for data must, to use Commission language from that decision, favour an "open and non-discriminatory marketplace".[83] Other interveners in that underlying proceeding, including CNOC[84] and Rogers,[85] supported that view.

122. Nevertheless, as the application about Vidéotron's "Unlimited Music" service has not been determined, the Coalition hereby illustrates how its proposed analytical framework would apply. The Coalition notes that this framework could be more effectively applied with information only Vidéotron, and possibly the Commission, possess.

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82 TNC 2016-192 at para. 23.

83 Mobile TV, headnote.

84 Intervention of CNOC (14 October 2015) at para. 16:

> to the extent that Videotron is using the Unlimited Music service to deliver its own music streaming content without subjecting it to data charges, while subjecting any other music streaming content to such charges, the same concerns raised in Decision 2015-26 are engaged and that practice should be prohibited.

85 Supplemental Submission of Rogers at para. 3:

> The Commission has been very clear on the issue of whether mobile carriers can zero-rate or otherwise exempt an audiovisual service from standard data charges that apply to other types of services. It determined in Broadcasting and Telecom Decision CRTC 2015-26 (BTD 2015-26) that both Videotron's illico.tv service and Bell Mobility's mobile TV service violated subsection 27(2) of the *Telecommunications Act* by exempting their audiovisual services from certain data charges. In our view, there is no valid public policy reason to treat an audio service that is delivered over a mobile network, such as Unlimited Music, differently than the audiovisual services that were the subject of BTD 2015-26.

Stage 1 – Identify the key policy objectives

123. Stage 1 of the proposed analytical framework involves identifying the key policy objectives to be considered in the analysis.

124. As noted above, the Coalition believes that subsections 7(a), (b) and (h)[86] are the most relevant policy objectives in respect of differential pricing practices given the central role access to the internet plays for almost all Canadians; given the gatekeeping function of ISPs, the way differential pricing practices are being used; and given the dependence of differential pricing practices on the existence of data caps. The Coalition also believes that efficiency and competitiveness of Canadian telecommunications, and reliance on market forces should not trump the open internet, and the economic and social requirements of users. Furthermore, the Coalition reiterates its call for examination of data caps in the first place, to explore whether the widespread use of data caps which has led to the practice of differential pricing practice are fulfilling a legitimate purpose and should be permitted.

Stage 2 – Assessment of effects on the 4 "Cs": customers, content, carriers, & competition

125. Stage 2 of the proposed analytical framework involves an assessment of the actual effects of the differential pricing practice in question on *customers*, *content (including third party content and application creators)*, *carriers* and *other carriers (competitors)*, with reference to the key policy considerations.

(I) Effects on customers

- *Is the differential pricing practice available to all customers (all tiers, all plans, all abilities)?*

126. No. Vidéotron's Unlimited Music is only available to customers who can afford to subscribe to higher tier plans, known as "premium" plans. At the time of this further intervention that means subscribers to the fifth, sixth, and seventh most expensive plans.[87] The lowest available "premium" plan is currently offered, in a promotion, at $66 per month.

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86 These objectives, again, are:

> 7(*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;
>
> 7(*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
>
> 7(*h*) to respond to the economic and social requirements of users of telecommunications services.

87 Online: http://www.videotron.com/residential/mobile/mobile-plans#tab/cat2380084.

127. Customers who are unable to afford the premium plans are not able to avoid penalties for streaming music, even if it is from a service provider included in the "Unlimited Music" list of streaming services.

- *If the differential pricing practice is offered only to certain classes of customers, upon what basis is the discrimination between customers made?*

128. It is not clear on what basis higher-tier customers benefit from the preference in respect of certain music streaming services.

129. It *is* clear however that Vidéotron is targeting so-called "millennials", that is, customers of a certain age demographic.

- *Is a customer free to choose the type of content they wish to consume, without consequence?*

130. No. Anyone, regardless of plan, is penalized by caps if they have different music tastes and preferences other than the music tastes and preferences expressed by the selected music streaming services included in "Unlimited Music."

131. Also, as noted below, the Vidéotron offering is for music only, not video or other forms of data.

132. Although Vidéotron claims that all music services are eligible for "Unlimited Music", as noted below, one provider has been excluded as ineligible, the whole class of broadcast radio has been excluded and there are technical requirements that are or may be de facto exclusionary to other services.

- *How low or high, relative to the market and international benchmarks, are the data caps of the ISP offering the differential pricing practice? What is the incremental cost of data for customers as they buy larger package?*

133. Vidéotron's caps are relatively comparable to, or even less than, other major service providers; however, the relative cost of data overage per GB on lower-priced plans appears higher than for overage on higher-priced plans.[88]

[88] Vidéotron, "Mobile plans", online: http://www.videotron.com/residential/mobile/mobile-plans:

Regular		
Plan	Price	Data
Basic	31.95	50 MB
	41.95	50 MB
Plus	46.95	500 MB
	54.95	1 GB

(II) Effects on content (edge providers)

- *What are the impacts of the differential pricing practice on edge providers?*

134. The evidence on the record of the Vidéotron "Unlimited Music" proceeding indicates that there may be technical limits and *de facto* eligibility restrictions which exclude certain music streaming services.

135. 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' over 700,000 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.

136. There are broader impacts on all other forms of content (everything online except music, and music from streaming service providers who can meet Vidéotron's eligibility requirements).

137. This question goes directly to Vidéotron's ability to act as a gatekeeper, and to influence what content, and types of content, its customers consume. Vidéotron has already recognized that, by virtue of administrative and technical issues, it makes editorial choices over what is included, and what is excluded: "L'intégration de ces stations, potentiellement très nombreuses, peut s'avérer ardue si les flux de musique ne sont pas intégrés au sein d'un nombre plus limité de flux."[89]

Premium	66.00	6 GB
	77.00	7 GB
	88.00	8 GB
	99.00	9GB

Flex	-	50 MB
	5.00	100 MB
	10.00	200 MB
	15.00	500 MB
	20.00	1 GB
	25.00	2 GB
Overage	0.05	1MB

89 Québecor Média(CRTC)1déc2015-3.

- *Does the differential pricing practice prefer one type or category of data or audio-visual content? What is the justification?*

138. Yes. Vidéotron's "Unlimited Music" prefers music, as a general category, and, de facto, only music from certain sources.

139. The justification offered by Vidéotron is differential pricing is a response to competition and is necessary to target "millennials."

- *Does the differential pricing practice permit access to all edge services or only to some? If to all, is it limited to a set amount of data? What is the rationale for the limit?*

140. Vidéotron's "Unlimited Music" service does not restrict access to other edge services. It does, however, create an incentive to prefer one type of edge service, and those edge service providers eligible to be included in the service.

- *Are applications of a given type or within a given category treated the same? (the "**CNOC principle**"[90])*

141. No. The evidence suggests that there are technical restrictions that exclude some edge providers. Excluded services include but are not limited to: music streaming services from private or unlicensed sources and all video content. Also, radio stations that offer streaming are also not included in "Unlimited Music", a point noted by a large consortium of "concerned radio broadcasters" that operate terrestrial radio undertakings that also stream their signal online.

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90 CNOC(CRTC)22Jul16-1 TNC 2016-192:

> With respect to establishing specific categories of service/application definitions for the purpose of applying differential pricing, CNOC is of the view that the process for achieving this must be fluid in nature in order to respond to the rapid evolution of Internet services and applications. Put another way, it would not be appropriate to establish static and rigid definitions of service/application categories that may be applicable today but will not apply to new types of Internet services and applications that will, without a doubt, be in introduced in the future.
>
> Under this approach, the process to define appropriate service/application categories would be guided by the criteria set out in the following principle:
>
> A service/application category must include all retail services and applications that provide services and applications that are completely or significantly substitutable with each other.
>
> The requirement to include all retail services and applications that "are completely or significantly substitutable with each other" will ensure that all services and applications that offer comparable types of functions or capabilities are included in a service/application category. This would have the effect, for example, of requiring an ISP that wishes to apply differential pricing to video streaming services to apply differential pricing to all services and applications that offer video streaming, while excluding other services such as those that offer video downloads, which are not significantly substitutable with video streaming.

142. Furthermore, as CNOC has noted, "the criteria that Videotron uses to determine which music streaming services could participate in its Unlimited Music service were not necessarily clear."[91]

- *Does the differential pricing practice prefer the ISP's affiliated content?*

143. No. If it did, the Coalition submits that, above and beyond the submission of COSCO, CAC and PIAC in the underlying proceeding, the *Mobile TV* decision would be determinative.

- *Does the differential pricing practice prefer certain non-affiliated content? If so, is there a payment by the third party to the ISP? If not, is there an exchange of consideration, value or other benefit (for example, subscriber information) between the third party and the ISP?*

144. Vidéotron has claimed that there is no "financial compensation" changing hands. It is not clear if there is any non-financial consideration, such as an exchange of personal information, involved in the arrangements.[92] There are cross-marketing agreements in place with streaming services that allow Vidéotron and these parties the chance to grow subscribers/membership.

- *Are there any technical requirements that effectively exclude certain content within that category?*

145. There do not appear to be any *de jure* technical requirements that prohibit a streaming service from being included, however, at least one intervener in the underlying proceeding noted there were *de facto* technical factors that would exclude certain edge providers.[93]

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91 CNOC, TNC 2016-192, First Intervention at para. 47.

92 From Vidéotron's supplemental submission: "Videotron receives no financial compensation from the streaming partners who participate in the Unlimited Music service. Videotron receives no non-financial compensation either." From their RFI:

> Fourth, no money is changing hands between Videotron and its music streaming partners as relates to the Unlimited Music service. A simple letter agreement is signed with each partner to codify the parties' respective rights and obligations, including for example the timely provision of IP coordinates as discussed above. Videotron does have a separate business arrangement with one music streaming provider, Stingray, by which Videotron defrays the cost of a music app for its subscribers and by which Stingray has developed an exclusive collection of themed channels focused on Canadian and French-language music. This arrangement, however, does not in any way affect the functioning of the Unlimited Music service or the terms of Stingray's access to the service.

93 CIPPIC, Supplemental Submissions, CRTC File No. 8661-P8-201510199, 13 January 2015, at para 17:

> Moreover, the use of HTTPS / TLS, which is the standard protocol for encryption of HTTP traffic over transport networks, will obfuscate URLs making traffic flow identification on this basis difficult.37 To the extent this discourages Unlimited Music partners from using data encryption, it undermines important policy objectives such as the protection of privacy.38 To the extent non-partner music streaming services currently use such mechanisms and

146. Also, as the Coalition discussed below there are numerous reasons, de facto, why not all music streaming is eligible for "Unlimited Music".

- *Are there any other requirements that effectively exclude certain content within that category?*

147. As discussed below, there are numerous reasons why, within the narrow category of music streaming services, much content is excluded.

- *What outreach/efforts/resources are committed by the ISP to seeking out and technically adding qualifying applications to its offer?*

148. The Coalition submits that although Vidéotron has claimed it is open to all music streaming services, the practical limitations are such that only large, established, and what Vidéotron calls "popular"[94] streaming services are able to gain inclusion in Vidéotron's "Unlimited Music" service.

- *Can/do all start-up content or application providers benefit from the program?*

149. No. There are several reasons why certain other music streaming services are excluded.

150. Providers must be associated with music distributors (labels) or otherwise have publicly verifiable streaming rights.[95] This excludes private and unlicensed sources of music.

151. Providers must be "un fournisseur réputé de contenu de musique sous licence à partir de diverses sources."[96] This excludes audio streaming from a single source.

152. Music video streaming services are excluded.[97]

153. Commercial radio broadcasters are excluded.[98]

154. Videotron excluded at least one service provider for not meeting its eligibility criteria.[99]

155. Videotron recognizes that, by virtue of administrative and technical issues, it makes editorial choices over what is included, and what is excluded: "L'intégration de ces

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are thereby prevented from participating in Unlimited Music, the unjustly discriminatory elements of Vidéotron's zero rating service highlighted above) are aggravated.

94 Online: http://www.videotron.com/unlimitedmusic.
95 Québecor Média(CRTC)1déc2015-1.
96 Québecor Média(CRTC)1déc2015-1.
97 Québecor Média(CRTC)1déc2015-1.
98 Québecor Média(CRTC)1déc2015-3.
99 Québecor Média(CRTC)1déc2015-2.

stations, potentiellement très nombreuses, peut s'avérer ardue si les flux de musique ne sont pas intégrés au sein d'un nombre plus limité de flux."[100]

156. The technical mechanisms used to identify eligible music streaming traffic may exclude certain providers, although the details on the criteria used were submitted in confidence making it difficult to determine the circumstance in which this would occur.[101]

157. Aside from technical limitations, on the basis that Vidéotron's marketing focus is on "popular" apps and millennials, the Coalition believes that start-ups cannot benefit from the program.

- *What is the effect of the differential pricing practice upon freedom of expression?*

158. Freedom of expression is limited by the exclusion of private "unsigned" music (even that with a "creative commons" licence) as well as music services that do not fit Vidéotron criteria for eligible services. This reduces diversity of content and promotes a homogenization of music, limited to those artists that are present on major streaming services.

(III) Effects on carriers

Effects on the discriminating carrier

- *What is the impact of the differential pricing practice on the ISP's own traffic?*

159. Vidéotron has indicated the impact has been minimal, but the Commission only has information about the initial period of "Unlimited Music" being in the market. The Coalition believes that given Vidéotron's extensive marketing of the service it is likely to have increased overall consumption of traffic on Vidéotron's network.

160. The Coalition believes that would be relevant to the issue of whether Vidéotron can justify the use of data caps in the first place, and whether those facing data caps, generally, and those facing data caps for music (either because they cannot afford a premium plan or because they stream music from sources outside of the service) are being unjustly discriminated against.

- *What is the impact of the differential pricing practice on the ISP's business?*

161. This is an unknown but presumably, based on the marketing intent of "Unlimited Music", it has attracted millennial subscribers to Vidéotron, or motivated existing subscribers who like music to move up to premium plans to avoid penalties for exceeding their caps.

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100 Québecor Média(CRTC)1déc2015-3.
101 Québecor Média(CRTC)1déc2015-8.

- *What is the effect of the differential pricing practice on all users of the ISP?*

162. Again, the Coalition invites the Commission to consider updated traffic impacts of "Unlimited Music" (and more broadly, of all differential pricing practices). The Coalition believes it may be possible that differential pricing, in favouring certain content, may either degrade network quality, or create network scarcity for those who cannot afford premium plans and therefore cannot benefit from the service.

- *What is the effect of the differential pricing practice on non-participating users of the ISP?*

163. The effect is either these non-participating users cannot benefit from streaming music, or they do so, assuming equal levels of interest in streaming music and equal daily demand, with financial penalties due to overages. The non-participating users also de facto pay more for data because the participating users are receiving some part of their online experience provided at no cost.

- *What data caps are employed by the ISP offering a differential pricing practice? Have they gone up, down? What is the trend?*

164. As noted above, Vidéotron's data caps are relatively low compared to comparable cable internet providers and comparable WSPs across the country. However, without historical data (which the Commission could request from Vidéotron) it is impossible to see the trend.

Effects on competitors (telecom competition)

- *Is the differential pricing practice a major source of competitive advantage or revenue?*

165. The Coalition submits that, on Vidéotron's own admission, "Unlimited Music" is intended to be a source of competitive advantage, which should translate to revenue.

166. The Coalition does not believe that Vidéotron is receiving any financial consideration from streaming service providers, but that could be a factor in other cases ("paid prioritization").

- *Are other ISPs disadvantaged by the differential pricing practice?*

167. The Coalition believes that only large ISPs may be able to launch differential pricing practices such as "Unlimited Music". The intervention of TbayTel highlights how small service providers believe they do not have the size or scale to execute such practices.

168. The Coalition believes that small ISPs are therefore disadvantaged by Vidéotron's "Unlimited Music" service.

- *Can other ISPs replicate the differential pricing practice?*

169. As explained in discussing the previous factor, no, not all other ISPs can replicate the differential pricing practice.

- *What is the effect of the differential pricing practice on telecommunications competition?*

170. The Coalition believes that the effect of "Unlimited Music" protects large, established ISPs from competition from smaller competitors who do not have enough scale and scope to execute an "Unlimited Music" program or other category exemption differential pricing practice. The Coalition believes this protects large ISPs engaged in differential pricing practice. The Coalition also believes that allowing this form of differential pricing practice, when so many Canadians are concerned about data caps, indicates telecommunications competition is not working in the interests of users. The Coalition also believes there is an impairment of competition via a distortion of what content is preferred and what content is penalized through higher effective data rates.

171. The Coalition believes further that it is not "competition" when the focus is on one subset of the population ("millennials") and on higher-tier or "premium" plans.

- *Can start-up ISPs replicate the differential pricing practice?*

172. In considering the overall effects of zero-rating: music, the differential pricing practice on customers, content, carriers and competition, which may be more significant or less significant, depending on the nature of the differential pricing practice in question.

173. The Commission may wish to rank these factors to make its analytical framework analysis more robust. It may also wish to consider different scoring or ranking methods to assist parties that wish to engage in different forms of differential pricing practices. The Coalition, however, has not ranked or otherwise scored the potential criteria on the basis that the factors may be more appropriately weighted and assessed on a case-by-case analysis of the facts.

Stage 3 – Assessment of Policy Considerations, Determination, and Compliance with Policy Direction

174. Stage 3 of the proposed analytical framework involves, having identified the key policy considerations in stage 1, and then identified the effects of the differential pricing practice in stage 2, considering whether there are any policy reasons that would support allowing the discriminatory differential pricing practice. These factors could be assessed by examining the following issues:

- *Does the discriminatory differential pricing practice enhance telecommunications access?*

175. No. The Coalition believes that Vidéotron's "Unlimited Music" program does nothing to improve telecommunications access. It is marketed at "millennials" who already have a high level of wireless adoption..

- *Does the discriminatory differential pricing practice enhance telecommunications affordability?*

176. No. The Coalition believes that Vidéotron's "Unlimited Music" program does nothing to improve telecommunications affordability. It is only available for subscribers to higher-tier "premium" plans, not on those who struggle to afford telecommunications services. Those lower-tier consumers who wish to stream music, even from services included in "Unlimited Music", face the possibility of being penalized for consuming the same type of content.

- *Does the discriminatory differential pricing practice support the Canadian broadcasting policy objectives?*[102]

177. "Unlimited Music" does not seem to favour Canadian production. The majority of presently offered streaming services are foreign-based and there are no CanCon requirements for music streaming services based in Canada, only for commercial radio broadcasters. Even if Vidéotron did offer a predominantly Canadian catalogue, or a predominantly francophone or Québecois service, the Coalition still would question, given its analysis of the other factors herein, if on balance that favouritism, which may or may not have a statutory basis, is worth the cost of the other negative effects.

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[102] As the Coalition argued in its first intervention, at para. 157: The Coalition believes that the broadcasting policy objectives are best served by rules and Commission policies that ensure equitable treatment of online content so that it can be discovered, rather than bending or breaking the telecommunications rules to favour Canadian content. This is consistent with the Commission's determination in a case of zero-rating. See 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* where the Commission said this at para. 60 regarding the interaction of the two acts in relation to such preference:

> Although section 28 of the *Telecommunications Act* applies in the present case to the extent that the preference and disadvantage relate to the transmission of programs, the Commission notes that the broadcasting policy set out in the *Broadcasting Act* is not in itself determinative of the issue. The favourable terms offered by Bell Mobility and Videotron for the transport and data connectivity required for their own mobile TV services might support certain objectives of the broadcasting policy. However, the disadvantage to consumers in accessing other Canadian programs on their mobile devices, and to these other programs, could not be said to further these objectives. Accordingly, the Commission considers that the preference or disadvantage cannot be justified in regard to the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*.

- *Does the differential pricing practice enable achievement of any of the telecommunications policy objectives?*

178. The Coalition believes that Vidéotron's "Unlimited Music" program does not enable achievement of any of the telecommunications policy objectives. The Coalition has already addressed how "Unlimited Music" is not a sign of competition, nor an example of competition, but rather an anti-competitive program aimed at a certain demographic to the detriment to other demographics and to the broader detriment of an open internet.

Determination of outcome or relief

179. Based on all of the foregoing, the Coalition believes its analytical framework produces a determination that Vidéotron's "Unlimited Music" is unlawfully discriminatory against certain customers and certain competitors, provides undue and unreasonable preference vis-à-vis itself and certain customers, and that this is not justified by any telecommunications policy objective.

180. Accordingly, the Coalition would recommend that Vidéotron be directed to eliminate its unlawful practice with respect to data charges for its "Unlimited Music" service.

Compliance with the Policy Direction

181. Consistent with subparagraph 1(*a*)(ii) of the Policy Direction, as invoked in the Mobile TV decision, the Coalition submits that eliminating the unlawful practice with respect to data charges in relation to the "Unlimited Music" service is efficient and proportionate to its purpose, and would interferes with the operation of market forces to the minimum extent necessary to meet the policy objectives.

182. The Coalition submits that, as in the Mobile TV case, eliminating the exemption from data charges is one way to address the undue and unreasonable preference or disadvantage. Further, the elimination of the unlawful practice with respect to data charges neither deters economically efficient competitive entry into the market, nor promotes economically inefficient entry, consistent with subparagraph 1(*b*)(ii) of the Policy Direction. As the Commission stated then: "Quite the reverse, in removing a significant impediment to competition, it would allow for efficient competitive entry into the market."

Illustrative example 2: Zero-rating: customer care functions

183. In this next illustrative example the Equitable Internet Coalition applies its proposed analytical framework to the zero-rating of access to customer care functions, such as contacting customer service, or checking usage and balances.

184. The Coalition does not repeat all of the arguments and explanations from the previous illustrative example, and, for the sake of efficiency, lists its conclusions about each o the stages and factors.

Stage 1 – Identify the key policy objectives

185. Stage 1 of the proposed analytical framework involves identifying the key policy objectives to be considered in the analysis. As noted above, the Coalition believes that subsections 7(a), (b) and (h)[103] are the most relevant policy objectives in respect of differential pricing practices.

Stage 2 – Assessment of effects on the 4 "Cs": customers, content, carriers, & competition

186. Stage 2 of the proposed analytical framework involves an assessment of the actual effects of the differential pricing practice in question on *customers*, *content (including third party content and application creators)*, *carriers* and *other carriers (competitors)*, with reference to the key policy considerations.

(I) Effects on customers

187. The differential pricing practice is, the Coalition believes, available to all customers subscribing to all tiers, of all wireless plans. It remains to be determined if there are any discriminatory effects on customers with different abilities.

188. Because there is no zero-rating of other forms of content, and because the Coalition expects the share of data associated with customer care to be minimal, a customer is free to choose the type of content they wish to consume, without consequence.

189. There are no the impacts on edge providers because their content is fully accessible, and their competitors content is not being favoured.

190. The differential pricing practice does indeed prefer one type or category of data or audio-visual content, but the justification, the Coalition believes, would be that the usage involved is minimal, and is used for the sole purpose of account management.

191. The differential pricing practice permits access to all edge services.

192. The differential pricing practice does prefer the ISP's affiliated content, however the content is technical and financial in nature related to the customer's account and service, which is not likely to be any form of competitive advantage.

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103 7(*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;

7(*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;

7(*h*) to respond to the economic and social requirements of users of telecommunications services.

193. The differential pricing practice does not prefer certain non-affiliated content.

(III) Effects on carriers

Effects on the discriminating carrier

194. The impact of the differential pricing practice on the ISP's own traffic is likely negligible, and it may be that customers already use these types of functionality regardless of the data amounts involved are likely negligible.

195. The impact of the differential pricing practice on the ISP's business is likely negligible, financially. It may create goodwill on the part of customers.

196. Because the data amounts involved are likely negligible, there is likely no impact on the other users of the ISP.

Effects on competitors (telecom competition)

197. The differential pricing practice is unlikely a major source of competitive advantage or revenue. Other ISPs are not disadvantaged by the differential pricing practice. Other ISPs, including smaller ones, can replicate the differential pricing practice. There is, therefore, likely no effect, positive or negative, on telecommunications competition.

Stage 3 – Assessment of Policy Considerations, Compliance with Policy Direction

198. The zero-rating of customer care access likely only has marginal impacts on the telecommunications policy objectives, and therefore, in accordance with the 4 Cs analysis, which indicates there are no negative effects of zero-rating customer care access, the practice should be allowed.

Determination of outcome or relief

199. The Equitable Internet Coalition believes that the zero-rating of access to customer care functions, such as contacting customer service, or checking usage and balances, present far fewer concerns about unjust discrimination, preference or disadvantage and little threat to the open internet.

200. Based on all of the foregoing, the Coalition believes its analytical framework produces a determination that the zero-rating of access to customer care is not unlawfully discriminatory against customers or competitors, nor does it provide undue and unreasonable preference vis-à-vis itself and certain customers. There is therefore no need for justification using telecommunications policy objectives, and no need for a regulatory measure.

Compliance with the Policy Direction

201. Because there is no need for a regulatory measure, there is no need for assessment of compliance with the Policy Direction.

Part VI. Conclusion and suggested questions for ISPs at the hearing

202. In this part of its further intervention the Equitable Internet Coalition concludes by (i) summarizing its position on discriminatory differential pricing practices, and (ii) recommending questions the Commission may wish to ask parties at the public hearing this fall.

(i) Summary of Coalition's position on discriminatory differential pricing practices

203. In this further intervention the Coalition has highlighted the record to date, and analysed the legislative and policy framework for telecommunications in Canada, with emphasis on (i) the Commission's role in respect of Canadian telecommunications policy objectives in section 7 of the Act, and under the Policy Direction, (ii) the conduit function of common carriers under the Act; and (iii) the concept of unjust discrimination, undue or unreasonable preference and disadvantage under section 27(2) of the Act

204. From that legislative and policy framework, the Coalition derived its proposed analytical framework for evaluation differential pricing practices, and identified for the purposes of demonstrating its analytical framework, categories of differential pricing currently in the market.

205. On the basis of the legislative and policy framework, and having applied, on an illustrative basis, the Coalition's proposed analytical framework to two types of differential pricing practices currently in the market, the Coalition reiterates the following key submissions from its first intervention.[104]

206. Discriminatory differential pricing practices should not be permitted, with very limited exceptions. To the extent that the Commission with this proceeding may wish to identify types of services or applications or traffic that may appropriately be zero-rated, it should only be done in very limited circumstances, and be required uniformly of all ISPs, in respect of all types of a given content, in such a way as to eliminate completely any gatekeeping.

207. The Coalition believes, given the comments from individual Canadians filed to date, Canadians are supportive of an open internet, free from ISP interference. Individual Canadians also support a internet that is free from artificially imposed limits on use.

(ii) Suggested questions for ISPs at the public hearing

208. Given the central role that data caps play in creating the dynamic to which discriminatory differential pricing can be seen to be a response, the Coalition believes it is essential that

[104] Equitable Internet Coalition, TNC 2016-192, First Intervention, 28 June 2016, at paras. 25 and 116.

the Commission have from the ISPs full evidence about the technical purposes and marketing purposes that data caps fulfil.

209. The Coalition therefore recommends that the Commission ask the following questions of ISPs at the public hearing:

    1. What technical limits, if any, prevent you from offering unlimited data plans for all of your subscribers?

    2. What is the incremental cost of provisioning a given bitrate on a given network architecture once the fixed cost is paid?

    3. How is data usage measured? How is that measurement verified? Are there any independent controls or verification to ensure that data is accurately and consistently measured and billed? How can customers challenge the accuracy of the measurements?

    4. If the ISP has a differential pricing practice, what are the economic incentives driving such a practice?

210. The coalition also recommends the questions in the above potential framework be asked of ISPs who have indicated that they engage in, or are considering, differential pricing practices.

211. The Coalition believes responses to the numbered questions should shed light on the need for data caps, which is a key evidentiary matter required for the Commission to be able to properly assess differential pricing practices because (i) without data caps, there would be no need for differential pricing practices; and (ii) transparency is a critical aspect of the Commission's consultation question 9.[105]

212. The Coalition further believes the responses to some or all of the proposed framework questions can illuminate the Commission's thinking on the proper scope of differential pricing practices in Canada under the *Telecommunications Act*.

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[105] Q.9: Are ISPs being sufficiently transparent with respect to the information they provide to consumers about the Internet access differential pricing practices they use? How aware are consumers about the implications of these practices?

21 September 2016

Interrelationship of Common Carriage Regulation and Reliance on Market Forces

Prof. Barbara A. Cherry

Properly framing the inquiry in this proceeding is critical for guiding the Commission's examination of differential pricing practices used by Canadian Internet service providers (ISPs) and their compliance with section 27(2) of the *Telecommunications Act* ("*Act*"). Such framing requires an appropriate understanding of the interrelationship between the *Telecommunications Act* ("Act") and the Policy Direction issued by the Governor in Council,[1] and, in particular, among the policy objectives set forth in section 7 of the *Act* and the Policy Direction. Unfortunately, some filings in the pending proceeding do not recognize or inadequately address compliance with section 27(2) in the context of this interrelationship.

Subsection 27(2) of the *Telecommunications Act* prohibits a Canadian carrier from unjustly discriminating, subjecting any person to an undue or unreasonable disadvantage or giving an undue or unreasonable preference toward any person, including itself, in relation to the provision of a telecommunications service. These are longstanding prohibitions on a common carrier's prices, terms and conditions of service that derive from the common law and have been codified in the *Telecommunications Act.* These prohibitions are legal principles that evolved from the conduit (transmission) function of the service offered to the public and policy considerations related to the provision of an essential service or facility to customers and communities.

The policy objectives in section 7 of the *Act* are achieved through enforcement of the various requirements placed on carriers in the *Act*, including section 27(2). Policy objectives in section 7 include reliable and affordable telecommunications services of high quality (7(b)), enhancement of the

[1] The Governor in Council issued an *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives,* P.C. 2006-1534, 14 December 2006 (the Policy Direction).

efficiency and competitiveness of Canadian telecommunications (7(c)), response to the economic and social requirements of users of telecommunications services (7(h)), and protection of the privacy of persons (7(i)). Section 7 in its entirety provides:

> It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:
> (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;
> (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
> (d) to promote the ownership and control of Canadian carriers by Canadians;
> (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
> (f) to foster increased reliance on market forces for the provision of telecommunications 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; and
> (i) to contribute to the protection of the privacy of persons.

By its own terms, fostering increased reliance on market forces under subparagraph (f) is only *one* of many objectives under section 7 of the Act. Subparagraph (f) also provides that, where regulation is required, it is to be efficient and effective.

The Policy Direction further directs how the Commission is to implement the policy objectives set out in section 7 of the *Act*. The Policy Direction provides in relevant part:

> 1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission (the "Commission") shall implement the Canadian telecommunications policy objectives set out in section 7 of the Act, in accordance with the following:
>
> (a) the Commission should
>
> > (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and

> (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

Under the Policy Direction, the Commission is directed to rely on market forces to the maximum extent feasible as a *means* of achieving the policy objectives under section 7 of the *Act*. In essence, the Policy Direction elevates the importance of competition – relative to its preexisting role under section 7(f) – to the preferred means for achieving the numerous other policy objectives set forth in section 7. Yet, by it own terms, the Policy Direction also recognizes the need for some continued reliance on regulation, consistent with section 7(f) of the *Act*. Section 1(ii) of the Policy Direction again expands upon the objective in section 7(f) of the *Act* – that regulation should be efficient and effective – to provide that, when relying on regulation, the Commission is to use measures that are efficient, proportionate to their purpose, and interfere with operation of competitive market forces to the minimum extent necessary to meet the policy objectives. In this way, the Policy Direction again elevates the importance of competition as the preferred *means* for meeting policy objectives of the *Act*, in this case, to minimize interference with competitive market forces when regulatory measures are still required.

Enforcement of the prohibitions under section 27(2) to differential pricing practices in this pending proceeding must be understood within this context. Importantly, the Policy Direction does not state that reliance on market forces is itself an objective that overrides or trumps the other policy objectives in section 7 of the *Act*. Rather, telecommunications is still clearly governed by the industry-specific regime under the *Act*. In this regard, the *Act* is based on common carriage principles, which by definition do restrict behavior by telecommunications carriers to an extent not applicable to non-carriers, such as the prohibitions in section 27(2). Therefore, to the extent regulatory measures are necessary to achieve policy objectives under the *Act*, which includes the common carriage principles

set forth in section 27(2) as well as broadcasting policy in section 36 of the *Act*, such measures are not precluded by the Policy Direction.

Unfortunately, this interrelationship between the *Telecommunications Act* and the Policy Direction is not recognized or is inadequately addressed by some filings in this proceeding. Illustrative is the Expert Report of Jeffrey Eisenach attached to the filing by Telus. Dr. Eisenach's report does not address the conduit function of ISP's Internet access service and the related obligations under section 27(2) imposed on common carriers. Rather, he frames the issue of differential pricing practices in this proceeding as if the relevant body of law is antitrust, and assumes that economic efficiency is the primary concern. Yet, antitrust law is a separate body of law that does not address the concerns, values, or objectives underlying common carriage law embodied in the *Act* and the Policy Direction. Moreover, Eisenach's analysis elevates economic efficiency associated with competition beyond being a preferred *means* for meeting policy objectives under the *Act* to becoming *the policy objective itself*.

Similarly, the Competition Bureau intervention approaches this proceeding from the perspective of economic analysis under antitrust law, and thereby ignores the fundamental prohibitions on common carriers under section 27(2) and the other policy objectives in the *Act* and the Policy Direction.[2] In addition, as does Dr. Eisenach, the Competition Bureau focuses primarily on *de jure* incentives for ISP's to discriminate – particularly of vertically integrated ISP's – ignoring the *de facto* impact of ISP behavior. Yet, section 27(2) of the *Act* requires no showing of carrier intent (or scienter) but rather prohibits certain behavior or practices (whether intended or in effect).

Under the *Telecommunications Act*, even as instructed under the Policy Direction, common carriers simply do not have – contrary to economists' preference for the economic efficiency properties of perfect price discrimination or what may otherwise be permissible under antitrust law – the same

[2] E.g. "In telecommunications, achieving economic efficiency is paramount" Competition Bureau Intervention (pars. 40(b), 80(b)).

latitude to discriminate among persons as do other general businesses. Moreover, achieving the policy objectives under the *Act* can be undermined by carriers' differential pricing practices that violate section 27(2). Examination of the differential pricing practices of ISP's must be conducted in this appropriate legal and policy context.