

# **Comments (Essential)** to

**Canadian Radio-television and Telecommunications  
Commission**

**by**

**Vaxination Informatique**

**regarding**

**Telecom Notice of Consultation CRTC 2013-551  
Review of wholesale services  
and associated policies**

**File number: 8663-C12-201313601**

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**Montréal, Québec**

**31-Jan-2014**

## **Table of Contents**

<b>Introduction .....</b>	<b>3</b>
<b>EX-Post vs Ex-Ante .....</b>	<b>4</b>
<b>Scaling duplication .....</b>	<b>5</b>
<b>36-ii Controlled by a firm .....</b>	<b>6</b>
<b>Concept of competition at the wholesale level .....</b>	<b>7</b>
Off Tariff deals.....	7
<b>Types of essential services .....</b>	<b>8</b>
Essential facing phase-out .....	8
Forbearance requests .....	8
<b>Pricing regulation .....</b>	<b>9</b>
<b>Geography.....</b>	<b>10</b>
<b>GAS and TPIA .....</b>	<b>11</b>
<b>Conclusion .....</b>	<b>12</b>

## **Introduction**

1. Pursuant to Telecom Notice of Consultation 2013-551, Vaxination Informatique wishes to be considered an intervener in this process and requests to appear at the hearing.
2. This document focuses only on the other non FTTP aspects of the 2013-551 Notice of Consultation. A separate document is filed for the FTTP aspects.

## **EX-Post vs Ex-Ante**

3. The 2008-17 decision implemented a ex-ante approach, declaring that certain services would be forborne in a number of years. This approach should be avoided because it is hard to predict the future. A service which does not appear to be strategic today and thus prepared for forbearance may turn out to be a key component required for many downstream retail services in a few years. For instance, for telcos, ethernet has (finally) replaced ATM technology.
4. There are however some strategic directions which should be supported by the Commission's policies. For instance, upgrading of last mile to fibre should be fostered, and so would be the decommissioning of the old copper in areas that have been upgraded. However, instead of trying to predict when copper no longer becomes essential, the Commission should do this in an ex-post basis for every areas where the telco has converted its customer base to fibre and ready to rip the copper out.
5. In an ex-post approach, the onus is on the incumbent to go to the Commission and show that sufficient competition has appeared in the wholesale segment and forbearance is thus justified.
6. Another reason to not adopt an ex-ante approach is changing market dynamics. For instance, with Bell Canada having become vertically integrated just like the other incumbent in the duopoly: cable companies, the need for independent competitors has grown to prevent market failure.
7. Similarly, expectation of new technologies providing competition should not be used in devising policies that apply today. For instance, the 2010-632 decision mentions an expectation that wireless may become a competitor to wired internet in the future. The advent of services such as Netflix in HD, large Internet connected televisions etc, and most importantly, the current restructuring of the wireless industry into incumbent controlled entities means that wireless has not provided any significant competition to wired internet. The Commission's policies should not be tainted by hope of such competition until such competition materialises.

## Scaling duplication

8. The essential services framework must take into consideration that there may be times where duplication of facilities is not desirable or not considered efficient, even if it is said to be easily duplicatable. The wiring mayhem often seen in India may be sign of unregulated free enterprise, but is it desirable and does it really benefit consumers ?
9. Evaluation of duplicability must consider how much duplicability can scale. Which is preferable ?
  - One or two competitors able to build facilities/string wires alongside the 2 incumbents in only a few geographies.
  - Incumbents are mandated to wholesale their infrastructure and a significant number of competitors can participate in the market over a large footprint which brings competition to a larger number of Canadians ?
10. Just because a facility such as telephone poles or underground conduits has rules to allow competitors to buy a right of way does not mean that there is always room in such conduits, or that the telephone poles are not already at their engineering weight limits.



## **36-ii Controlled by a firm**

36. ii. *The facility is controlled by a firm<sup>6</sup> that possesses upstream market power such that withdrawing mandated access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market; and*

*(6) In the context of these definitions, the term "firm" includes a group of firms exercising joint dominance.*

11. Incorporating the footnote into the main paragraph would help make the definition much clearer at first reading. Vaxination suggests the following modification:

*The facility is controlled by a firm or a group of firms that, together possess upstream market power such that withdrawing mandated access to the facility(ies) would likely result in a substantial lessening or prevention of competition in the relevant downstream market; and*

12. The current wording allows for structurally separated entities to exist and fit the requirements for regulation despite them not having any control over the downstream/retail market. Any change in wording should preserve this possible scenario (even if unlikely). The current wording is also independent of the incumbent's downstream/retail control of the market. This should remain this way. Success of competitors to reduce incumbent's retail market share does not reduce in any way the need for access to the wholesale service at regulated rates.

## **Concept of competition at the wholesale level**

13. Although perhaps not required, the essential services framework should include the desirability of having 2 mandated wholesale systems where possible in order to provide downmarket competitors with options on the supply of the required input service. While the level of competition between 2 wholesale incumbents is not strong, it does provide a bit of discipline both at the wholesale market level and at the regulatory level where an incumbent may not desire to set its wholesale prices so high that it prices itself out of the wholesale business.

### ***Off Tariff deals***

14. To this end, where two incumbents provide an equivalent essential wholesale service (such as GAS and TPIA), off-tariff deals should be permitted, with the condition that they be offered to all wholesale customers. This restriction provides the safeguards against undue preference.

## **Types of essential services**

15. In an ex-post environment, service classifications should not be dependent on future expectations of forbearance. A service should either be essential today or not essential.

### ***Essential facing phase-out***

16. While the current framework discusses phase-out, it does not deal with the situation where an essential service is being replaced with a newer one, such as old copper based services replaced by fibre based ones. The phase-out may last a very long time, during which the older technology remains essential in areas that have not been upgraded, while it can be withdrawn in areas with the new technology and new wholesale paradigm (for instance, the concept of unbundled local loops is lost in most FTTP deployments and replaced by other types of wholesale access).
17. Vaxination proposes an "essential subject to phase-out" category. An initial consultation would decide whether to apply this category to one or more services and would define the parameters and conditions to be met to withdraw the service(s). For instance, this allows the incumbent to get regulatory clarity on conditions to be met before presenting request to end copper services in certain geographical areas.
18. The essential services framework must not hinder an incumbent's ability to renew its infrastructure and dispose of older technologies. This is perhaps the first time in the telephone company's history where an upgrade of their wiring results in the original copper services being replaced by totally new services on a totally new type of cabling.

### ***Forbearance requests***

19. In terms of forbearance requests, there would be 2 types: one where competition levels have risen sufficiently to justify forbearance, and the others would be when the service has lost strategic value and is no longer a significant input used by competitors to provide their retail services. The onus would be on the regulated entity to make the requests for forbearance provide supporting evidence to support its request.



## **Pricing regulation**

20. If a service meets the definition of "essential service", are there scenarios where a non-cost based pricing approach is desirable ?
21. Any/all services which warrant regulation do so because they are a required input to provide competitive downstream services. For such services to be competitive, the wholesale service must be competitively neutral. This requires cost based pricing, as well as a cost structure which does not allow the incumbent to influence or control the retail pricing of its competitors (for instance, attempts by an incumbent to impose the same retail UBB limits onto its competitors as it does for its own retail service, preventing competitors from offering better service)
22. In the past, there were times where the Commission accepted retail-minus wholesale pricing. Due to regulatory lag, this allowed incumbents to offer retail promotions which were below the regulated wholesale rates. This may have been acceptable in a context where the goal was to ween competitors from incumbent's facilities to cause facilities-based competition. However, as was seen in the major files over the last few years, ***the Commission cannot and should not interfere with the operation of market forces in order to achieve an unnatural buildup of facilities-based competition.*** Facilities based competition will happen naturally where it makes sense.
23. In an environment where regulation is applied to wholesale services because they are a required input to competitors, the pricing should be competitively neutral and allow competitors to differentiate themselves and be without retail influence from the incumbent. In an environment without structural separation, the incumbent has motivation to skew wholesale rate and their structure to grant itself control over its competitors pricing to reduce their competitive force against the incumbent's own retail operation. This was seen when an incumbent attempted to impose the exact same retail UBB limits onto its competitors.
24. The debates of the last few years have shown why cost based wholesale pricing is required, and that it should be structured to be competitively neutral (for instance, CBB based instead of UBB based) to remove the potential influence an incumbent could have onto its competitors.

25. Canada is not only a vast country, but also very diverse in economies and telecommunications markets and infrastructure.
26. When considering regulation and forbearance, the Commission must consider that conditions vary greatly. Just because there may be sufficient competition in provision of fibre on Bay Street in downtown Toronto does not mean this applies to all of Toronto, all of Ontario or all of Canada. Just as POTS forbearance is done for specific geographies where the incumbent has shown sufficient market share by competitors has been achieved, similar metrics should be used when arguing for or against forbearance of an essential service. (For instance, recent forbearance of Ethernet wholesale service should not have been an all or nothing forbearance, and instead should have been done on a geographical basis with competition levels verified for each region).
27. Ideally, the benefits of providing competitive arena at the retail level through wholesale access should benefit all Canadians, not just a lucky few in certain territories.
28. For example, large portions of Québec are served by Télébec instead of Bell Canada or Bell Aliant. As a result, all the work done to establish competitive environments in Bell Canada's territory excludes large portions of Québec. This gets worse in parts of northern Québec where the 2 incumbents, Télébec and Cablevision du Nord are both subsidiaries of Bell Aliant, yet neither provide GAS or TPIA access to competitors.
29. Vaxination suggests that approved tariffs and wholesale access obligations automatically apply to wholly owned subsidiaries of regulated companies which operate in the same province(s).
30. This would allow competition to reach a greater proportion of Canadians without a significant increase in regulatory burden (Télébec for instance would inherit the same tariffs as Bell Aliant. However, Northwestel would not inherit the same tariffs since it operates outside of Bell Canada's Ontario/Québec territory and has obviously different costing.
31. On a different slant, the Commission should ponder on why there is very few wholesale customers in certain provinces despite the wholesale service being available and whether the Commission should be more pro-active in promoting such services to help deploy more competitive services in those regions.

32. The 2010-632 decision concluded:

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

33. The context of the 2009-261 consultation was a result of the 2008-17 decision setting a direction of forbearance for GAS/TPIA with the hopes of finding a facilities-based competition solution. (Matching speeds issue was added midway through the consultation). The hope of finding "facilities based" solution and eventual forbearance was one reason why GAS/TPIA were not classed as "essential" in 2008-17.

34. The consultation proved that changes in technology (such as moving DSLAMs to neighbourhoods) made facilities-based competition unworkable and access to incumbent's last mile and aggregation were necessary to enable competition at the retail level.

35. As a result of this review of 2008-17, the Commission should formally grant the "essential" monicker to the GAS and TPIA wholesale services since there is not only no realistic hope of facilities based competition, but also because it makes sense to have open access last mile at regulated rates to ensure competition at retail level.

36. Since 2010-632, the telcos have launched their own BDU services, losing any differentiation with cablecos as they too have the instinct to protect their BDU business from OTT competition. This change, combined with significantly increased vertical integration increases the need to have a vibrant independent ISP industry to prevent market failure.

## **Conclusion**

37. The essential services policy needs to be simplified with fewer classifications. Any wholesale service that requires regulation to ensure proper function of market forces downstream should be considered essential.
38. The document needs to be ex-post with regards to forbearance. Forbearances should not be predicted, it should be granted once sufficient competition has been achieved, or the service has been made unneeded or replaced with newer technology.
39. In cases where long term replacement (such as from copper to fibre) is happening, a framework for forbearance and decommissioning of the old technology can be established (thus classifying a service as essential subject to phase out). This service remains essential where it has not been upgraded, but loses in geographical areas where it has been upgraded.
40. Any forbearance must be done by geographical region.
41. Because the goal of mandating wholesale access is to enable competition downstream, the pricing of the wholesale service must be competitively neutral and thus cost based.

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