



**Intervention of OpenMedia**

**Submitted to the  
Canadian Radio-television and Telecommunications Commission**

**In the Matter of**

**TNC CRTC 2017-49  
*Review of the competitor quality of service regime*  
CRTC File No.: [1011-NOC2017-0049](#)**

**24 April 2017**

*OpenMedia is a community-based organization that works to  
keep the Internet open, affordable, and surveillance-free.*

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## Introduction and Executive Summary

1. Regardless from what perspective one examines the Canadian telecommunications market, its current structure leaves something to be desired as far as fair competition, affordable choice, and high quality of service go. From a high-level, abstract view of market forces and economic policy, distorted incentives allow dominant players to wield power within conflict-of-interest-ridden relationships with smaller providers who are both their forcibly loyal customers and fastest growing rivals. From a grassroots, on-the-ground perspective, Canadian Internet users experience great frustration as they are subjected to missed installation appointments, Internet connection repair delays, recalcitrant technicians, inconsistent quality of service, and potentially direct or indirect penalties for going with the Internet service providers (ISPs) of their, or their respective budgets', choice.
2. In view of this, Canadians absolutely need the Commission to update the current competitor quality of service (CQoS) regime to include, at the very least, retail Internet services such as FTTN and FTTP, mobile wireless services and their carriers, and cable-based carriers. This will complete what would otherwise be only a partial or deficient wholesale services policy, and promote choice, affordability, and competition in Canada's telecommunications market, to the benefit of everyday users across the country.
3. OpenMedia is pleased to submit its intervention to Telecom Notice of Consultation CRTC 2017-49, *Review of the competitor quality of service regime*. Although this proceeding and issue is not about the Internet alone, in view of OpenMedia's mandate and mission as "a community-driven organization that works to keep the Internet open, affordable, and surveillance-free,"<sup>1</sup> this intervention will focus predominantly on competitor quality of service issues as relate to retail Internet services and mobile wireless services. The submissions below do not seek to answer every question that the Commission set out in the Notice, and OpenMedia reserves its opinion at this stage on the questions and issues it does not address. Where sections below respond to specific questions, OpenMedia has indicated at the opening to the relevant section.
4. In summary, this intervention recommends that the Commission take the following steps as a result of this proceeding: recognize that market forces have not and will not suffice to ensure high quality of service, particularly in Internet and mobile wireless services; incorporate new guiding principles into the Rate Rebate Plan (RRP) and CQoS regime generally; and update the CQoS regime and RRP to include indicators for wholesale high-speed access services, mobile wireless services, and their associated incumbent carriers, including cable-based carriers. The Commission should also consider including administrative monetary penalties (AMPs) as an enforcement tool in the CQoS regime; implement the resulting determinations of this proceeding with as little delay as possible to the ongoing and already drawn-out implementation of TRP CRTC 2015-326; and review the CQoS regime every five years or in alignment with reviews of wholesale service policies.
5. With respect to market forces, the level of market dominance that Canada's top ILEC and cable-based carriers enjoy, both in subscriber and revenue share, and both in wireline and wireless services, demonstrate that a robust competitor quality of service is required to level the playing field for independent ISPs and any new mobile virtual network operators (MVNOs) who may venture into the Canadian telecommunications landscape. Comments from everyday citizens across Canada express frustration and dismay at issues that a strong CQoS regime could resolve or prevent. Furthermore, incumbent carriers' reluctance to provide competitors with viable wholesale services outside of a mandated regime suggests an even stronger need for CQoS measures, for the wholesale policies themselves to remain effective.
6. The primary objective of the CQoS regime must be to facilitate and protect fair competition for independent Internet service providers (as well as independent providers in other sectors), in order to encourage more affordable choice for Canadians at the end of the day. In view of that,

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<sup>1</sup> "How We Operate" *OpenMedia*, online: <<https://openmedia.org/en/ca/how-we-work>>.

the Commission should incorporate or emphasize four guiding principles in the RRP and CQoS regime generally.

7. First, the regime should seek to lower or eliminate switching costs to consumers, a primary reason that independent ISPs are not growing as quickly as they might, inhibiting affordable choice in the Canadian telecommunications market. Second, the regime should prioritize prevention and consumer as well as competitor compensatory remedies over after-the-fact rebates, taking inspiration from the current quality of service consultation and automatic compensation framework proposed by Ofcom in the United Kingdom. Third, an effective CQoS regime would facilitate competitor autonomy by giving them as much control as possible over their own customers' experiences at the retail services level. Fourth, this regime must be responsive and dynamic, such that it adapts to new services as they emerge, and not several years later.
8. As mentioned above, the Commission must at the least update the CQoS regime to include Internet and mobile wireless services, including wholesale high-speed access services such as FTTN and FTTP, and mobile GSM-based roaming services. The direction of incentives and demonstrated disinclination on the part of incumbent carriers to open up their wireline and wireless networks demanded that the Commission establish a wholesale services regime to begin with; and it is these same factors that demand a robust CQoS regime to enforce and give meaning and effect to the Commission's aims in establishing wholesale service policies.
9. On the strength of cable carriers' dominant position in the Internet services market, and applying the principle of regulatory symmetry as well as section 1(b) of the Governor in Council's Policy Direction, the Commission should update the CQoS regime to include cable-based carriers, particularly for wholesale high-speed access services. The CISC Ad Hoc 1540 Working Group, while it has resolved some issues, only addressed a specific set of matters, and set standards but did not provide for enforcement of those standards.
10. Finally, the Commission might consider incorporating AMPs into the CQoS regime, and the test for determining the amount of AMPs appropriate seems suited to the kind of considerations that would arise in a CQoS dispute. The Commission should also take care that in updating the CQoS regime, carriers do not use it as reason to impose even further delay on implementing wholesale disaggregated high-speed access services, namely, FTTP. As for review time periods, OpenMedia recommends reviewing the CQoS regime every five years or in alignment with wholesale service policy reviews.

## I. Canadian Telecommunications System Requires a Robust Competitor Quality of Service Regime

*Q2. Are market forces sufficient to ensure a high level of service or are Q of S regulatory measures required?*

### A. Canadian Telecommunications Market Lacks Competition

11. When examining rules that apply to wholesale services in Canada, the Commission must remain cognizant of the backdrop of a low-competition telecommunications market in Canada. This increases the importance of the role that independent ISPs play, as a minor yet key source of competition, and the regulatory environment must support them in being able to compete on a level playing field with incumbent providers.
12. Both technology and Commission policies have advanced over the past several years, but the state of competition in Canadian telecommunications has not. In fact, it has likely worsened.

13. To begin with, Canada's graveyard of major independent telecommunications service providers has continued to grow. First, consumers lost Mobilicity and Public Mobile to Rogers and TELUS, respectively, and then they closed completely.<sup>2</sup> Then, Canadians lost a promising fourth player in Wind Mobile to Shaw, with the expected consequences of price increases and the merged entity succumbing to lack of competitive discipline, rather than imposing discipline on its rivals.<sup>3</sup> Finally, Bell recently acquired MTS in Manitoba,<sup>4</sup> even after the Competition Bureau concluded the following—in the context of assessing the Bell-MTS acquisition, but in indictment of the state of competition in the Canadian telecommunications market generally:

Based on an analysis of information collected during this inquiry, the Competition Bureau (Bureau) concluded that as a result of coordinated behaviour among Bell, TELUS and Rogers, mobile wireless prices in Canada are higher in regions where Bell, TELUS and Rogers do not face competition from a strong regional competitor. Conversely, the Bureau concluded that where Bell, TELUS and Rogers face competition from a strong regional competitor, prices are substantially lower. The Bureau concluded that the lower prices are caused by the presence of a strong regional competitor who can disrupt the effects of coordination among Bell, TELUS and Rogers.<sup>5</sup>

14. While most of the losses described have occurred in the mobile wireless sector, as opposed to wireline Internet, they are significant for two main reasons. First, the dearth of competition suggests an even stronger need for competitor quality of service rules for mobile wireless services than for wireline Internet and voice services. Second, the outsized dominance of the top three wireless providers in Canada—Bell, Rogers, and TELUS together control 90% of the market<sup>6</sup>—amplifies (and is amplified by) their outsized (combined 88%) share of the wireline market,<sup>7</sup> amounting to significant market power across Canadian telecommunications as a whole. Independent competitors, whether in wireline or wireless, require robust quality of service measures if they are to compete on a level playing field.
15. Price trends also suggest that the Commission must foster more competition through the competitor quality of service regime. If market forces functioned as they should, Canadians would be seeing their Internet and mobile phone bills trend downwards. Instead, they are subjected to the opposite, with Internet prices rising nearly five times as fast as inflation (5.0% increase versus 1.1% increase), according to the 2016 CRTC *Communications Monitoring Report (CMR 2016)*.<sup>8</sup>
16. For instance, Rogers raised prices on its mobile wireless plans in Manitoba mere weeks after Bell and MTS announced their merger, in a stark illustration of what future subscribers could expect after losing their regional stronghold.<sup>9</sup> In January 2016, Bell, Rogers, and TELUS all raised the price of various mobile plans by \$5 per month each, while announcing similar price increases for home Internet plans the next month.<sup>10</sup> These near-simultaneous price increases are almost a regular feature of Canadian telecommunications by this point, including in 2014

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<sup>2</sup> Christine Dobby, "Court approves Mobilicity sale to Rogers for \$465-million" *Globe and Mail* (23 June 2015), online: <<http://www.theglobeandmail.com/report-on-business/rogers-to-buy-mobilicity-sources-say/article25081410/>>.

<sup>3</sup> "I see pricing somewhat discounted, but probably closer to the incumbents as we go forward, which allows us to increase ARPU [average revenue per user]." Christine Dobby, "Shaw to buy Wind Mobile for \$1.6-billion" *Globe and Mail* (16 December 2015), online: <<http://www.theglobeandmail.com/incoming/shaw-buying-wind-mobile-for-16-billion/article27791628/>>.

<sup>4</sup> Ian Hardy, "BCE completes acquisition of MTS and forms Bell MTS in Manitoba" *mobilesyryp* (17 March 2017), online: <<http://mobilesyryp.com/2017/03/17/bell-mts-in-manitoba>>.

<sup>5</sup> Competition Bureau, Competition Bureau statement regarding Bell's acquisition of MTS (Statement) (Ottawa: Competition Bureau, 20117), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>>.

<sup>6</sup> Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report 2016* (Report) (2016), at page 286 (Figure 5.5.5).

<sup>7</sup> *Ibid.*, at page 250 (Figure 5.3.1).

<sup>8</sup> *Ibid.*, at page 50 (Figure 2.0.3).

<sup>9</sup> Ian Hardy, "Rogers increases select monthly rate plans in Manitoba by \$5", *mobilesyryp* (17 May 2016), online: <<http://mobilesyryp.com/2016/05/17/rogers-increases-select-monthly-rate-plans-in-manitoba-by-5>>.

<sup>10</sup> "Wireless rates rise with hikes in internet, home phone ahead", *CBC News* (19 January 2016), online: <<http://www.cbc.ca/news/business/telcos-rate-hikes-1.3410425>>.

when the same three carriers raised mobile wireless plan prices within two months of each other, resulting in all three charging the same price for their respective plans.<sup>11</sup> Notably, such price increases have also omitted provinces like Manitoba and Saskatchewan, demonstrating the impact for consumers of even one additional provider who can compete on equal terms with the major three.

## B. Internet Access Services Are More Important Than Ever to Canadians

17. At the same time that Internet access services are becoming more dear expense-wise, they are also becoming more dear to Canadians in terms of day-to-day living as well as in terms of enabling or enhancing fundamental aspects of life and living in a purportedly free and democratic society. A report by the Public Interest Advocacy Centre (PIAC) found that

almost half (49%) of respondents made some trade-off in their household budgets in order to pay their communications bills. For instance, 28% of all survey respondents bought cheaper goods while 24% held off on certain expenses. In our view, far too many respondents (17%) indicated they went without other essential goods, such as food, medicine or clothing in order to pay a communications bill.<sup>12</sup>

18. As Chairman Blais stated with the release of the Commission's basic telecommunications services decision:

Access to broadband Internet service is vital and a basic telecommunication service all Canadians are entitled to receive. Canadians who participated during our process told us that no matter where they live or work in our vast country — whether in a small town in northern Yukon, a rural area of eastern Quebec or in downtown Calgary — everyone needs access to high-quality fixed Internet and mobile services. ... High quality and reliable digital connectivity is essential for the quality of life of Canadians and Canada's economic prosperity.<sup>13</sup>

19. According to the 2016 CMR, the average amount of data that Canadians downloaded rose 40% from 2014 to 2015, and Canadians now download an average of 93 GB of data per month. Globally, the Cisco Visual Networking Index predicts a *seven-fold* increase in mobile data traffic from 2016-21.<sup>14</sup> Everyday Canadians and small businesses require the technology and infrastructure to not just keep up but be at the forefront of such shifts in the digital economy. A competitive telecommunications market is critical to choice and affordability, and that in turn requires a robust wholesale services regime that cannot function effectively without competitor quality of service measures ensuring fair and meaningful competition in both wireline and wireless Internet access services.

## C. Market Forces Have Not Ensured Sufficiently High Quality of Service

20. The fact that complaints still abound regarding telecommunications carriers and various stages of switching providers, installing new services, or remedying service disruptions suggests that market forces have not ensured sufficiently high quality of service where Internet access services are concerned. This is primarily the case where there are no competitor quality of service measures to inject a level of competition that the market should but cannot provide as it

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<sup>11</sup> "Wireless carriers hike prices across Canada" *CBC News* (17 March 2014), online: <<http://www.cbc.ca/news/business/wireless-carriers-hike-prices-across-canada-1.2575886>>; Jon Brodwin, "Canada's top carriers roll out identical price hikes in two-month span" *Ars Technica* (20 March 2014), online: <<https://arstechnica.com/business/2014/03/canadas-top-carriers-roll-out-identical-price-hikes-in-two-month-span>>.

<sup>12</sup> Jonathan Bishop and Alysia Lau, "No Consumer Left Behind Part II: Is There a Communications Affordability Problem in Canada?" Report, Public Interest Advocacy Centre (July 2016), online: <[http://www.piac.ca/wp-content/uploads/2016/09/PIAC\\_No-Consumer-Left-Behind-Part-II-Website-Version.pdf](http://www.piac.ca/wp-content/uploads/2016/09/PIAC_No-Consumer-Left-Behind-Part-II-Website-Version.pdf)>, at page 125.

<sup>13</sup> Government of Canada, "CRTC establishes fund to attain new high-speed Internet targets" (News Release) (21 December 2016), online: <<https://www.canada.ca/en/radio-television-telecommunications/news/2016/12/crtc-establishes-fund-attain-new-high-speed-internet-targets.html>>.

<sup>14</sup> "5G will start moving the needle on mobile data growth in 2020: Cisco VNI" *disruptive.asia* (8 February 2017), online: <<https://disruptive.asia/5g-mobile-data-growth-2020-cisco-vni/>>.

is structured today. Multiple proceedings and subscribers' personal experiences have demonstrated this.

21. In preparing this intervention, OpenMedia reached out to its community through various online platforms. Nearly 7,000 Canadians signed a petition with the following requests to the Commission:

**Upgrade the CRTC's rules** to ensure competitor quality of service for cable Internet, high-speed fibre broadband Internet, and mobile wireless services. These are the services of today and tomorrow.

**Ensure a level playing field with fair treatment.** Indie ISPs can't compete properly if their customers aren't treated fairly by incumbent providers. We need fair rules for real competition.

**Support affordable choice.** When Big Telecom is able to hold back small providers, it makes it much more difficult for Canadians to find affordable Internet options to subscribe to. The CRTC needs to demonstrate its commitment to Internet affordability in Canada.<sup>15</sup>

22. In addition to these 7,000, a number of users entrusted OpenMedia with submissions sharing their views and experiences with issues that fall under competitor quality of service concerns. Citizens submitted comments through a Reddit thread<sup>16</sup> and an online form<sup>17</sup> as embedded in an introductory blog post on OpenMedia's website.<sup>18</sup> Comments submitted through the online form are attached to this intervention as Appendix A. Comments submitted through Reddit are attached as Appendix B.
23. Reading individual users' submissions suggests that Canadians continue to experience frustration with Internet service quality in cases where a wholesale services relationship is involved. On the whole, respondents believe they are subjected to lesser customer service from incumbent staff and indirectly penalized for subscribing to a competitor ISP rather than to the associated incumbent provider. Users have experienced for themselves the differences in quality and price for identical service, as comments below will demonstrate, and believe that the Commission must remedy this situation through fair competitor quality of service rules (though some also expressed doubt as to the likelihood of that occurring).
24. For example, Melanie P. from Calgary, Alberta, submitted:

I think it is imperative that the giant ISPs are held accountable for the service they sell to indie ISPs. I've been with Lightspeed for over two years now, and there are outages once or twice a month, in most months, usually on weekends. When I called them to try to get it fixed, it was always something that they couldn't control - they had to wait out the fix too. On bad months - long outages, or more frequent ones - I've been ready to throw up my hands and cancel my account to go with Telus. Which ironically, is the VERY SAME SERVICE that Lightspeed is selling me, but Telus has arranged for it to be patchy when coming from their competitor. That is absolute garbage, and I sit through the outages because I will not be manipulated by the giant corporation trying to strongarm me in to going with them instead.<sup>19</sup>

25. Several users described specific incidents with technicians who worked for incumbent providers, illustrative of just one of the costs of switching that users bear when they attempt to

<sup>15</sup> "Stop Undermining Indie ISPs" *OpenMedia*, online: <<https://act.openmedia.org/fairISPs>> (emphasis in original).

<sup>16</sup> "Hey Canada, let's make sure Indie ISPs have a fair playing field — tell us about your installation misadventures and we'll bring them to the CRTC" (13 April 2017), online: reddit <[https://www.reddit.com/r/canada/comments/651wjv/hey\\_canada\\_lets\\_make\\_sure\\_indie\\_isps\\_have\\_a\\_fair/](https://www.reddit.com/r/canada/comments/651wjv/hey_canada_lets_make_sure_indie_isps_have_a_fair/)>.

<sup>17</sup> "Fair Service Quality Rules for Indie ISPs: Your Comments to the CRTC", online: Google Forms <[https://docs.google.com/forms/d/10H21NwBuYy9sjQ4uG7GwPiikNs8dQMgWBJyhs6UA\\_S4/closedform](https://docs.google.com/forms/d/10H21NwBuYy9sjQ4uG7GwPiikNs8dQMgWBJyhs6UA_S4/closedform)>.

<sup>18</sup> Cynthia Khoo, "Let's put your Internet installation horror stories on the record" *OpenMedia* (12 April 2017), online: <<https://openmedia.org/en/lets-put-your-internet-installation-horror-stories-record>>. Please note that two of the comments submitted through this form are from individuals currently employed by OpenMedia, commenting in a personal capacity. The Commission may treat these submissions as it sees fit.

<sup>19</sup> Appendix A.

“vote with their feet” in the absence of functioning market forces. For example, Heather H. from Richmond Hill, Ontario, shared at the end of one submission: “The contempt with which [the technician] spoke about ‘my provider’ was clearly discernible. The blame was placed squarely on ‘my provider’ and, though unsaid, I was left with the sense that it was my fault for not being a Rogers customer.”

26. Similarly, Eric B. from Vercheres, Quebec, wrote:

When I moved in my new house, I wrote to my indie ISP 1 week in advance to make the switch. And I was forced to wait 3 weeks to get my internet working because of the tech guy that was from one of the big companies that wasn't able to come enable my connection. When the tech guy came to plug the wire. He showed me the Internet speed and said: "This is the speed you can get with your ISP. And this is the speed you could get with our company." My indie ISP gave me 1 free month for the troubles.<sup>20</sup>

27. Jacky Y. from Unionville, Ontario, shared:

When I applied for internet service with my current ISP, they had to requested a technician from Rogers to complete the installation. The technician arrived late on the appointment date and he tried to persuaded me switch to Rogers so he could get paid extra. When I refused to switch, he threaten to leave and I had to warned him that I will file a complaint to Rogers and CRTC against him if he does not correct his attitude.

To make sure every consumers can choose the service they want and get the service they want, it's crucial that there are rules in place to protect their rights.

28. Canadians also believe that incumbent service providers are exploiting their position of control over certain aspects of competitors' customer service operations, either to disadvantage the competitor or incent the subscriber to switch to the incumbent. For instance, Noah S. from Saint John, New Brunswick, described experiences with multiple ISPs in various cities, then concluded:

Both ILECs provided an enormous window indicating when they would arrive, usually four hours with no specific time. This might have been acceptable before computerized ticket systems but if the company knows its employees schedule, they should be able to provide customers with a more specific appointment. Aside from setting that large block of time aside for this fairly routine task, I also needed to listen anxiously so that I could respond immediately to the ILEC technician, well known to leave claiming that no one was home. It definitely appears as though ILECs are providing inferior service deliberately in order to make people frustrated with independents.

29. On Reddit, an individual who goes by the username "Reliant" shared the following:

[...] Fast forward to the next July, exactly 1 year later. My internet goes out. I do the usual, call my ISP on a Monday, they send the ticket to Bell, Bell schedules someone to come out on Friday, and I wait. I waited all day, and no-one came. When I called my ISP, they said that Bell's official position is that a technician was sent out and that my internet was functioning properly. I said this wasn't the case, so they sent another request. Bell waited exactly 5 days before rejecting it because "we won't send another technician when the last one said it works". Again, this went back and forth for weeks, and we were completely stuck. It only got resolved when we learned that one of my dad's cousins happens to work for Bell, and they were able to pull some strings from inside to get it resolved. It took the entire month of July to resolve. [...]

I found it absolutely disgusting at how every rejection would take exactly 5 days to be rejected. I was fully aware that I was with a "reseller", and it felt to me like Bell was intentionally dragging their feet in order to pressure people into abandoning the indies and going with Bell directly.<sup>21</sup>

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<sup>20</sup> Appendix A.

<sup>21</sup> Appendix B.



30. Felix R. from Vancouver, British Columbia, sums up what broadly appears to be the situation, from the perspective of Internet users throughout Canada:

In British Columbia, every few years the broadband monopoly (Shaw, Bell, Telus, Rogers) have made changes to their policy or pricing. It's never in the favour of the consumer. When this happens I check what independent options are available, concerned mostly the cost to switch and the reviews of the service. Most reviews of independent ISPs are positive, except for installation/activation and any issue or situation that requires a technician to visit. People report multiple weeks of no service, repeat no shows from technicians, double charging, and other aggressive competition denying tactics from the larger networks. For over a decade the situation has been the same; If you switch to an independent ISP you will save on your monthly bill but the larger networks will make you pay in other ways.<sup>22</sup>

31. OpenMedia also received submissions from those who had themselves worked for Internet service providers. Tim S. from Port Perry, Ontario, related his experience as follows:

I am a network technician, and set up small networks for a number of business clients. We used to use a competitive DSL service provider for all our customers, but have found that it is nearly impossible to maintain a reliable service. In most areas, Bell has let their copper fall into a state of disrepair. A 5 Mb service can barely get 2 Mb/s, and is constantly disconnecting.

If you open a ticket with the independent provider, the Bell technician will take a few days to look at it, and will often say that they couldn't find anything wrong. They give you an 8 hour window that you have to wait around for them to show, and some times they don't show at all. If it isn't fixed, our provider then has to open another ticket, and we are constantly passing messages back and forth. In most of these cases, Bell is the only carrier with any infrastructure in the area.

The independent ISPs can offer much better service from their network - they can provide address space, IPv6 connectivity, and much better transit paths. Bell Internet is actually quite terrible from a routing standpoint, but unless you are a Bell customer, you seem to be lowest priority when it comes to getting something fixed.

32. David C. from North York, Ontario, simply stated, "Having worked for both large and small ISPs, I most strongly urge the CRTC review and strengthen the SLAs which the duopolies owe to the ISPs under the Competitor Quality of Service rules."

#### **D. Market Forces Will Not Ensure Sufficiently High Quality of Service**

33. Not only does the evidence above suggest that market forces have not supported competitor quality of service, at least when it comes to retail Internet, but evidence indicates market forces will do nothing to support competitor quality of service going forward, either. In fact, market forces arguably drive in the opposite direction, given the market conditions, market structure, and adversarial nature of proceedings surrounding, for instance, the implementation of wholesale high-speed access services such as FTTP.
34. In *Wholesale Wireline*, for instance, the Commission noted that "there is limited competition for wholesale HSA services between the ILECs and the Cablecos, and what competition that does exist today is largely, if not entirely, a result of regulatory intervention. Consequently, there is limited rivalrous behaviour to constrain upstream market power."<sup>23</sup>
35. When it comes to competitor quality of service and wireline Internet, in particular, the Commission should also take special note of the lengths to which Bell Canada has gone to reverse or otherwise undermine the decision to open up its high-speed access networks to competitors. Since the Commission released Telecom Regulatory Policy 2015-326, Bell has

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<sup>22</sup> Appendix A.

<sup>23</sup> Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies* (22 July 2015) [*Wholesale Wireline*], at para 123.

launched: a Petition to the Governor in Council to vary the decision;<sup>24</sup> a Part 1 Application to Review and Vary the decision; and a Part 1 Application to expand the deregulatory aspects of the decision. All three were denied.<sup>25</sup>

36. It is difficult to imagine at this stage that an incumbent service provider in such a position would be particularly keen to ensure high competitor quality of service, if it did not have to. Canadians require the Commission to protect their interests by ensuring competitor ISPs may operate under fair conditions, and that means implementing a robust CQoS regime for services such as wholesale high-speed access.
37. While the evidence above suggests that market forces have not and will not support competitor quality of service where retail Internet is concerned, evidence from the current CQoS regime does indicate that it has been effective for local voice. Statistics from ILEC reports over the years show distinct improvement in competitor quality of service over time.<sup>26</sup>
38. This is despite the fact that even back in 2001, incumbent telecommunications providers “generally suggested that no new indicators should be required because competition would ensure adequate levels of service quality. They argued the competitive market provides a powerful incentive to maintain very high levels for customer satisfaction and they are sensitive to their customers’ perceptions and needs.” The Commission decided, and intervening time has shown, that they were in the wrong back then—twice<sup>27</sup>—and if incumbent carriers argue similarly in this proceeding, with respect to 21<sup>st</sup>-century contemporary services, they will be wrong today as well.
39. A well-designed CQoS regime would and should promote fair competition and higher quality of service for Canadians, in all of their telecommunications services. The Commission saw fit to do this for local voice, and it should do likewise for services that are even more central to Canadian telecommunications today.

## II. Primary Objective of CQoS Regime: Facilitate and Protect Fair Competition

*Q3. If a competitor Q of S regime is required, what should its objectives be?*

40. The primary objective of a competitor quality of service regime should be to facilitate and protect fair competition between competitor and incumbent service providers in the market.

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<sup>24</sup> Innovation, Science and Economic Development Canada, Spectrum Management and Telecommunications, Petition to the Governor in Council concerning Telecom Regulatory Policy CRTC 2015-326 (20 November 2015), online: <<http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11141.html>>. It is also worth noting that the mayors of two large, central, and powerful cities in Canada—Ottawa and Toronto—were brought into this particular fray on Bell’s behalf: Michael Geist, “The Battle Over the Future of Broadband in Canada: Mayors Tory & Watson v. Nenshi” (12 January 2016), online: <<http://www.michaelgeist.ca/2016/01/the-battle-over-the-future-of-broadband-in-canada-mayors-tory-watson-v-nenshi/>>.

<sup>25</sup> “Bell loses CRTC appeal over fibre internet access for competing ISPs” *CBC News* (29 June 2016), online: <<http://www.cbc.ca/news/technology/bell-appeal-crtc-1.3658261>>; Telecom Decision CRTC 2016-245, *Bell Canada - Application to review and vary certain determinations set out in Telecom Regulatory Policy 2015-326 concerning disaggregated wholesale high-speed access* (29 June 2016); and Telecom Decision CRTC 2016-306, *Bell Canada - Application to expand determinations set out in Telecom Regulatory Policy 2015-326 concerning the unbundled local loop framework and the rates for certain wholesale legacy services* (2 August 2016).

<sup>26</sup> Reports available at Canadian Radio-television and Telecommunications Commission, “Competitor Quality of Service Indicators Reports - 8660-C12-201000406 - Pursuant to Decision 2005-20” online: <[http://www.crtc.gc.ca/PartVII/eng/2010/8660/c12\\_201000406.htm](http://www.crtc.gc.ca/PartVII/eng/2010/8660/c12_201000406.htm)>.

<sup>27</sup> “[T]he ILECs are currently mandated to provide certain wholesale services to competitors due to limited or non-existent supply alternatives. As a result, the potential consequences to competitors associated with repeated or prolonged service delays, which were taken into consideration by the Commission during the establishment of the trailing indicators, remain as concerns today.” Telecom Decision CRTC 2012-287, *Bell Aliant Regional Communications, Limited Partnership and Bell Canada - Application to remove the trailing indicators from the competitor quality of service framework and the rate rebate plan* (11 May 2012), at para 15.

Competitor service providers, and the wholesale markets they comprise, are crucial to a competitive and functioning telecommunications market, particularly one with the levels of concentration as seen in Canada, and particularly in the context of retail Internet markets being forborne.

41. The Commission has consistently recognized the importance of wholesale Internet access markets throughout a number of decisions. For example, in Telecom Regulatory Policy CRTC 2010-632, *Wholesale high-speed access services proceeding*, the Commission noted that “competitors’ services bring pricing discipline, innovation, and consumer choice to these retail Internet service markets”.<sup>28</sup> This finding contributed to the Commission’s decision to require speed matching from incumbent carriers in selling wholesale high-speed Internet access services to competitor ISPs.
42. Similarly, the Commission began Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies* with the statement, “Wholesale telecommunications services...are integral to the overall development of the Canadian communications system.”<sup>29</sup> The Commission continued:

The provision of wholesale services primarily supports competition in various retail service markets, such as local phone, television, and Internet access service markets... so that competitors can extend their networks where necessary to provide their own services to consumers. Wholesale services also play a supporting role in the overall telecommunications system - for example, by ensuring the efficient interconnection of competing networks, by ensuring public safety through the provision of emergency services, and by optimizing the use of support structures such as poles and conduits.

Over the years, the Commission has established various policies, rules, and regulations to govern the provision of wholesale services. These regulatory measures are necessary because incumbent carriers have had considerable advantages over competitors. Without wholesale regulation, fewer competitive service options would be available to Canadians.<sup>30</sup>

43. The Commission has supported these statements and demonstrated commitment to a healthy wholesale services market in Canada, at least for wireline Internet, through close monitoring of wholesale rates and taking appropriate action where rates have been found to be too high.<sup>31</sup> The driving principle behind this is to “ensure that there is a competitive wholesale market that accurately compensates each incumbent for the costs incurred to make those wholesale services available to the independent service providers and, *at the same time, to allow for effective and efficient competition to the benefit of Canadians.*”<sup>32</sup>
44. It is not enough that competitors simply exist; the Commission must also establish a regulatory environment in which they can compete effectively and efficiently, against much larger, better resourced, more powerful, and market-dominating incumbent providers. Only then will meaningful choice and more affordable options be available to Canadians at the retail level.
45. Last year, the Commission again ordered significant reductions in wholesale rates, decreasing “the rates some companies proposed for network access by up to 39 per cent and cut[ting] the

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<sup>28</sup> Telecom Regulatory Policy CRTC 2010-632, *Wholesale high-speed access services proceeding* (30 August 2010) [*Speed Matching*], at para 50.

<sup>29</sup> Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies* (22 July 2015) [*Wholesale Wireline*], at para 1.

<sup>30</sup> *Ibid.*, at paras 2-3.

<sup>31</sup> “In a policy statement and eight separate decisions released Thursday, the Canadian Radio-Television and Telecommunications Commission adjusted some of the approved rates major providers can charge, most notably cutting BCE Inc.-owned Bell Canada’s Ontario and Quebec wholesale rates for its DSL service by more than half.” Christine Dobby, “CRTC ruling clarifies wholesale Internet pricing, slashes rates for Bell and Telus” *Financial Post* (21 February 2013), online: <<http://business.financialpost.com/fp-tech-desk/crtc-ruling-clarifies-wholesale-internet-pricing-slashes-rates-for-bell-and-telus>>.

<sup>32</sup> Telecom Regulatory Policy CRTC 2013-70, *Disposition of review and vary applications with respect to wholesale high-speed access services: Introductory statement* (21 February 2013), at para 14 (emphasis added).

proposed rates for the transport of Internet data by up to 89 per cent in some cases,<sup>33</sup> in Telecom Order CRTC 2016-396.<sup>34</sup> With respect to this decision, Chairman Blais stated:

Competitors that provide retail Internet services to Canadians using wholesale high-speed services must have access to these services at just and reasonable prices. ... What's even more concerning is the fact that Canadians' access to a choice of broadband Internet services would have been at stake had we not revised these rates. As always, we strive to create a dynamic competitive telecommunications market for Canadians.<sup>35</sup>

46. Not only has the Commission issued statements and decisions recognizing the critical role that independent service providers play in promoting choice and competition in the market; the market itself has borne this out. For example, in expectation of the 2013 wholesale rate reductions, which would allow competitor ISPs to compete on more level ground, Rogers, Bell and TELUS all reintroduced unlimited Internet plans on wireline again.<sup>36</sup> In 2013, Rogers, Bell, and TELUS began offering unlimited Internet plans in expectation of a CRTC decision that cut wholesale rates significantly.

47. More recently, after the 2016 wholesale interim rate reductions, independent ISP TekSavvy shocked Canadians by going against the grain established by incumbent providers, and lowered customers' Internet bills while raising speeds of various Internet plans, at no cost. TekSavvy directly attributed this to the Commission:

"Correcting wholesale network access rates to a fairer level lets us create more savings for our customers, get back to innovating on service and features, and — we hope — spur a more competitive telecom market in Canada."<sup>37</sup>

48. This is exactly the direction that functioning market forces should be working to push Canadian telecommunications services towards. The Commission again acknowledged, in a tweet responding to pleasantly surprised Canadians, the direct connection between enforcing a meaningful and effective wholesale services market and its ultimate impact for citizens on the ground, at the retail level: "#CRTC glad Canadians r getting lower rates from @TekSavvyBuzz following wholesale decision. Healthy wholesale market = healthy retail market".<sup>38</sup>

49. In light of the above, the primary objective of a competitor quality of service regime must be to ensure a healthy wholesale market, through effective enforcement of a level playing field between competitor ISPs and incumbent carriers. This allows competitor ISPs to meaningfully impose competitive discipline and push incumbent providers to improve their services and lower their own retail prices for consumers.

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<sup>33</sup> Christine Dobby, "Pushing for competitive market, CRTC slashes wholesale fees charged by incumbent ISPs" *Globe and Mail* (6 October 2016), online: <<http://www.theglobeandmail.com/report-on-business/crtc-aims-to-boost-home-internet-competition-with-rate-cut/article32279440/>>.

<sup>34</sup> *crtc 2016-396*;

<sup>35</sup> Canadian Radio-television and Telecommunications Commission, *CRTC finds proposed wholesale high-speed access rates unreasonable* (News Release) (6 October 2016), online: <<http://www.newswire.ca/news-releases/crtc-finds-proposed-wholesale-high-speed-access-rates-unreasonable-596202821.html>>.

<sup>36</sup> "Unlimited internet offers return to Bell, Rogers" *CBC News* (20 February 2013), online: <<http://www.cbc.ca/news/technology/unlimited-internet-offers-return-to-bell-rogers-1.1387141>>.

<sup>37</sup> "CRTC ruling prompts Teksavvy to cut prices, hike some internet speeds" *CBC News* (21 December 2016), online: <<http://www.cbc.ca/news/business/crtc-teksavvy-1.3906730>>.

<sup>38</sup> Canadian Radio-television and Telecommunications Commission, "#CRTC glad Canadians r getting lower rates from @TekSavvyBuzz following wholesale decision. Healthy wholesale market = healthy retail market" (20 December 2016), online: Twitter <<https://twitter.com/CRTCeng/status/811282160023928833>>.

### III. Guiding Principles for an Effective CQoS Regime

*Q6. If an RRP for competitors is required, are the guiding principles established in Telecom Decision 2005-20 still appropriate? If the existing guiding principles are no longer appropriate, what principles should be adopted?*

50. OpenMedia supports both reinforcing and updating the current RRP for competitors, as well as the current guiding principles set out in Telecom Decision 2005-20. In updating the RRP and its principles, OpenMedia would emphasize four in particular (some of which the current principles encompass, and some which may be new). The principles that guide any part of the competitor QoS regime should be rooted in the primary objective described above, of ensuring a meaningful, effective, and healthy wholesale services market. The Commission itself noted this in setting out the original principles: “The purpose of the Q of S regime for competitors, including the RRP for competitors, is to ensure that all competitors receive a Q of S from the ILECs of a sufficiently high level to enable the competitors to compete on a level playing field with each other and with the ILECs.”<sup>39</sup>
51. Based on the above grounding and evidence from the experiences of everyday citizens, OpenMedia recommends that the Commission strengthen or add the following four guiding principles to the rate rebate plan, as well as use them to guide determinations and future development of the competitor QoS regime generally: 1) lower or eliminate consumer costs of switching; 2) prioritize prevention; 3) facilitate competitor autonomy; and 4) ensure the regime is responsive and dynamic.

#### A. Lower or Eliminate Switching Costs to Consumers

52. First, the Commission should ensure that the RRP, and CQoS regime generally, is designed in a way that systematically lowers or eliminates the costs of switching providers, among consumers. Many of those who submitted comments through OpenMedia stated that they supported independent ISPs and the competition they bring to the market, and would subscribe were it not for issues that are central to what the CQoS regime is supposed to prevent or remedy. As Felix R. above noted, “In British Columbia, every few years the broadband monopoly (Shaw, Bell, Telus, Rogers) have made changes to their policy or pricing. It's never in the favour of the consumer. When this happens I check what independent options are available, concerned mostly the cost to switch and the reviews of the service.”<sup>40</sup>
53. Indeed, even the most informed of consumers have difficulty switching providers, as described in a blog post by the Public Interest Advocacy Centre:

So far I have internet access that works, who knows what could happen if I tried to switch? Could I experience an internet blackout for weeks? Why rock the boat? “I’ll do it another time,” I told myself. [...]

I have been struck by comments made by high-profile regulators—institutions created to protect the public interest—which have lamented that telecom consumers are in part to blame for their strife and complaints about high prices, low data caps, and throttled broadband speeds. *Why don't consumers just cancel their service and switch providers?* [...]

These statements discount an array of reasons which have formed the foundation of today's consumer protection laws and regulations, including:

- The significant imbalance in bargaining power between companies and individual consumers;

<sup>39</sup> Telecom Decision CRTC 2005-20, *Finalization of quality of service rate rebate plan for competitors* (31 March 2005) [Quality of Service], at para 31.

<sup>40</sup> Appendix A.

- The traditional “take it or leave it” nature of service terms and contracts;
- The disparity in resources available to a company and to a consumer in cases where “something goes wrong” or a dispute arises;
- The complexity of the telecommunications market and the high cost of information acquisition;
- The effect of high switching costs and barriers such as bundled services and fixed-term contracts; and
- The fact that a market of goods or services rooted in the ability of a consumer to “negotiate” a better contract creates an inequitable system which vastly favours consumers who traditionally have more time, independence, income, knowledge, education, mobility, and confident language skills.

[...] Switching is just hard. I am a consumer advocate and was as entangled in the incumbent web as anyone else. It is not merely a matter of being at the mercy of any penalties your old telecom provider may impose on you, or having to pay upfront for a new modem and installation costs, although all these things matter—inertia and fear are true consumer barriers. It’s a matter of being human, and companies know exactly how to take advantage of it.

To begin, the telecommunications market is unique not merely because of the fast-paced changes in technology but also because consumers must make complex decisions related to several different products and services at the same time. ... Studies have shown that not only are consumers reluctant to switch, but when they do, particularly in electricity or telecom markets, they end up subscribing to “sub-optimal contracts”—many end up paying more than they need to for their actual usage. [...]

According to Lunn, in the telecom sector this means that “consumers may be foregoing substantial gains, because alternative providers would need to provide several times the consumer surplus of the current contract before consumers would be willing to switch.”<sup>41</sup>

54. As demonstrated above and through hundreds if not thousands of citizen comments throughout the years, in addition to manual comparison of plan offerings on incumbent carriers’ and independent providers’ websites, subscribers do consider alternative providers to offer several times the consumer surplus—*once they are subscribed*. To get to that state of operating subscription, however, is another matter entirely.
55. This is where the competitor quality of service regime must come in and shine. The system must ensure that citizens are not subjected to worse customer service, or penalized directly or indirectly in the Internet provider switching process, by virtue of the fact they are subscribing to an independent ISP rather than the wholesale vendor incumbent carrier. The Commission must structure the CQoS indicators and RRP in a way that customers do not experience downsides or barriers to subscribing to an independent ISP, that they would not experience if they subscribed to an incumbent ISP instead.
56. If the RRP and CQoS were focused on lowering switching costs to consumers, that could give rise to new indicators specifically addressing consumers’ pain points when it comes to switching providers. For example, the Commission should monitor and enforce competitor quality of service when it comes to each of the following steps in the switching process between Internet service providers: scheduling an installation appointment; obtaining an installation appointment that falls within a reasonable number of days; obtaining a reasonably narrow waiting window, if not an actual specific appointment time; arrival and task completion of the technician; and ensuring the new Internet connection works properly as soon as it is set up.

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<sup>41</sup> Alysia Lau, “Switching Providers Isn’t All About Reasons: It’s Just Hard” (4 April 2017), online: Public Interest Advocacy Centre <<https://www.piac.ca/switching-providers-isnt-all-about-reasons-its-just-hard/>>.

57. OpenMedia notes that many of these steps appear to be addressed through indicators in the current regime, for the services that are currently included.<sup>42</sup> As this submission will elaborate further below, the Commission must update the current RRP and CQoS regime to account for cable carriers and modern-day basic services such as high-speed fibre broadband Internet and mobile wireless services. This means assessing the particular pain points that consumers face in each situation, and including indicators specific to each circumstance.

## B. Prioritize Prevention and Remedy over Rebates

58. The second principle that should guide the RRP, and CQoS regime generally, is to prioritize prevention and then remedies, over rebates. While the latter are certainly important and should remain a key part of the CQoS regime, the Commission should ensure that the system is not designed in a way that focuses more on after-the-fact cures at the expense of a greater focus on preventing issues from occurring in the first place. This is somewhat an extension of the current guiding principle of sufficient incentive, specifically the determination that the RRP “must not be designed so as to encourage an ILEC to view any rebates as simply a cost of doing business.”<sup>43</sup>
59. Given that the ultimate purpose of the RRP and CQoS regime is not to penalize incumbent carriers for its own sake, but to ensure high quality of service in the first place, the Commission should look to measures that either further encourage prevention from service quality dropping to begin with, or failing that, look to incorporating direct-to-consumer remedies in addition to compensating the affected competitor ISP with rebates.
60. Using the issue of disrupted service or outages during network upgrades or changes, for example, there have been reports in the past of a competitor ISP’s network not working, with timely repairs unavailable, while the associated incumbent ISP assures affected consumers that they would be able to get back online near immediately if they switched over.<sup>44</sup> This suggests a potential opportunity for discriminating against and then attracting customers who are on a competitor’s plan rather than the incumbent’s own, likely more expensive plan. Currently, the CQoS regime is based predominantly on rebate-focused measures, which would not help in such situations beyond potentially deterring them from occurring again in the future. The Commission should make the CQoS regime more effective by including remedy-focused and prevention-focused measures, as well.
61. A rebate-focused measure would mean that after all is said and done, the incumbent would include this incident in its reporting requirements, and pay a compensatory rebate to the affected competitor ISP. However, this does nothing for the customer whose day-to-day life or work may have been paralyzed due to the lack of service. The disruption already occurred; the consequences already flowed.
62. These consequences sometimes include subscribers giving up and switching to an incumbent provider even if they do not wish to, simply because they are more interested in reliable service than in *ex post* compensation. Melanie P. from Calgary, Alberta, relates: “On bad months—long outages, or more frequent ones—I’ve been ready to throw up my hands and cancel my account to go with Telus. Which ironically, is the VERY SAME SERVICE that Lightspeed is selling me, but Telus has arranged for it to be patchy when coming from their competitor.” Kelly M., also from Calgary, Alberta, describes how she arrived at her decision to subscribe to the incumbent provider Shaw:

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<sup>42</sup> *Quality of Service*, *supra* note 39, at Appendix B.

<sup>43</sup> *Quality of Service*, *supra* note 39, at para 36.

<sup>44</sup> “He and his roommates had been using TekSavvy for three years until Aug. 6, when the service stopped. ... After 16 days without service, Prashad and his roommates called TekSavvy to say they were going to call Rogers to find out what was going on. TekSavvy urged them not to, he said. Within minutes of making the call to Rogers, the company offered them the same plan that could be up and running within a day, Prashad said.” “Some TekSavvy internet customers upset by long service outages” *CBC News* (31 August 2013), online: <<http://www.cbc.ca/news/canada/ottawa/some-teksavvy-internet-customers-upset-by-long-service-outages-1.1309647>>.

I have tried to use more than 5 different indy ISP's, each for 6 months or more—they are all on either Telus's Copper or Shaw's Cable network. Every single time, like clockwork consistency I would have unplanned outages with the Indy ISP. These would happen on a Friday evening and last for the absolute longest they were allowed to by law's given to Shaw or Telus (SLA's with the Indy ISP) for trouble tickets—it was always the backbone and nothing the indy company could do but say sorry and submit a ticket and ask for updates, which were ignored. It became very obvious that I was suffering from deliberate sabotage to discourage me from using Indie ISP's. I am with Shaw now. I feel I had no choice for the speed I require and reliability. I live in a monopoly, there is no question.<sup>45</sup>

63. The primary effect of a rebate is potential deterrence, which offers little in the way of more concrete prevention and competitor quality assurance, particularly where users on the ground are concerned. An after-the-fact rebate given to competitor ISPs would have done little to remedy the issues that Melanie and Kelly experienced, either before or after.
64. A remedy-focused measure is more consumer-centred, and more in keeping with a telecommunications system meant to serve individual Canadians at the end of the day. An example of this would be giving the consumer, for example, one week's or one month's worth of complimentary Internet access as compensation for regularly disrupted service. Some competitor ISPs already do this.<sup>46</sup> However, the CQoS regime should require that the incumbent ISP in turn compensate the competitor ISP for these periods of compensatory complimentary service, if the incumbent carrier was responsible for the service disruptions. This comes closest to making both the customer and the independent ISP whole, after the failure in maintaining quality of service.
65. Another example of a remedy-focused measure, from the consumer perspective, is an automatic compensation framework as Ofcom is currently running a consultation to establish in the United Kingdom:

In this consultation, we are proposing that telecoms providers should be required to introduce a system of automatic compensation for specific quality of service problems. If consumers suffer any of these problems, they would receive a set sum of compensation per day from their provider without having to go through a prolonged and difficult claims process. Our proposals could lead to up to 2.6m more compensation payments to consumers and up to £185m of additional compensation payments each year.<sup>47</sup>

66. The CRTC might consider implementing a similar system as part of a more comprehensive and consumer-focused competitor quality of service regime. To mitigate competitor quality of service concerns between incumbent carriers and competitor ISPs, such a system in the Canadian context should also require incumbent carriers to compensate competitor ISPs for any compensation paid to the latter's customers, where the quality of service problem was ultimately the incumbent carrier's responsibility.

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<sup>45</sup> Appendix A.

<sup>46</sup> See, e.g., Transcript, Broadcasting and Telecom Notice of Consultation CRTC 2015-239, *Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc.* (3 November 2015) [CCTS Review]:

3719 MR. ABRAMSON: -- to step in to describe a little bit how it happens on the ground, especially with respect to the CCTS map, I guess.

3720 But generally my understanding is that the CCTS sort of says look, we can work with Tek Savvy and that's about it and so, you know, Tek Savvy -- the installer didn't show up on such and such date and this guy took the whole day off work to be there.

3721 And then he took a second day off work to be there and the installer again didn't show up then a third time that happened again what are you going to do about it?

3722 And we say well first of all we're, you know, we're trying to work with the wholesale network access provider as closely as we can.

3723 But at the same time in the real world what ends up happening is we don't have a lot of levers to negotiate with the wholesale network access provider, so we don't get much, sort of, on the back end. We simply end up sort of compensating or paying out the customer, as often happens, and moving forward.

<sup>47</sup> Ofcom (United Kingdom), *Automatic Compensation: Protecting consumers from quality of service problems* (Consultation Document) (24 March 2017), online: <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0030/98706/automatic-compensation-consultation.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0030/98706/automatic-compensation-consultation.pdf)>.



67. A prevention-focused measure would be best of all, ensuring the highest quality of service by pre-empting particular issues completely, rather than after-the-fact restoration and compensation, which may often be too little, too late, from the consumer's perspective. This is also key to mitigating the conflict of interest inherent in the wholesale services relationship between ISPs in Canada's particularly concentrated and vertically integrated market, as well as counter the significant power imbalance between wholesale service buyers and vendors.<sup>48</sup> The Commission's determinations in Telecom Decision CRTC 2005-20 were also meant to counter this dynamic:

The Commission considers it important to emphasize that the ILECs operate under different incentives when they are providing service to retail customers as compared to when they are providing service to competitors. Many of the services provided to competitors only exist because the Commission has mandated their provision. The ILECs have little incentive to provide these services in a manner which facilitates the successful operation of their competitors' businesses.<sup>49</sup>

68. Similarly, TekSavvy noted the following during their hearing appearance leading to Broadcasting and Telecom Regulatory Policy CRTC 2016-102, *Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc.*:

3743 A, we don't have a lot of bargaining power and it's not clear to us that if [incumbent carriers] weren't force to provide these services that they would wish to.

3744 You know, so when someone's providing you a service they'd rather not, they may not always deliver it with the greatest of enthusiasm or assign to the group within the company that provides that service the most resources.

3745 But nonetheless we try and negotiate and find ways to ask them to do better or at least with those parts of the company that we're allowed to talk to.<sup>50</sup>

69. This set of incentives and conditions around wholesale services makes it self-explanatory why, in the 2005 CQoS proceeding, competitor service providers submitted that in addition to not allowing rebates to be considered a cost of business, QoS measures "should be in place to ensure that, if the service levels were not met, the ILECs would act quickly to bring service levels up to the approved minimum standards" and "should be substantial enough that the ILEC would do everything in its power to quickly bring a service level to the approved standard".<sup>51</sup>
70. Prevention-focused measures would address the conflict-of-interest and incentive concerns through more direct requirements and stronger or better aligned incentives to ensure competitor quality of service. In the example at hand, for instance, a prevention-focused CQoS measure might require that (if applicable, depending on the type and geographical region of the network servicing), to the extent it is necessary to disrupt subscribers' service, an incumbent carrier must disrupt its own subscribers' service before disrupting that of a wholesale competitor's subscribers. Or, the incumbent carrier must ensure that the number of competitors' subscribers who are left without service is never higher than the number of the incumbents' subscribers who are left without service, during a necessary disruption. This would give the incumbent carrier the greatest incentive to first, avoid service disruptions unless absolutely necessary, and second, complete the required servicing as quickly as possible—or at least more quickly than if it knew that its own customers continued to receive service while its competitors' subscribers did not, for the duration of the upgrades or repairs.<sup>52</sup>

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<sup>48</sup> "What this means, though, is that when a consumer signs up for service with us it is a Bell, or Rogers, or Shaw, or Telus, or Videotron technician that either shows up to do the installation, or doesn't, during the appointed window which has long been scheduled in advance. By definition, that tariffed service is not one that we have freely negotiated but one that has been mandated so we don't have a lot of bargaining power." *Ibid.*, at para 3634.

<sup>49</sup> *Quality of Service*, *supra* note 39, at para 72.

<sup>50</sup> Transcript, *CCTS Review*, at paras 3743-45.

<sup>51</sup> *Quality of Service*, *supra* note 39, at para 24.

<sup>52</sup> OpenMedia is cognizant that it is not an Internet service provider and does not purport to offer specific indicators as suggested here, which may be more appropriately established by the Commission or the providers themselves

71. For another example of a prevention-focused measure—or at least an incentive-aligning repair-acceleration measure—the Commission might take inspiration from Ofcom, who, along with the Automatic Compensation consultation noted above, happens to be in the midst of a consultation and review of its competitor quality of service regime as well.<sup>53</sup> One measure that Ofcom proposed, in relation to service level agreements, was to toughen the requirement that a wholesale provider pay daily compensation to competitors where it “fails to repair faults in line with its one or two working day service level agreement”. The current regime caps such payments at 60 working days; Ofcom proposes to remove this cap, given the requirement’s lack of effectiveness to date.<sup>54</sup>
72. By aligning incumbent carriers’ incentives with maintaining high competitor quality of service and ensuring prompt repairs or otherwise, the Commission would facilitate a more effective CQoS regime that will allow competitor ISPs to compete and innovate on their core services rather than redirect resources to disputing with incumbent carriers, and Canadians will ultimately receive better, more affordable choices in telecommunications services.

### C. Facilitate Competitor Autonomy

73. In addition to the inherent conflict-of-interest dynamic and significant power differential when it comes to wholesale service relationships between ISPs in Canada, it seems that many issues that arise in the context of competitor quality of service could be resolved by simply giving competitor ISPs more control over a greater proportion of their customers’ experiences at the retail level. OpenMedia has been calling for the Commission to facilitate autonomy of independent ISPs since at least 2011,<sup>55</sup> and the need for this remains today.
74. During the CCTS hearing, for example, TekSavvy told the Commission that “a big part of our CCTS complaints is driven by consumers who are frustrated at experiences controlled entirely by incumbents.”<sup>56</sup> And later: “I can tell you that most frequent and the trickiest of the most frustrating issues I deal with on either side of the CCTS fence relates to retail experiences that are wholly within someone else’s control and that we have very few levers to fix. Customers don’t care who’s responsible they just want a single window.”<sup>57</sup> Given that competitor ISPs are the ones accountable to their subscribers at the end of the day, it seems sensible and just that they have as much control as possible over the quality of service their customers experience.
75. It appears that similar concerns drove the Commission in the 2005 CQoS decision when it recognized that “it [is] generally preferable for services to competitors to be available on the

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in a CISC Working Group. Rather, this example is offered as a theoretical proof of concept to further illustrate what is meant by the general recommendation of prevention-focused measures, to address what has emerged as a clear and competition-harming problem for Internet users in Canada and the Canadian telecommunications system as a whole.

<sup>53</sup> See Ofcom (United Kingdom), *Quality of Service for WLR, MPF and GEA: Consultation on proposed quality of services* (Consultation Document) (31 March 2017), online: <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0033/99645/QoS-WLR-MPF-GEA.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0033/99645/QoS-WLR-MPF-GEA.pdf)>. WLR, MPF, and GEA stand for, respectively, Wholesale Local Access, Metallic Path Facility, and Generic Ethernet Access (including FTTC, aka FTTN, and FTTP).

<sup>54</sup> “Currently, when Openreach fails to repair faults in line with its one or two working day service level agreement, it needs to pay daily compensation to retail telecoms providers up to a maximum of 60 working days. The evidence we have reviewed indicates that a material number of faults remain unrepaired after this period. To ensure the continued effectiveness of these service level guarantee payments, we are proposing that there should be no caps on the periods over which fixed compensation is payable. On a similar basis, we propose to remove the cut off period for installation SLGs. These arise when Openreach fails to install a service on the date promised.” *Ibid.*, at para 1.36 (page 6).

<sup>55</sup> “Choice: Enable Independent ISP autonomy, and Internet access choice • Functional separation should be adopted to enable ISP competition and choice. • Users and service providers should be free to develop applications and operate any services without the prior approval of carriers, provided they do not interfere unduly with network operations or violate the neutrality of the network.” *Casting an Open Net: A Leading-Edge Approach to Canada’s Digital Future* (Report), OpenMedia (2011), online: <[https://openmedia.org/sites/default/files/OpenNetReport\\_ENG\\_Web\\_0.pdf](https://openmedia.org/sites/default/files/OpenNetReport_ENG_Web_0.pdf)>.

<sup>56</sup> Transcript, *CCTS Review*, at para 3635.

<sup>57</sup> *Ibid.*, at para 3654.

basis of a fixed service interval, rather than a negotiated service interval, since this latter approach may provide an ILEC with an inappropriate level of influence over how a competitor conducts its business.”<sup>58</sup>

76. In light of the above, OpenMedia recommends that the Commission incorporate into the RRP and CQoS regime generally the guiding principle of facilitating competitor ISPs’ autonomy to the greatest degree possible, within the context of mandated wholesale services. For example, in the event a new CQoS issue arises such that a new indicator is required, instead of adding a new indicator and rebate, the Commission might look to whether it is instead possible to give the impacted competitor ISP more control over the aspect of the service giving rise to the subscriber’s pain point.
77. This is even more key now given the Commission’s recent decision against Layer 2 solutions in the follow-up proceeding for disaggregated wholesale high-speed access services, “[i]n spite of CNOC’s argument that the technical benefits of a Layer 2 service solution would provide competitors greater control of their networks, their service offerings, and the underlying cost structure”.<sup>59</sup>
78. OpenMedia also notes that in Broadcasting and Telecom Regulatory Policy CRTC 2016-102, *Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc.*, the Commission used section 24.1 of the *Telecommunications Act* to apply conditions of service directly to competitor ISPs or otherwise non-carrier providers, rather than maintain such conditions through wholesale contracts.<sup>60</sup> The fact that competitor ISPs will increasingly be more directly accountable in this way, independent of their relationships with wholesale vendors, makes it all the more critical that the CQoS regime, the one realm designated to account for this relationship and incumbent carriers’ control over competitors’ services, meaningfully and comprehensively addresses all of the issues that arise due to how those market relationships are currently structured.

#### **D. Ensure CQoS Regime Is Responsive and Dynamic**

79. The final and perhaps most important guiding principle that the Commission must incorporate is that the RRP, and CQoS regime generally, must be responsive and dynamic, in order to keep pace with technological advancement as well as the rapidly evolving telecommunications needs of Canadians. This involves making the RRP and CQoS regime forward-looking by design, such that the Commission may adapt it on an as-needed and timely basis as new technologies emerge and new services are brought under wholesale service policies.
80. As the Commission noted, Canada’s telecommunications landscape, including the realm of wholesale services, has changed dramatically in the intervening *decade* since the current CQoS regime was last formally reviewed and updated:

The telecommunications marketplace and the Commission’s regulatory measures have changed since Telecom Decision 2005-20 was issued. For example, the existing competitor Q of S indicators were established when competition for local wireline voice services, based on leased facilities, was growing. In recent years, however, wholesale revenues associated with wireline local exchange and long distance services have decreased, while those associated with Internet and mobile wireless services have increased. In addition, new wholesale services have been introduced, some of which have been mandated.<sup>61</sup>

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<sup>58</sup> *Quality of Service*, *supra* note 39, at para 200.

<sup>59</sup> Telecom Decision CRTC 2016-379, *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities* (20 September 2016) [*Follow-up FTTP*], at para 73.

<sup>60</sup> Telecom Regulatory Policy CRTC 2016-102, *Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc.* (17 March 2016), at paras 44-45.

<sup>61</sup> Telecom Notice of Consultation CRTC 2017-49, *Review of the competitor quality of service regime*, at para 6.

81. Services such as high-speed fibre broadband Internet and mobile wireless have not only emerged, obtained their own wholesale service policies, and risen in popularity and revenues. They have gone further and risen to the level of essential, basic services that everyday citizens rely on to fulfill various fundamental aspects of life, both in terms of survival and meaningful participation in society and democracy (the two of which are often intertwined).
82. Many of the Commission's decisions in recent years have explicitly focused on establishing forward-looking and "future-proof" policy for Canada's telecommunications system. For example, in the 2010 *Speed Matching* decision, the Commission "indicated its intention to apply its essential services framework for wholesale services in this proceeding on a forward-looking basis to provide appropriate incentives for continued investment in broadband infrastructure, encourage competition and innovation, and expand consumer choice".<sup>62</sup>
83. The Commission also emphasized in its basic telecommunications decision, titled *Modern telecommunications services – The path forward for Canada's digital economy*, that "[a]s technology and applications evolve within the telecommunications ecosystem, expectations concerning speeds are likely to change, and network infrastructures must be able to respond to future needs."<sup>63</sup>
84. The competitor quality of service regime must achieve this same measure of forward-looking, future-responsive design, and in fact must be even more dynamic, given its role in upholding and giving meaning to established wholesale policies, in practice and on an ongoing basis. The CQoS regime must not be a static framework that is allowed to sit on the shelf and collect dust until another decade passes. It must be an active, live framework that dynamically adapts to account for new services as they are added to their respective wholesale services regimes, in order to give the latter meaning, allow them to function effectively, and fulfil the policy aims that the Commission intends wholesale service regimes to fulfil.

## IV. CQoS Regime Must Include Internet and Mobile Wireless Services

### Q10. What specific services should be subject to the regime?

85. The competitor quality of service regime must include basic telecommunications services, as defined by the Commission, that are subject to wholesale service policies. Specifically, today that includes wholesale high-speed access services, such as FTTN and FTTP, and certain aspects of mobile wireless services. However, mobile wireless services outside of a mandated wholesale service regime, where applicable, should also be covered by CQoS considerations.

### A. CQoS Regime Must Include High-Speed Access Services (FTTN and FTTP)

86. Above all, the Commission must establish competitor quality of service measures and indicators for wholesale high-speed access services, including fibre-to-the-node (FTTN) and fibre-to-the-premises (FTTP), as established in Telecom Regulatory Policy CRTC 2010-632 (*Speed Matching*) and Telecom Regulatory Policy CRTC 2015-326 (*Wholesale Wireline*), respectively.
87. First, the broadband connectivity that wholesale high-speed access services provide now constitutes a basic service, given its fundamental importance in the lives of Canadians. The Commission established this in Telecom Regulatory Policy CRTC 2016-496 ("Basic Services"):

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<sup>62</sup> *Speed Matching*, *supra* note 28, at para 23.

<sup>63</sup> Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy* (21 December 2016) [*Modern Services*], at para 78.

During the second week of the hearing, the Panel acknowledged that today, broadband Internet access services are vital to Canada's economic, social, democratic, and cultural fabric. There is general agreement by all parties on the importance of broadband Internet access services for Canadians to participate in the digital economy. [...]

Broadband Internet access services have become the catalyst for so much change – in the way businesses and governments offer and deliver services, and in the way Canadians express themselves as consumers, creators, and citizens of the digital world. Indeed, today's networked environment has created fundamental shifts in just about every aspect of Canadians' lives. Broadband Internet access services are used for economic development, to enhance productivity, to improve safety, and for the Internet of Things.

Moreover, broadband Internet access services offer innovative new approaches for Canadians to access the news and information they want from a wide choice of providers. These services empower Canadians to access audiovisual content that informs and entertains them when and how they choose. These services also help to attract and maintain the workforce in, and enhance the economies of, rural and remote regions of the country. Canadians will increasingly need to access broadband Internet access services to effectively participate in the digital economy.

Since the Commission's last review of the basic service objective, set out in Telecom Regulatory Policy 2011-291, broadband Internet access services have continued to increase in importance for Canadians. For example, the number of households subscribing to broadband Internet access services at speeds of 5 Mbps or higher increased from 54% in 2011 to 80% in 2015. Canadians have also made greater use of these services; the monthly amount of data downloaded by residential subscribers has increased at an average rate of 50.4% annually over the last five years. [...]

Accordingly, the Commission hereby establishes a universal service objective: Canadians, in urban areas as well as in rural and remote areas, have access to voice services and broadband Internet access services, on both fixed and mobile wireless networks. [...]

The universal service objective reflects the modern telecommunications services that enable the participation of Canadians in the digital economy and society. The Commission determines that the following service—which form part of the universal service objective—are basic telecommunications services within the meaning of subsection 46.5(1) of the Act: (i) fixed and mobile wireless broadband Internet access services, and (ii) fixed and mobile wireless voice services.<sup>64</sup>

88. As a result of the above findings regarding the role and impact of broadband Internet in Canadians' lives, it is particularly important that the Commission do whatever is in its power to increase choice and affordability for Canadians, when it comes to accessing these services. Such considerations arguably played a role in the Commission deciding to bring FTTN and FTTP services into the wholesale wireline services regime:

The Commission considers that competition in retail service markets drives innovation and provides end-users with the greatest choice of service providers and service characteristics, including pricing, service features, and customer service quality. The Commission has recently noted that the rapidly developing array of Internet services and applications represents extraordinary advances. It has also noted that information and communications technologies support education, health care, and cultural activities; foster communities; and facilitate trade and commerce.<sup>65</sup>

Notwithstanding current usage levels, competitor usage of wholesale HSA services is generally expected to increase in all incumbent carriers' serving regions in Canada, given the overall demand for retail Internet access services, and the valuable role that they play in the lives of Canadians. [...] Based on the current and projected demand levels, the Commission therefore finds that wholesale HSA services, including those provided over

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<sup>64</sup> *Ibid.*, at paras 21, 32-34, and 131 (footnotes omitted).

<sup>65</sup> *Speed Matching*, *supra* note 28 at para 22.

FTTP access facilities, meet the input component of the Essentiality Test in all the incumbent carriers' serving regions.<sup>66</sup>

89. In applying the wholesale wireline services policy to FTTN and, in particular, FTTP services, the Commission stated that it intended to achieve several policy objectives, with the first among them being "enhancing the effectiveness of the wholesale service regime to facilitate vibrant and sustainable retail competition that provides Canadians with reasonable prices and innovative services of high quality that are responsive to their evolving social and economic requirements".<sup>67</sup> Given that the CQoS regime is meant to give meaning to and uphold the objectives of the wholesale services regime in practice, there is little point in applying one without the other to operate in conjunction and alongside.
90. Therefore, having found that high-speed access services such as FTTN and FTTP belong in the wholesale wireline services regime, in view of the public interest and to facilitate a competitive, affordable, high-quality telecommunications system for Canadians, the Commission would be remiss not to apply the CQoS regime as well, given the critical role it plays in upholding wholesale policy objectives in practice and at the retail level, where they impact Canadians directly.

## B. CQoS Regime Must Include Mobile Wireless Services

91. For similar reasons as those described above for wholesale high-speed access services, the Commission should update the competitor quality of service regime to apply to wholesale mobile GSM-based roaming services. The fact that this is the only aspect of mobile wireless services currently subject to mandated wholesale access makes it even more critical that the Commission uphold and maintain competitor quality of service as far as this service is concerned.
92. To begin with, the importance of mobile wireless service in Canadians' lives is both well established and still growing. The year 2015 marked the first time that more Canadian households subscribed only to mobile wireless services than to online wireline voice services.<sup>68</sup> In recognizing mobile wireless services, along with fixed broadband services, as a basic telecommunications service, the Commission noted the following, in addition to where it referenced mobile wireless services in the passages already quoted above:

The use of mobile wireless services also continues to grow, with 22 million Canadians subscribing to mobile wireless broadband services in 2015, compared to 13.2 million in 2011. Also, the average monthly mobile wireless data usage per subscriber increased from 637 megabytes (MB) in 2014 to 932 MB in 2015, and the average monthly mobile wireless data usage by smartphone users increased from 988 MB in 2014 to 1,361 MB in 2015. [...]

Accordingly, the Commission establishes the following criterion to assess whether the broadband portion of the universal service objective is achieved: the latest generally deployed mobile wireless technology should be available in Canada not only in premises, but on as many major transportation roads as possible. [...]

Mobile wireless and fixed broadband Internet access services are key components of the universal service objective.<sup>69</sup>

93. Chairman Blais reiterated the key role of mobile wireless services in Canadians' lives at a recent hearing for Telecom Notice of Consultation CRTC 2016-293, *Review of the Wireless Code*:

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<sup>66</sup> *Wholesale Wireline*, supra note 23, at paras 118 and 120.

<sup>67</sup> *Ibid.*, at para 14.

<sup>68</sup> Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report 2015: Canada's Communications System: An Overview for Citizens, Consumers, and Creators*, online: <<http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr2.htm>>.

<sup>69</sup> *Modern Services*, supra note 63 at paras 35, 64, and 182 (footnotes omitted).

It is hard to overstate the importance of wireless services to Canadians. Mobile voice and data wireless services improve the quality of life for Canadians and empower them as citizens, creators and consumers. Canadians use these services to do all sorts of things: find jobs, conduct business, keep up with current events, monitor and engage in social media and of course—keep in touch with family and friends.<sup>70</sup>

94. As with wholesale high-speed access services, the importance of mobile wireless services to Canadians factored into the Commission's decision to mandate wholesale access to domestic GSM-based roaming services, in order to facilitate a more competitive market that would give rise to greater choice and more affordable options for consumers:

Canadians are increasingly relying on mobile wireless services as their primary means of communication. These services constitute the largest component of Canadians' spending on telecommunications services. As stated earlier, mobile wireless services make up nearly half of all telecommunications revenues, which is an indication of their importance to the Canadian economy. Competition in the wireless industry benefits society and the economy by providing innovative communications services at reasonable prices. [...]

The Commission's determinations in this proceeding ... were made with a view to achieving the following objectives with respect to the mobile wireless services market: continued innovation and investment in high-quality telecommunications facilities; sustainable competition that provides benefits, such as reasonable prices and innovative services, to Canadians [...]

The Commission considers that the objective of any regulatory intervention in the wholesale market should be to ensure sustainable competition in the retail market that provides benefits to Canadians, such as reasonable prices and innovative services.<sup>71</sup>

95. Sustainable competition in the retail market depends on the health of the wholesale market, which in turn relies on robust competitor quality of service measures. Given that, the Commission must update the CQoS regime to include mobile wireless services where they are included in a wholesale services regime. This update is necessary to uphold key policy objectives that the Commission has set out for wireless services, wholesale markets, and retail markets alike, to the ultimate benefit of mobile wireless users across Canada.
96. As mentioned above, domestic GSM-based mobile roaming is currently the only mobile wireless service included in a wholesale services regime; the Commission has thus far declined to facilitate further competition by opening wireless networks to mobile virtual network operators (MVNOs). However, OpenMedia submits that the Commission should take this opportunity to establish a forward-looking, responsive, and dynamic competitor quality of service regime, by updating the CQoS regime in such a way that it will have the necessary agility to adapt promptly to any future mobile wireless services that are brought into a wholesale services regime.
97. Thus far, this submission has focused on services that happen to be subjected to mandated wholesale service policies, as necessary candidates for inclusion in a modern-day CQoS regime. This is unsurprising, given that by definition, there are no wholesale market forces operating in favour of competitor ISPs, as incumbent carriers would be disinclined to actively contribute to independent ISPs' ability to meaningfully compete with them for the same customers at the retail level. It is clear in these cases that the Commission should apply CQoS measures not in addition to, but as an inherent part of a complete and effective wholesale services regime.
98. However, given the recognized difficulties of establishing a viable MVNO in Canada under current market conditions,<sup>72</sup> the Commission should also establish competitive quality of service

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<sup>70</sup> Government of Canada, "Jean-Pierre Blais at the public hearing on the Wireless Code review" (Speech) (6 February 2017), online: <<https://www.canada.ca/en/radio-television-telecommunications/news/2017/02/jean-pierre-blaisatthepublichearingonthewirelesscodereview.html?=&wbdisable=true>>.

<sup>71</sup> Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services* (5 May 2015) [*Wholesale Wireless*], at paras 14, 16, and 23 (footnotes omitted).

measures for any providers who are managing to operate as an MVNO, or for future providers who find a way to do so. For example, the Commission could monitor the development of Xplornet as an MVNO in Manitoba to identify likely customer pain points that emerge in context of incumbent control over part of a wireless competitor's quality of service (keeping in mind that somewhat different incentives operate in this specific situation, due to Xplornet being a tradeoff for Bell's massively market-consolidating acquisition of MTS). In addition, the Commission could issue interrogatories to current MVNOs to inquire if they experience similar issues as competitor ISPs do with wholesale high-speed access services.

## V.CQoS Regime Must Include Cable Carriers

*Q11. Should the competitor Q of S regime be expanded to include cable carriers, wireless carriers, small ILECs, and Northwestel? If so, should the competitor Q of S regime apply to all such carriers or should there be a threshold based on the size of the company and/or other factors?*

99. The competitor Q of S regime should include cable carriers, particularly incumbent carriers who provide wholesale services to competitor service providers. Several considerations militate towards applying CQoS measures to cable carriers, including: cable carriers' substantial and growing market share in Internet and mobile wireless services; spurring on greater competition at both the wholesale and retail levels, between ILECs and cable carriers as well as the competitor ISPs who rely on them for wholesale services; and applying regulatory symmetry consistently.
100. Before continuing, OpenMedia notes that the Canadian Network Operators Consortium (CNO), in 2013, filed a Part 1 application to establish a CQoS regime for cable carriers' provision of wholesale high-speed access services. This resulted in a CISC working group to address specific issues, in addition to bilateral discussions to address select remaining issues.<sup>73</sup> Based on the most recent report, nearly all of these specific issues appear to have been resolved.<sup>74</sup>
101. However, this development does not remove the need to update the CQoS regime to include cable carriers. First, the CISC group and bilateral discussions only resolved a narrow set of issues: six of the ten issues that the Commission identified in its final decision.<sup>75</sup> Second, that it took several years from competitor ISPs raising these quality of service issues (let alone experiencing them), to the resolution of some of those issues may be all the more reason to establish a clear CQoS regime, to promote certainty and efficiency in ensuring competitor quality of service. Third, the results of the CISC working group and bilateral discussions may be characterized as quality of service *standards*—they do not provide for consequences or remedy if an incumbent cable carrier fails to meet these agreed-upon standards, the way the RRP does for ILECs. Thus, the need remains to update the CQoS regime to apply it to cable carriers, for the reasons that follow below.
102. First, cable carriers provide retail Internet service to nearly half of residential subscribers, and to more than incumbent TSPs do. According to the 2016 CRTC Communications Monitoring

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<sup>72</sup> See *Ibid.*, at paras. 88, 102, 106, 108, and 109 (Commission conclusions regarding wholesale MVNO access and essential service assessment).

<sup>73</sup> Telecom Decision CRTC 2015-40, *Canadian Network Operators Consortium Inc. - Application to improve the quality of wholesale high-speed access services provided by cable carriers to independent Internet service providers* (12 February 2015) [*TPIA QoS*].

<sup>74</sup> Canadian Network Operators Consortium Inc. – Application to improve the quality of wholesale high-speed access services provided by cable carriers to independent Internet service providers – Letter with Joint Reports from CISC 1540 Ad-Hoc Working Group and Bilateral Discussions (22 September 2016).

<sup>75</sup> *Ibid.*; and *TPIA QoS*, *supra* note 72 at paras 23-24.



Report (CMR), cable-based carriers bring in more revenue<sup>76</sup> and had 5,986 subscribers in 2015 (50% market share), while incumbent TSPs had 4,586 (38% market share).<sup>77</sup>

103. True, these particular subscribers may be outside of the CQoS regime itself, as they subscribe directly to an incumbent provider as opposed to an ISP who falls within “Other service providers” in the cited table. However, the numbers indicate how dominant cable carriers are in Canada’s telecommunications and Internet access services landscape, and thus should be subject to quality of service measures to the same degree that ILECs are. It is also possible that some of their subscribers would switch to competitor ISPs if they knew that incumbent cable carriers were held to competitor quality of service standards, which would promote fair competition and encourage a more dynamic market.
104. Moreover, while ILECs currently retain the vast majority of revenue share in the wholesale wireline market, cable carriers, along with other facilities-based service providers, have been gradually yet steadily closing the gap since 2011.<sup>78</sup> The trend suggests that cable carriers will continue to make headway into the wholesale wireline service market, and the Commission should act accordingly by bringing them into the competitor quality of service regime now.
105. The principle of regulatory symmetry would also seem to demand bringing cable carriers into the CQoS regime. The Commission took this principle into account on at least two occasions in the wholesale services context, with respect to ILECs and cable-based carriers.
106. First, in Telecom Regulatory Policy CRTC 2010-632 (*Speed Matching*), “[a]ll parties generally expressed support for the principle of symmetry for the ILECs’ and cable carriers’ regulatory obligations”,<sup>79</sup> in determining whether or not to impose a speed-matching requirement. The Commission agreed: “[A] speed-matching requirement currently applies to the cable carriers’ TPIA services. The Commission considers that applying a speed-matching requirement to the ILECs’ aggregated ADSL access services would be equitable and would not represent a competitive advantage to either the ILECs or the cable carriers.”<sup>80</sup> The same could be said of the reverse, in relation to regulatory obligations under the competitor quality of service regime.
107. Second, the Commission at least in part drew on the notion of regulatory symmetry to deny mandated Layer 2 disaggregated services, in Telecom Decision CRTC 2016-379, the follow-up decision to implement disaggregated wholesale high-speed access service (including FTTP):

A requirement for Bell Canada to provide both a Layer 2 and Layer 3 disaggregated service while the Cablecos are only required to provide a Layer 3 disaggregated service would introduce an extra regulatory burden for Bell Canada and would result in a lack of symmetry between the wholesale HSA service offerings for Bell Canada as compared to the Cablecos. [...] Accordingly, the Commission determines that Bell Canada and the Cablecos are required to only provide service solutions that utilize their proposed routing and switching techniques (characterized as Layer 3 approaches) for their configuration proposals in support of disaggregated wholesale HSA services.<sup>81</sup>

Again, it seems that consistent application of this principle would require bringing cable-based carriers into the purview of a regime that already applies to ILECs, where both kinds of incumbent carriers provide the same services to competitor ISPs and ultimately to nearly all Canadians who use telecommunications services such as wireline and mobile wireless Internet.

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<sup>76</sup> For residential Internet access service revenues, cable carriers brought in \$3,651 million in 2015, as opposed to \$2,760 million for incumbent TSPs. Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report 2016 [CMR 2016]*, at page 248 (Table 5.3.2).

<sup>77</sup> *Ibid.*, at page 249 (Table 5.3.4 and Table 5.3.1).

<sup>78</sup> In 2011, cable and alternative facilities-based providers had 12% revenue market share, compared to ILECs’ 86%. By 2015, these numbers had moved, respectively, to 17% and 80%. *Ibid.*, at page 327 (Table 5.6.11).

<sup>79</sup> *Speed Matching*, *supra* note 28 at para 59.

<sup>80</sup> *Ibid.*, at para 61.

<sup>81</sup> Telecom Decision CRTC 2016-379, *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities* (20 September 2016), at para 72.

108. Third and last, applying CQoS measures to incumbent cable carriers—and enforcing them—will spur competition in Canada’s telecommunications market in two ways. The first way is that it will level the playing field between incumbent cable carriers and the competitor ISPs who are their wholesale clients, allowing the latter to compete more strongly in such a concentrated and incumbent-dominated market. The second way is that cable-based competitor ISPs becoming more competitive will also create additional competitive pressure for ILEC-based competitor ISPs, as well as for ILECs themselves. The result is a more competitive telecommunications market across the board, which can only benefit Canadians in the end.

## VI. Enforcement, Transition, and Review

*Q8. Should another mechanism be considered as an enforcement mechanism, either alone or in conjunction with the RRP for competitors?*

*Q16. How should any changes to the regime be phased in or out, and what would be the best way to make the transition to a new regime?*

*Q17. What is an appropriate time frame to begin a review of the new regime?*

### A. Include AMPs as a CQoS Enforcement Measure

109. In view of the recommendation above to strengthen prevention-focused CQoS measures, the Commission should incorporate into the CQoS regime the option to issue administrative monetary penalties (AMPs), particularly in the event of repeated failures to meet a particular indicator. Comments that Internet subscribers submitted to this proceeding suggest that one of the primary drivers of frustration when it comes to service quality is not only the fact of a particular incident itself, but the fact it occurs repeatedly, whether periodically throughout the duration of a person’s subscription, or every single time a person tries to switch to a competitor ISP.
110. For instance, Claude B. from Brantford, Ontario, shared: “I used a small ISP from Toronto. The tech from the CABLE COMPANY (ROGERS) failed to show up on *six consecutive days*.”<sup>82</sup> Melanie P. from Calgary, Alberta, related, “I’ve been with Lightspeed for over two years now, and there are outages *once or twice a month, in most months, usually on weekends*. When I called them to try to get it fixed, it was always something that they couldn’t control—they had to wait out the fix too.”<sup>83</sup>
111. Arian N. from Waterloo, Ontario, expressed frustration at the consistently poor experience customers bear, due to an incumbent’s control over a competitor’s retail service quality:
- I had my Teksavvy third party internet connection disconnected by Rogers in my apartments telco room. It took 7 days for them to come plug a single cable back in, even though there was a rogers tech in the building every day that week. *When I needed to move, Rogers was there again, interfering with my ability to have affordable internet*. I had a Docsis 3.0 modem, and a 30 mbit connection, but rogers forced me to purchase a new but slightly different Docsis 3.0 modem for the same 30 mbit connection. This cost me an extra \$100, which is a lot of money on a student budget.<sup>84</sup>
112. On reddit, one subscriber gave up entirely even trying to obtain service improvements:
- I’m the “serious service disruption” side of things. Last summer was particularly bad - no internet at all for up to 36 hours, obviously TekSavvy can’t do anything about it other than

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<sup>82</sup> Appendix A (emphasis added).

<sup>83</sup> Appendix A (emphasis added).

<sup>84</sup> Appendix A (emphasis added).

schedule a tech 4 days later. Problem resolves itself and then I get a follow up call saying "Yeah, it was our vendor, sorry". *This must have happened 5 times over the span of a few months.* It got to the point where the last couple of times it happened I didn't bother to do anything except wait it out.<sup>85</sup>

113. Although the current regime addresses repeat failures,<sup>86</sup> it appears not to have successfully in fact prevented repeat failures in ensuring competitor quality of service, even for the same individual subscriber, let alone within a competitor provider, wholesale provider, or service category as a whole. If the Commission does not modify the current RRP to account for and more effectively address or prevent repeat failures, due to the rationale set out in 2005-20, then AMPs would provide a good alternative.
114. The procedure surrounding and the test associated with AMPs would also seem to lend themselves to enforcing competitor quality of service standards. For instance, the following factors in determining an AMP amount could also apply in a CQoS enforcement context: the focus on the nature and scope of the violation (how disruptive was the failure to meet the CQoS standard to the subscriber and competitor ISP); history of compliance (was it a repeat failure, and assessing the incumbent carrier's recent history of meeting CQoS standards); any obtained benefit from the failure (did any of the competitor's subscribers switch to the incumbent carrier as a result of the failure); and ability to pay (where the Commission could take into account the size of the carrier, and adjust the amount accordingly).
115. The availability of AMPs would act as an additional deterrent to incumbent carriers and provide a stronger counteracting factor to the conflicts of interest and counterproductive incentives inherent to a functionally integrated (rather than structurally separated) telecommunications market. The Commission would have another tool to use within its discretion, and without raising the incentive-distorting concerns in how the RRP itself is designed and operates.

## **B. CQoS Regime Update Must Not Further Delay Implementation of TRP CRTC 2015-326**

116. In determining the transition plan to the new CQoS regime, the Commission must ensure to the greatest extent possible that the transition adds no further delay to the implementation of TRP CRTC 2015-326, or of the follow-up determinations in Telecom Decision CRTC 2016-379. OpenMedia recently documented the already lengthy history and drawn-out nature of this proceeding, which was meant to make available to Canadians more affordable choices in wholesale high-speed access services, including FTTP, in its submission supporting CNOC's request for information and disclosure in that proceeding:

[C]itizens throughout Ontario and Quebec continue to wait through deadline extensions, improper interim rates, and additional rounds of process such as this current one for disclosure and information that should not have required extra process to obtain. Still more rounds of comments and replies remain, the earliest of which is currently set to be due 30 days from the time this current procedural round is resolved. Further issues await resolution through a CRTC Interconnection Steering Committee (CISC) working group. Only then can carriers even begin to make more competitive high-speed Internet services a reality on the level of physical networks and commercial transactions—and only after that point will anyone turn their minds to implementing this much needed change in the rest of Canada, outside of Ontario and Quebec.<sup>87</sup>

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<sup>85</sup> Appendix B (emphasis added).

<sup>86</sup> "In the Commission's view, the competitor Q of S evidence indicates that the interim RRP did not provide the necessary incentives to prevent repeated failures. Since the initiation of the interim RRP, Bell Canada and TCI have repeatedly missed competitor Q of S standards for some indicators. [...] The Commission is of the view that the changes in the structure of the RRP set out above should significantly enhance the incentives for the ILECs to meet the Q of S standards. The Commission is concerned that the mechanism proposed by the Competitors to address repeated failures could become punitive in effect. Accordingly, the Commission does not consider it appropriate, at this time, to incorporate in the RRP a mechanism to address repeated Q of S failures." *Quality of Service*, *supra* note 39, at paras 97-99.

<sup>87</sup> Follow-up to Telecom Decision CRTC 2016-379 – *Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities* (CRTC Files 8638-C12-201509663, 8740-B2-

117. OpenMedia emphatically supports applying CQoS measures to both cable carriers as well as the services at the centre of this implementation process, as presented above. However, the Commission should not allow its determinations in this matter, in the event it agrees with these submissions, to be used as an excuse for even more delay than necessary in making affordable and competitive high-speed access services, including FTTP, available *in practice* to Internet users across Canada.

### C. Review CQoS Regime Every Five Years or with Wholesale Services Reviews

118. The Commission should review the CQoS regime every five years, or in conjunction with its reviews of mandated wholesale services of any kind. In keeping with the proposed guiding principle of upholding a responsive and dynamic system, the CQoS regime must be open to adaptation with every new service added to a wholesale regime, in order to give meaning and effect to the objectives of wholesale service policies in practice, and where it counts the most— at the level of the user's experience.

## VII. Policy Objectives and Policy Direction

### A. Updating CQoS Regime Is in Accordance with the Section 7 Policy Objectives

119. Updating the CQoS regime, and in particular, updating it to apply to cable carrier, wholesale high-speed access services like FTTN and FTTP, and mobile wireless services and carriers, would not only be in keeping with but actively further the section 7 policy objectives in the *Telecommunications Act*.<sup>88</sup>
120. The update would further sections 7(a) by applying regulatory symmetry between incumbent ILECs and cable carriers, the two main providers of facilities-based Internet service providers across Canada. This would facilitate orderly development, and the increased competition would further sections 7(b), 7(c), and 7(h) by inducing more affordable, more reliable, and higher quality Internet access options to proliferate throughout Canada. This would in turn contribute to strengthening the social and economic fabric of Canada and its regions, given the role that Internet access plays today in Canadians' lives and communities.
121. Updating the CQoS regime with the recommendations above would also advance the policy objectives in section 7(f) and 7(g), by enabling independent ISPs to compete with fewer artificial barriers, and compelling incumbent ISPs to compete further on the merits of their retail services to customers. This is when market forces will rule users' choices, rather than deficiencies or inequities in the wholesale services regime allowing for unfair advantages. Moreover, by ensuring competitor quality of service, independent ISPs will be able to redirect resources from, for instance, launching Part 1s or engaging in bilateral discussions and uphill negotiations with wholesale providers for fair service, to instead investing in research and innovation regarding the telecommunications services they provide to Canadians. This in turn would add additional pressure to both other competitor providers as well as incumbent providers to themselves innovate and compete, leading to a virtuous cycle of genuine, market forces-based competition.

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201700055, 8740-C6-201700097, 8740-R28- 201700071 and 8740-V3-201700063) – CNOC request for disclosure and additional information – Comments of OpenMedia Engagement Network (6 February 2017), at para 4. CNOC provides a timeline of events in its recent Part 1 application for transitional aggregated FTTP: Application for Transitional Aggregated Wholesale High-Speed Access Services over Incumbent Fibre-to-the-Premises Facilities (31 March 2017), at paras 28-29 (pages 13-15).

<sup>88</sup> *Telecommunications Act*, SC 1993, c 38, s 7.

## B. Updating CQoS Regime Is in Accordance with the Policy Direction

122. The Policy Direction states that the Commission should “rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives” and “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”.<sup>89</sup> Updating the CQoS regime adheres to both of these directives, as it simply constitutes one component of enforcing the already established wholesale services regime, which has already been found to be in accordance with the Policy Direction.
123. Applying the CQoS regime to modern-day services subjected to mandated wholesale policies ensures that market forces, rather than unfortunate inter-provider practices or incidents, will drive competition and users’ choices of Internet service providers, allowing genuine market forces to flourish. The measures are both efficient and proportionate, given that they have already been established as such, and have demonstrated effectiveness at achieving intended policy objectives, with respect to ILECs and legacy services.
124. Furthermore, applying the CQoS regime to cable carriers may also be required by sections 1(b)(iii) and 1(b)(iv) of the Policy Direction, to implement regulation “in a symmetrical and competitively neutral manner” and, in connection with “regimes for access to networks, ... ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers”.<sup>90</sup> In this respect, it is critical to remember that the wholesale services regime exists because retail services are already forborne from regulation. Therefore, a meaningful, effective, and functioning wholesale services regime—which inherently necessitates a robust competitive quality of service regime, for completion—is what facilitates and permits minimal intervention and regulatory forbearance to begin with.

## Conclusion

125. Canadian telecommunications law and policy comprises an ecosystem of various laws, policies, and regulations that work together to ensure a reliable, competitive, innovative, affordable, and high-quality telecommunications system for Canadians. The wholesale services regime is one such of these, and it encompasses modern-day basic services such as high-speed Internet access services, including FTTN and FTTP, cable-based Internet services, and mobile wireless services. However, the wholesale services regime cannot stand and fulfill its objectives without a robust competitive quality of service regime to give it effect and meaning where it matters.
126. Where it matters is what everyday citizens experience when they call their Internet service provider to open a complaint, when they try to make the switch, when an Internet outage occurs during their work day, or when they are waiting at home for the third consecutive day for a technician to arrive. An effective CQoS regime is a regime that directly resolves these issues in a way that users can tell and benefit from the difference.
127. Without strong CQoS measures, evidence indicates that market forces have not and will not suffice to support high quality of service, particularly in high-speed wireline Internet, such as FTTP. In light of that, the Commission should emphasize four guiding principles in the updated RRP and updated CQoS regime generally: lower or eliminate consumers’ switching costs; prioritize prevention and customer remedies over after-the-fact rebates; facilitate competitors’ autonomy to the greatest extent possible with established wholesale regimes; and design the new CQoS regime to be responsive and dynamic, such that it can adapt to new wholesale services as they emerge.

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<sup>89</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, s 1 [*Policy Direction*].

<sup>90</sup> *Policy Direction*, ss 1(b)(iii) and 1(b)(iv).

128. In implementing and enforcing the CQoS, the Commission should consider integrating administrative monetary penalties (AMPs) as an additional tool, and review the new regime within a more reasonable time than that which has passed since the last review in 2005. OpenMedia suggests reviewing the CQoS policy every five years, or, to further the principle of adaptability and dynamism, reviewing the CQoS policy or relevant aspects of it whenever the Commission reviews a particular wholesale service policy, or a new service component or technology joins the wholesale services regime. The Commission must also ensure that updating the CQoS regime, as much as possible, does not add even further delay to the ongoing follow-up proceeding to implement wholesale disaggregated FTTP services across Canada.
129. The primary objective of the CQoS regime should be to facilitate and protect fair competition between competitor service providers and incumbent service providers, such that Canadians ultimately have more choice and affordability in their telecommunications services. This is particularly important for retail Internet services, or wholesale high-speed access services such as FTTN and FTTP, as well as for mobile wireless services, both of which today constitute fundamental aspects of every facet of Canadian society and individuals' lives. A CQoS regime that did not cover Internet and mobile wireless services, now considered modern basic telecommunications services, could not call itself a modern regime.
130. By including Internet and mobile wireless services in an updated CQoS regime, however, in addition to bringing cable-based carriers into the fold based in part on the notion of regulatory symmetry, the Commission will demonstrate its commitment to increasing choice for Canadians and fostering affordable telecommunications, by facilitating a level playing field to encourage genuine competition in the market.

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