Final Reply 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

6 September 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. OpenMedia is pleased to provide its final reply to the Review of the competitor quality of service (CQoS) regime (TNC CRTC 2017-49). OpenMedia submitted in its first intervention, and now reiterates, that the Commission must take three key steps as a result of this proceeding: include wholesale high-speed access services in the CQoS regime; apply the CQoS regime to cable carriers; and update the regime to include mobile wireless services.

2. OpenMedia also put forward four guiding principles for the Commission to integrate into the CQoS regime as part of the modernization process:

    a) eliminate switching costs (for users and competitors);
    b) prioritize prevention (over after-the-fact rebates) and consumer remedies;
    c) maximize competitor autonomy; and
    d) ensure the CQoS regime is responsive and dynamic.

3. The underlying rationale behind these principles is to ensure that the outcome of this proceeding results in a Canadian telecommunications system that goes beyond simply "not as bad as before", but is in fact tangibly *good*, as far as Internet users and their on-the-ground experiences are concerned. As the CRTC has noted, a heathy wholesale market is what enables a healthy retail market.[1] The ultimate litmus test for the health of either market is whether and to what extent Internet subscribers face undue barriers in subscribing to competitor Internet service providers (ISPs), for instance, compared to subscribing to incumbent ISPs.

4. The results of a community engagement campaign earlier this year, "Stop Undermining Indie ISPs",[2] suggest that under the current CQoS regime, Canada's telecommunications wholesale market and thus retail market are both failing this test. Approximately 7,000 Internet users across Canada have called on the Commission to:

    a) upgrade the CQoS regime to ensure competitor quality of service for cable Internet, high-speed fibre broadband, and mobile wireless services;
    b) ensure a level playing field with fair treatment of competitor ISPs; and
    c) support affordability by eliminating switching costs and enabling more affordable, better options for Canadians through facilitating fair grounds of competition for competitor ISPs.

5. In addition to the above, OpenMedia also submitted several dozen unique "horror stories" that Canadians experienced in attempting to set up or repair Internet access services, which appeared to arise from the fact they subscribed to competitor rather than incumbent ISPs.[3] As one Reddit user put it, "Why does the CRTC need public consultation on this matter? They should simply create regulations that prohibit discrimination of repair for wholesale services. What is the point of the CRTC regulations about wholesale access to incumbent infrastructure if the incumbents can simply neglect repair and service to wholesalers?"[4] OpenMedia agrees that the matter should be as straightforward as that.

6. Throughout the past several years, the Commission has not shied away from tackling head-on the daunting task of updating and modernizing Canada's telecommunications system, to bring it into the 21st century where Canadian Internet users already reside. This has included, of course, future-proofing the wholesale wireline services regime by including high-speed access (HSA) Internet

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1 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>.

2 See: https://act.openmedia.org/fairISPs.

3 Intervention of OpenMedia, at Appendix A and B.

4 Reddit, "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" (April 2017), online: https://www.reddit.com/r/canada/comments/651wjv/hey_canada_lets_make_sure_indie_isps_have_a_fair/

services such as fibre-to-the-premises (FTTP),[5] and recognizing the need for mandated wholesale rates for GSM roaming services.[6] More recently, the Commission took another step forward, albeit tentatively, in somewhat expediting the implementation of TRP CRTC 2015-326, *Review of wholesale wireline services and associated policies* ("*Wholesale Wireline*") through Telecom Order CRTC 2017-312, *Interim rates for disaggregated wholesale high-speed access services in Ontario and Quebec*. The Commission may also be poised—with the encouragement of an Order-in-Council from the Minister of Innovation, Science, and Economic Development (ISED)—to bring Canada's wireless regime into alignment with the needs and expectations of consumers, as well as with our counterparts around the world, through reconsidering the role that WiFi-based mobile virtual network operators (MVNOs) may play in increasing affordability of mobile wireless services for Canadians.[7]

7. In each of the examples above, the Commission (or ISED Canada) recognized and then took action to remedy a gap between the regulatory framework at the time and the reality that Canadian Internet users lived in, with respect to obtaining affordable, reliable, and high-quality Internet access services. OpenMedia commends the Commission for taking these sensible and forward-looking steps on behalf of Internet users throughout the country.

8. However, the job is not done. Canada's telecommunications system is a patchwork of various laws, regulations, decisions, policies, and real-world dynamics that work in concert with each other to build what is intended to be a world-class telecommunications system for Canadians. The Commission has worked hard to update and modernize many of these pieces over the past several years, as described above.

9. The competitor quality of service regime is simply one more of these moving pieces that requires updating and modernizing in order to remain contemporary and relevant regulation. In fact, without updating the CQoS regime, the Commission risks significantly undermining its advances in modernizing related, interlocking aspects of telecommunications regulation in Canada, specifically the wholesale wireline and wireless services frameworks, and various forbearance decisions.

10. The balance of this submission is divided into the following sections: Part I describes how retaining and modernizing the CQoS regime is required to achieve a world-class telecommunications system, particularly in the absence of structural separation. Part II discusses the Commission's regulatory evolution around the CQoS regime, "monopoly-era regulation", and forbearance to demonstrate that past regulatory context does not bar, but rather would support, a decision to retain and update the CQoS regime to include mandated wholesale services such as high-speed Internet access and wholesale mobile wireless GSM roaming (or perhaps WiFi-based MVNO access, depending on the outcome of TNC CRTC 2017-259). Part III sets out evidence that consumers and competitors have put on the record to demonstrate continued need for a CQoS regime, and a clear requirement to update it by including cable carriers, wholesale high-speed Internet access services, and mobile wireless roaming both currently and in the event that independent MVNOs of any sort eventually come to fruition within Canada.

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[5] Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies* (22 July 2015) [*Wholesale Wireline*].

[6] Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services* (5 May 2015) [*Wholesale Mobile Wireless*].

[7] Telecom Notice of Consultation CRTC 2017-259, *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service* (20 July 2017).

I. CQoS Regime Is Required Component of World-Class Telecommunications System

A. CQoS Regime Is "Modest" Alternative to Structural Separation

11. When considering its determinations in this proceeding, it is important for the Commission to contextualize the CQoS regime in the broader environment of Canada's telecommunications system—not what it currently is or has been, but more pertinently, what it could be or ought to be. OpenMedia notes that the ILECs' and cable carriers' submissions frequently make comparisons to pre-existing regimes within Canada—for example, TELUS compares the circumstances of today to circumstances of the past, when telephone carriers were a monopoly as opposed to an oligopoly,[8] while cable carriers compare their own situation to that of the ILECs'.[9]

12. However, to only look to the past and to pre-existing models provides a potentially distorted baseline, which is a problem if the Commission only makes incremental tweaks or steps away from that particular baseline, especially if it is very far from the ultimate objective or ideal state to begin with. This ensures that Canada's telecommunications system is only ever looking back, with the goal to only ever become "somewhat less bad" as a result of each new step the Commission takes. Rather, as OpenMedia has also pointed out in broadband funding regime intervention,[10] the Commission should have a positive goal state in mind, and make confident regulatory strides *towards* that positive vision, as opposed to only incrementally adjusting away from demonstrated deficiencies.

13. At this point, the question is: What is that positive goal state? In the context of competitor quality of services, OpenMedia submits that the goal state is to ensure that competitor service providers are able to compete on a level playing field with incumbent service providers, with respect to the specific aspects of service delivery for which competitors depend on their wholesale providers, *to the extent that consumers cannot tell the difference*.

14. Anything less would constitute market distortion hindering the "orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions"; knowingly allowing fair competition to succumb to clear and foreseeable moral hazards; and enabling failure of market forces (or, alternatively, market forces successfully working against Canada's telecommunications policy objectives).

15. The next question, then, is what system would most effectively achieve this result of consumers experiencing no functional difference between incumbent providers and competitor providers, where incumbent providers have control over components of competitor providers' services?

16. At the outset, the system that would *most* effectively achieve this result is one in where incumbent providers do not have this kind of control at all—i.e., structural separation. As OpenMedia has continually pointed out throughout its history of involvement in telecommunications policy,[11] and continues to maintain, structurally separating the retail and wholesale layers of Canadian telecommunications services would solve, in one fell swoop, many of the perverse-incentive-induced

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[8] Intervention of TELUS, at paras 7-14.
[9] Intervention (Joint Comments) of Cable Carriers, at paras 59-67.
[10] Intervention of OpenMedia (28 June 2017) in TNC CRTC 2017-112, *Development of the CRTC broadband funding regime*, at paras 13-14.
[11] See, e.g., Appearance of Steve Anderson on behalf of OpenMedia.ca before Standing Committee on Industry, Science and Technology (10 February 2011), Evidence of meeting #56 for Industry, Science and Technology (Number 056) in the 40th Parliament, 3rd Session, online <http://www.ourcommons.ca/DocumentViewer/en/40-3/INDU/meeting-56/evidence>: "As another example of the structural problem we have, if you look at the reactions of Bell in particular to this public outcry, and other big telecom companies, they attack their own consumers. In what other industry do you see that? Public relations 101 is that when you have a big problem with your consumers, you admit fault. That's not what they did. In fact they were elitist and condescending and disrespectful. That's not something you can do unless you dominate a market and you have captured the regulator. If you ask people why they're so upset and engaged, it's that context."

problems that the Commission has had to painstakingly craft complex regulatory edifices just to partially mitigate. The CQoS regime is one such example of attempted mitigation.

17. As the Public Interest Advocacy Centre (PIAC) states,

> [I]t is worth noting that the United Kingdom (UK) and Australia have adopted approaches to essential facilities which rely on market forces to a greater extent than Canada. Specifically, by requiring the structural separation of wholesale assets, regulators in the UK and Australia have created new entities without an incentive to favour a particular retail provider. By restructuring the market, these countries are able to rely on market forces to provide an appropriate quality of wholesale service.[12]

18. In fact, parties have called on the Commission to implement structural separation for over two decades now, including as early as during the proceeding that gave rise to one of the Commission's earlier general competitor quality of service proceeding for telephone companies, Telecom Decision CRTC 94-19, *Review of Regulatory Framework* ("*Regulatory Framework*"):

> Some parties contended that only structural separation or divestiture can adequately address problems of vertical integration. CBTA and BCOAPO et al considered that, as long as telephone companies remain vertically integrated, there will be opportunities for anti-competitive conduct. Both parties proposed structural separation of monopoly and competitive activities. CBTA considered that, if the telephone companies provided competitive services through separate affiliates, there would be no need to regulate such services. […] According to CBTA, structural separation reduces the opportunity for, and enhances the ability to detect, inappropriate self-dealing and cross-subsidies, while requiring much less regulatory scrutiny.[13]

19. In response, the Commission decided against structural separation, and rationalized that decision with the following:

> Rather, in establishing the new framework, the Commission has incorporated other, more flexible, regulatory alternatives that should be as effective as structural separation in safeguarding against anti-competitive abuses associated with the vertically integrated structure of the Stentor companies, but without many of the associated problems.[14]

20. Given the evidence placed on the record of this proceeding (see Part III below), as well as on the record of intervening proceedings since that decision, such as the proceedings leading to Telecom Regulatory Policy CRTC 2010-632, *Wholesale high-speed access services proceeding*; to *Wholesale Wireline*; to Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services* ("*Wholesale Mobile Wireless*"); to Telecom Decision CRTC 2014-398, *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*; and to Broadcasting and Telecom Regulatory Policy CRTC 2016-102, *Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc.*,[15]—for starters—it seems that the more flexible regulatory alternatives that the Commission has opted for have *not* been "as effective as structural separation in safeguarding against anti-competitive abuses".

21. In context of both wholesale high-speed access services (whether provided by ILECs or cable carriers) and mobile wireless services, the observations above combined with the evidence presented below leads OpenMedia to agree with PIAC's observation as follows: compared to the United Kingdom and Australia implementing structural separation as a response to similar anti-competitive dynamics as have been regularly found in Canada, "Adopting a quality of service regime which encourages the adoption of non-discriminatory systems to respond to service calls *is, in comparison, quite modest*."[16]

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[12] Intervention of PIAC, at para 37.
[13] Telecom Decision CRTC 94-19, *Review of Regulatory Framework* (16 September 1994) [*Regulatory Framework*].
[14] *Ibid*.
[15] Broadcasting and Telecom Regulatory Policy CRTC 2016-102, *Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc.*, at paras 147, 151.
[16] *Ibid*., at para 75 (emphasis added).

B. Commission Must Assess Impact of CQoS Regime Based on What Is World-Class (Not What Happened to Come Before)

22. In opposing recommendations to update and modernize the CQoS regime, incumbent providers make a number of arguments. These include: the cable carriers' circumstances differ from ILECs' circumstances, such that the CQoS regime need not apply to cable carriers; incumbent providers must make financial expenditures to comply with the CQoS regime; there is no evidence that competitor ISPs have suffered competitively; and administrative monetary penalties (AMPs) would be an inappropriate measure to apply in the CQoS context. None of these arguments hold water, particularly when assessed in light of what Canada's telecommunications system *should* look like, were all of the section 7 policy objectives achieved—as opposed to assessed in light of a past or pre-existing, deficient or dysfunctional system.

23. First, the joint comments of the cable carriers describe a number of differences between themselves and the ILECs, "submit[ting] that the circumstances in the wireline voice telephony market that led to the creation, and expansion, of the ILECs' C Q of S regime have no parallel in the high-speed Internet market".[17] OpenMedia would submit that differing originating circumstances do not matter, so much as the final outcomes. If at the end of the day, the same harms occur to consumers, competitors, and the state of Canadian telecommunications, in the high-speed Internet services market as the Commission was concerned with in the wireline telephony market—which the evidence suggests do occur—then a CQoS regime for such services remains nonetheless necessary.

24. It is to the cable carriers' credit that they "invested tens of billions of dollars … without regulations that would assure them a reasonable rate of return [and when they] did not have a 'regulatory bargain' to provide universal service of high quality in exchange for a monopoly franchise and secured rates of return."[18] However, this perhaps simply highlights aggravating factors in the case of the ILECs, rather than negates the need to also ensure competitor quality of service when it comes to cable carriers. Again, the objective is not to simply make Canadians' experiences of their telecommunications system marginally better than what came before (i.e., ILECs during era of wireline telephony), but to actively drive towards an optimal state of being world-class (i.e. better than both ILECs and cable carriers today).

25. Second, Bell Canada suggests that "if ISPs were receiving degraded quality service, it would affect their competitiveness."[19] As evidence to support the claim that ISPs are not receiving degraded quality service, Bell states and demonstrates in Table 2 of its intervention, "Between 2011 and 2015, the residential Internet service subscriber growth has been significantly higher for other service providers relative to either Incumbent TSPs or Cable-based carriers."[20] Again, however, incumbent wholesale providers are using the wrong comparator. To truly assess the impact of degraded quality of service requires comparing the competitive performance of competitor ISPs <u>not</u> to that of incumbent TSPs or cable carriers, but *to that of competitor ISPs in the absence of competitor quality of service difficulties*.

26. For all such evidence as in Table 2 shows, degraded quality of service is indeed affecting the competitiveness of independent ISPs, and they have been succeeding in spite of these issues, rather than because such issues do not exist. This, again, points towards what Canadians now can only hope to enjoy in the way of telecommunications services, looking to what competitor ISPs might further achieve on a playing field that is not slanted against them. Through updating the CQoS regime to include wholesale high-speed access services, for both ILECs and cable carriers, the power to find out rests in the Commission's hands.

27. Third, incumbent providers point to their expenses that go towards complying with the CQoS regime, as reason not to modernize the regime, or to even do away with it altogether.[21] However, the costs

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[17] Intervention (Joint Comments) of Cable Carriers, at para 59.
[18] *Ibid*., at para 62.
[19] Intervention of Bell Canada, at para 26.
[20] *Ibid*.
[21] Intervention (Joint Comments) of Cable Carriers, at paras 21-22; Intervention of Bell Canada, at para 35; Response to Bell et al(CRTC)24May17-6.

associated with complying with a CQoS regime should be considered part of the costs of doing business in a regulated industry such as telecommunications, and specifically providing services as critical as high-speed Internet access and mobile wireless services. The cable carriers suggest that the "potential benefits of a C Q of S regime are very limited and could not outweigh the significant costs"[22]—but as they are not in a position to be the direct beneficiaries,[23] compared to their *competitors*, their opinion may hold comparatively little weight on the issue.

28. Fourth and lastly, TELUS argues that "AMPs would be excessive and ineffective for the redress of quality of service related concerns [and that an] AMP would have no such relationship to rates, …would not compensate the aggrieved party and would not be tied to the historical purpose of QoS regulation." The fact that competitor quality of service concerns remain in full force today, on the part of consumers and competitors alike, suggests that the Commission's measures to date have not sufficed to fully resolve such issues. OpenMedia would suggest that such circumstances, in which other tools have proven inadequate, are precisely why the AMP power was granted to the Commission.

29. As the Commission states in Compliance and Enforcement and Telecom Information Bulletin CRTC 2015-111, Guidelines regarding the general administrative monetary penalties regime under the *Telecommunications Act*,

> AMPs are monetary penalties imposed for violations of regulatory requirements. AMPs are an additional tool that the Commission can use to promote compliance with the Act, regulations, or Commission decisions. AMPs are not used to punish. They will be used where they are the most appropriate tool to obtain compliance and deter future non-compliance.[24]

30. In its headnote, the bulletin states, "The intent of this regime, which gives the Commission powers to impose AMPs for violations of regulatory requirements, is to promote compliance with the Act. … By working to ensure that individuals or entities comply with the Act, the Commission is contributing to the development of a world-class communication system for all Canadians."[25] Nowhere in the bulletin does it state that AMPs must be tied to the historical purpose of the regulation for which the Commission uses an AMP to promote compliance. In fact, given the nature and origin of the Commission's AMP power, tying the Commission's ability to use AMPs to the historical purpose of the relevant regulation may ensure that the Commission is never able to use this particular power, a result surely contrary to both Parliament's and the Commission's intent.

II. CRTC Regulatory History Supports Retaining and Modernizing CQoS Regime

A. CQoS Regime Is Tied to Market Power (Not Solely Monopoly Context)

31. Some wholesale service providers have emphasized that the competitive quality of service regime arose in the monopoly context of wireline telephony.[26] They argue that because Canadian telecommunications is no longer in a state of pure monopoly, consumers and competitors no longer require regulations that arose during that time, such as a competitor quality of service regime that would ensure fair competition, a level playing field, and world-class telecommunications services for all users throughout Canada, regardless of whether they subscribe to an incumbent ISP or a

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[22] Intervention (Joint Comments) of Cable Carriers, at para 22.
[23] Having said that, incumbent providers could benefit indirectly through being forced to compete more rigorously and thus becoming more innovative, as well as potentially garnering additional wholesale business that they would not have otherwise under less competitive circumstances, where CQoS issues amount to additional barriers to entry.
[24] Compliance and Enforcement and Telecom Information Bulletin CRTC 2015-111, *Guidelines regarding the general administrative monetary penalties regime under the Telecommunications Act*, at paras 16-17.
[25] *Ibid*., at para 17 and headnote.
[26] Intervention of TELUS, at para 12; Intervention (Joint Comments) of Cable Carriers, at paras 47-58; Intervention of Shaw, at para 13.

competitor ISP—simply *because* this regulation arose during a time of monopoly, and must thus have been rooted strictly in the existence of a monopoly.

32. This interpretation is inaccurate, and the argument wrong.

33. First, to confine the competitor quality of service regime to being relevant and applicable purely in the context of strict monopoly is to ignore the historical and legal evolution of the Commission's approach to regulating the conflicts-of-interest-ridden dynamics between incumbent and competitor service providers, whether in the context of wireline telephony or high-speed Internet access. This evolution reflects a flexible and purposive understanding on the Commission's part of the role and implications of incumbent control over essential services, or bottleneck facilities—whether due to the existence of a monopoly or not.

34. For example, in Telecom Decision CRTC 94-19, *Review of Regulatory Framework*, the Commission set out to assess the continued relevance and applicability of its regulatory approach in the face of evolving technology and increasing competition. While the Commission did ask in its notice of consultation (Public Notice 92-78), "Is the Commission's historical form of monopoly regulation still the most appropriate?", the Commission also made clear throughout PN 92-78 as well as *Regulatory Framework* that it was not concerned with monopoly for monopoly's sake, but for what it meant in terms of concentration of power and control within particular, and few, companies:

> Having posed these questions [which included the abovementioned question on monopoly regulation], the Commission stressed that any changes to the current regulatory framework intended to enhance the efficiency and effectiveness of regulation must, at the same time, be conducive to the attainment of the following objectives: … (4) assurance that telephone companies do not unfairly take advantage of their monopoly *or dominant market positions* in dealings with competitors; […]
>
> By way of guidance to those who might wish to participate in the proceeding, the Commission noted [in the Public Notice] the following as areas in which it was particularly interested: (1) Regulation should continue to protect subscribers and service suppliers from abuse of monopoly *or dominant power* by the telephone companies. […]
>
> In the opinion of the Commission, regulation should focus primarily on services supplied on a monopoly (*or near-monopoly*) basis or in markets that are not yet workably competitive. This includes *access to bottleneck or other Utility services by competitors*. […][27]

35. In summarizing its decision, the Commission noted:

> Regulation is necessary to ensure that service is affordable, where market forces are not sufficient to provide that assurance, and to address issues of undue preference and unjust discrimination that arise *due to the vertically integrated nature of the telephone companies and their dominance* in some markets.[28]

36. Lastly, under a section titled "Approaches to Vertical Integration" in the same decision, the Commission stated:

> In telecommunications, the monopoly product (the local exchange network) is, as a practical matter, the sole source of ubiquitous switched distribution to end users*, and is, therefore, an essential input, one on which both the vertically integrated firm and its competitive market rivals depend*. The Commission agrees that the telephone companies have both the incentive and the opportunity to use their vertically integrated structures *to lessen competition by exploiting control over bottleneck facilities*.[29]

37. As the above excerpts demonstrate, the Commission did not regulate monopolies solely because they were monopolies. The Commission regulated monopolies because monopolies were an overt example—but not the only example—of telecommunications companies possessing market dominance and having "both the incentive and the opportunity to use their vertically integrated

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[27] *Regulatory Framework* (emphasis added).
[28] *Ibid*. (emphasis added)
[29] *Ibid*. (emphasis added)

structures to lessen competition by exploiting control over bottleneck facilities". It is the resulting control over bottleneck facilities that was at the heart of the Commission's concern and thus the target of regulation back then, and that remains no less at the heart of consumer and competitor concerns today—regardless of whether it arises from a pure monopoly of the past, or from oligopolistic arrangements of the present.

38. The Commission has had several occasions to reformulate and refine its approach to essential services and bottleneck facilities in this context since 1994, culminating most recently in Telecom Regulator Policy CRTC 2015-325, *Review of wholesale wireline services and associated policies*. In the following passage, the Commission sets out the essential services test developed in Telecom Decision 2008-17, *Revised regulatory framework for wholesale services and definition of essential service* ("*Essential Service*"), which the Commission determined remained appropriate in *Wholesale Wireline*. Notably, there is no more mention of "monopoly", but the concern with incumbents' bottleneck control remains key, for the purpose of determining whether to mandate wholesale access:

> The Commission has endorsed the concept of essential services in the context of wholesale regulation since the late 1990s. More recently, in Telecom Decision 2008-17, the Commission established an essential services test (hereafter referred to as the Essentiality Test), with three components:
>
> - the facility is required as an input by competitors to provide telecommunications services in a relevant downstream market (the input component);
>
> - the facility is controlled by a firm that possesses upstream market power such that denying (or withdrawing) access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market (the competition component); and
>
> - it is not practical or feasible for competitors to duplicate the functionality of the facility (the duplicability component).[30]

39. This is in fact not a surprise, as in *Essential Service*, the Commission explicitly rejected the notion that such regulation must be tied to monopoly control:

> The Commission considers that a key departure from the definition set out in Telecom Decision 97-8 is that the [Competition] Bureau's definition discussed above *contemplates a dominance, or market power, standard, versus one based on monopoly control. The Commission concurs with this revision*. The Commission considers that *requiring evidence of monopoly control for essentiality would be unduly strict, would not reflect current market conditions, and would risk the substantial lessening or prevention of competition in many markets*.[31]

40. Thus, to state that the competitor quality of service regime arose in a monopoly context of telecommunications, and due to that fact alone is *thus* disqualified from continued relevance, applicability, or necessity now that Canada's telecommunications market has departed (albeit not overly so) from such monopoly, is incorrect. Based on the Commission's actual standard of dominance, market power, and control over essential facilities, the CQoS regime is, on the contrary, more relevant, applicable, and necessary than ever.

41. Furthermore, in *Wholesale Wireline*, the Commission applied the abovementioned essential services test to determine that it had to mandate wholesale access to high-speed Internet access services. This is one of the main services that consumers, public interest groups, and competitor service providers are calling on the Commission in this proceeding to bring into the fold of the competitor quality of service regime, to ensure fair treatment of competitors, ISPs and their subscribers. We do so for the same reasons that wholesale access to high-speed Internet services must be *mandated*—because it would not occur otherwise.

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[30] *Wholesale Wireline*, at para 15.
[31] Telecom Decision CRTC 2008-17, *Revised regulatory framework for wholesale services and definition of essential service*, at para 20 (emphasis added) [*Essential Service*].

B. Citing Forbearance to Weaken CQoS Obligations Constitutes Reversal of Operations

42. In its first intervention, TELUS submits the following claim:

> Where a wholesale service has been forborne, there is no justification for imposing quality of service metrics attaching to that service. By definition, the Commission has found that there is sufficient competition in the market to protect the interests of users. CQoS regulation does not apply to such services today and should not be imposed in the future.[32]

This argument is wrong in two ways.

43. First, section 34 of the *Telecommunications Act*, which TELUS relies on as authority for the above claim, provides for *two* situations in which the Commission may forbear from regulating a particular service. Section 34(1) states that the Commission "may make a determination to refrain…where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives". Only section 34(2) states that the Commission "shall make a determination to refrain" in the event "the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users".[33]

44. This means that while a Commission finding that there is "competition sufficient to protect" would necessarily lead to a finding of forbearance, the reverse is *not* true: the Commission having decided to forbear does *not* necessarily mean it has also made a finding of competition sufficient to protect the interests of users. The Commission may have decided to forbear for other reasons consistent with Canada's telecommunications policy objectives, as provided for in section 34(1). As a result, the Commission having forborne from a particular service does not automatically mean there are no competitive concerns such as to negate the need for a CQoS regime.

45. It is true that section 34(3) states that the Commission "shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services". However, this leads to the second flaw with TELUS's argument above: the Commission may have decided to forbear from a service *because a CQoS regime is in place to protect competition*, not because an isolated set of circumstances exist independent of both forbearance and a CQoS regime that both allows the former and negates any need for the latter. The existence of the latter (CQoS) may form part of the factual matrix that allowed for the former (forbearance) to occur in the first place.

46. For example, in Telecom Decision CRTC 2006-15, *Forbearance from the regulation of retail local exchange services*, the Commission set out a number of circumstances that the ILEC would have to demonstrate before the Commission would be "prepared to forbear from regulating local exchange services in a relevant market". Notably, one of these circumstances is: "The ILEC has, for the six months prior to the application, met individual standards for each of the 14 specified competitor quality of service (Q of S) indicators of the rate rebate plan (RRP) for competitors, when the results are averaged across the six-month period".[34] Other circumstances that the ILEC must demonstrate

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[32] Intervention of TELUS, at para 29 (footnote omitted).

[33] *Telecommunications Act* (SC 1993, c 38), at s 34. See also footnote 11 in *Wholesale Wireline* (emphasis added): "The Commission forbears, or refrains, from regulation when it finds that a service is subject to sufficient competition, *or* when forbearance is consistent with the Canadian telecommunications policy objectives set out in section 7 of the Act."

[34] Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services*, at headnote and paras 242-243. See also paras 260-61: "The Commission considers that the achievement of this minimum standard of service by an ILEC is an important factor in limiting an ILEC's market power and helping to ensure that competition within a relevant market will be sustainable. The Commission has determined that, in order for an ILEC to qualify for forbearance in a particular relevant market it will be required to show that for the six months prior to the application, it has met the individual standards for each of the 14 Q of S indicators for competitors, when the results are averaged across the six-month period."

are in place include competitor services tariffs, competitor access to operational support systems, and loss of 25 per cent market share with respect to the service for which the ILEC seeks forbearance.[35]

47. Thus, the Commission's decision to forbear relied on the fact that competitor quality of service regulations were already in place—without the latter, there could not have been the former. The existence of forbearance does not mean that the Commission may eliminate CQoS obligations. Rather, the elimination of CQoS may instead require the Commission to revisit any previous decisions to forbear that were predicated even in part on the existence of CQoS obligations.

48. Second, even if TELUS were correct in its argument above, and the Commission had forborne based on factors independent of the existence of any competitor quality of service regulations, this would still not lead necessarily to the conclusion that there is no need for a CQoS regime. As the Commission stated in *Wholesale Wireline*, "When a service is forborne, it is generally not subject to a Commission-approved tariff, although *the service may still be regulated with respect to other aspects*."[36] And given the evidence regarding off-tariff negotiations below, it seems that the need for the latter with respect to competitor quality of service conditions very much remains.

III. Evidence from Incumbents, Competitors, and Consumers Demonstrates the Commission Must Modernize CQoS Regime

49. Evidence on the record of this proceeding demonstrates that the Commission must modernize the CQoS regime, by updating it to include cable carriers, as well as applying it to wholesale high-speed access services and to mobile wireless services (where applicable). In light of such evidence, which OpenMedia will detail below, two aspects of incumbent providers' submissions are particularly striking.

50. First, several incumbent wholesale suppliers claim that there is "no evidence" that there has been competitor harm due to insufficient competitor quality of service measures, or that competitors' ability to compete has been negatively impacted, or that there is a need to update or even retain the CQoS regime.[37] Given the dozens of submissions from Internet users through OpenMedia and individuals' interventions, however, in addition to interrogatory responses from TekSavvy and the members of CNOC, incumbents' claims that there is "no evidence" rather begs the question: did they look? The record demonstrates that asking those who would be on the receiving end of negative impacts and would be best placed to provide evidence of harm leads to quite different findings. And where wholesale suppliers *would* be in possession of the best available evidence, such as through internal systems recording wholesale and retail data for comparison and analysis—they largely do not even track or collect it.[38]

51. Second, Bell Canada, in particular, relies frequently on economic theory to support its claims. Bell does not claim that its consumers say, or experience has shown, or evidence demonstrates, but rather that "Economics suggests", "Economics recognizes", and "Economics tells us".[39] However, in making its determinations, the Commission should note that it is not just economics in the abstract, but real Internet users suggesting that the Commission must protect their interests and

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[35] *Ibid*.
[36] *Wholesale Wireline*, at footnote 11 (emphasis added).
[37] See, *e.g.*, Intervention of Shaw at para 40; Response to Bell Canada(CRTC)24May17-1 page 4; and Intervention (Joint Comments) of Cable Carriers, at para 107.
[38] See, *e.g.*, Responses to Rogers(CNOC)24May17-3, Rogers(PIAC)24May17-6 and -7, TELUS(CRTC)24May17-A5(a), and Cogeco(PIAC)24May17-6, -7, and -8. OpenMedia notes that Shaw, however, was able to track or manually collect data in response to many of CNOC's and other interrogatories regarding wholesale and retail records, suggesting that the lack of availability of such information on the part of other providers may not necessarily be due to inability to track or maintain such records.
[39] Intervention of Bell Canada, at paras 5, 20, and 31.

telecommunications needs through a modernized CQoS regime; experienced public interest and consumer interest groups recognizing that market forces alone do not suffice to ensure competitor quality of service and thus a level playing field that would facilitate innovation and consumer choice; and Canada's actual telecommunications system as it operates today under live circumstances that tells us—through dysfunctional market incentives, affordability and reliability issues, synchronized price hikes, and consumer complaints—that short of structurally separating the retail and wholesale layers of the market, implementing and enforcing a modernized CQoS regime to include wholesale high-speed access services, mobile wireless services, and cable carriers is the next best thing.

52. The above recommendations result from evidence on the record demonstrating the following: that consumers continue to suffer on-the-ground harm from lack of CQoS protection for high-speed Internet access services; that competitor ISPs continue to experience difficulties arising from their wholesale relationships with incumbent providers where there is no CQoS regime in place; that it is essentially not possible for competitor ISPs to simply switch wholesale vendors in the event of deficient quality or service; and that without a CQoS regime in place, there would be little to no intrinsic incentives among incumbent providers to ensure high quality of service in their wholesale services relationships with competitors, whether through internal processes of off-tariff negotiations.

53. First, OpenMedia provided evidence that difficulties at the wholesale market level often affects end users at the retail level, in ways that directly implicate the section 7 policy objectives of the *Telecommunications Act*.[40] See, for example, the individual stories and experiences that users shared through OpenMedia, as well as via Twitter, through sources that OpenMedia provided or cited in its first intervention.[41]

54. Second, competitor Internet service providers such as TekSavvy and the members of the Canadian Network Operators Consortium (CNOC) submitted evidence that belies Bell Canada's notion that competitors can simply switch wholesale suppliers in the face of deficient quality of service or anti-competitive dynamics.[42] See, for example, TekSavvy's response to TekSavvy(CRTC)24May17-2, of which the following opening paragraph provides a general overview:

> Switching wholesale service providers for mandated wholesale High-Speed Access (HSA) services is a significant undertaking. Initial network-related investment would include investment both within our network and operations, and at the point of interconnection with the HSA provider. Further costs would relate to migrating consumers over to the new last-mile wholesale service.[43]

55. While TekSavvy detailed the difficulties of switching wholesale service providers for high-speed Internet services, CNOC also described how in many cases, it may not even be possible for a competitor provider to switch at all:

> Since each large telephone company and cable carrier operates in a defined geographic area, it is not possible for a wholesale consumer to switch from one large telephone provider to another or from one cable carrier to another for the purpose of serving a particular end-user. The only switching that is possible is switching between telephone company and cable carrier platforms, and this can only occur in those cases where an end-user is located with the service footprint of both types of carriers, which is also not always the case. […]
>
> Given all of the variables that factor into switching from one wholesale provider to another, it is impossible to provide a meaningful quantification of these costs. Suffice to note that these costs represent a daunting barrier to switching for competitors, especially those of a smaller size and scale. As a consequence, switching providers is not a feasible response to persistent quality of service problems with a wholesale provider.[44]

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[40] Intervention of OpenMedia, at paras 119-121.
[41] *Ibid*., at Appendix A and B; See also tweets cited throughout blog post, "Let's put your Internet installation horror stories on the record" (April 2017), online: *OpenMedia* <https://openmedia.org/en/lets-put-your-internet-installation-horror-stories-record>.
[42] Intervention of Bell Canada, at para 33.
[43] Response to TekSavvy(CRTC)24May17-2.
[44] Response to CNOC(CRTC)24May17-3.

56. The difficulty of switching and unrealistic nature of Bell's argument is reinforced by Shaw, and Bell itself, in their responses to interrogatories from OpenMedia. Shaw stated that "the majority of Shaw's TPIA consumers also purchase wholesale high speed access services from the incumbent telco,"[45] while Bell explained that a wholesale consumer who "leaves" Bell "do[es] not terminate their relationship with us [but rather] will direct most, if not all, of its new end-user activations (and sometimes its speed upgrades of its existing end-users who are already on our network) to our cable competitors."[46] If a competitor service provider already obtains services from both the ILEC and cable carrier in a particular region, then it is stuck with both unless it is able to surmount the highly onerous barrier of migrating all of its pre-existing consumers on one technology to the other.

57. While Bell notes that competitors may direct new users or user speed upgrades to a rival cable carrier or ILEC in response to one or the other failing to meet quality-of-service obligations, this fails to mitigate any concerns. First, the cable carriers have jointly noted, "Internet penetration is approaching the point of market saturation,"[47] meaning there is a limited number of and thus limited influence to new users, for the purpose of imposing competitive discipline. As for speed upgrades, again, a critical mass of users would have to independently decide to switch technologies for their upgrade—and that is assuming a critical mass decides to upgrade speed to begin with, and on a timeline that happens to be or appear responsive to the delinquent wholesale supplier.

58. The above would be the case unless the competitor ISP were to decide to cut off all options for one technology above a certain speed level, and only offer it on the other, but that introduces a third issue with Bell's argument: switching wholesale suppliers will not help a competitor provider if *both* the sole ILEC and sole cable carrier in a particular region are failing to ensure quality of service to their consumer-competitors (and are able to do so precisely because of lack of meaningful competition, as might be encouraged through a more inclusive and modernized competitor quality of service regime).

59. Third, incumbent providers have cited off-tariff negotiations as evidence of "competitor bargaining power", or evidence that there is no need to update the CQoS regime to include wholesale high-speed access services, or to include cable carriers. However, evidence suggests that off-tariff negotiations have not been a viable avenue through which to address competitor quality of service. See, for example, responses from TekSavvy and CNOC to Commission requests for information:

> TekSavvy has not successfully negotiated the inclusion of quality of service intervals in any off-tariff agreement for mandated wholesale services. … In view of the access seeker's limited bargaining power as against HSA providers providing a service that they are mandated to provider, it is not clear to TekSavvy that there is any likelihood of success for such negotiations absent the regulatory requirement to do so. However, and for clarity, TekSavvy would eagerly pursue any negotiated opportunity to obtain such terms from an HSA provider, and renews its invitation to HSA providers to contact us to arrange such terms.[48]
>
> Based on the information provided by CNOC members, it does not appear that any of them have been able to negotiate the inclusion of Q of S intervals in any off-tariff agreement for mandated wholesale services. The few off-tariff arrangements that have been offered by incumbents have only dealt with wholesale service pricing and related terms. This is so despite past complaints by CNOC members to incumbents regarding quality of service problems.[49]

60. Evidence that incumbent wholesale suppliers themselves provided in interrogatory responses further demonstrate that off-tariff arrangements to date have only addressed rates, and have not, in fact, included any CQoS terms or considerations.[50] Furthermore, wholesale service providers such as

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[45] Response to Shaw(OpenMedia)24May2017-2(e).
[46] Response to Bell Canada(OpenMedia)24May17-3.
[47] Intervention (Joint Comments) of Cable Carriers, at para 26.
[48] Response to TekSavvy(CRTC)24May17-3.
[49] Response to CNOC(CRTC)24May17-4.
[50] See, e.g., Responses to Bell et al(CRTC)24May17-3; Cogeco(TekSavvy)24May17-1(b); Shaw(TEKSAVVY)24May2017-A1(c); and Shaw(CRTC)24May2017-A3.

Eastlink and Rogers also disclosed through interrogatories that they have no internal incentives for meeting wholesale revenue and growth targets.[51]

61. While there are some exceptions to the above, such as TELUS having provided for order intervals "exceptionally"[52] in off-tariff negotiations, or Shaw confirming TPIA-specific financial growth targets,[53] this far from suffices in terms of providing Canada-wide, systematic protection of competitor quality of service for competitor ISPs and ultimately Canadian Internet users. It is not enough that some wholesale providers do track particular indicators, or do internally incent wholesale growth targets or provide for off-tariff QoS terms. The baseline should be that *all* wholesale providers do all of the above, as a matter of course, or take equivalent measures to ensure results such that competitor quality of service is not a concern to the extent that subscribers and competitor ISPs alike are calling on the Commission to take necessary action.

Conclusion

62. OpenMedia urges the Commission to keep the following in mind as it considers the record of this proceeding in making its determinations: First, the ultimate objective at hand is to deliver to Canadians a world-class telecommunications system. This means comparing what users currently experience with, not what they may have experienced in the past, but what they could or should be experiencing in the future, in another jurisdiction, or in a better and more forward-looking, competition-friendly Canada (as far as telecommunications issues are concerned).

63. Second, the competitive quality of service regime does not exist in a vacuum, or in isolation from all of the Commission's other policies and regulatory frameworks applied to various services, and particularly mandated wholesale services. Some of these regulatory frameworks and decisions rely on the existence of the CQoS regime and the protection it affords consumers and competitors; without CQoS safeguards in place, certain decisions predicated on such safeguards may suddenly find themselves on shaky foundations, to the detriment of consumers and industry players alike.

64. If mandated wholesale service decisions such as *Wholesale Wireline* and *Wholesale Mobile Wireless* set out the policy, then the competitor quality of service regime is the mechanism through which the Commission can actually enforce such policy. Without the ability to monitor and enforce fair treatment of competitors and their subscribers, such as through a CQoS regime, mandated wholesale service regimes may amount to little more than well-meaning suggestions.

65. Third and lastly, all of the regulatory frameworks that the Commission has built around wholesale services, such as mandated open access, mandated wholesale roaming, and competitor quality of service—are moderate solutions to the true problem at the heart of all of the competition-related issues in this area: vertical integration and lack of structural separation between retail and wholesale providers, leading to an industry rife with conflicts of interest and requiring elaborate manipulation around perverse, anti-competitive incentives.

66. Structurally separating Canada's telecommunications market would address the real root of the problem when it comes to ensuring fair competition and a level playing field that would enable independent ISPs to succeed above and beyond what the past may have led to believe is possible. Failing that, however, ensuring a robust and enforceable competitor quality of service regime, and modernizing it to include cable carriers, wholesale high-speed Internet access services, and wholesale mobile wireless services, is Canadians' next best hope for genuine competition, innovation, and affordable choice in our aspirationally world-class telecommunications system.

*** END OF DOCUMENT ***

[51] Responses to Bragg(CRTC)10August17-A2 and Rogers(CRTC)10Aug17-2.
[52] Response to TELUS(CRTC)24May17-A3(b).
[53] Responses to Shaw(OpenMedia)24May2017-3(a) and Shaw(OpenMedia)24May2017-2(a).