

In the matter of Telecom Notice of Consultation CRTC 2018-98, *Lower-cost Data-only Plans for Mobile Wireless Services*



COMMENTS OF SHAW COMMUNICATIONS INC.

9 OCTOBER 2018

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I. INTRODUCTION & EXECUTIVE SUMMARY

1. Shaw Communications Inc. (“**Shaw**”), and its wholly-owned subsidiary, Freedom Mobile Inc. (“**Freedom**”), are pleased to provide these comments pursuant to the procedures set out in Telecom Notice of Consultation CRTC 2018-98, *Lower-cost data-only plans for mobile wireless services*, 22 March 2018 (the “**Consultation**”).
2. The Commission has initiated this proceeding in response to concerns raised by the Governor in Council and by the Commission itself that there appears to be a lack of choice of innovative and affordable mobile wireless services, in particular with respect to the availability of lower-cost data only (“LCDO”) plans. In response to this perceived gap, the Commission is considering whether to direct Bell, Rogers and TELUS (the “Incumbents”) to make LCDO plans available to customers and is assessing whether (i) it would be appropriate for the Commission to establish a price ceiling and capacity floor for the plans; and (ii) whether other aspects or attributes are necessary and, if so, what those ought to be.
3. Shaw is concerned that the Commission’s proposed remedy to address the perceived lack of availability of LCDO plans in the market will actually diminish competitive choice in the market. In particular, the Commission has suggested applying a condition of service in accordance with section 24 of the *Telecommunications Act*, S.C. 1993, c. 38 (the “Act”) to direct the Incumbents to make LCDO plans available to consumers. The Commission has also suggested establishing a price ceiling and capacity floor for the LCDO plans using its powers under section 24, subsection 27(1) and subsection 27(5) of the Act.
4. These proposals will have the unfortunate and unintended consequence of forestalling long term competition at a time when facilities-based competitors, such as Freedom, Videotron and Eastlink, are emerging as viable competitors. Facilities-based competitors are in the process of investing billions of dollars to enhance and expand their networks and have introduced differentiated, innovative and competitive wireless services in the market. As a result of these efforts, facilities-based competitors are starting to have a

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real impact on competition in the retail mobile wireless market and are challenging the dominance of the Incumbents in the markets.

5. In addition, as Shaw explained in its responses to the Commission's interrogatories, the Commission does not have the authority to establish a price ceiling and capacity floor for LCDO plans under section 24. Mandating a LCDO plan with a price ceiling and a capacity floor would be tantamount to rate regulation, which it cannot do except under section 25 of the Act.
6. The Commission cannot exercise its powers under section 25 of the Act in relation to the mobile wireless services without reopening the forbearance determinations that are applicable. While there are presently competition problems in the Canadian mobile wireless market, now is not the time to introduce interventionist price controls that will interfere with and harm the ability of facilities-based competitors, such as Freedom, to effectively compete in the mobile wireless market and, in the words of the Competition Bureau, is "antithetical to competition."¹ To do so would work at cross-purposes with the policy of facilities-based competition and would be inconsistent with the Canadian telecommunications policy objectives. As a result, there is no cause to reopen the Commission's prior decisions to forbear from exercising its powers under section 25 of the Act in relation to the mobile wireless market in Canada.
7. If the Commission decides to intervene in the retail mobile wireless market to mandate an Incumbent LCDO plan, Shaw has proposed a simpler and less intrusive alternative.² The Commission could treat the Incumbents' proposed LCDO plans as unilateral, voluntary undertakings. The Incumbents' proposals already bear the hallmarks of undertakings and could, with additional formality, be treated as undertakings.
8. There are no jurisdictional impediments to the adoption of this lighter regulatory approach. Shaw's proposed approach will offer customers greater, not less choice. In addition, Shaw's proposed alternative will balance the intended consumer benefit more appropriately with the harm to Shaw and other facilities-based competitors from Commission intervention.

¹ Competition Bureau, Comments dated 13 June 2018, Telecom Notice of Consultation CRTC 2018-98, *Lower-cost data-only plans for mobile wireless devices*, 22 March 2018 ("TNC 2018-98"), paragraphs 8 and 9.

² Shaw(CRTC)20Jul2018-201.

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9. Proposed regulatory intervention by the Commission must be considered in light of the Canadian telecommunications policy objectives set out in section 7 of the Act and the Policy Direction. They jointly require the Commission to rely on market forces to the maximum extent feasible as a means of achieving the policy objectives and, when relying on regulation, to use measures that are efficient and proportionate to their purpose. Accordingly, any regulatory intervention by the Commission must be assessed against the following criteria:
- (a) Is the Commission’s proposed intervention – a mandated Incumbent LCDO plan – necessary to address the perceived “gap” or market failure?
 - (b) What will be the effect of the proposed regulatory measure on competitive market forces in the mobile wireless market and on the Policy Direction’s directive to the Commission that it rely on market forces to the maximum extent feasible in order to achieve the Canadian telecommunications policy objectives?
 - (c) Will the benefits of the Commission’s proposed regulatory intervention outweigh any ensuing harm that may result from intervention?
10. The evidence on the record of this proceeding demonstrates that the lower-cost segment is subject to relatively vigorous levels of competition, thanks to the efforts of strong facilities-based new competitors like Shaw, and that the existence of the perceived gap is therefore questionable. Intervention in the retail mobile wireless services market will harm facilities-based new competitors by undermining the ability of facilities-based new competitors to differentiate themselves from the Incumbents in the marketplace.
11. Indeed, facilities-based new competitors are delivering through market forces and competitive rivalry affordable entry-level plans that Canadians, including those in the lower-cost segment of the market, want without the need for price regulation. This includes a range of lower-cost data plans that provide up to 1 GB of data and additional features, such as text messaging, to customers for \$30 and under. The Incumbents have also stated that they intend to launch various LCDO plans on their sub-brands.³

³ Rogers(CRTC)20Jul18-201; TELUS(CRTC)20Jul18-201; and Bell Mobility(CRTC)20Jul18-201.

12. While Shaw supports and shares the Commission's commitment to providing Canadians with more affordable wireless services, including LCDO plans, Shaw strongly opposes intrusive regulatory intervention in the retail mobile wireless services market in the form of a mandated retail Incumbent LCDO plan with a Commission imposed price ceiling or capacity floor. The harm to facilities-based new competitors will outweigh any potential benefits from regulatory intervention.

13. Avoiding intrusive regulation that distorts markets and creates uncertainty is imperative as Canada's wireless carriers transition to 5G technologies. As the Minister of Innovation, Science and Economic Development Canada, Navdeep Bains, understands, "5G is the gateway to the future ... To harness 5G for the future, we'll need to be bold, visionary and decisive."⁴ Building and deploying the next-generation 5G wireless networks in every province and territory across Canada will require a tremendous amount of investment from facilities-based wireless carriers. The spectre of uncertainty when investment is needed to build-out next-generation 5G networks will have a very real impact on the ability of facilities-based new competitors to attract and make investments in their networks. Now is not the time to interfere in the operation of competitive market forces with the introduction of unnecessary retail price regulation based on questionable legal authority.

II. FACILITIES-BASED COMPETITION IS DRIVING SUSTAINABLE COMPETITION IN THE MOBILE WIRELESS MARKET

14. There is a competition problem in the mobile wireless market, which is characterized by high prices and lack of rivalry, except in areas where there is a strong, facilities-based fourth carrier. As the Commission and the Competition Bureau have consistently confirmed, the market remains dominated by the three national Incumbents, who collectively control 89% of subscribers and 91% of revenue.⁵ The barriers to investment

⁴ The Honourable Navdeep Bains, Minister of Innovation, Science and Economic Development, Speech re. Strategic Innovation Fund – ENCQOR Investment, 19 March 2018, <online: <https://www.canada.ca/en/innovation-science-economic-development/news/2018/03/strategic-innovation-fundencqor-investment.html>>

⁵ See Commission, *Communications Monitoring Report, 2017*, Figures 5.5.5 and 5.5.6 <online: <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr.htm>>.

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- and efficient roll-out for facilities-based competitors remain persistently high⁶ and the Incumbents jointly exercise market power in at least some parts of Canada.
15. However, intrusive retail rate regulation of the Incumbent carrier retail services will not correct this issue. Facilities-based competition is the solution to addressing the problem of insufficient competition in Canada's wireless market.
 16. We know this because facilities-based investment by new players is having a positive impact on sustainable competition in the retail wireless market. Both the Commission and the Competition Bureau have consistently affirmed that the focus on developing facilities-based competition, which is the official strategy of the Government of Canada, is starting to work in areas where there are strong facilities-based competitors.⁷ The Commission recognizes that policies that support facilities-based competitors are beginning to have a positive impact on the intensity of facilities-based competition across the country.⁸ According to the Competition Bureau, wireless prices are typically lower in parts of Canada where there is "... a strong regional competitor who can disrupt the effects of coordination among [the Incumbents]."⁹
 17. Facilities-based competitors are challenging the market power and dominance of the Incumbents by investing heavily in their networks, improving the quality, reliability, coverage and distribution of their services, and listening to the diverse needs of customers that have traditionally been neglected by the Incumbents. This has allowed facilities-based competitors to astutely respond to customer demand for more affordable plans, including data plans, while building the next generation wireless networks needed to support increasing demands for capacity and speed at affordable prices.
 18. Freedom has been at the forefront of providing customers with a range of innovative service offerings, including data plans that provide customers with high data allotments

⁶ See Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services*, 5 May 2015 ("TRP 2015-177"), paragraphs 35 and 36; and Competition Bureau, *Competition Bureau statement regarding Bell's acquisition of MTS*, 15 February 2017 (the "Bureau's Statement Regarding Bell's Acquisition of MTS") <online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>>.

⁷ See Telecom Decision CRTC 2018-97, *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service*, 22 March 2018 ("Telecom Decision 2018-97"), Preamble and paragraph 120.

⁸ Telecom Decision 2018-97, paragraph 114.

⁹ The Bureau's Statement Regarding Bell's Acquisition of MTS.

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at fair and affordable prices. The most recognizable of these plans are Freedom's successful Big Gig plans. These affordable data plans with additional features offer customers a remarkable 10 GB of LTE data for only \$50 a month, 15 GB of LTE data for only \$70 a month and an incredible 20 GB of LTE data for only \$90 a month in addition to unlimited global text messaging and protection from overage charges.

19. Freedom has followed up the Big Gig plans with new entry-level data plans at a fair price. The new Freedom Data Plan 1 GB offers 1 GB of LTE data and unlimited text messaging to Canada and the U.S. starting at only \$25 per month. For customers that want voice service, the new Freedom Home 250 MB Plan offers 250 MB of LTE data, 100 minutes of Canada-wide talk and unlimited text messaging to Canada and the U.S. for as low as \$15 per month. The Freedom Home 500 MB Plan offers 500 MB of LTE data, unlimited Canada-wide talk and unlimited text messaging to Canada and the U.S. for as low as \$25 per month.
20. These new lower-cost data plans are intended to target price conscious consumers in the wireless market. They provide a low-cost entry point with generous data allowances, particularly for Canadians with low household incomes. As Paul McAleese, President of Wireless at Freedom stated:

"Too many Canadians cannot afford wireless services because it is simply too expensive for their monthly budget – their exclusion is contributing to a growing digital divide. Canadians want access to more high-speed data at a fair price, they don't want to be penalized for using too much, and they want to clearly understand what they're paying for."¹⁰
21. Freedom is committed to ensuring that there are affordable wireless services available to all Canadians in all segments of the market, including the lower-cost segment of the market, which has always been, and continues to be, a focus of Freedom.
22. Despite PIAC's claims to the contrary,¹¹ the presence and innovative offerings of facilities-based carriers has put real pressure on the Big 3 Incumbents to improve their service offerings. For example, after Freedom introduced its incredibly popular Big Gig

¹⁰ Shaw, "More Canadians get fairer pricing with news plans from Freedom Mobile," *Shaw Press Release*, 19 July 2018 <online: <http://newsroom.shaw.ca/materialDetail.aspx?MaterialID=6442452136>>.

¹¹ CRTC(PIAC)20July2018-101, pages 5 and 6.

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- plans into the market in December 2017, the Incumbents responded with their own deeply discounted plans. According to TELUS, “In December 2017, the national wireless providers offered promotional wireless plans of \$60/month for 10GB of data and unlimited Canada-wide voice and text for customers bringing their own device. These plans were in response to Freedom Mobile’s “Big Gig” promotion, offering 10GB of data for \$50”¹² (emphasis added).
23. Financial analysts that cover Canada’s wireless market have observed that the Incumbents, and their sub-brands, continued to offer promotional pricing on wireless plans with more data through the first half of 2018 to compete with Freedom’s Big Gig plans and other innovative offerings.¹³ According to these analysts, competition from Freedom is also restraining what used to be “predictably strong increases in monthly prices” by the Incumbents.¹⁴
24. The positive impact of facilities-based competition is most apparent in the lower-cost segment of the mobile wireless market, which is the most rivalrous. The evidence in this proceeding and past proceedings demonstrates that there are a range of competitive and affordable entry-level mobile wireless service offerings available to customers in the lower-cost segment of the market, including lower-cost data plans.
25. In response to the Commission’s request for information,¹⁵ wireless carriers, including Freedom, SaskTel, SSi Micro, Eastlink, Videotron, Rogers, TELUS and Bell provided the Commission with an extensive list of talk, text and data wireless plans that they offered for \$30 per month and below in 2017 and 2018. For example,
- (a) SaskTel provided seven plans for \$30 per month and below, including (i) the “Prepaid Talk, Text and Data 25” plan with 50 daytime minutes (unlimited evening and weekends) and 250 MB of data for \$25; (ii) the “shareMORE Data Only 5 GB” plan with 5 GB of data and unlimited incoming text messaging for \$20

¹² TELUS, Reply Comments dated 28 June 2018, TNC 2018-98, paragraph 33.

¹³ Christine Dobby, “Heated Competition Cools Wireless Price Growth”, *The Globe and Mail*, 13 August 2018 <online: <https://www.theglobeandmail.com/business/article-wireless-prices-stalling-amid-subscriber-surge-as-competition-and/>>. See Bell Mobility(CRTC)20Jul18-101, pages 9 and 10 for various promotional offers since December 2017.

¹⁴ Christine Dobby, “Heated Competition Cools Wireless Price Growth”, *The Globe and Mail*, 13 August 2018.

¹⁵ (CRTC)Jul18-203, TNC 2018-98.

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per month; and (ii) the “shareMore Data Only 10GB” plan with 10 GB of data and unlimited incoming text messaging for \$30.¹⁶

- (b) Videotron provided four plans for \$30 per month and below, including a plan with 200 minutes (unlimited evenings and weekends), unlimited text messaging and 500 MB of data for \$29.95.¹⁷
- (c) SSi Micro provided one plan for \$30 per month known as the “Natsagaq 25” with 500 Nunavut-wide voice minutes, 100 Canada-wide voice minutes and unlimited text messaging. The plan includes a pay-as-you go option of \$3/100 MB.¹⁸
- (d) Freedom provided nine plans for \$30 per month and below, including the Home 250 MB plan for \$20, the Freedom Data Plan 1 GB for \$25 and the Home 500 MB plan for \$30.
- (e) In response to this competitive pressure, the Incumbents have also started to provide plans for \$30 per month and below across all of their brands.¹⁹

26. It is evident from the foregoing that facilities-based competitors are offering customers affordable talk, text and data plans and are driving the Incumbents to offer the same through competitive rivalry and market forces. Many of these plans are superior to the proposed regulatory measure being contemplated by the Commission, since they already provide similar amounts of data, namely 1GB of data for \$25 or less, with the added benefit of additional features (e.g., text messaging) at a similar price point.

¹⁶ SASKTEL(CRTC)20JUL18-203.

¹⁷ Québecor Média(CRTC)20juillet2018-203.

¹⁸ SSi(CRTC)20Jul18-204.

¹⁹ For example, Rogers provided (i) Rogers’ “Talk & Text w/100MB Data” plan with unlimited Canada-wide minutes, 100 text messages and 100 MB of data for \$25; (ii) Fido’s “Bring Your Own Phone Plan” with unlimited Canada-wide minutes, unlimited text messaging and 300 MB of data for \$30; and (iii) Fido’s “1 GB, Talk & Text – BYOP” plan in Quebec with unlimited Canada-wide minutes, unlimited text messaging and 1 GB of data for \$30. See Rogers(CRTC)20Jul18-204; and TELUS offers customers a plan with 500 MB of data and unlimited text messaging for \$30 per month through Koodo and a plan with 600 MB of data for \$30 per month through Public Mobile. See TELUS(CRTC)20Jul18-101, paragraph 24.

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Contrary to the Bureau's position,²⁰ market forces can deliver and are delivering effective, lower-priced plans without the need for regulatory supervision.

27. Therefore, the promotion of facilities-based competition is already working to drive sustainable competition and has led to better rivalry, particularly in the lower-cost segment of the mobile wireless market.
28. There is still further work to be done to ensure sustainable competition across Canada. Shaw shares Quebecor, SSi Micro and SaskTel's position that the Commission must continue to support facilities-based competition and focus on supporting the growth and continued viability of facilities-based new competitors.²¹ This means continuing to support and develop facilities-based competition through the use of efficient and targeted regulatory measures that remove barriers to investment, including addressing spectrum concentration, more regulation on antenna tower sharing, and continued and improved access to mandated wholesale roaming services, including seamless hand-off between carriers.
29. Shaw agrees with Quebecor that the Commission should provide the facilities-based competitors with certainty and stability by respecting the five-year period established in the wholesale wireless framework before considering any major regulatory changes, such as retail price regulation.²²
30. Efficient, light-handed regulation that promotes the emergence of strong facilities-based alternatives, while minimising reliance on intrusive retail regulation, is the only effective and sustainable way to address problems related to wireless competition, including "gaps" in the retail wireless market. This is also consistent with the Policy Direction, which requires that the Commission rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives set out in the Act.

²⁰ Competition Bureau(CRTC)20Jul18-101, paragraph 23: "Historically, lower-priced wireless plans have either not existed or have not been sufficiently attractive to consumers in the Canadian wireless industry. As such, it is difficult to expect market forces to deliver effective lower-priced plans without some form of regulatory supervision."

²¹ SASKTEL(CRTC)20JUL18-101, page 4 of 6; SSi(CRTC)20Jul18-202; and Québec Média(CRTC)20juillet2018-101, page 2 of 2.

²² Québecor Média(CRTC)20juillet2018-201.

III. INTERVENTION IN THE RETAIL MARKET WILL HARM AND UNDERMINE THE ESTABLISHMENT AND CONTINUATION OF FACILITIES-BASED COMPETITION

31. As discussed above, the emergence of facilities-based competition in the mobile wireless market in Canada has resulted in greater choice of affordable mobile wireless services, including entry-level data plans for Canadians. Shaw further submits that not only is regulatory intervention by the Commission in the lower-cost segment of the retail mobile wireless market not required, it will harm and undermine the establishment of strong-facilities based wireless carriers that are promoting competition and rivalry, especially in the lower-cost segment of the market.
32. It is widely understood that mandating a uniform retail LCDO plan will interfere with the ability of facilities-based new competitors, such as Freedom, Videotron and Eastlink, to effectively compete and differentiate themselves from the Incumbents in the mobile wireless market.²³ The facilities-based competitors' strength in a wireless market that is still dominated by the Incumbents is their ability to develop innovative and affordable plans for Canadians that the Incumbents fail to serve effectively. This includes addressing the previously unmet demand in the market for high-speed data-intensive offerings at a fair price. This is central to Freedom's strategy of attracting and retaining customers and gaining greater market share. Our customers continue to choose Freedom as their wireless provider because of our differentiated value proposition led by data-centric service plans.²⁴
33. It appears Videotron is also entering into the low-cost wireless market segment with the launch of its new Fizz brand. The website for the new Fizz service touts the speed of the LTE-based service and outlines Beta testing pricing of between "\$1 and \$8 during our 3-month beta period and highly competitive rates after our official launch".²⁵ Clearly, new facilities-based entrants are vying for a position in the low-cost market.
34. Facilities-based new competitors are legitimately concerned that this competitive activity would be negatively impacted by regulatory rate intervention. The harm from the

²³ Bell Mobility(CRTC)20Jul18-101, page 11; TELUS(CRTC)20July18-101, paragraph 52; and Québecor Média(CRTC)20juillet2018-101, page 2 of 2.

²⁴ Shaw, "Shaw Announces Third Quarter and Year-To-Date Fiscal 2018 Results", *Press Release*, 28 June 2018, <online: <http://newsroom.shaw.ca/materialDetail.aspx?MaterialID=6442452122>>

²⁵ See Fizz <online: <https://fizz.ca/en>>

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proposed price regulation will hit the facilities-based new competitors the hardest and put the business models of facilities-based new competitors at risk.²⁶ Since facilities-based new competitors are vigorously competing in the lower-cost segment of the market, a proposed regulatory measure that targets this segment of the market and mandates a uniform Incumbent LCDO plan will effectively carve out the lower-cost data-only segment of the market for the Incumbents.²⁷

35. As SSi Micro explains, "... a set price point, for example, below the \$25 per month level that the Commission contemplates ... will force competitors to the [Incumbents] to determine whether they can meet or better that price, and then, if they determine that it is possible and desirable to contest that segment of the mobile wireless market, it will artificially constrain both the content of the services they offer and the prices they can charge."²⁸ Given that competitors must set their price point at or below the artificial mandated price, only the Incumbents will likely end up offering LCDO plans to customers.
36. Even the Incumbents acknowledge that Shaw, Videotron and Eastlink could be the most susceptible to the impact of any regulatory action that distorts market forces and introduces artificial pricing plans and services into the market.²⁹ By harming the ability of facilities-based new competitors to effectively compete, the Commission will inadvertently undermine the emergence of strong facilities-based competition. As SSi Micro warns, "even a temporary requirement that establishes a retail price ceiling, with or without a capacity floor, risks erecting permanent barriers to competition."
37. It is therefore difficult to understand how PIAC can claim that a mandated LCDO plan would be "minimally intrusive."³⁰ PIAC did not even consider the impact of the proposed regulatory intervention on facilities-based new competitors and generally seems indifferent to supporting facilities-based competition. This position is peculiar considering that facilities-based competitors, such as Freedom, are providing Canadians with affordable mobile wireless plans that the Incumbents were not willing to provide,

²⁶ Québecor Média(CRTC)20juillet2018-101, page 2 of 2.

²⁷ SSi(CRTC)20Jul18-101, page 7 of 8.

²⁸ SSi(CRTC)20Jul18-101, page 7 of 8.

²⁹ TELUS(CRTC)20July18-101, paragraph 52; and Bell Mobility(CRTC)20Jul18-101, page 14 of 17.

³⁰ PIAC(CRTC)20July18-101, page 14.

including data plans that appeal to Canadians with low household incomes. Reliance on market forces is always preferable over unnecessary regulation.

38. A number of parties in this proceeding also raised the important point that price regulation and mandated wireless plans at artificial rates would undermine network investment.³¹ The Incumbents may not be significantly affected, but the Commission's regulatory intervention will have a very real impact on the business of facilities-based competitors and on their ability to attract and make investments in their networks. In particular, the uncertainty surrounding the Commission's intervention in the market will raise red flags just as billions of dollars of investment is needed to build-out next-generation 5G networks.
39. The foregoing explains the Competition Bureau's view that price regulation is "antithetical to competition".³² It replaces the key role of market forces in determining market outcomes and will ultimately undermine facilities-based competition and investment.
40. It is imperative then that the Commission not intervene and not introduce price controls in the retail wireless market. By harming the ability of facilities-based new competitors to compete, the Commission will only serve to further entrench the market power and dominance of the Incumbents.

IV. THE NEGATIVE IMPACTS OF INTERVENTION WILL OUTWEIGH ANY MINIMAL BENEFITS

41. Given that the Commission's proposed intervention in the retail wireless market to mandate an Incumbent LCDO plan will harm facilities-based competitors, the Commission should only intervene where there is clear evidence that the benefits of the proposed measure outweigh the harms. The Commission's proposed intervention though, fails to meet this criteria.
42. The record in this proceeding raises doubts with respect to the need for and the benefits of mandating the provisions of an LCDO plan by the Incumbents. The evidence indicates

³¹ Bell Mobility(CRTC)20Jul18-101, page 11 of 17; and Rogers(CRTC)20Jul18-101, page 6 of 9; and Québecor Média(CRTC)20juillet2018-101, page 2 of 2.

³² Competition Bureau, Comments dated 13 June 2018, TNC 2018-98, paragraph 8.

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that the demand for the LCDO plan envisioned by the Commission is limited and that there are already lower-cost data offerings in the market.

43. Accordingly, the negative impact of the Commission's intervention on facilities-based new competitors and on the emergence of facilities-based competition, as described above, will outweigh any minimal and short-term positive impact that a mandated LCDO plan offering will have.

A. There is Limited Demand for LCDO Plans in the Wireless Market

44. Shaw submits that the benefit of a mandated LCDO plan offering is questionable because the evidence in this proceeding demonstrates that the demand for these types of plans is minimal.
45. Based on Shaw's experience, the demand for the data-only plan envisioned by the Commission is relatively small and limited. Shaw has provided the Commission with subscriber data for a number of its wireless plans that clearly show that price-sensitive customers prefer an entry-level plan with voice, text and data while customers that want a data plan prefer plans with large buckets of data.
46. For example, #

#

47. Both SaskTel and Eastlink have arrived at the same conclusions based on their customer data. SaskTel notes that customer demand for an LCDO plan is anecdotal and speculative. According to SaskTel, it has had a plan in the market for approximately 2

years that includes 1 GB of data for \$15 and during that time, only 0.1% of its customer base has subscribed to the plan.³³ Similarly, Eastlink explains that in its experience, pure data-only plans are unpopular and that its customers are reluctant to purchase wireless plans without at least some voice minutes included.³⁴

48. PIAC³⁵ and the Forum for Research and Policy³⁶ argue that their survey data indicate that various types of consumers are interested in switching to lower-cost data only plans. However, Shaw notes that this survey is based on hypothetical questions and thus, the responses are speculative in nature. Indeed, PIAC states that, "...it would be valuable to corroborate [the survey] results with revealed preference data showing how consumers stated preferences translate into action."³⁷ Freedom and SaskTel have provided the Commission with this data, which show that customers in the lower-cost segment of the market overwhelmingly do not sign-up to lower cost data-only plans. Rather, they prefer affordable wireless plans with a mix of voice, data and text services.
49. Shaw shares Eastlink's view that that there is a likelihood that the phenomenon of consumers wanting more affordable wireless services has been conflated with the faulty assumption that consumers need and want a low-cost data-only plan.³⁸ As noted above, there are already many lower-cost talk, text and data wireless plans in the wireless market and facilities-based competitors, like Freedom, are continuously innovating to bring even more affordable plans to Canadians.

B. There are Already Affordable Data Offerings in the Wireless Market

50. As discussed above, the evidence filed on the record by the wireless carriers in this proceeding shows that there are already a range of lower-cost data plans, which provide up to 1 GB of data and additional features, such as text messaging, to customers for \$30 or less, being offered or proposed by both the Incumbents and facilities-based new competitors in all regions of Canada.

³³ SASKTEL(CRTC)20Jul18-101, page 3 of 6.

³⁴ Bragg(CRTC)20July2018-101, page 2 of 9.

³⁵ PIAC(CRTC)20July2018-101, pages 22 and 23.

³⁶ FRPC(CRTC)20July2018-101, page 2 of 5.

³⁷ PIAC(CRTC)20July2018-101, page 23.

³⁸ Bragg(CRTC)20July2018-101, page 3 of 9.

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51. LCDO plans and similar lower-cost data plans with additional features currently in the market include the following:
- (a) **Freedom:** Freedom Data Plan 1 GB with 1 GB of LTE data and unlimited Canada and U.S. text messaging starting at \$25 per month.
 - (b) **SaskTel:** shareMORE Data Only 1 GB with 1 GB of data and unlimited incoming text messaging for \$15; and shareMORE Data Only 5 GB with 5 GB of data and unlimited incoming text messaging for \$20 per month.³⁹
 - (c) **Koodo:** 500 MB of data and unlimited incoming text messaging for \$30 per month.⁴⁰
 - (d) **Public Mobile:** 600 MB of data for \$30 per month.⁴¹
52. The Incumbents have stated that they intend to launch the following (improved) LCDO plans and lower-cost data plans with additional features on their sub-brands:⁴²
- (a) **Fido:** 250 MB of data and unlimited text messaging for \$15; 500 MB of data and unlimited text messaging for \$25; and 1 GB of data and unlimited text messaging for \$30.
 - (b) **Koodo:** 1 GB of data and unlimited Wi-Fi based data, talk and text for \$30.
 - (c) **Virgin Mobile:** 1 GB of data and unlimited Wi-Fi data for \$28.
 - (d) **Lucky Mobile:** 500 MB of 3G data and unlimited Wi-Fi data for \$15.
 - (e) **Public Mobile:** 1 GB of data and unlimited Wi-Fi based data, talk and text for \$30.

³⁹ SaskTel, *Rate plans*, <online: https://www.sasktel.com/store/browse/Personal/Wireless/Rate-plans/_/N-2777>. Pricing current as of September 30, 2018.

⁴⁰ Koodo Mobile, *Plans* (ON), <online: <https://www.koodomobile.com/rate-plans>>. Pricing is current as of September 30, 2018.

⁴¹ Public Mobile, *Read-Made Plans*, <online: https://www.publicmobile.ca/en/on/plans?qclid=EA1a1QobChMIm7Sq9evj3QIVCMNkCh15GgRIEAAAYASAAEgLRIPD_BwE>. Pricing current as of September 30, 2018.

⁴² See Rogers(CRTC)20Jul18-201; TELUS(CRTC)20Jul18-201; and Bell Mobility(CRTC)20Jul18-201

53. It is important to note that the facilities-based new competitors, such as Freedom, are offering these plans in the wireless market through competitive rivalry and market forces. Facilities-based new competitors continue to be at the forefront of introducing innovative and differentiated service offerings, driving prices down and challenging the dominance of the Incumbents in markets in which they operate.
54. Meanwhile, the Incumbents have represented to the Commission that they will make their LCDO plans available in the market with the same price and capacity for a set period of time. Bell intends to make its proposed plans available to customers for three years.⁴³ Rogers intends to make its proposed plans available for at least two years. After two years, it will make the plans available on an ongoing basis with the intent of making no more than one change per year to adjust for changing technological and economic conditions.⁴⁴ TELUS intends to make its plans available for a minimum of one year.⁴⁵
55. Based on the foregoing discussion, there is a lack of evidence to support the Commission’s intervention in the retail wireless market to mandate an LCDO plan. Not only is there minimal demand for the plan, but there are already a range of lower-cost data plans available in the wireless market through competitive market forces. The Incumbents have also represented that they will make their (improved) LCDO plans available to customers without the need for regulation.
56. Shaw submits that the need for the Commission’s proposed intervention – a mandated Incumbent LCDO plan – to address a perceived “gap” with respect to LCDO plans is questionable and that the very real harm to facilities-based new competitors will therefore outweigh any minimal benefits.

V. ALTERNATIVE PROPOSAL – BINDING UNDERTAKING

57. As Shaw has proposed,⁴⁶ the Commission could treat the Incumbents’ proposals, including the length of time that they will make their LCDO plans available in the market, as unilateral, voluntary undertakings. The Incumbents’ proposals already bear the hallmarks of undertakings and could, with additional formality, be treated as

⁴³ Bell Mobility(CRTC)20Jul18-208.

⁴⁴ Rogers(CRTC)20July18-208.

⁴⁵ TELUS(CRTC)20July18-208.

⁴⁶ Shaw(CRTC)20Jul2018-201.

undertakings. Shaw asserts that the Commission has the power to receive and enforce undertakings given by parties in the course of proceedings before it pursuant to section 55 of the Act, which provides the Commission with the powers of a superior court. Just as a superior court is able to receive and enforce undertakings, so can the Commission. The Commission already uses undertakings as part of its procedures in proceedings before it. There is no need for the Commission to intervene and impose intrusive regulatory measures in the retail mobile wireless market that interfere with the operation of market forces.

58. Mandating LCDO plans in the absence of evidence would be inconsistent with and contrary to the Policy Direction’s directive for “efficient and proportionate regulation.” In particular, there is serious doubt as to the proportionality of the proposed plan given the questionable effectiveness of the measure in furthering the Commission’s objective, the serious deleterious effects that the measure will have on both suppliers and customers in the wireless market and the availability of a less intrusive way to ensure that the Incumbents make their proposed LCDO plans available in the market (i.e. the Shaw proposal).

VI. LEGAL CONSIDERATIONS

59. Over and above the fact that the Commission’s proposed intervention in the retail mobile wireless market does not meet the criteria for regulatory intervention set out under the Policy Direction, the Commission lacks the jurisdiction to undertake the proposed regulatory measures in the current context of mobile wireless forbearance.

A. The Commission Does Not have the Jurisdiction to Mandate the Provision of LCDO Plans with a Price Ceiling and Capacity Floor Under Section 24

60. In this proceeding, the Commission is considering whether it can apply a condition of service in accordance with section 24, subsection 27(1) and subsection 27(5) of the Act to direct the Incumbents to make LCDO plans available to consumers. It is also considering whether it would be appropriate for the Commission to establish a price ceiling and capacity floor for the LCDO plans using its powers under section 24, subsection 27(1) and subsection 27(5) of the Act.

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61. Shaw submits that the Commission does not have the authority to use its powers under section 24 of the Act to direct the Incumbents to provide the LCDO plan or to establish a price ceiling and a capacity floor for the LCDO plans. Mandating an LCDO plan with a price ceiling and a capacity floor invokes the Commission's rate making powers and would be tantamount to rate regulation.
62. Bell and Videotron similarly argue that the Commission's proposal is effectively rate regulation and that section 24 of the Act does not give the Commission the power to mandate any form of rate regulation.⁴⁷ Rather, as both Bell and Videotron note, the power to regulate rates is granted by section 25 and subsection 27(1) of the Act, neither of which the Commission retained when it decided to forbear from regulating the retail mobile wireless service market pursuant to section 34 of the Act.⁴⁸ As a result, it is not open to the Commission to purport to exercise its powers under these subsections absent a reversal of its retail mobile wireless forbearance determinations.
63. If anything, the Commission should consider the efficient and proportionate proposal put forward by Shaw of treating the Incumbents' final proposals as unilateral, voluntary undertakings. This would result in the Incumbents making their proposed LCDO plans available in the market and not require a mandatory condition of service via section 24. Anything more would not be compliant with the Policy Direction because the Commission's regulatory intervention would be more intrusive than necessary.
64. Shaw strongly disagrees with the position put forward by the Manitoba Coalition and PIAC that the Commission has authority to establish a price ceiling and capacity floor for LCDO plans under section 24 and subsections 27(1) and 27(5) of the Act. Their argument predominantly rests on the Commission's use of section 24 of the Act to require all wireless service providers to abide by the Wireless Code.
65. The Manitoba Coalition and PIAC curiously claim that the imposition of the Wireless Code on wireless carriers pursuant to section 24 indicates that the Commission has authority under section 24 to impose conditions on mobile wireless carriers that affect

⁴⁷ Bell Mobility(CRTC)20Jul18-101, pages 15 and 16 of 17; and Québecor Média(CRTC)20juillet2018-101, page 2 of 2

⁴⁸ Bell Mobility(CRTC)20Jul18-101, pages 15 and 16 of 17; and Québecor Média(CRTC)20juillet2018-101, page 2 of 2

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the price of wireless services offered by carriers.⁴⁹ However, requirements such as the (i) provision of device unlocking free of charge; and (ii) caps on data overage charges, which are cited by the two parties,⁵⁰ do not regulate the rates or plans for wireless services. Rather, they are limits on the amounts that wireless service providers can charge customers for practices related to the provision of wireless services.⁵¹

66. The Wireless Code does not regulate the rates charged by wireless service providers for wireless services. For example, wireless service providers are free to determine the rate of overage charges. The Code requires wireless service providers to suspend data overage charges once they reach \$50 in a single monthly billing cycle, unless they obtain express consent from the customer to pay additional charges. This does not directly or indirectly amount to rate regulation.⁵²
67. Shaw reiterates that section 24 has not been used to mandate any form of rate regulation or a uniform retail wireless service like the LCDO plan proposed by the Commission. The proposal is unlike the regulatory requirements that have been imposed by way of a section 24 condition in the past. It would be inappropriate for the Commission to establish as a condition of service a price ceiling and capacity floor for an LCDO plan to be provided by the Incumbents.

B. No Reason(s) for the Commission to Reverse Forbearance from Regulating Retail Mobile Wireless Services

68. The Commission is also considering whether, instead of establishing a price ceiling and capacity floor under section 24 and subsection 27(1), it would be more appropriate for the Commission to require the Incumbents to file tariffs and cost studies for a mandated LCDO plan pursuant to section 25 of the Act.

⁴⁹ CRTC(PIAC)20July2018-101, pages 16 to 19; and Manitoba Branch of the Consumers' Association of Canada and the Aboriginal Council of Winnipeg, "Manitoba Coalition Responses to Requests for Information", TNC 2018-98, 10 September 2018 ("Manitoba Coalition Responses to Requests for Information"), paragraphs 39(j) and 58.

⁵⁰ CRTC(PIAC)20July2018-101, pages 16 and 19; and Manitoba Coalition Responses to Requests for Information, paragraphs 39(j) and 58.

⁵¹ Telecom Regulatory Policy CRTC 2017-200, *Review of Wireless Code*, 15 June 2017 ("TRP 2017-200"), paragraph 294.

⁵² TRP 2017-200, paragraph 225.

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69. As noted above, pursuant to section 34 of the Act, the Commission has forbore from regulating retail mobile wireless services, except with respect to its powers under section 24 and subsections 27(2), 27(3) and 27(4) of the Act. The Commission must therefore reverse its forbearance findings in order to require carriers to file tariffs for a mandated LCDO plan pursuant to section 25.
70. If the Commission decides to conduct a forbearance assessment under section 34 of the Act, LCDO plans are not the relevant product market for the purpose of the assessment as suggested by the Commission.
71. The majority of participants in this proceeding agree with Shaw that LCDO plans cannot be the relevant product market.⁵³ As a number of parties note, the determination of the relevant product market hinges on the question of substitutability and takes into account the availability of actual and potential substitutes.⁵⁴ LCDO plans are part of a “continuum” of voice, text and data plans and consumers frequently switch between plans with different allocations of voice, text and data at different price points.⁵⁵
72. Rather, Shaw shares Bell’s view that LCDO plans represent a market segment and not a product market:

“It is important to distinguish between a product market and a market segment. A product market is an economic construct used to define a set of products over which a would-be monopolist is able to significantly increase price for a non-transitory period of time without incurring a non-profitable diversion of demand towards outside products.

A market segment, in contrast, refers to a subset of customers who share certain characteristics or preferences or who may be particularly receptive to certain types of service features or publicity campaigns.

⁵³ Québecor Média(CRTC)20juillet2018-101, page 2 of 2; Bell Mobility(CRTC)20Jul18-101, pages 4, 5 and 6 of 17, TELUS(CRTC)20July18-101, paragraph 2; SSi(CRTC)20Jul18-101, pages 4 and 5 of 8; and SASKTEL(CRTC)20JUL18-101, page 2 of 6.

⁵⁴ Québecor Média(CRTC)20juillet2018-101, page 2 of 2; Bell Mobility(CRTC)20Jul18-101, page 4 of 17; SSi(CRTC)20Jul18-101, page 4 of 8; and TELUS(CRTC)20July18-101, paragraph 2.

⁵⁵ Bell Mobility(CRTC)20Jul18-101, pages 4 and 12 of 17.

In our view, what the Commission has identified as a “gap” is a market segment that it believes has not been extensively served – not evidence of a separate product market.”⁵⁶

73. Importantly, the Bureau also acknowledges that it does not have sufficient evidence at this point in time to determine whether LCDO plans should be considered a relevant product market.⁵⁷ Shaw agrees. The Bureau also confirms that it has not historically concluded that plans of differing price or capacity levels should be considered separate relevant product markets.⁵⁸ Therefore, it would be arbitrary and unsupported by evidence for the Commission to conclude that LCDO plans are the relevant product market.
74. Second, in order to reverse its forbearance findings, the Commission must find that there has been a change in circumstances such that there no longer exists competition sufficient to protect the interests of users in the mobile wireless market.
75. Although Shaw acknowledges that there are presently competition problems in the Canadian mobile wireless market, Shaw reiterates that now is not the time to introduce interventionist price controls into the market that will interfere with and harm the ability of facilities-based new competitors, such as Freedom, to effectively compete in the mobile wireless market. To do so would work at cross-purposes with the policy of facilities-based competition and would be inconsistent with the Canadian telecommunications policy objectives. As a result, there is no cause to reopen the Commission’s prior decisions to forbear from exercising its powers under section 25 of the Act in relation to the mobile wireless market in Canada.

VII. CONCLUSION

76. Now is not the time to introduce intrusive price controls into the market, which the Bureau considers can be as harmful to competition as market power. Regulatory intervention in the form that is being proposed by the Commission in this proceeding is of questionable value and will only serve to further entrench the market power of the Incumbents.

⁵⁶ Bell Mobility(CRTC)20Jul18-101, page 6 of 17

⁵⁷ Competition Bureau(CRTC)20Jul18-101, paragraph 5.

⁵⁸ Competition Bureau(CRTC)20Jul18-101, paragraph 8.

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77. Telecommunications policy should promote maximum reliance on market forces to deliver the benefits of choice, innovation and affordability to Canadians. In the mobile wireless market, the Government has consistently focused on promoting facilities-based competition and maximum reliance on market forces to achieve the Canadian telecommunications policy objectives. The Government and the Commission's facilities-based strategy is beginning to pay off. The Commission should not undermine this strategy through the adoption of mandated Incumbent LCDO plans.

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