October 9, 2018

*Filed electronically*

Mr. Claude Doucet
Secretary-General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

**RE:** **Telecom Notice of Consultation 2018-98, *Lower-cost data-only plans for mobile wireless services*: SSi Micro Ltd. Comments on Responses to Requests for Information**

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Dear Mr. Doucet;

1. In accordance with the Commission's procedural letters dated July 31, 2018 and August 8, 2018, SSi Micro Ltd. ("SSi") is pleased to provide comments on the responses received to the Commission's Requests for Information ("RFIs") concerning Telecom Notice of Consultation 2018-98, *Lower-cost data-only plans for mobile wireless services* ("TNC 2018-98").

2. The Commission's RFIs sought parties' views concerning the implications of the CRTC's proposal to require the three national wireless carriers ("NWCs") to offer lower-cost data-only ("LCDO") retail mobile wireless plans. Generally, the Commission sought parties' views concerning how it might implement this proposal within its legislative mandate. The Commission also sought more details concerning the proposed LCDO plans advanced by each of the NWCs and asked competitive wireless carriers, including SSi, to detail current retail mobile wireless packages and indicate whether they had plans to offer LCDOs that would compete with those proposed by the NWCs.

3. After the Commission issued these RFIs, SSi sought the Commission's permission to become a party to TNC 2018-98. We did so primarily out of concern about the larger implications of the Commission's proposal for the development and operation of Canada's mobile wireless market and its potentially negative impacts on competition and on new and emerging wireless carriers. We thus accepted the Commission's invitation to respond fully to certain RFIs. We are grateful to the Commission for including us in this proceeding, and for


356B Old Airport Rd. YELLOWKNIFE, NT X1A 3T4
PHONE (867) 669-7500 FAX (867) 669-7510 www.ssimicro.com

permitting us to submit a revised version of our responses on September 13, 2018, which corrected numbering and certain cross-references in our responses.

4. Failure to address a specific argument or the position of a particular party should not be construed as signifying SSi's agreement with that argument or party.

***Summary***

5. After review of the responses of other parties to the RFIs, we remain concerned that the Commission's proposal amounts to rate regulation of retail mobile wireless services, a proposal that can negatively impact new and emerging wireless carriers, particularly if the CRTC establishes a price ceiling and/or capacity floor for LCDOs. In our respectful submission, the Commission must not embark upon this unprecedented step unless a comprehensive and local-market specific review has been completed, demonstrating: i) that no new competitors are coming into the relevant market(s); ii) that competition in the market for retail mobile wireless services is no longer sufficient to protect the interests of users; and iii) that forbearance from rate regulation is thereby no longer appropriate.

6. In the comments that follow, we will expand on three major points:

   - For the Commission to exercise its powers under section 24 of the Telecommunications Act (the "Act") to order some wireless service providers ("WSPs"), namely the three NWCs, to offer a particular configuration of retail services, either at a set price or at a price under a set ceiling, would extend beyond the appropriate scope of this power, especially in view of the fact that rates are specifically addressed in sections 25 and 27;

   - The Commission's exercise of sections 25 and 27 of the Act to make the same order is not appropriate absent a finding that it may no longer forbear from regulation pursuant to section 34, and the record of this proceeding does not support such a finding; and

   - Whether the Commission extends section 24 to encompass selective retail rate regulation or rolls back forbearance for the same purpose, ordering the NWCs to offer LCDO plans will have a negative impact on the ability of competing and emerging wireless carriers to effectively contest the market position of the NWCs and, therefore, on the health of competition in the market for retail mobile wireless services in Canada.

***NWC LCDO Plans are Not an Appropriate Exercise of s. 24 Jurisdiction***

7. In SSi's view, the Commission's proposal cannot reasonably be viewed as anything other than retail price regulation. SSi agrees with Shaw Communications Inc. ("Shaw") that "[e]stablishing a price ceiling and capacity floor for LCDO plans is tantamount to rate

regulation, which the Commission does not have jurisdiction to undertake, absent reversal of its forbearance determination and exercise of its powers under section 25 of the [*Telecommunications*] Act."[1]

8. The Commission's proposal seems unprecedented. While the history of telecommunications regulation in Canada is replete with retail rate regulation, it is far more usual for a carrier to propose to offer a particular retail service or package, which the Commission then evaluates on a number of grounds including whether the carrier's proposed price for that offering is just and reasonable in view of, among other things, underlying costs. In this case, the Commission is considering ordering some service providers in a competitive market to offer a package at a given (or capped) retail price.

9. Under the current proposal, the Commission would still be establishing a retail price for a specified offering. However, instead of exercising its powers under sections 25 and 27 of the Act to control rates by approving a tariff – a practice that the Commission has specifically forborne from in the case of the retail market for mobile wireless services, pursuant to s. 34 – several parties suggest that it might accomplish this effect using its powers under section 24:

> 24. *The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.*

10. The Commission has exercised its powers under s. 24 to subject service providers operating in the competitive market for retail mobile wireless services to specific conditions. In deciding to make such orders, the Commission has first concluded that even though it is competitive, the market is not meeting the needs of users in a specific way. However, it has done so only on an exceptional basis, and only by establishing conditions that apply to all service providers in the retail mobile wireless services market.

11. The question is whether the current proposal, to mandate certain carriers to provide a particular configuration of retail wireless services at a regulated price, constitutes an acceptable or justifiable use of the s. 24 powers. SSi respectfully submits that the answer to this question is no.

12. The Commission has been very specific concerning its jurisdiction pursuant to s. 24. In a series of determinations concerning the retail mobile wireless voice and data services market, beginning with Telecom Decision CRTC 2012-556, the Commission has consistently concluded that its analysis of this market must begin with an assessment of whether conditions are such that it can no longer forbear from rate regulation in the market. Because the mobile wireless services market is subject to competition – a fact that no party to this proceeding denies, though many suggest the competition could be more vigorous – the CRTC

[1] Shaw(CRTC)20Jul18-101 at paragraph 30.

has consistently decided throughout this series of decisions that it must continue to forbear from intervening to determine "mobile wireless service rates".

13. In Decision 2012-556, however, the Commission determined that "market forces alone cannot be relied upon to ensure that consumers have the information they need to participate *effectively* in the competitive mobile wireless market." Thus, the Commission relied upon its powers under s. 24 of the Act to establish a mandatory Wireless Code to address this specific deficiency by ensuring "that consumers have the information and protection they need to make informed choices in the competitive market." [2]

14. The Commission again exercised its s. 24 jurisdiction to deal with these information issues in Telecom Regulatory Policy 2013-271, which established the Wireless Code applicable to all providers of retail mobile wireless services, and in Telecom Regulatory Policy 2017-200, which revised the same Code.

15. Asked to rule on whether the first iteration of the Code was legitimate despite its retrospective application, the Federal Court of Appeal determined that it was not unreasonable as a means of "enabling consumers to make informed choices in the competitive market" and thus "contribut[ing] to making that market even more competitive."[3]

16. However, what the Commission is proposing to do in the current instance is far from "enabling consumers to make informed choices in the competitive market." Instead, the proposal would require certain firms in that competitive market to offer a particular configuration of retail wireless service at a price at or below a certain level.

17. The supporters of the Commission's proposal do not offer an interpretation of s. 24 that extends the CRTC's powers to encompass what would normally be seen as retail rate regulation.

18. The Competition Bureau, for instance, argues that imposing LCDO plans on a temporary basis could increase "economic welfare and wireless penetration in Canada," but takes no position concerning how the Commission should interpret the *Telecommunications Act*, either with respect to the powers the CRTC traditionally uses when it determines that it must regulate rates, or in connection with the exercise of its power to establish conditions pursuant to s. 24.[4]

19. Almost as an aside, though, the Bureau indicates that it is aware that the proposal under consideration here constitutes retail rate regulation. The Bureau thus suggests that "it is

[2] Telecom Decision CRTC 2012-556, Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services, 11 October 2012 (paragraph 21 quoted; emphasis added).

[3] *Bell Canada v. Amtelecom Limited Partnership et al.*, [2016] 1 FCR 29, [2015] FCA 126 (paragraph 53 quoted).

[4] Bureau(CRTC)20Jul18-101, paragraphs 28, 36 and 39.

preferable to use price caps and capacity floors in defining what an LCDO Plan is, rather than specifying particular price and capacity levels." The Bureau comments that such an approach is preferable because this provides "at least some scope for competitive business strategies designed to undercut competitors or differentiate one's product offerings."[5]

20. The Competition Bureau's suggestion amounts to asking the Commission to define a new category of offer, which the CRTC could then require certain carriers to make available in a competitive market. In SSi's submission, this suggestion rests on a distinction without a difference. In practice, there is no difference between establishing required rates for a service, on one hand, or establishing a required service defined on the basis of rates, on the other. Either way, the Bureau appears to advocate the Commission requiring certain of the wireless carriers it regulates to offer a type of retail wireless plan (data only) that is distinguished from others primarily on the basis of a price that has been established by the regulator.

21. The Manitoba Branch of the Consumers' Association of Canada and the Aboriginal Council of Winnipeg (together, the "Manitoba Coalition"), specifically addresses whether the Commission has jurisdiction under s. 24, as well as under s. 25 and s. 27, to order LCDO plans.

22. The Manitoba Coalition requests "that carriers be required to offer a lower-cost data only plan similar in design and no higher in price than the proposed CRTC flex plan" after reviewing the instances where the Commission has used its powers under s. 24. The Manitoba Coalition correctly emphasizes the relevance of the Commission's Wireless Code decisions as an instance of establishing conditions even where the Commission declines to upset its preliminary finding that the market is competitive.

23. However, the Manitoba Coalition mischaracterizes elements of the Wireless Code, such as data roaming caps and the requirement to sell wireless devices on an unlocked basis, as being tantamount to the sort of retail rate regulation the Commission is considering in the present case. The data use and roaming caps, in particular, operate as set levels at which wireless service providers are required to inform their customers on postpaid plans of the charges they have already accrued, and seek the customer's consent to continue to provide the relevant service. In other words, the requirement on the wireless service provider remains *to provide its customer with relevant information*.

24. The requirement to sell devices only on an unlocked basis can also be construed as requiring the wireless service provider to inform its customer of the true retail price of any device the customer acquires from the service provider, rather than dividing the retail price between an upfront charge and a balance that the service provider will charge over time, such as the length of a service contract.

[5] Bureau(CRTC)20Jul18-101, paragraph 40, quoting Bureau Intervention, 13 June 2018, paragraph 41.

25. The requirement to offer LCDO plans, by contrast, cannot be construed as remedying an information deficiency. The Bureau correctly distinguishes between an order to offer LCDO Plans, on the one hand, and their promotion, on the other, alleging that the latter action in itself is necessary if LCDO plans are to improve economic welfare.[6]

26. The Public Interest Advocacy Centre ("PIAC") takes a different approach. PIAC urges the Commission to push its jurisdiction under s. 24 beyond the grounds of remedying information deficiencies in the competitive market for retail mobile wireless services. PIAC argues that the Wireless Code determinations constitute an exercise of "jurisdiction under s. 24 to incidentally affect the price of service provided [the Commission] is pursuing a larger policy goal under an overarching consumer protection framework."[7]

27. We urge the Commission to resist PIAC's interpretation, which invites the Commission to abandon its tradition of balancing the elements of the telecommunications policy in favour of establishing retail price regulation through the circuitous route of imposing s. 24 conditions instead of the direct route of repealing forbearance and ordering wireless carriers to file tariffs for their retail services.

28. The only wireless carrier to endorse the idea that the Commission can, or should, use its powers pursuant to s. 24 to mandate NWCs to offer LCDOs is Rogers Communications Canada Inc. ("Rogers"). Rogers urges the Commission to find that, if it needs to regulate LCDOs at all, "it should do so under section 24." Rogers expresses a preference that any such s. 24 condition "direct carriers to make available their individual proposed plans to the public for a period of time to ensure the gap for lower-cost data-only plans identified by the Commission is closed."8

29. It is clear that Rogers prefers that the Commission make some form of direction under s. 24 rather than revisit its forbearance decisions concerning the retail mobile wireless market. Rogers does not specifically address the difference between a s. 24 order to offer a data-only plan that has been proposed by a NWC to meet the Commission's standard of "lower-cost", on one hand, and the rate regulation that it associates with rolling back forbearance. As noted above, the use of s. 24 in this way seems indistinguishable in practice from retail rate regulation.

30. Bell Mobility agrees with Rogers that the Commission's use of s. 24 conditions would be "less contentious" if it required the NWCs to implement their own proposals for LCDOs, with the "price and other economic aspects of each proposal [being] voluntarily chosen" by each of them. Yet Bell Mobility goes on to point out that a s. 24 requirement:

> *[…] would not be compliant with the (2006) Policy Direction as such regulation would be more intrusive than necessary to achieve the Commission's policy objective …*

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[6] Bureau(CRTC)20Jul18-101, paragraph 33.
[7] PIAC(CRTC)20Jul18-101(iii).
[8] Rogers(CRTC)20Jul18-101 (i).

> *National carriers would honour their commitments in any case, but an imminent review [of the wholesale wireless framework] would ensure that they have every incentive to do so*.[9]

31. In SSi's respectful submission, if the Commission is truly convinced that regulatory action tantamount to retail rate regulation is needed to incent carriers, including the NWCs, to offer LCDO plans, it would be preferable that the CRTC, as Shaw puts it, "consider the efficient and proportionate approach of treating the incumbents' final proposals as unilateral, voluntary offerings."[10] As Bell Mobility notes, this is the least intrusive approach, and thus the most consistent with the Policy Directive.

32. However, we remain very concerned that even this option would encourage the NWCs – the three national carriers with the greatest share of the retail mobile wireless market – to undermine or even preclude competitors and new entrants from innovating by offering data-only plans in markets where the NWCs do not currently perceive demand for this sort of offering.

***The Commission Cannot Regulate Retail Rates Without First Repealing Forbearance***

33. With its RFIs, the Commission sought to expand the record of the TNC 2018-98 proceeding so as to provide evidence for the CRTC's possible assessment of the market conditions associated with LCDO plans for the purpose of conducting an analysis under s. 34 of the Act. The Commission did not take a position on whether or not such an analysis would be necessary in order for it to mandate the provision of LCDOs or impose a price ceiling on LCDO plans.

34. Consistent with our views concerning the appropriate (and accepted) scope of the Commission's jurisdiction under s. 24 to make orders that establish rates or rate ceilings, we believe that the Commission must decide that s. 34 analysis is necessary.

35. Moreover, we believe that the evidence provided in response to the Commission's RFIs is such that the Commission's s. 34 analysis cannot support a finding that its previous forbearance determinations should be reversed. The Commission should not resume exercising its duties under sections 25 and 27(1) of the Act to mandate the NWCs' provision of LCDO plans or to impose a price ceiling on such plans.

36. We note that the RFI itself cites the Competition Bureau's submission that the NWCs enjoy market power in at least some parts of Canada, and that this market power may affect customers for both lower- and higher-capacity retail wireless plans. Shaw and others make

[9] BellMobility(CRTC)20Jul-101 (iii) + (iv).

[10] Shaw(CRTC)20Jul18-201, paragraph 3.

the point that any competition problems in the retail mobile wireless market are lessened "in areas where there is a strong, facilities-based fourth carrier."[11]

37. SSi does not dispute these observations. Our own experience with introducing competitive, facilities-based mobile wireless service in Canada's North makes amply clear that one of the NWCs, Bell Mobility, and its affiliated incumbent local exchange carrier ("ILEC"), exercise market power in the market for wholesale services required to deliver competitive mobile wireless service. This market power can make it challenging to arrange interconnection and access to backbone connectivity in ways and at a price competitive to retail services offered by Bell Mobility.[12]

38. However, whether or not the NWCs exercise market power over interconnection and wholesale arrangements or over retail mobile wireless services, the fact remains that there are plenty of competitors in most parts of Canada, including SSi in Canada's North, offering a wide range of retail services and plans.

39. Competitors clearly evaluate local market demand conditions as they develop their retail offerings. For some of the competitive WSPs that participated in the TNC 2018-98 proceeding, that evaluation supports the offer of data-only plans at various price points.[13] For others, it does not.[14]

40. Parties generally disagreed with the Commission's suggestion that LCDOs ought to be considered a relevant product market for purposes of an assessment under s. 34.

41. The Competition Bureau considered that it had "insufficient evidence" to determine whether LCDOs are a relevant product market. Although it would not rule out that market segmentation might be an appropriate analytical approach, the Bureau noted that the only segmentation it has itself made in past assessments of the market for retail mobile wireless services is one between "all postpaid plans" and prepaid plans.[15]

42. Other parties noted, as we did, that LCDOs are part of the same relevant product market as retail mobile wireless data and voice services.[16] The functionalities that LCDO plans would make available are so similar to other service plans within this broader market that the only characteristic that would affect customers' decisions to substitute a data-only plan for a full-service plan might be a significantly lower price. This is exactly the characteristic that the

[11] Shaw(CRTC)20Jul18-101 (ii), paragraph 12.

[12] See for example SSi(CRTC)20Jul18-205 (revised version).

[13] See, for instance, Shaw(CRTC)20Jul18-205; Vidéotron(CRTC)20Jul18-205. IceWireless indicated that it already offers data-only plans based on its own assessment of its market: IceWireless(CRTC)20Jul18-205.

[14] For example, SSi(CRTC)20Jul18-205 (revised version); Eastlink(CRTC)20Jul18-205. SaskTel indicated that while it currently offers data-only plans, it does not currently intend to adjust those plans or rates in response to the Commission's proposals in TNC 2018-98: SaskTel(CRTC)20Jul18-205.

[15] Bureau(CRTC)20Jul18-101, paragraphs 7-10 and paragraph 5.

[16] See, for instance, SSi(CRTC)20Jul18-101, Shaw(CRTC)20Jul18-101, Vidéotron(CRTC)20Jul18-101, FRPC(CRTC)20Jul18-101; BellMobility(CRTC)20Jul18-101

Commission is considering imposing by regulatory fiat. LCDO plans are a pricing strategy, nothing more.

43. The parties that advocate for Commission-imposed LCDOs provided general arguments that because there is market power in the retail mobile wireless services market, this translates to insufficient competition in the segment that includes LCDOs. PIAC offers a new category of retail wireless service that appears to be the focus of its advocacy in this proceeding: "lower-cost plans with data".[17] The prices at which NWCs and competitors alike offer retail wireless mobile plans that include data allotments may or may not be low enough to appeal to the Canadian consumers that PIAC alleges are being denied access to wireless service under current competitive conditions; but this is not the focus of the Commission's current proceeding. The Commission should reject PIAC's evidence concerning the substitutability of plans without data for plans with data. It is not relevant to the current proceeding.

44. PIAC also offers a novel argument that the Commission's analysis of the retail mobile wireless services market should incorporate a temporal definition, as well as a geographic and product definition. However, by accepting PIAC's invitation to "focus on the wireless markets as they now are [and] avoid speculating about the wireless services which may be offered in future," the Commission would be departing from its regular practice in assessing forbearance conditions. The Commission would also be ignoring the letter of the Act that outlines its jurisdiction. We note that s. 34(2) specifically directs the Commission to refrain from the exercise of its regulatory powers where it 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*" (emphasis added).

45. PIAC advances its argument that the Commission must look only at the state of competition at the moment of assessment – not in the foreseeable future, as the Act directs – so as to convince the Commission that it cannot "rely… on non-binding commitments made by service providers."

46. As we have noted above, it seems that the only path available to the Commission that falls squarely within its jurisdiction and complies with the Policy Direction is exactly the option PIAC dismisses here: to accept the carriers' proposals. The alternative requires the Commission to revise its forbearance determinations concerning the market for retail wireless services, a prospect that is not supported by the evidence in this proceeding – and seems disproportionate to the objective the Commission wants to achieve.

***Mandating the NWCs to offer LCDOs will have Negative Impacts on Competition and Emerging Carriers***

47. Even if ordering the NWCs to offer LCDO plans with a given capacity at or below a set price does result in new product offerings that appeal to certain consumers, we are concerned

[17] PIAC(CRTC)20Jul18-101.

that this selective rate regulation of the retail market will actually undermine the competitive market for wireless services.

48. For one thing, requiring the NWCs to offer LCDO plans everywhere they serve, without regard to local market conditions including the cost of existing wholesale arrangements, could foreseeably foreclose competition and new competitive entry at the lower priced end of the spectrum for retail mobile wireless services. Even where the NWCs do face competition, their introduction of a low-cost option that is substitutable for competitors' retail wireless plans because of a price level that has been set by regulatory fiat is likely to reduce the market share available to competitors.

49. This is especially the case if, as TNC 2018-98 and the Commission's RFIs to the NWCs suggest, the Commission orders the NWCs to make LCDO plans available through their main brands as well as the flanker brands in which they have proposed LCDO options. If the Commission orders the NWCs to offer LCDOs at prices as low as some of those suggested in this proceeding, and if those very low priced LCDOs are offered ubiquitously across the NWCs' networks on their main brands, even the most nimble and efficient competitors and emerging carriers that do not benefit from the NWCs' economies of scale will be able to develop data-only plans or, as PIAC requests, lower-priced plans that include data components, only with great difficulty.[18]

50. Put more plainly: if the Commission mandates the NWCs to offer LCDO plans throughout their networks, even in remote and rural locations where retail mobile wireless service (let alone competitive service in many markets) is only now beginning, there is a strong chance that that new entrants and competitive service offerings will never develop – and this is certainly not a desirable outcome, nor one that will protect consumers' interests.

51. Mandating LCDO plans will reduce both the incentive and the ability of regional carriers and other new entrants in Canada's wireless markets to invest in offering service in remote and rural regions. And even with access to the CRTC's Broadband Fund and other public funding, the fact remains that a new entrant must perceive a viable market opportunity in order to commit the investment in infrastructure and operational capacity required to serve that market.

52. Since the *Telecommunications Act* came into force in 1993, the Commission's approach to giving effect to the telecommunications policy objectives set out in s. 7 of the Act has been to balance them even where they appear to compete. It has not been to order the telecommunications service providers that it regulates to act in a way that "respond[s] to the economic and social requirements" of certain users of those services (s. 7(h)) if by doing so, it will undermine the achievement of objectives such as facilitating the orderly development of Canada's telecommunications system (s. 7(a)).

[18] See for instance the retail prices the Commission asked the NWCs to respond to in [NWC]CRTC20jul18-201.

53. Indeed, mandating the NWCs to offer LCDO plans can upset that balance, to the long-term detriment of wireless development in this country.

***Conclusion***

54. Introducing retail price regulation in a piecemeal fashion, as TNC 2018-98 suggests the Commission is contemplating doing by mandating the NWCs to provide LCDO plans across their networks, is neither necessary nor advisable.

55. The record the Commission has developed in this proceeding demonstrates that where a gap is identified in the retail wireless services market, a wide range of competitors perceive it to be in their interests to offer services that they believe will meet the customer demand that such a gap *may* represent.

56. Selective rate regulation – whether it comes in the guise of a condition of service, pursuant to s. 24, or in the more straightforward form of an order to the three largest players in the market to propose a tariff for a new pricing strategy in the retail markets they serve – risks distorting competitive conditions in a market that incumbents and new entrants alike assess on the assumption that they are free to propose retail packages and options that will appeal to the markets they serve while permitting them to recover their costs.

57. The better course would be for the Commission to complete its review of the wholesale wireless framework and to ensure that it permits newer entrants in Canada's retail markets for mobile wireless services to compete fairly. This course will better serve the interests of Canadians, both in the immediate term and in the future.

All of which is respectfully submitted,

SSi Micro Ltd.

[SGD – DEAN PROCTOR]
Dean Proctor
Chief Development Officer

CC: Jeremy Lendvay, CRTC, jeremy.lendvay@crtc.gc.ca
Sylvie Labbé, CRTC, sylvie.labbe@crtc.gc.ca
Parties to TNC 2018-98 as listed the Commission's letter of August 8, 2018

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