



December 7, 2020

*Filed electronically*

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

**RE: Northwestel Inc. Tariff Notice (TN) 1099 to Introduce Unlimited FTTP Internet Packages:  
Intervention of SSi Canada**

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Dear Mr. Doucet:

1. SSi Micro Ltd., doing business as SSi Canada ("SSi"), opposes the final approval of Northwestel Inc. ("Northwestel") TN 1099.
2. In TN 1099, Northwestel has applied to the Commission for permission to offer new internet packages, including unlimited packages, to residential and business customers that it serves over two specific types of access facilities over which Northwestel exercises a monopoly: coaxial cable, which Northwestel also uses to offer cable television services; and fibre-to-the-premises ("FTTP").
3. On November 13, 2020, in response to the Commission's November 4, 2020 Request for Information, Northwestel filed a Phase II costing study in support of its TN 1099 filing. In order to give parties an opportunity to review the information provided by Northwestel, the Commission extended the period for comment to December 7, 2020.
4. Notwithstanding this extension, the Commission issued Telecom Order 2020-378 on November 24, 2020, granting interim approval to the new internet packages.
5. SSi recognizes the public interest in introducing unlimited internet packages in Canada's North. There is no question that Northerners are, generally, disadvantaged by a digital divide that impedes their ability to participate fully in Canada's digital economy. SSi remains committed to addressing that divide by offering the pricing and service benefits of competitive choice wherever possible in the North.
6. However, TN 1099 has such significant anti-competitive implications that it cannot represent an appropriate way to achieve this goal.
7. Northwestel's provision of the unlimited internet services proposed in TN 1099, is built on not one but two instances of undue preference:

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- **First**, the offer of these services over terrestrial access facilities – cable and FTTP – to which its competitors do not have the access they would require in order to offer competing services of comparable capacity and quality; and
  - **Second**, the limitations inherent in Northwestel’s only wholesale transport service are such that even if competitors had their own access facilities capable of supporting unlimited internet access services, they would not be able to offer competing services of adequate quality or capacity based on transport provided pursuant to the Wholesale Connect tariff.
8. SSi submits that, before the Commission can give final approval to introduction of unlimited internet access packages by Northwestel over cable, FTTP, or any of the access or transport facilities supported by the CRTC Broadband Fund, the Commission must address the undue preference Northwestel establishes for itself by continuing to deny competitors, such as SSi, access on just and reasonable wholesale rates to the same facilities.
9. Accompanying this Intervention, SSi is also filing a Part 1 Application to require Northwestel to develop and file tariffs providing wholesale access to its cable television and FTTP facilities (the “SSi TPIA Application”). In the SSi TPIA Application, we urge the Commission to act on an expedited basis to provide certain remedies to help counter the undue preference that Northwestel is according itself: monopoly control of the only high-capacity terrestrial local access facilities available in either the Yukon or Northwest Territories capable of supporting unlimited internet service.
10. In this Intervention, we propose certain remedies that the Commission must implement in order to begin to counter the undue preference that Northwestel is according itself because of the nature of its Wholesale Connect transport service. In particular, we urge the Commission to impose a significant rate reduction on Northwestel’s Wholesale Connect rates. Whether or not the Commission reduces Wholesale Connect rates, we urge the Commission to immediately make the Wholesale Connect tariff interim in order to permit the Commission to order redress, as we believe it is required to do by the terms of the *Telecommunications Act*.
11. We recognize the public demand for unlimited internet access retail services in Northwestel’s serving territory. Our interest in this proceeding is not to delay the introduction of such services. Rather, we want to ensure that residents of the North continue to have access to the best available mechanism by which the pricing, the service offer, and the availability of such desirable retail services can properly be disciplined: a competitive market.

### ***The Importance of Competition in Canada’s North***

12. As long ago as 2011, the Commission recognized the importance of competition to the people living and working in Northwestel’s serving territory:

*Canadians who reside in the North should be able to enjoy the full benefits of competition. Accordingly, the Commission has decided to introduce local competition in Northwestel's territory to provide a choice of service providers and different service options."*<sup>1</sup>

13. Despite this endorsement, it has proven difficult to establish, build and maintain viable competitive alternatives to Northwestel. In fact, even in the two largest communities in the Western Arctic, Whitehorse and Yellowknife, the choice of internet service providers available to both residential and business consumers has actually continued to go down since 2011.
14. This is not because all competitive ISPs have focused on the resale model, been able to extract value by taking advantage of price differences between markets, or otherwise been able to engage in arbitrage. Rather, as SSi and others have pointed out regularly over the intervening period, it is because Northwestel continues to enjoy a monopoly in the upstream fibre backbone transport and wholesale market, and a dominant position in the downstream retail market. Neither competition nor the regulatory oversight to date has proven adequate to prevent Northwestel from effectively excluding or eliminating its competitors from these markets.
15. The Commission has recognized that competition has not been able to substitute for regulation to discipline Northwestel's retail internet service rates, terms and conditions. As recently as November 9, 2020, the Commission expressed reliance on rate regulation in its determination to grant final approval to Northwestel TN 1084, increasing, on a permanent basis, the usage allowance included in certain residential and business internet packages, offered over digital subscriber line (DSL) as well as cable and FTTP facilities, without any corresponding increase in rates.
16. The Commission noted the anti-competitive effect of TN 1084, but determined that the regulation of retail rates to be comparable to rates in southern Canada would be sufficient to protect the interests of Northwestel's customers:

*The increases in the data packages are an improvement in data allowance and move towards creating a more comprehensive Internet service for most customers, while they pay rates that have already been approved and were found to be just and reasonable. Although the additional data allotment could be perceived as Northwestel providing itself with an undue preference, the Commission addressed this concern in Telecom Decision 2015-78. In that decision, the Commission determined that some of Northwestel's services, including the ones in question in this tariff notice, should be*

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<sup>1</sup> Telecom Regulatory Policy CRTC 2011-771, *Northwestel Inc. – Review of regulatory framework*, 14 December 2011 ("TRP 2011-771"), page 2.

*available to consumers at rates that were more comparable to those available in the South, which resulted in the approval of some rates that are below cost.*<sup>2</sup>

17. With respect, the regulation of retail rates – and in particular, the determination to approve rates for DSL services below Northwestel’s stated cost of providing those services – does nothing to address the undue preference that Northwestel provides itself over its wholesale customers, that is to say its competitors, when the company increases data packages, as it did in TN 1084, or introduces unlimited internet packages as it is proposing to do in TN 1099.
18. Rather, the regulation of these retail rates constitutes an acknowledgement that the Commission has chosen to favour Northwestel’s retail customers over its wholesale customers. The Commission has, in effect, abandoned the commitment it made to “provid[ing] a choice of service providers and different service options” in the internet market.

### ***Commission Evaluation of Northwestel’s Justification for the TN 1099 Rates***

19. When Northwestel filed TN 1099, it provided minimal justification for the new unlimited internet packages, and made no attempt to address the issue of the undue preference the company grants itself with TN 1099.

20. Northwestel offered the following justification for its filing:

*On 12 August 2020, Northwestel was pleased to be awarded \$62M in broadband funding to expand broadband in our serving territory. As part of each of these winning bids for broadband funding, we committed to introduce unlimited Internet service packages not only where we received funding, but also within our cable and FTTP-served footprints as soon as possible. Consistent with this commitment, we are pleased to file today new proposed packages including unlimited Internet service packages for residential and broadband users. ... [W]e are proposing to introduce these new Internet packages without a supporting Phase II cost study effective 2 November 2020.*<sup>3</sup>

21. Following a request from the Commission to file a Phase II cost study or explain why not, Northwestel filed a study on November 13, 2020, that purports to show the rates the company proposed in TN 1099 “meet the price floor test and are just and reasonable.”<sup>4</sup>

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<sup>2</sup> Telecom Order CRTC 2020-370, *Northwestel Inc. – General Tariff – Amendment to terrestrial Internet services*, 9 November 2020, paragraph 32.

<sup>3</sup> “Northwestel Inc. Tariff Notice (TN) 1099 – Introduce Unlimited FTTP Internet Packages”, 14 October 2020, paragraphs 2-3.

<sup>4</sup> Telecom Commission Letter addressed to Stan Thompson (Northwestel Inc.), 4 November 2020; Northwestel Report on the Economic Evaluation for Terrestrial Cable Internet Services, Attachment (Abridged), 13 November 2020, paragraph 9.

22. Without access to the details of Table 2 of the Appendix, most of which Northwestel filed in confidence with the Commission, we cannot assess whether it is true that the rates meet the price floor test. We note that in its first effort to answer the Commission's November 4, 2020 request for information, Northwestel asserted the following:

*[W]e attest that the proposed rates pass the price floor test. Further, as part of the work in developing the supporting cost study, we assessed the impact of imputing Wholesale Connect rates and determined that the proposed rates for unlimited Internet packages would continue to meet the price floor test if Wholesale Connect were imputed for the transport element.<sup>5</sup>*

23. Again, without access to the data, we must rely on the Commission's own analysis to assess the veracity of these statements. However, the statements do not address the fundamental point we are making in this Intervention. Even if the Phase II cost study were based upon the imputation of Wholesale Connect rates, this would not address the undue preference that Northwestel is providing itself by introducing the TN 1099 unlimited internet packages. The fact is that a competitor that must rely upon Wholesale Connect service for transport cannot offer an unlimited internet package to compete with Northwestel's proposed TN 1099 packages – at any price.

***The Commission's Responsibility to Prevent Unreasonable Discrimination Does Not End with Rate Tests***

24. Although the Commission has come to rely upon tests such as the price floor test to assess whether incumbent rates are just and reasonable, we note that this does not fully discharge the Commission's statutory responsibility with respect to services offered by the incumbents.
25. That responsibility is set forth in s. 27(2) of the *Telecommunications Act*:

*27 (1). Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.*

*27(2). No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.*

26. It is clear from the use of the disjunctive "or" in s. 27(2) that an undue preference might arise, not only from the *rate* that a Canadian carrier charges, but also from the circumstances in which that carrier provides the telecommunications service in question.
27. The Commission has clearly acknowledged that the tools applied to evaluate whether rates are just and reasonable do not themselves conclusively resolve all questions of whether discrimination in the

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<sup>5</sup> NWTel(CRTC)4Nov20-2.

provision of a service is unjust. In Telecom Regulatory Policy 2009-80, the Commission described the purpose of the floor test:

*The Commission concludes that the price floor test establishes a minimum price threshold to ensure that rates are just and reasonable and not unjustly discriminatory. **The Commission also concludes that the price floor test guards against certain anti-competitive pricing**, in order to facilitate the development of sustainable competition.<sup>6</sup>*

28. In assessing whether a proposed rate is “just and reasonable”, the Commission naturally looks beyond whether the rate meets established cost criteria to examine whether the terms of offer are such that the rate represents reasonable value for the customer.
29. For example, the origins of Northwestel’s Wholesale Connect service itself reflect a determination by the Commission that, contrary to SSi’s own assessment of our requirements, our need for transport service could be satisfied with the service that Northwestel proposed. The Commission made similar rulings in response to requests by Ice Wireless Inc. and Iristel Inc., Allstream Inc., and TELUS Communications Corp.<sup>7</sup>
30. In the present case, we urge the Commission to look beyond the rate that Northwestel is proposing to charge, whether or not it meets the price floor test, and even whether Northwestel’s November 11, 2020 claims concerning the impact of imputing Wholesale Connect rates have upon the Phase II cost study of the TN 1099 rates.
31. The floor test was not designed to identify flaws inherent in the design of a wholesale service that have the effect of according to the incumbent an undue preference and of unreasonably disadvantaging its competitors.
32. Northwestel is clearly and improperly according itself an undue preference by limiting wholesale customers to the capabilities of Wholesale Connect for the transport services necessary to support competing retail internet services.

### ***Wholesale Connect Service Cannot Support Competitive Unlimited Internet Service***

33. For a competitor to attempt to offer unlimited retail internet service using facilities with very limited and/or costly capacity requires the service provider to do one of three things: offer unlimited usage on an unacceptably congested network, thereby reducing the accessibility and quality of the service for end-users; drastically slow down transmission speeds to reduce consumption of data; or price the service at

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<sup>6</sup> Telecom Regulatory Policy CRTC 2009-80, *Review of the price floor test and certain wholesale costing methodologies*, 19 February 2009, paragraph 12 (emphasis added).

<sup>7</sup> Telecom Regulatory Policy CRTC 2013-711, *Northwestel Inc. – Regulatory framework, modernization plan, and related matters*, 13 December 2013 (“TRP 2013-711”), paragraph 159-177.

such a high level that only very limited consumer uptake can occur . All techniques result in either reduced quality or unacceptably expensive service to the end-user – and, ultimately, to unhappy end-users.

34. TN 1099 does not address how Northwestel is going to accommodate unlimited use on its transport facility, which presumably does have some capacity limitations. Nor does it explain what transport facilities Northwestel will use to support its proposed terrestrial unlimited internet service.
35. However, what is clear is that a competitor reliant upon Wholesale Connect service could not offer “unlimited” retail internet packages with an acceptable quality of service at a price that is even remotely competitive with the TN 1099 offerings.
36. When Northwestel first introduced Wholesale Connect, SSi requested that the Commission require changes to the service as filed to render it a reliable backbone service for a wholesale customer itself responsible to end-users for service quality. Among these changes were the introduction of a 1 Gbps speed tier, thereby offering higher capacity, and the provision of technical parameters in Service Level Agreements (“SLAs”) more appropriate for wholesale customers. The significance of SLAs is that, in addition to specifying performance and service availability targets, these agreements specify penalties for failure to meet the targets.
37. Although the Commission required Northwestel to carry out its commitment to assess whether there was sufficient demand for a 1 Gbps speed tier, the service as approved did not provide for this capacity of service at an attractive price.
38. With respect to SSi’s request for wholesale-level SLAs, the Commission ruled that SSi had not justified its request to modify the SLAs from those that apply to similar services Northwestel offers on a retail basis. Northwestel was permitted to offer this vital wholesale service subject to retail-level SLAs, thereby leaving a wholesale customer without redress if the underlying transport service failed to support the needs of the customer’s end-users.<sup>8</sup>
39. Without appropriate SLAs, and with the final approved rates for Wholesale Connect such that it would be impossible for a competitor to secure sufficient speed and capacity (speed tiers) at a price that permits the competitor to offer equivalent unlimited internet packages at a comparable price, it is clear that, whatever Northwestel’s assertion concerning the result of imputing the Wholesale Connect rates in its cost study, the reality is that the Wholesale Connect service is not an appropriate backbone from which to offer unlimited internet packages.

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<sup>8</sup> TRP 2013-711, paragraphs 160 to 165.



40. Therefore, by offering unlimited internet packages as proposed in TN 1099, Northwestel is according itself an undue preference.

***Resolution of These Issues Cannot Await the Proceeding Initiated by TNC 2020-367***

41. In filing this Intervention and the SSi TPIA Application, we are aware that the Commission recently initiated its long-delayed proceeding to review the regulatory framework applicable to Northwestel and issues affecting the state of telecommunications in Canada's North, including whether additional regulatory measures are required to further foster competition in the North (Telecom Notice of Consultation CRTC 2020-367, *Call for comments – Review of the Commission's regulatory framework for Northwestel Inc. and the state of telecommunications services in Canada's North*, 2 November 2020, referred to herein as "TNC 2020-367").

42. In view of the urgency of the public interest in unlimited internet access packages in Canada's North, we submit that the Commission should establish the conditions precedent to Northwestel's offer of such services well in advance of the conclusion of the proceeding initiated by TNC 2020-367.

43. We note that the Commission has stated its intention to conduct the TNC 2020-367 review proceeding in two phases, including a public hearing (TNC 2020-367, paragraph 6). While we respect the Commission's determinations concerning its own process and its desire to conduct a thorough review of the issues, we are concerned that deferring consideration of the unreasonable discrimination Northwestel is according itself in TN 1099 will actually delay progress towards the goal of closing the digital divide in Canada's North.

44. More crucially, we submit that permitting Northwestel to implement TN 1099, or any other service or package introduction that, like TN 1099, does not comply with stringent safeguards intended to prevent Northwestel from granting itself an undue preference including the conditions precedent we propose in this intervention, will have the irrevocable and undesirable effect of eliminating internet competition, and existing competitors, long before the Commission can conclude its examination of the state of competition in the North.

***Remedy Sought***

45. As noted, the Commission already granted Northwestel permission to introduce its proposed unlimited internet packages on the basis of interim approval of TN 1099 as filed.<sup>9</sup>

46. With Northwestel reportedly rolling out this highly desirable retail service, the Commission has relatively limited options for redressing the undue preference and unreasonable discrimination inherent in this tariff filing.

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<sup>9</sup> Telecom Order CRTC 2020-378, *Northwestel Inc. – Interim approval of a tariff application*, 24 November 2020.



47. SSi respectfully suggests that the only way to redress this undue preference is to implement the following three measures in the earliest possible timeframe:
- a. Approve the SSi TPIA Application so that competitors have access to Northwestel's cable and FTTP facilities, including the proposal to establish interim rates for that service at a significant discount from the retail rates Northwestel has proposed in TN 1099;
  - b. Reduce the approved rates for Wholesale Connect service by a significant margin, starting at 40%, so as to permit competitors reliant on this transport service to purchase sufficient capacity to be able to compete in the design and offering of unlimited internet packages to their own end-customers; and
  - c. In any event, and independent of (a) and (b), make the Wholesale Connect rates, terms and conditions interim so that when the Commission is able to complete its adjudication of these matters, options exist for adjusting the service from a date relatively close to Northwestel's introduction of the TN 1099 services.

All of which is respectfully submitted.

SSi Canada

[SGD – DEAN PROCTOR]

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enc. SSi Part 1 Application to Require Northwestel to Provide Third-Party Internet Access

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