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Framework for assessing the differential pricing practices of Internet service providers

In order to provide clarity to stakeholders, including consumers, content providers, and Internet service providers (ISPs), the Commission establishes a framework and sets out the evaluation criteria it will apply to determine whether an ISP's specific differential pricing practice is or is not consistent with subsection 27(2) of the Telecommunications Act.

In this decision, the term “differential pricing practice” refers to the zero-rating or discounting of retail Internet data traffic. Practices associated with ISPs' own managed Internet protocol networks are not included in the analysis and determinations set out in this decision.

The evaluation criteria are the following:

- *the degree to which the treatment of data is agnostic (i.e. data is treated equally regardless of its source or nature);*
- *whether the offering is exclusive to certain customers or certain content providers;*
- *the impact on Internet openness and innovation; and*
- *whether there is financial compensation involved.*

Of these criteria, the degree to which the treatment of data is agnostic will generally carry the most weight. In any evaluation, the Commission will also consider whether there are any exceptional circumstances that demonstrate clear benefits to the public interest and/or minimal harm associated with a differential pricing practice.

The differential pricing practices framework supports the freedom of consumers and citizens to access the online content of their choice without being unduly influenced by the marketing strategies and pricing decisions of ISPs with respect to the transmission of specific content. It also supports the ability of all content providers to innovate and encourages ISPs to compete and innovate based on the capabilities of their networks, as

well as to offer a range of speed- and volume-based data packages to provide better choices to Canadian consumers.

The issue of differential pricing practices is part of the broader public policy discussion on net neutrality. In this context, this decision, together with the Internet traffic management practices framework, the Mobile TV decision, and the decision regarding Videotron's Unlimited Music program, effectively comprise the Commission's policy framework for net neutrality.

Background

1. The Internet has become a critical resource in modern life as a way to connect to a vast array of information, services, news, entertainment, culture, social media, and other content. It plays a central role in the modern economy as a source of innovation and an engine of growth, and in modern democracy to facilitate discourse, engagement, and political organization. It connects and engages people, communities, and businesses from around the world in ways that were not possible a few decades ago. In short, the Internet has transformed the world profoundly in a very short amount of time.
2. In Telecom Regulatory Policy 2016-496, the Commission established the universal service objective that all Canadians should have access to voice services and broadband Internet access services on fixed networks and mobile networks. The Commission set the following specific objectives: speeds for fixed broadband services of at least 50 megabits per second (Mbps) download and 10 Mbps upload; an unlimited data option for fixed broadband services; and the latest mobile wireless technology being available not only to all homes and businesses, but also on as many major Canadian roads as possible. The Commission established a fund of up to \$750 million over a five-year period to help achieve the universal service objective.
3. Internet service providers (ISPs)¹ provide retail Internet access services and are thus uniquely situated as the link between Canadians and the online world. ISPs have control over the speed of a customer's Internet connection, which is measured in bits per second. They also set the allowable monthly volume limit, measured in bytes, for their customers' data plans (commonly referred to as a data cap or data allowance). Customers who exceed this limit typically incur additional charges.
4. As a result of the current growth in data consumption, ISPs in Canada and around the world are, not surprisingly, adopting various practices to leverage their networks and differentiate their services from those of their competitors in order to attract and retain customers. Speed and volume, together with price, are the main differentiators ISPs use to establish their various retail Internet plans.

¹ In the context of this decision, ISPs are service providers that offer retail Internet access services over wireline or wireless networks, including the commercial mobile networks operated by wireless service providers.

5. One practice that has emerged among ISPs in recent years is differential pricing, which occurs when the same or a similar product or service is sold to customers at different prices, such as in the context of a sale, a discount, or a promotion. In general, differential pricing, in and of itself, is not necessarily a cause for concern. However, the retail Internet access market's importance and its unique attributes highlight differential pricing as a potential legal, regulatory, and public policy concern.
6. An example of a differential pricing practice related to Internet data plans is the zero-rating or discounting of data traffic, where data from a certain source (e.g. a particular website or application) is discounted or not counted at all against a customer's monthly data cap, while all other data is counted against the cap.
7. Another example of differential pricing is sponsored data, which occurs when a third-party content provider² enters into an arrangement with an ISP to provide its content or application to consumers without charging them for the associated data. The ISP agrees to zero-rate the data associated with the content or application within a consumer's data plan and is compensated by the content provider, who agrees to cover the cost of the data charges.
8. Differential pricing practices can be agnostic or non-agnostic in nature, with respect to their content. With agnostic practices, the transmission of all data is given equal treatment as part of a particular offering, such as a time-of-day offering that zero-rates the transmission of all data traffic for a particular period during the day. Non-agnostic practices zero-rate particular data but not other data.
9. For the purposes of this decision, the term "differential pricing practice" refers to the zero-rating (or discounting) of retail Internet data traffic, regardless of whether or not the data is sponsored and whether the practice is agnostic or non-agnostic. Practices associated with ISPs' own managed Internet protocol (IP) networks are not included in the analysis and determinations set out in this decision.³
10. Contextually, the issue of differential pricing is part of the broader public policy discussion on net neutrality.⁴ The general concept of net neutrality is that all traffic on the Internet should be given equal treatment by ISPs. In other words, there should be no manipulation, preference, or discrimination, either through technical or economic means.

² For the purposes of this decision, the term "content provider" refers to any entity that provides content or applications on the public Internet, such as websites, audiovisual services, etc. Synonymous terms include "edge provider" and "application provider."

³ In other words, this decision does not apply to the various practices, offerings, and arrangements (typically between ISPs and other businesses) that support certain applications, such as some "Internet of Things" applications, which make use of managed IP networks rather than the public Internet.

⁴ Other terms that are sometimes used interchangeably with "net neutrality" include "Internet neutrality" and "open Internet."

11. Other commonly held tenets of net neutrality include: (a) innovation without permission, which means that content providers are free to innovate, grow, and develop as they see fit without having to conform to an ISP's requirements; (b) consumer choice, meaning that users are able to choose what they want to consume without interference; and (c) low cost of innovation, which has enabled such entrepreneurial activity as content providers entering the market and competing regardless of size. Net neutrality principles have been instrumental in enabling the Internet to grow and evolve as it has.
12. The Commission has in past decisions examined issues related to net neutrality pursuant to its mandate under subsection 27(2) of the *Telecommunications Act* (the Act) to address matters of undue preference and unjust discrimination in the provision of telecommunications services. Subsection 27(2) states: "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."
13. In 2009, the Commission established a framework to govern the Internet traffic management practices (ITMPs) of ISPs (the ITMP framework),⁵ mainly to address concerns that ISPs were engaging in unwarranted traffic management practices, such as throttling.⁶ In 2010, that framework was extended to apply to the use of mobile wireless data services to provide Internet access.⁷ The Commission encouraged ISPs to invest in their networks as a first step in alleviating congestion. The ITMP framework recognized that ISPs have a legitimate need to manage network traffic to avoid network congestion, but that these practices should be transparent to consumers. In addition to placing disclosure requirements on ISPs, the Commission established a set of criteria it would apply to assess whether an ITMP about which it had received a complaint violated subsection 27(2). A key theme of that framework was ensuring that the Internet remained an environment that fostered innovation.
14. More recently, in Broadcasting and Telecom Decision 2015-26, the Commission found that Bell Mobility Inc. (Bell Mobility) and Quebecor Media Inc., Videotron Ltd., and Videotron G.P. (collectively, Videotron) had violated subsection 27(2) of the Act by exempting their respective mobile TV services from data charges (in other words, zero-rating) (the Mobile TV decision). Both companies were no longer permitted to continue this practice.
15. So, while there is no all-encompassing Commission decision or regulatory framework on the broad issue of net neutrality, when the various legislative and regulatory elements are put together – including subsection 27(2), the ITMP

⁵ See Telecom Regulatory Policy 2009-657.

⁶ Throttling refers to the practice of an ISP slowing down the speed of an Internet connection.

⁷ See Telecom Decision 2010-445.

framework, and the Mobile TV decision – the meaning of net neutrality in the Canadian context is clear. The current proceeding is about adding another perspective to Canada’s net neutrality framework.

Proceeding

16. This proceeding stems from two separate complaints the Commission received concerning the billing practices employed by Videotron in the provision of its Unlimited Music program. The applicants argued that the program, which is a promotion whereby music streamed from certain online music providers is not counted against the data cap for subscribers with certain data plans, is a differential pricing practice that is unjustly discriminatory and violates subsection 27(2) of the Act.
17. In light of those complaints and the Mobile TV decision, it has become clear that differential pricing practices are occurring in Canada and have the potential to become more prevalent in the future. As such, the Commission decided to examine the policy issues surrounding the use of differential pricing practices by Canadian ISPs, in particular the zero-rating of certain data traffic, and to establish a clear and transparent regulatory approach to govern these practices.
18. To that end, in order to assist it in determining which differential pricing practices, if any, raise concerns under subsection 27(2) of the Act, the Commission issued Telecom Notice of Consultation 2016-192, in which it sought comments on several issues to address the following overarching policy questions:
 - What are the benefits and concerns associated with differential pricing practices, and do the concerns outweigh the benefits such that regulatory intervention is justified?
 - What regulatory measures, if any, should the Commission implement regarding differential pricing practices?
19. A large number of parties participated in the proceeding, including ISPs, content providers, consumer groups, and individuals. The Commission also created a reddit forum to enable individuals to comment. The public record of this proceeding, which closed on 23 November 2016, is available on the Commission’s website at www.crtc.gc.ca or by using the file numbers provided above.
20. Concurrently with this decision, the Commission is issuing Telecom Decision 2017-105, in which it sets out its determinations on the complaints it received regarding Videotron’s Unlimited Music program.

Issues

21. The Commission has identified the following issues to be addressed in this decision:

- Assessment of differential pricing practices under subsection 27(2) of the Act
- Differential pricing practice framework and evaluation criteria
- Application of section 36 of the Act to differential pricing practices
- Consideration of interventions received regarding data caps and the ITMP framework

Assessment of differential pricing practices under subsection 27(2) of the Act

22. Telecommunications common carriers⁸ that are subject to the legislative authority of Parliament are regulated under the Act. The prohibition against unjust discrimination and undue or unreasonable preference or disadvantage in subsection 27(2) of the Act is a core component of the legislative and regulatory framework applicable to such telecommunications common carriers. In this regard, Parliament has determined that ISPs that are telecommunications common carriers are held to, and are required to comply with, a more stringent standard than businesses in other industries or sectors that may employ differential pricing practices.
23. The purpose of this decision is to provide clarity and guidance to the industry and consumers as to how the Commission will generally apply subsection 27(2) of the Act in the context of differential pricing practices. To that end, the Commission has examined the potential impacts of such practices with regard to key components of the telecommunications policy objectives set out in section 7 of the Act⁹ and whether there are any mitigating circumstances that ought to be considered as part of the analysis.

⁸ The Act defines a telecommunications common carrier as “a person who owns or operates a transmission facility used by that person to provide telecommunications services to the public for consumption.”

⁹ The policy objectives are as follows; of particular importance in this case are the objectives in paragraphs 7(a), (b), (c), (g), and (h): 7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; (d) to promote the ownership and control of Canadian carriers by Canadians; (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada; (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services; (h) to respond to the economic and social requirements of users of telecommunications services; and (i) to contribute to the protection of the privacy of persons.

Do differential pricing practices, in general, result in a preference or disadvantage under the Act?

24. As a first step in an analysis under subsection 27(2) of the Act, the Commission must examine whether the conduct of a Canadian carrier results in discrimination, confers a preference toward a person, or subjects any person to a disadvantage.

Positions of parties

25. Parties opposed to differential pricing practices argued that they lead to a preference toward certain subscribers and content providers over others, and they put those not able to participate in the practice at a disadvantage.
26. Parties that supported such practices, including Videotron, did not generally dispute that there may be an advantage for some subscribers and content providers, but they refuted the allegation that the advantage would be undue. Videotron argued that wireless service providers (WSPs) like itself must adopt new strategies to improve and differentiate their services in order to attract new customers.

Commission's analysis and determinations

27. As previously determined in the Mobile TV decision, the functions performed by ISPs to establish data connectivity and provide transport over their networks are the same regardless of whether the content being transported is part of a differential pricing practice or not. More generally, in the case of the differential pricing practices at issue in this proceeding, which exempt access to certain content from standard monthly data caps, the ISP is providing the same retail Internet access service to its customer, whether or not the content is zero-rated. However, the differential pricing practice results in a difference in cost to the consumer to access the zero-rated content compared to other content accessed over the Internet that is not zero-rated. This cost differential can be significant, depending on the volume of data consumed, and may influence behaviour.
28. Consumers therefore typically have a strong economic incentive to access zero-rated content or applications rather than other content that is subject to standard data charges. As a consequence, the differential pricing practice confers a preference upon certain content providers over others and subjects providers whose content is not zero-rated to a disadvantage.
29. Differential pricing practices have generally been offered only to subscribers with high-tier data plans, which tend to be the ISPs' more expensive plans, and have not been made available to other subscribers. In these circumstances, such practices result in a preference or advantage for subscribers whose plans qualify for access to the zero-rated content or application, as compared to those whose plans do not qualify. In addition, differential pricing practices give a preference to subscribers who value or are interested in the selected content, as opposed to subscribers who may prefer other content that is not zero-rated or those who are unable to make use of the content, for example due to a disability. This type of preference would exist

even for a time-of-day differential pricing practice, which can prefer certain subscribers and content based on the time that content can be accessed.

30. Accordingly, differential pricing practices, generally speaking, result in (a) a preference toward certain subscribers over others, (b) a preference toward certain content providers over others, (c) a disadvantage to subscribers who are not eligible for, or interested in, a differential pricing practice offering, and (d) a disadvantage to content providers that are not eligible for, or included in, an offering.

Do differential pricing practices generally raise concerns of undue or unreasonable preference or disadvantage?

31. A preference or a disadvantage in and of itself is not contrary to the Act; an examination as to whether there is a violation of subsection 27(2) of the Act would require a determination as to whether any preference or disadvantage is undue or unreasonable. When the Commission receives a complaint, pursuant to subsection 27(4) of the Act, the burden of establishing that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that gives the preference or subjects the person to the disadvantage.

What are the impacts of differential pricing practices?

32. The Commission has considered the impacts that differential pricing practices generally have with regard to the following key components of the telecommunications policy objectives, which were discussed on the record of this proceeding and which the Commission considers to be relevant in an examination of such practices pursuant to subsection 27(2) of the Act:
 - competition;
 - innovation;
 - consumer choice;
 - access and affordability; and
 - privacy.

Competition

33. Supporters of differential pricing practices, including many ISPs, argued that these practices represent an opportunity for ISPs and content providers to compete in the market by catering to the different needs of consumers. They also submitted that differential pricing practices give ISPs a way to differentiate themselves in the market, to expand their customer base, and ultimately to help drive investment and economic growth. For these parties, differential pricing practices are a sign of normal, healthy market activity.

34. For instance, TELUS Communications Company (TCC) submitted that differential pricing practices allow carriers to attract more customers, spread their costs over a larger customer base, and reduce prices. However, TCC cautioned that vertically integrated firms that zero-rate their own affiliated content have strong incentives and significant opportunity to stifle innovation and consumer choice, further entrenching their market power.
35. Likewise, Shaw Cablesystems G.P. (Shaw) indicated that differential pricing practices are examples of innovation and competition at work; it cited Unlimited Music as an example of a wireless competitor making efforts to distinguish itself from incumbent wireless carriers.
36. Those who opposed differential pricing practices argued that they reflect a lack of competition in a highly concentrated market controlled by a small number of vertically integrated ISPs. These parties submitted that differential pricing practices are anti-competitive and cause market distortions that extend not only to the provision of Internet access services, but also to the specific content or services that are selected for inclusion in or have been excluded from the differential pricing practice offering.
37. For example, l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) and the Independent Broadcast Group/Le groupe de diffuseurs indépendants (IBG/GDI) submitted that differential pricing practices could have a negative effect on the creation of cultural content, as they tend to advantage large, well-established content providers. These parties indicated that differential pricing practices could create a barrier to entry and additional costs for content providers by requiring them to negotiate separate arrangements with various ISPs. Professor Barbara van Schewick submitted that allowing ISPs to zero-rate selected applications would systematically increase barriers to entry and the cost of innovation, make it more difficult for start-ups and small businesses to compete, and marginalize certain voices.
38. Several parties, including those for and those against differential pricing practices, used international examples to support their arguments concerning the impacts of these practices on competition and other factors.

Commission's analysis

39. With respect to the international evidence submitted by various parties regarding differential pricing practices, it is difficult to draw meaningful direct comparisons between the Canadian market and markets in other countries, given that there are fundamental differences between telecommunications markets around the world, such as the legislative framework, the regulatory landscape, the competitive environment, the maturity of the market, penetration rates, technological developments, cultural factors, and consumer behaviour.

40. The Canadian retail Internet access service market is highly concentrated, with a handful of large ISPs holding approximately 85% of the revenue market share.¹⁰ Many of these large ISPs are also vertically and/or diagonally integrated,¹¹ holding broadcasting and other content-producing assets. Thus far, only two of the largest ISPs (Bell Canada through its affiliate Bell Mobility and Videotron) have offered content-specific differential pricing practices, and most of the others, including Bragg Communications Inc., carrying on business as Eastlink (Eastlink), Cogeco Communications Inc. (Cogeco), Shaw, and TCC, largely support allowing such practices. There are no examples of small ISPs offering content-specific differential pricing practices in Canada.¹²
41. Based on the record of this proceeding, the investment required to offer differential pricing practices can be in the millions of dollars.¹³ This situation, coupled with the fact that no small ISPs have offered content-specific differential pricing practices, suggests that such practices are more likely to be implemented by large, established ISPs that already have strong market positions.
42. In addition, differential pricing practices are likely to have negative competitive impacts on content providers. The record demonstrates that these practices tend to be offered to popular and well-established content providers, since these entities and their brands are likely to be familiar and desirable to consumers from a marketing perspective. Other content providers may have difficulty gaining access to such programs or may have to wait a long time before being granted access,¹⁴ which could increase the barriers to their entry into the market, increase their costs of offering services, and compromise their market positions in relation to their competitors.
43. Content providers could also be faced with having to negotiate separate differential pricing practice agreements with many different ISPs if they want their services to be accessible to as many Canadians as possible. Such agreements might be out of reach for small content providers and would again favour more established ones. This type of situation would be exacerbated in the case of sponsored data

¹⁰ See the Commission's *Communications Monitoring Report 2016*. The largest ISPs include Bell Canada, Cogeco, Eastlink, Rogers Communications Inc. (Rogers), Saskatchewan Telecommunications, Shaw, TCC, and Videotron.

¹¹ Diagonal integration generally refers to arrangements or partnerships between companies to improve access to consumers and to achieve economies of scale and scope.

¹² There is, however, evidence of small ISPs, such as Xplornet Communications Inc., offering content-agnostic differential pricing practices in the form of time-of-day pricing.

¹³ For example, during the oral hearing phase of the proceeding, Rogers referred to the costs of implementing differential pricing practices. Videotron provided its implementation costs in confidence on 4 November 2016.

¹⁴ For example, the average time from contact to implementation for Videotron's Unlimited Music program was 5.5 months. As of November 2016, ongoing negotiations to include other services in the program had been underway for an average of 8.1 months, without any result.

arrangements, in which large content providers with significant financial resources compensate ISPs for preferential treatment of their data traffic, thereby creating a barrier to entry for smaller content providers that do not have the same financial resources or negotiating leverage.

44. Differential pricing practices enable ISPs to differentiate their marketing offers from those of their competitors. They can be attractive for some consumers, as they provide discounted data for certain content and a measure of predictability with respect to data consumption and any corresponding charges.
45. While it has been argued that differential pricing practices promote competition, in the Commission's view, the impact of such practices on competition would generally be negative in both the retail Internet access services market and the various content markets, as well as for Canadian consumers. In the long term, this negative impact could extend or entrench the already favourable market positions of large, established ISPs and content providers, and could prevent or limit competitive activity by smaller players, which would be detrimental to consumers.
46. The Commission considers that competition in the retail Internet access services sector is best served, and the telecommunications policy objectives set out in the Act are best achieved,¹⁵ when ISPs compete and differentiate their services based on their networks and the attributes of the services on those networks, such as price, speed, volume, coverage, and the quality of their networks.

Innovation

47. Proponents of differential pricing practices submitted that they are innovative and add benefits to the services offered to consumers without threatening net neutrality. These parties generally argued that prohibiting such practices would involve a significant risk of stifling innovation, undermining benefits to consumers, and negatively impacting consumption, innovation, and freedom of expression.
48. For example, Bell Canada argued that innovation need not be based on technologies but can also be based on processes, business models, or marketing improvements, and that differential pricing practices such as zero-rating and sponsored data fall into the latter category.
49. Those who oppose differential pricing practices argued that they do not represent innovation in telecommunications services and actually hinder innovation in Internet application services by artificially selecting particular products and technologies, and preventing new products from developing.
50. For example, OpenMedia submitted that the ability of Internet users to participate in online creation and innovation-fuelled or -fuelling activities could be limited or

¹⁵ In particular, the objectives set out in paragraphs 7(a), (b), (c), (f), (g), and (h)

compromised if the behaviour of these users is guided by factors extrinsic to the substance and merit of online applications and activities themselves.

51. Professor van Schewick submitted that differential pricing practices would end the era when entrepreneurs are free to innovate without permission, which is a core net neutrality principle that has fostered innovation up until now.
52. Vaxination Informatique noted that innovation in telecommunications is about deploying a new technology that has greater speeds and greater capacity at lower prices; it is not about marketing someone else's innovation as part of your service.

Commission's analysis

53. While the development of the underlying technologies that permit the creation and implementation of differential pricing practices can be innovative, to the extent that differential pricing practices introduce a new type of promotional offering, the practices themselves are simply a marketing tool.
54. The Commission considers that differential pricing practices do not represent innovation in the provision of telecommunications services; they do not involve making new, improved, or different products, services, or technologies available to consumers. Rather, such practices essentially constitute a marketing strategy and occupy resources that could otherwise be directed toward network innovation and investment by ISPs.
55. Furthermore, differential pricing practices that favour particular services, technologies, or content would, in general, negatively affect innovation for several reasons.
56. First, as discussed above, differential pricing practices can be expected to favour large, established, and popular application providers, since ISPs are more likely to use popular services to attract and retain customers. New and small content providers may not have the same popularity as large and established content providers and would therefore be at a significant disadvantage, which could compromise their ability to enter and succeed in the marketplace. A significant source of innovation on the Internet comes from start-up companies using new ideas and disruptive technologies. If it were more difficult for these companies to enter the market, the innovation they might bring would be delayed or compromised, or would not materialize at all. Many of today's large, established content providers began as small companies and were able to innovate and grow their brands and businesses due in large part to the open nature of the Internet, operating and competing in an environment where differential pricing practices such as zero-rating did not occur to any great extent. In the Commission's view, new and small content providers should enjoy the same degree of Internet openness in order to innovate, compete, and grow their businesses.
57. Second, the record of this proceeding indicates that in order to participate in a particular differential pricing practice, content providers must often meet certain

technical criteria specified by ISPs. In some cases, meeting the requirements of multiple ISPs could be resource intensive, complex, burdensome, and time-consuming for content providers, particularly small ones. For example, as IBG/GDI argued, given that there are many ISPs operating across Canada, a content provider could have to conform to several different sets of technical specifications, and negotiate multiple agreements with ISPs, if it wanted to serve all of Canada. In the Commission's view, this situation could have the effect of diverting a content provider's resources from innovating and developing its core offerings to complying with technical specifications and negotiating with multiple ISPs.

58. In light of the above, the Commission considers that content-specific differential pricing practices generally do not encourage innovation in the provision of telecommunications services and are actually more likely to have a negative effect. Accordingly, these types of practices are generally inconsistent with the Canadian telecommunications policy objective set out in paragraph 7(g) of the Act.
59. Rather than implementing marketing practices such as zero-rating, ISPs in the retail Internet access services market should focus on innovating by enhancing, for example, the speed, coverage, capacity, security, and reliability of their existing networks, for the benefit of Canadians. The development of telecommunications networks is the best approach to achieving the policy objectives set out in paragraphs 7(a), (b), (c), (f), (g), and (h) of the Act.

Consumer choice

60. Proponents of differential pricing practices submitted that they benefit consumers by giving them access to more choice at lower cost and responding to their particular needs and wants. Bell Canada and Shaw both filed market research studies showing that the majority of Canadians have positive or neutral impressions of zero-rating and do not support banning such practices.
61. TCC indicated that consumers have a choice of whether to subscribe to plans that have a differential pricing component and that a consumer with no interest in a differential pricing practice will likely subscribe to a plan without that feature.
62. OpenMedia argued that the Commission must ensure that access and content remain structurally and conceptually distinct in order to preserve the functional integrity of access while protecting users' freedom of choice in content.
63. Professor van Schewick submitted that the differential treatment of applications directly translates into changes in consumer behaviour and that many zero-rated plans actually limit the ability of consumers to make meaningful choices among competing applications.
64. The overwhelming majority of individual parties expressed the view that over the long term, differential pricing practices would negatively impact consumer choice because they would allow ISPs to act as gatekeepers by selecting which content is zero-rated or discounted. Consumers were also concerned that differential pricing

practices give ISPs an incentive to keep data caps low. While some of these parties acknowledged that differential pricing practices have the potential for short-term benefits, such as the availability of extra data for consumers or as a means of differentiating the services of ISPs, they indicated that these benefits would be outweighed by the long-term consequences.

Commission's analysis

65. While some parties argued that differential pricing practices might expose consumers to new content that they might not have known about or accessed if the data associated with that content were not discounted, these practices do not make new content or services available to consumers and do not add to the choices that are available to consumers online. They merely serve to entice consumers to access the content of providers selected by ISPs.
66. Although Bell Canada and Shaw claimed that their market research studies indicated that the majority of consumers surveyed found differential pricing practices to be beneficial and supported the Commission allowing them, nearly all the consumers who participated in this proceeding, either as individual parties, through OpenMedia,¹⁶ or through the reddit forum,¹⁷ were opposed to such practices because of their long-term consequences.
67. The Commission considers that any short-term benefits of differential pricing practices would be greatly outweighed by the negative long-term impacts on consumer choice if ISPs were to act as gatekeepers of content through their use of such practices. Ultimately, differential pricing practices are likely to result in ISPs having arrangements with only a small handful of popular, established content providers – those with strong brands and large customer bases. This situation, coupled with the significant financial incentives for consumers to access zero-rated or discounted content, would effectively steer consumers toward content chosen by the ISP. In the Commission's view, this outcome would not be consistent with the policy objectives set out in paragraphs 7(a) and (h) of the Act.

Access and affordability

68. Some proponents of differential pricing practices, such as Bell Canada, the Centre for Democracy and Technology, Facebook, Ms. Roslyn Layton, Sandvine Incorporated (Sandvine), and Shaw, submitted that such practices could facilitate access to the Internet and/or certain applications for some people, such as those with low income or those with disabilities. Other parties, including consumer groups and individuals, submitted that differential pricing practices are not the proper means to address the issues of access and affordability, and that increasing monthly data allowances and lowering prices would be preferable.

¹⁶ Nearly 30,000 individuals filed jointly in support of OpenMedia's submission.

¹⁷ There were approximately 1,200 comments received through the reddit forum.

69. Media Access Canada (MAC) submitted that it does not support differential pricing practices, because growth in such practices would counteract its broader effort to improve broadband access. It indicated that many consumers are also concerned that differential pricing practices are an incentive to keep monthly data caps low and per-byte prices high, adding that surpassing data caps can be very expensive, particularly for Canadians with disabilities who rely on data-intensive applications and services.

Commission's analysis

70. The differential pricing practices that have thus far been offered in Canada (mobile TV and Unlimited Music) were offered only to consumers who subscribed to the upper tiers of service at higher prices, so it cannot be said that these practices promoted, facilitated, or encouraged adoption of Internet access services or improved affordability in any meaningful way. Further, the evidence on the record does not suggest that any future differential pricing practices in Canada will be implemented in a manner that improves the adoption of Internet access services or their affordability. The Commission is not persuaded that differential pricing practices would improve access to the Internet or affordability in the Canadian market.

Privacy

71. Opponents to differential pricing practices raised concerns with regard to privacy and the security of information, arguing that the implementation of these practices requires the use of deep packet inspection by ISPs and precludes the use of virtual private networks (VPNs)¹⁸ by customers.
72. The Canadian Media Concentration Research Project (CMCRP), as well as some individual parties and individuals who commented via the reddit forum, submitted that differential pricing practices raise concerns with respect to privacy and personal information, as the monitoring involved in such practices takes place by default with no required opt-in. Some parties were concerned that there could be some non-transparent knowledge transfer between ISPs and content providers included in a differential pricing practice.
73. Sandvine indicated that to implement a subscriber service tier with differential pricing, it does not need to collect or store any personal information beyond what is needed to charge or bill its customers accurately. It submitted that deep packet inspection provides information that is central to an ISP's business, allowing it to plan capacity, plan and execute new service offerings, measure and manage

¹⁸ A VPN is a private network that extends across a shared or public network (Internet) and enables users to send and receive data as if their devices were directly connected to the private network. VPNs can provide functionality, security, and/or network management benefits to the user. Some VPNs allow employees to securely access a corporate intranet while located outside the office. Individual Internet users can use VPNs to secure their wireless transactions, to circumvent geographic restrictions and censorship, or to connect to proxy servers for the purpose of protecting personal identity and location.

subscriber quality of experience, detect fraud, etc. Sandvine argued that deep packet inspection allows a company to know which website a subscriber is visiting, but not to read the content of emails, listen to voice calls, or know what particular videos are streamed or what files are downloaded or uploaded.

74. Distributel Communications Limited, Sandvine, and Saskatchewan Telecommunications submitted that the use of VPNs could result in consumers not being able to access content on a zero-rated basis.

Commission's analysis

75. In various decisions, including the ITMP framework and Telecom Regulatory Policy 2009-723, the Commission has established regulatory measures to safeguard customer information and to protect the privacy of consumers.
76. In addition, in keeping with the Wireless Code, which is set out in Telecom Regulatory Policy 2013-271, and the universal service objective, which is set out in Telecom Regulatory Policy 2016-496, service providers must communicate with customers using plain language and ensure that their written contracts and related documents, such as privacy policies and fair use policies, are written in a way that is clear and easy to read and understand.
77. There is no evidence on the record indicating that differential pricing practices generally violate the rules established by the Commission. In the Commission's view, an ongoing case-by-case approach under privacy legislation and the existing Commission rules would be the appropriate approach to protecting privacy.
78. The Commission would be concerned, however, if differential pricing practices affected the use of VPNs. The Commission recognizes that VPNs are a legitimate tool to protect sensitive information, as recommended by security firms. While the Commission does not find differential pricing practices to have a direct negative impact on privacy per se, it is concerned that their adoption could discourage the use of VPNs and thus compromise the privacy and/or security of consumers.

Are there specific types of differential pricing practices that may mitigate any negative impacts?

79. In this section, the Commission examines whether there are specific factors that could influence whether differential pricing practices would be permitted in certain cases.
80. In this regard, several parties suggested that certain types of differential pricing practices do not raise significant concerns and could be permitted. Such practices include those associated with the following:
 - content-agnostic offerings;
 - content/application categories;

- social good;
- administrative functions;
- promotions; and
- broadcasting objectives and promoting Canadian content.

Content-agnostic offerings

81. Content-agnostic differential pricing practices are offers that treat all retail Internet access service data traffic equally, without regard to application or content. The most common type of such offers is time-of-day pricing, where all data is zero-rated during a specific time period. Most parties indicated that content-agnostic differential pricing practices do not raise concerns and could be permitted.

Commission's analysis

82. Differential pricing practices that are content-agnostic in nature, such as time-of-day zero-rating, generally do not raise the concerns discussed in previous sections regarding the impact on providers of specific content or applications. However, depending on the terms of the offer, these types of practices could still favour one class of subscribers over others if they are not offered to all.
83. The Commission considers that the benefits of differential pricing practices that are content-agnostic in nature would generally mitigate any negative impacts, provided that the practices are not exclusive to a particular class or group of subscribers.

Content/application categories

84. Several parties, including the Canadian Network Operators Consortium Inc. (CNOOC), Cogeco, Sandvine, and Videotron, argued that differential pricing practices that apply in the same manner, with clear and transparent criteria, to all services or applications that are of the same essential type and nature would not result in undue preference or unjust discrimination and should be permitted.
85. Many other parties who commented on this matter argued that there are considerable challenges associated with allowing a differential pricing practice for a particular class of service, particularly with respect to defining categories and identifying which content providers would fit within a particular class.
86. For instance, Professor van Schewick argued that it is practically inconceivable that an ISP¹⁹ would be able to include, in a differential pricing practice offering, every content provider that falls within a certain category and, even if this were possible,

¹⁹ In her submission, Professor van Schewick was referring specifically to T-Mobile's Bing On service offered in the United States.

it would still be harmful, as it would exclude all those content providers that are not part of that class.

87. The Canadian Internet Policy and Public Interest Clinic submitted that zero-rating any particular category of services subverts the innovative potential of the Internet by hindering the emergence of models that are unexpected and wholly different from existing models.

Commission's analysis

88. At first glance, a differential pricing practice that encompasses all the content of a selected category might appear to mitigate the risk of undue preference in favour of certain content providers; however, several concerns arise with such a practice. First of all, by definition, the category selected will exclude all content not within that category. For example, in the case of Unlimited Music, the applicable category of online music streaming services excludes many other types of music services.
89. Furthermore, it is unlikely that all content providers within a given category can be identified and accommodated for the purposes of a differential pricing practice. For example, while Videotron has stated repeatedly that it wants its Unlimited Music program to include as many music streaming services as possible to make it more attractive to subscribers, the number of services included is very limited²⁰ when compared to all the online music streaming services available on the Internet. In addition, the inclusion of these services has required extended negotiations between Videotron and the content providers, and there are ongoing negotiations to include other services. Such delays, in an ever-changing environment such as the Internet, could have a major impact on the excluded content or applications. This suggests that the negative impacts described above can result even when a differential pricing practice is apparently open to all services within a content category.
90. There are also considerable difficulties associated with defining and identifying categories of online services. For example, CNOC submitted a list of over a dozen categories of online services, many of which share overlapping characteristics. Even for such a seemingly straightforward category as “music,” many questions need to be addressed, such as: Can the selected category be said to include all comparable services? What is a music service for consumers? Does it include only streaming, or are podcasts also included? Does it include radio stations? What about spoken word? How does the ISP identify which types of online music services are included? Do the ISP's technical requirements exclude any potential content providers? How easily and quickly can a provider be added to the differential pricing practice?
91. Compounding the difficulty of such an exercise is the fact that the Internet is in a constant state of evolution, with new and innovative services being launched

²⁰ Videotron indicated that as of 14 November 2016, its Unlimited Music program included 14 music streaming applications.

regularly. As some parties have cautioned, attempting to fit various services into categories may negatively affect innovation and have a distorting effect on the marketplace, as content providers may take into consideration their eligibility to participate in a differential pricing practice offering when making business decisions.

92. In light of the foregoing, the Commission considers that differential pricing practices associated with content/application categories raise significant concerns regarding the selection, definition, and implementation of the categories, in addition to the concerns discussed above regarding the likely negative impacts on competition, consumer choice, and innovation. The Commission therefore considers that content categories, even broad, apparently all-encompassing ones, would not mitigate the negative impacts of content-based differential pricing practices.

Social good

93. Certain parties submitted that differential pricing practices related to applications that serve social needs could be justified. However, several parties urged caution in this regard. For example, Shaw submitted that it would be an enormous challenge to define and identify which Internet services address a social need, particularly when many online services are intended to satisfy dual social and entertainment objectives, and that such an undertaking would entail making judgements about how consumers, creators, and citizens use the Internet.
94. MAC submitted that this type of differential pricing practice is perceived as having the potential to harm rather than help consumers, particularly consumers with disabilities, as it exacerbates some concerns. For example, MAC noted that it is unclear how such differential pricing practices would impact an ISP's best efforts to preserve or improve the service quality of fixed and mobile services that are currently available.

Commission's analysis

95. As discussed above, defining a content category is problematic; it is all the more so if the category is meant to define something as broad and subjective as "social good." Furthermore, the Commission considers that there is insufficient information on the record to enable it to assess the full impact of allowing differential pricing practices for social issues.
96. The Commission therefore considers that it is not appropriate to create a broad "social good" content category for the purposes of differential pricing practices.

Administrative functions

97. The record of the proceeding indicated that many ISPs use differential pricing practices for some data that is associated with billing and account management for their wireless customers. Most parties, including those generally opposed to

differential pricing practices, considered this type of practice to be acceptable. OpenMedia, however, opposed the availability of a differential pricing practice for the purpose of managing service accounts, arguing that the Commission should under no circumstances allow exceptions to an *ex ante* ban on differential pricing practices for content-based practices.

Commission's analysis

98. Differential pricing practices that give customers access to ancillary functions or services required to maintain and operate their wireless devices and Internet access services could be considered as part and parcel of the devices or services themselves, and not as separate access to the Internet. There are no alternatives to billing and account management services available for subscribers, as these services are linked to the ISP and to the subscriber's retail Internet access service plan. One could therefore argue that there would be no preference or disadvantage and, by extension, no harm if these services were zero-rated or discounted.
99. Furthermore, differential pricing practices that provide access to online accounts and bills could be said to be consistent with the purpose of section 27.2 of the Act, which states: "Any person who provides telecommunications services shall not charge a subscriber for providing the subscriber with a paper bill." Access to online services that allow subscribers to keep or renew their services supports this "no pay to pay" policy and could be consistent with past practices.
100. On balance, the Commission's view is that, to the extent that all consumers are treated alike, there would be little harm, if any, in allowing zero-rating for account-related functions, such as monitoring data and paying bills online, and there would be clear consumer benefits. The Commission therefore considers that the benefits of differential pricing practices that are related to account management of an ISP's Internet access service (e.g. monitoring data usage and paying bills online) would outweigh the negative impacts, if any, associated with content-based differential pricing practices. This issue is dealt with further in a subsequent section of this decision.

Promotions

101. Eastlink submitted that a framework for differential pricing practices could incorporate exceptions for short-term promotions, as their limited offer would diminish their impact on competition. As examples, it cited a local film festival website and a trial period for a small video game. Eastlink suggested the following parameters: a combined enrollment and benefit period not exceeding three months, no lock-in requirement beyond the promotion period, a minimum six-month waiting period between promotions involving the same or similar services, and compliance with general policy principles for differential pricing practices (i.e. compliance with the ITMP framework and section 36 of the Act, no denial of consumers' access to the content they want, no exclusivity, no affiliated content, transparency).

102. Certain parties, such as OpenMedia, argued that the Commission should not make an exception for short-term promotions, as they raise the same concerns as longer-term offerings, particularly with respect to competition and innovation.

Commission's analysis

103. Making a differential pricing practice available even for only a short period of time would not necessarily mean that there would be little negative impact during that period. Eastlink suggested a waiting period between promotions involving the same or similar services; however, in that type of situation, nothing would prevent an ISP from offering promotions of different services one after the other, effectively offering differential pricing practices on a permanent basis, which would otherwise be considered unacceptable by the Commission.
104. The Commission considers that allowing differential pricing practices for temporary promotions would lead to a risk of regulatory gaming and would not mitigate the negative impacts of such practices.

Broadcasting objectives and promoting Canadian content

105. Pursuant to section 28 of the Act, the Commission is required to have regard to the broadcasting policy objectives set out in section 3 of the *Broadcasting Act* in determining whether any preference or disadvantage is undue or unreasonable in relation to the transmission of programs. Some parties suggested that differential pricing practices that uphold the broadcasting policy objectives should be allowed.
106. The Canadian Media Producers Association submitted that the Commission should be open to considering ways in which differential pricing practices could be used to promote the discoverability of, and consumer access to, Canadian programming. ADISQ suggested that the Commission re-evaluate the ISPs' status as broadcasting distribution undertakings (BDUs) under the *Broadcasting Act* and examine whether ISPs are subject to the *Exemption order for digital media broadcasting undertakings*, also known as the digital media exemption order (DMEO).²¹ TCC suggested that a condition relating to differential pricing practices be added to the DMEO and to the existing framework on vertical integration.
107. OpenMedia submitted that zero-rating Canadian content would represent an erroneous conflation of content and access, and that such a practice would involve applying broadcasting policy in a manner that is incompatible with the Act. OpenMedia added that this type of zero-rating would protect the legacy Canadian broadcasting industry more than it would necessarily protect content deemed Canadian.
108. Rogers Communications Inc. (Rogers) submitted that subjecting all data to standard data charges, regardless of the nature of its content, would further broadcasting

²¹ The DMEO is set out in the appendix to Broadcasting Order 2012-409.

policy in Canada and would encourage the development of Canadian expression by ensuring that Canadian programming services offered online are not unduly disadvantaged in comparison to foreign services.

Commission's analysis

109. Telecom Notice of Consultation 2016-192, which initiated this proceeding, was launched under the Act and was focused on the examination of differential pricing of retail Internet access services by wireless and wireline Internet access service providers. Therefore, consideration of changes to policies made by the Commission under the *Broadcasting Act* that apply to BDUs or programming services (e.g. the DMEQ or the vertical integration framework) are outside the scope of this proceeding. Further, with regard to ADISQ's suggestion that the Commission re-evaluate the ISPs' status as BDUs, the courts have confirmed that ISPs are not BDUs to the extent that they provide Internet access service.²²
110. With regard to the application of section 28 of the Act, the Commission stated in the Mobile TV decision that, although that provision applied to the extent that the preference and disadvantage related to the transmission of programs, the broadcasting policy set out in the *Broadcasting Act* was not in itself determinative of the issue. In that decision, the Commission found that the favourable terms offered by Bell Mobility and Videotron for the transport and data connectivity required for their own mobile TV services might have supported certain objectives of the broadcasting policy. However, the disadvantage to consumers in accessing other Canadian programs on their mobile devices, and to those other programs themselves, could not be said to further those objectives. Accordingly, in the Mobile TV decision, the Commission considered that the preference or disadvantage could not be justified with regard to the broadcasting policy.
111. The creation, support, and discoverability of programming made by Canadians underscore many of the policy objectives set out in subsection 3(1) of the *Broadcasting Act*. Those objectives could be supported by differential pricing practices that would make that content available on Internet platforms in an easy and inexpensive way. However, the conception and implementation of such practices would be problematic for the same reasons that differential pricing practices based on content categories would pose a problem. For instance, while longstanding Canadian content recognition procedures are in place, the reliable identification by ISPs of this content, as well as the regulation and enforcement of the differential pricing practice, would be difficult.
112. When the parties who suggested such use of differential pricing practices were asked how they would implement their suggestion, they did not provide details at a practical or technical level. The record does not provide any basis to demonstrate that differential pricing practices could be fully and reliably implemented in such a

²² *Reference re Broadcasting Act* [2012] S.C.J. No.4; 2012 SCC 4

way as to ensure that all programming made by and transmitted to Canadians in the online space would be properly captured.

113. Given all the drawbacks and limitations of using differential pricing practices as a way to support and promote Canadian programming, the Commission considers that any benefits to the Canadian broadcasting system would generally not be sufficient to justify the preference, discrimination, and/or disadvantage created by such practices.

Conclusions regarding undue or unreasonable preference or disadvantage

114. Considering the impacts of differential pricing practices on such factors as competition, innovation, consumer choice, access and affordability, and privacy, the Commission considers that such practices, when they are content-specific in nature, generally raise concerns of undue or unreasonable preference or disadvantage with respect to Canadian subscribers and content providers.
115. However, differential pricing practices that are content-agnostic in nature and those that relate to administrative functions associated with the management of subscriber Internet access service accounts are likely to mitigate the negative impacts discussed above. These types of practices are therefore not likely to violate subsection 27(2) of the Act.

Differential pricing practice framework and evaluation criteria

116. As set out above, differential pricing practices generally raise concerns of undue or unreasonable preference or disadvantage under subsection 27(2) of the Act; nevertheless, there may be circumstances where the preference or disadvantage is not undue or unreasonable. Given recent examples of differential pricing practices that have surfaced in the Canadian marketplace and abroad, and the potential for more ISPs to offer such practices, it is evident that a regulatory framework to govern these practices is needed in order to provide clarity for all stakeholders. The question then turns to how best to structure and implement a framework that provides guidance to ISPs regarding the provision of differential pricing practices, in compliance with subsection 27(2) of the Act and in support of the telecommunications policy objectives set out in section 7 of the Act.

Positions of parties

117. Certain parties, including the CMCRRP, MAC, and OpenMedia, argued for a strict *ex ante* prohibition on all differential pricing practices, with no exceptions.
118. Professor van Schewick submitted that the Commission should adopt bright-line, *ex ante* guidelines that ban three types of differential pricing practices: (a) zero-rating in exchange for payment from content providers; (b) zero-rating of some applications, but not other similar applications (without payment from content providers); and (c) zero-rating that is open to a whole class of applications (without payment from content providers).

119. Most other parties were in favour of the Commission implementing a complaints-based, *ex post* approach under subsection 27(2) of the Act. However, these parties differed in their views as to whether additional principles or criteria were needed to evaluate complaints about differential pricing practices under subsection 27(2).
120. Bell Canada and TCC argued that compliance with subsection 27(2) of the Act should be determined on a case-by-case basis, in response to complaints, and that a governing set of guidelines or principles is not required. TCC indicated that the only scenario where the Commission should impose an *ex ante* prohibition is in the case of the zero-rating of affiliated broadcasting content by vertically integrated firms.
121. Other parties, including CNOC, Cogeco, Eastlink, Facebook, Rogers, Sandvine, TekSavvy Solutions Inc. (TekSavvy), and Videotron, proposed that the Commission establish a set of guidelines or criteria that would apply to its examination of complaints under subsection 27(2). Many of these parties submitted similar criteria with slightly different wording, leading to the emergence of several common themes (with varying terms and conditions), including: (a) equal and consistent application of an ISP's standard data charges; (b) openness/availability to all content providers offering the same or a similar service (i.e. no exclusive arrangements); (c) equal terms and conditions for all content providers; (d) transparency and disclosure for consumers; (e) no prioritization of traffic; (f) no zero-rating of affiliated content; and (g) no sponsored data.

Commission's analysis and determinations

Structure of the framework

122. As with the ITMP framework, the Commission is not persuaded that adopting *ex ante* rules indicating which specific retail differential pricing practices are acceptable and which are not is the appropriate way forward. Given the ever-changing and evolving nature of the Internet, *ex ante* rules would need to be continually reconsidered and reviewed as new forms of differential pricing practices emerge that have not been contemplated in this proceeding.
123. Instead, an *ex post*, complaints-based framework based on a subsection 27(2) analysis would generally be more responsive and adaptable to future developments in the retail Internet access service market, and would enable the Commission to assess any future complaints on a fact-specific basis.
124. However, given the parties' diverging views on differential pricing practices, the various types of practices that were discussed in the proceeding, and the relative nascence of differential pricing practices in the marketplace, the Commission considers that specific evaluation criteria would be beneficial. The Commission therefore sets out below the evaluation criteria it will apply in a subsection 27(2) analysis to allow stakeholders to assess which differential pricing practices can be expected to be compliant with the Act.

125. The Commission hereby establishes a framework for assessing the differential pricing practices of ISPs that

- is complaints-based (i.e. *ex post*);²³
- relies on subsection 27(2) to assess whether a particular differential pricing practice involves undue or unreasonable preference or disadvantage; and
- is informed by evaluation criteria to add clarity to the subsection 27(2) analysis.

Evaluation criteria

126. In the context of evaluating whether a differential pricing practice is compliant with subsection 27(2) of the Act, the Commission has established evaluation criteria that will provide all stakeholders, particularly ISPs, with a degree of predictability. The Commission will consider the following evaluation criteria in any future analysis of whether a differential pricing practice involves an undue or unreasonable preference or disadvantage:

- *The agnostic treatment of data.* The Commission will consider the extent to which data traffic is priced or rated equally or agnostically by an ISP with regard to its customers' retail Internet access services, while having regard to the amount of data involved. Offerings that rate or price data non-agnostically, such as by zero-rating data traffic from certain content providers (including affiliated entities), are likely to raise concerns under subsection 27(2). Differential pricing practices that treat data traffic agnostically (e.g. time-of-day offerings) are not likely to raise the same level of concern.
- *The exclusiveness of the offering.* The Commission will consider the extent to which a differential pricing practice is exclusive to a particular class or group of subscribers, or to a particular content provider or class or group of content providers, while also having regard to the number of subscribers or content providers affected. For example, differential pricing practices that are exclusive to subscribers to a particular data plan²⁴ are likely to raise concerns under subsection 27(2).
- *The impact on Internet openness and innovation.* The Commission will consider the extent to which a differential pricing practice inhibits or compromises the openness of the Internet for Canadians and the choices available to Canadians. In particular, this analysis will consider (a) whether a differential pricing practice affects the ability of content providers or

²³ The Commission may also initiate its own investigation.

²⁴ There may be instances where the availability of certain data plans or offerings varies depending on location and type of service (i.e. wireless or wireline).

innovators to enter the market by creating barriers to entry, and (b) the extent to which a differential pricing practice affects innovation. For example, differential pricing practices that require content providers to conform to administrative and technical requirements that are burdensome, costly, or time-consuming to meet are likely to raise concerns under subsection 27(2). Differential pricing practices that favour large, established content providers over smaller ones and new entrants are also likely to raise concerns.

- *Whether there is financial compensation involved.* The Commission will consider whether a differential pricing practice results in financial compensation or other financial benefits between a content provider and an ISP or third-party sponsor (including affiliated entities), having regard to the amount of compensation involved and the extent of the financial interest with any affiliated entity. For example, sponsored data arrangements, where an ISP receives payment from a content provider in exchange for zero-rating the data traffic to and from that provider, are likely to raise concerns under subsection 27(2).

127. In applying these criteria, the Commission will give primary consideration to the agnostic treatment of data, since differential pricing practices that favour certain content at the expense of other content have the greatest potential for harm. The Commission will look to the other three criteria as additional considerations in any evaluation of a differential pricing practice.
128. None of the four evaluation criteria will necessarily be determinative on its own, as each assessment of a differential pricing practice will be fact-specific. The weight given to each criterion may also vary from case to case, depending on the circumstances.
129. Finally, the Commission will consider whether there are exceptional circumstances that demonstrate clear benefits to the public interest and/or minimal harm associated with a differential pricing practice. For example, the Commission may consider whether there are privacy-related, technological, administrative, or other factors that would impact its analysis under subsection 27(2) such that the benefits of allowing a specific differential pricing practice would clearly outweigh any harms.

Implementation of differential pricing practices

130. Under the framework set out above, ISPs may implement differential pricing practices without prior Commission approval, with an expectation that any practice that is implemented is consistent with the evaluation criteria. Upon receipt of a complaint, or in the case of a Commission-initiated investigation, the Commission would look to these criteria and the specific facts involved to determine whether the differential pricing practice will be permitted.

131. If an ISP is unsure as to whether a differential pricing practice would be consistent with the framework, it may file an application seeking a Commission determination prior to implementing the practice in question. In its application, the ISP should demonstrate how its proposed differential pricing practice would satisfy the evaluation criteria set out in this decision.
132. To minimize the risk of regulatory gaming, the Commission will endeavour, to the extent possible, to address complaints in an expedited fashion. The Commission expects that the evaluation criteria set out in this decision will assist parties and the Commission itself in this regard.
133. As well, to promote compliance with the Act and with the evaluation criteria in this decision, and to encourage ISPs to seek a determination in advance of offering a differential pricing practice as appropriate, the Commission, in dealing with a complaint about a differential pricing practice and in accordance with its powers under section 72.003 of the Act, may consider imposing an administrative monetary penalty if the practice in question is found to be in violation of subsection 27(2) of the Act.

Account management

134. Many parties made submissions regarding the appropriateness of differential pricing practices related to Internet access service account management (e.g. monitoring data usage and paying bills online). The Commission has therefore decided to provide clarity on this matter by applying the evaluation criteria to this type of differential pricing practice.
 - *Does the practice treat data agnostically?* Only data related to account management would be zero-rated, and all other data would count against a data cap, so this criterion would not be satisfied.
 - *Is the offer exclusive?* Assuming that the zero-rating of account-related functions is not exclusive to a particular class or group of an ISP's subscribers, this criterion would be satisfied, and there is no evidence on the record to suggest otherwise. There would not be any exclusivity issues with respect to content providers, since account-related functions can be provided only by a subscriber's ISP.
 - *Does the practice have an impact on Internet openness and innovation?* The Commission does not foresee any negative impacts on Internet openness, consumer choice, or innovation that would result from account-related functions being zero-rated, so this criterion would be satisfied.
 - *Is there financial compensation involved?* Account management involves a subscriber using an ISP's website or application to pay bills or monitor data usage. The ISP is not being compensated by any third-party content providers. Although the ISP is benefitting financially from subscribers paying their bills,

this compensation would have occurred regardless of whether or not account management functions are subject to data charges. Thus, this criterion would be satisfied.

135. In terms of mitigating factors, most parties viewed the zero-rating of account-related functions as mostly harmless. Other important considerations are the fact that account-related functions typically involve relatively small amounts of data, are only available through a subscriber's ISP, and offer clear benefits to consumers in that they can monitor their data and pay their bills online without incurring data charges.
136. In light of the above, the Commission expects that differential pricing practices related to Internet access service account management would be permitted under the framework, provided the ISP makes them available to all its retail Internet subscribers, having regard for regional differences in its plans and offerings.

Application of section 36 of the Act to differential pricing practices

137. There was some discussion during the proceeding about whether section 36 of the Act would apply to differential pricing practices with regard to data plans for ISPs' Internet access services. Section 36 states: "Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public."
138. Most parties argued that while differential pricing practices may influence consumers' choice as to content, they do not result in ISPs having control over the content of telecommunications, nor do they influence the meaning or purpose of telecommunications. Those parties who argued that section 36 is engaged by differential pricing practices submitted that such practices generally result in ISPs controlling the content of telecommunications by driving customers toward certain content.
139. The Commission considers that section 36 is generally not triggered by differential pricing practices that simply involve setting different prices for the provision of access to content transported over the Internet. Such differential treatment based on the content of data being transmitted is better considered in the context of subsection 27(2) of the Act. Nevertheless, certain differential pricing practices may require approval under section 36, such as those that require a content provider to alter its content or those that control the availability of content accessible by consumers.

Consideration of interventions received regarding data caps and the ITMP framework

140. In Telecom Notice of Consultation 2016-192, the Commission recognized that differential pricing practices would not exist if ISPs did not apply data caps. While examining the use of data caps was not the primary objective of this proceeding, the

Commission did receive several thousand comments with respect to this issue, in addition to comments regarding other aspects of the ITMP framework.

Positions of parties

141. Opponents of data caps proposed several options, including launching a data cap review and limiting or prohibiting data caps outright in order to prevent ISPs from employing differential pricing practices. In addition, opponents submitted that data caps are not a legitimate economic ITMP, as they are ineffective at managing congestion. More specifically, these parties argued that data caps were initially designed to limit peer-to-peer file-sharing, which is no longer the principal source of Internet congestion. They also argued that monthly data caps do not address the time-sensitive nature of Internet congestion.
142. Opponents also submitted that data caps are evidence of insufficient retail Internet access service competition, harm consumers, provide a disincentive for ISPs to invest in their networks,²⁵ are kept arbitrarily low due to vertical integration,²⁶ and suppress subscriber data usage through the use of punitive overage charges.
143. A number of ISPs contended that data caps are out of scope of this proceeding and that imposing data cap regulations would first require the Commission to conclude that the retail wireline and wireless Internet access service markets are not sufficiently competitive.
144. Most ISPs, the British Columbia Broadband Association, CNOOC, and the Information Technology and Innovation Foundation supported the use of data caps as an effective ITMP for managing congestion to sustain network quality. They argued that many other congestion management practices (such as technical ITMPs) are complicated and impractical, and would likely degrade subscribers' experience. Some ISPs noted that there would be significant costs involved in deploying the infrastructure necessary to make use of technical ITMPs in lieu of economic ITMPs like data caps.
145. ISPs also generally submitted that data caps are an important marketing and pricing practice; they allow subscribers to pay only for the services they want by ensuring that a variety of Internet service packages are available to meet their needs. Further, these parties argued that removing data caps would lead to price increases and reduced network speeds for many subscribers.
146. With respect to the ITMP framework as a whole, most parties submitted that it is functioning as intended and did not support any changes. However, certain

²⁵ Some parties submitted that ISPs benefit from high overage fees and that prohibiting data caps would force ISPs to invest more in their networks to meet demand unconstrained by such caps.

²⁶ According to this perspective, vertically integrated ISPs are motivated to retain subscribers on their fixed networks and therefore maintain artificially low data caps for mobile services to prevent them from serving as a substitute for fixed Internet access services.

consumer groups submitted that the framework is not consumer-friendly and that making a successful complaint is a complex and onerous process.

147. TekSavvy proposed a net neutrality code that would combine the ITMP framework with regulations for differential pricing practices, including *ex ante* restrictions.

Commission's considerations

148. With respect to data caps, there is a disparity in the size of the caps applied for fixed-line versus wireless Internet services, and there are distinct market structures, regulatory treatments, and underlying network architectures for each type of service. Therefore, the Commission has considered data caps in these markets separately.

Fixed-line service

149. Market forces are likely to encourage ISPs to continue to increase data caps or reduce the price of unlimited options for fixed-line Internet services. Many ISPs already offer unlimited plans by default, while others offer them for an additional cost. Furthermore, in some cases competitor ISPs provide larger data caps or less expensive unlimited options than those offered by incumbent ISPs. The size of data caps and the availability of unlimited plans are generally increasing, while the cost per gigabyte of data is generally decreasing.
150. The Commission has issued two decisions in recent years that impact competition, investment, and consumer choice, and it expects these decisions to have a positive impact on data caps:
- Telecom Regulatory Policy 2015-326 expanded competitor ISP access to incumbents' last-mile fibre networks²⁷ and initiated a follow-up process that has reduced, on an interim basis,²⁸ the wholesale rates incumbents charge for the high-speed access services that competitors use to offer their retail Internet services. Development of final rates is underway.
 - Telecom Regulatory Policy 2016-496 set a universal service objective for fixed-line Internet service, including speeds of at least 50 Mbps download and 10 Mbps upload and the availability of an unlimited data offering.
151. The continual expansion of transport and last-mile fibre networks and the ongoing development and introduction of advanced technologies will continue to lower the cost of transporting Internet traffic and increase network capacity. The Commission expects that these developments will lead to ISPs passing these benefits onto

²⁷ "Last mile" is the term commonly used to describe the portion of an ISP's network that connects directly to a home or business.

²⁸ See Telecom Order 2016-396.

Canadians by offering a variety of different service plans with better prices, higher speeds and data caps, and more unlimited data plans.

152. Finally, if the Commission were to examine prohibiting or regulating certain types of economic ITMPs such as data caps, it would have to consider which alternative congestion management strategies ISPs might use – for example, technical ITMPs, which can entail significant deployment costs and may affect retail prices, options, and services.

Wireless service

153. The deployment of the latest network technologies has resulted in wireless bandwidth increases, but due to the physical limitations of radio spectrum, wireless networks are generally not able to attain the capacity and speeds of fixed-line broadband networks. As a result, to help manage congestion, WSPs generally offer data plans with lower data caps than plans provided for fixed-line networks. However, market forces may be a more important factor than congestion management in determining the size of subscribers' data caps, given that certain WSPs charge different prices for similar or identical data plans in different geographic markets.
154. The Commission considers that the framework set out in this decision will provide an increased incentive for WSPs to compete and to differentiate their services based on network speed, coverage, service bundles, and data caps, including unlimited data options.
155. In addition, the Commission has recently issued decisions related to the wireless Internet market:
 - Telecom Regulatory Policy 2015-177 ensured that regional wireless carriers would have access to national wireless carriers' roaming services at tariffed rates, to facilitate the build-out of wireless networks and to help safeguard the competition provided by regional WSPs.
 - Telecom Regulatory Policy 2013-271 (the Wireless Code), which is currently under review (see Telecom Notice of Consultation 2016-293), includes rules that require the use of plain language, impose notification requirements, and limit data overage charges.
156. With respect to TekSavvy's proposed net neutrality code, the Commission considers that there is no need to create a new, separate code for net neutrality in Canada. Parliament's intentions as expressed through the Act (in particular subsection 27(2)), together with this decision, the ITMP framework, the Mobile TV decision, and the Commission's decision regarding Videotron's Unlimited Music program, effectively constitute Canada's net neutrality code. This code will continue to evolve in response to changing technology and business practices, among other things.

Conclusions on interventions received regarding data caps and the ITMP framework

157. In light of the above, the Commission will continue to closely monitor the retail prices and data caps for both wireless and fixed-line Internet services, which will enable it to assess the degree to which prices and network quality are keeping up with the continually growing consumer demand for data. This approach provides the Commission with time to monitor the positive impacts on competition, such as increases in data allotments, that it expects will result from its recent decisions on wholesale broadband access services and wholesale roaming services, changing market forces, and the continued deployment of advanced network technologies such as fibre-to-the-home.
158. The Commission expects that network investment will continue to be the primary solution to managing network congestion, as set out in the ITMP framework. The Commission further expects that ISPs will offer data plans that continue to meet evolving consumer expectations with respect to price, speed, and capacity. Therefore, the Commission will not launch a proceeding regarding data caps or the ITMP framework at this time.

Policy Direction

159. The Commission is required, in exercising its powers and performing its duties under the Act, to implement the policy objectives set out in section 7 of the Act, in accordance with the Policy Direction.²⁹ In the Commission's view, the determinations set out in this decision are in accordance with the Policy Direction.
160. Specifically, the Commission's determination to implement an *ex post*, complaints-based framework supported by specific evaluation criteria (a) relies on market forces to the maximum extent feasible, (b) seeks to remove barriers to entry, (c) is a measure that is efficient and proportionate to its purpose of preventing violations of subsection 27(2) of the Act, and (d) is applied in a competitively neutral manner.

Secretary General

Related documents

- *Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program*, Telecom Decision CRTC 2017-105, 20 April 2017
- *Modern telecommunications services – The path forward for Canada's digital economy*, Telecom Regulatory Policy CRTC 2016-496, 21 December 2016

²⁹ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

- *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016
- *Review of the Wireless Code*, Telecom Notice of Consultation CRTC 2016-293, 28 July 2016, as amended by Telecom Notices of Consultation CRTC 2016-293-1, 23 September 2016; 2016-293-2, 26 October 2016; 2016-293-3, 5 January 2017; 2016-293-4, 24 January 2017; and 2016-293-5, 17 February 2017
- *Examination of differential pricing practices related to Internet data plans*, Telecom Notice of Consultation CRTC 2016-192, 18 May 2016, as amended by Telecom Notices of Consultation CRTC 2016-192-1, 3 June 2016; and 2016-192-2, 19 September 2016
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015, as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Regulatory framework for wholesale mobile wireless services*, Telecom Regulatory Policy CRTC 2015-177, 5 May 2015
- *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*, Broadcasting and Telecom Decision CRTC 2015-26, 29 January 2015
- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012
- *Modifications to forbearance framework for mobile wireless data services*, Telecom Decision CRTC 2010-445, 30 June 2010
- *Regulatory measures associated with confidentiality provisions and privacy services*, Telecom Regulatory Policy CRTC 2009-723, 25 November 2009
- *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 2009