



Telecom Notice of Consultation CRTC 2016-192

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Notice of hearing

31 October 2016
Gatineau, Quebec

Examination of differential pricing practices related to Internet data plans

Deadline for submission of interventions: 17 June 2016

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The Commission will hold a public hearing, beginning on **31 October 2016 at 9:00 a.m.**, at the **Conference Centre, Phase IV, 140 Promenade du Portage**, in **Gatineau, Quebec**.

The Commission hereby initiates a proceeding to examine the policy issues surrounding the use of differential pricing practices by Canadian Internet service providers related to the provision of Internet data plans. This proceeding stems from an application made by several parties concerning the pricing practices used by Videotron when offering its Unlimited Music service to its mobile wireless customers.

As a result of this proceeding, it is expected that Canadians and Internet service providers alike will benefit from a clear and transparent regulatory policy regarding differential pricing practices for Internet data plans.

Introduction

1. As Canada's telecommunications regulator, the Commission facilitates the development of a healthy and competitive telecommunications service market, while protecting the interests of Canadians. In order to fulfill these roles and exercise its duties under the *Telecommunications Act* (the Act), the Commission, as required, develops regulatory policies and frameworks to address issues that may surface in competitive market segments.
2. Recent examples of such regulatory measures include the development of the Wireless Code,¹ the re-regulation of the rates charged by incumbent wireless carriers for domestic wholesale roaming services,² and the decision to require incumbent telephone and cable

¹ See Telecom Regulatory Policy 2013-271.

² See Telecom Regulatory Policy 2015-177.

service providers to share the access portion of their wireline networks with competitors to encourage sustainable competition.³

3. One of the most important and fastest-growing segments of the telecommunications service market, both in Canada and around the world, is the market for retail Internet access services, including services offered over both wireline and wireless networks. Internet data plans offered by Internet service providers (ISPs)⁴ typically include two main parameters, which vary depending on the price of the plan: speed, which is measured in bits per second, and volume, which is measured in bytes. Internet data plans, particularly wireless plans, typically include a monthly volume limit, also known as a data cap, but some wireline ISPs also offer unlimited plans with no data cap.
4. As a result of the growth in Internet data consumption, ISPs in Canada and around the world are adopting different practices to differentiate their services in order to attract and retain consumers.
5. One such practice is differential pricing, which, in general terms, occurs when the same or a similar product or service is sold to customers at different prices. An example of differential pricing is zero-rating pricing. In the context of Internet service provision, zero-rating pricing can happen when an ISP exempts data traffic stemming from a particular application or a set of applications from a monthly data plan, which is often sold to consumers at a fixed price per month. ISPs are sometimes compensated by the application providers for this arrangement. If a monthly data plan has unlimited volume, by definition, there can be no differential pricing based on the zero-rating of specific applications.
6. Another example of differential pricing is sponsored data, which occurs when a third-party application provider enters into an arrangement with an ISP to provide free or discounted use of its application to consumers. In exchange, the ISP agrees to provide differential pricing for the data associated with the application provider within a consumer's data plan.
7. Supporters of differential pricing practices generally contend that these practices enable consumers to benefit from the provision of free or discounted services, and potentially a greater choice of and more innovative service offerings.
8. Opponents of differential pricing practices argue that such practices undermine the principle of net neutrality⁵ because they enable ISPs to act as "gatekeepers" that can provide an advantage to certain application providers over others, create barriers to entry, influence consumption, and ultimately limit consumer choice, as well as threaten innovation, freedom of expression, and the diversity of voices.

³ See Telecom Regulatory Policy 2015-326.

⁴ For the purpose of this proceeding, ISPs are defined as service providers offering retail Internet access services over wireline or wireless networks, including the commercial mobile networks operated by wireless carriers.

⁵ According to the principle of net neutrality, ISPs should treat all Internet traffic fairly, without undue discrimination.

9. Differential pricing practices are a growing global trend that some regulators in other countries have examined, or are currently examining. For example, the [Telecom Regulatory Authority of India](#) (TRAI) recently ruled on the use of these practices. As well, the U.S. Federal Communications Commission (FCC) recently began a fact-finding exercise regarding these practices in the United States.⁶ In 2015, the [European Commission](#) agreed to set net neutrality rules, which include provisions concerning the zero-rating of Internet data by ISPs.

Background

10. The Commission forbore from regulating retail Internet services in the late 1990's, on the basis that the market for such services was sufficiently competitive to protect the interests of users. This means that ISPs are not required to file Internet service tariffs for Commission approval and are free to offer services and charge rates as they see fit in order to compete.⁷ However, the Commission did retain certain powers under the Act with respect to retail Internet services. Notably, the Commission kept its power under subsection 27(2) of the Act,⁸ which states that 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.
11. Pursuant to section 28 of the Act, when an issue of discrimination, preference, or disadvantage arises regarding the provision of broadcasting services, the Commission is required to consider the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* in determining whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable.
12. In September 2015, the Commission received two separate applications from parties⁹ in which they argued that the billing practices of Quebecor Media Inc. and its wholly-owned subsidiaries Videotron Ltd. and Videotron G.P. (collectively, Videotron) regarding their Unlimited Music service (referred to hereafter as the Unlimited Music proceeding) were unjustly discriminatory and therefore in violation of subsection 27(2) of the Act. The applicants also submitted that these differential pricing practices violate the Commission's Internet traffic management practices (ITMP) framework set out in Telecom Regulatory Policy 2009-657. Some parties to the Unlimited Music proceeding requested that the Commission initiate a public proceeding to examine these practices.

⁶ The FCC issued letters to AT&T, Comcast Corporation, and T-Mobile in which it requested that they assist FCC staff in understanding sponsored data services.

⁷ One exception is that the Commission regulates the rates for Northwestel Inc.'s retail Internet services. See Telecom Regulatory Policy 2013-711 for more information.

⁸ Regarding data services provisioned over mobile wireless networks, in Telecom Decision 2010-445, the Commission determined that the offering and provision by Canadian carriers of mobile wireless data services would be subject to the Commission's powers and duties under section 24 and subsections 27(2), (3), and (4) of the Act.

⁹ On 1 September 2015, the Commission received a Part 1 application from the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia, and the Public Interest Advocacy Centre. On 4 September 2015, the Commission received a Part 1 application from Vaxination Informatique.

13. The Commission has, in the past, examined issues related to those raised in the Unlimited Music proceeding.
14. Through the 2009 ITMP framework, the Commission put in place rules concerning the use of ITMPs by ISPs to deal with congestion of both wireline and wireless networks. While the Commission examined both technical ITMPs¹⁰ and economic ITMPs¹¹ regarding end-user consumption, the main focus was on technical ITMPs. In developing this framework, the Commission considered it appropriate to strike a balance between Canadians' freedom to use the Internet for various purposes and ISPs' legitimate interests to manage Internet traffic on their networks.
15. Through this lens, the Commission determined that ISPs must be transparent about their use of ITMPs, since consumers need this information to make informed decisions about the Internet services they purchase and use. The Commission found that pricing information related to economic ITMPs was generally disclosed to customers, and it expected this activity to continue. As such, the Commission did not place any disclosure obligations on ISPs in this regard.
16. To ensure that ISPs adequately inform consumers about technical ITMPs and the impact that such practices have on retail Internet services, the Commission determined that ISPs must disclose to their retail customers information related to their technical ITMPs, including
 - why these ITMPs are being introduced;
 - who is affected by these ITMPs;
 - when these ITMPs will occur;
 - what type of Internet traffic (e.g. application, class of application, or protocol) is subject to management; and
 - how these ITMPs will affect a user's Internet experience, including the specific impact on service speeds.
17. In addition, when ISPs respond to a complaint regarding an economic or technical ITMP they have implemented, the ITMP framework requires ISPs to describe the ITMP being used, as well as the need for it and its purpose and effect, and to identify whether or not the ITMP results in discrimination or preference. In the case of an ITMP that results in any degree of discrimination or preference, ISPs are required to

¹⁰ These are ITMPs through which traffic is managed to prevent or respond to network congestion, including slowing down a user's traffic, prioritizing traffic, and detecting heavy users in order to limit their bandwidth.

¹¹ These are ITMPs through which Internet service rates are linked to end-user consumption, including monthly bandwidth capacity limits, in which customers who exceed a predefined threshold must pay more for the amount of bandwidth they use, and time-of-day pricing for bandwidth use.

- demonstrate that the ITMP is designed to address the need and achieve the purpose and effect in question, and nothing else;
 - establish that the ITMP results in discrimination or preference as little as reasonably possible;
 - demonstrate that any harm to a secondary ISP, an end-user, or any other person is as little as reasonably possible; and
 - explain why, in the case of a technical ITMP, network investment or economic approaches alone would not reasonably address the need and effectively achieve the same purpose as the ITMP.
18. In Broadcasting and Telecom Decision 2015-26,¹² the Commission found that by exempting their respective mobile TV services from data charges, Bell Mobility Inc. (Bell Mobility) and Videotron had violated subsection 27(2) of the Act.
19. The Commission determined that these exemptions had given an undue preference in favour of subscribers of their respective mobile TV services, as well as in favour of their own services, and had subjected consumers of other audiovisual content services, as well as other services, to a corresponding undue disadvantage. The Commission therefore directed Bell Mobility to eliminate its unlawful practice with respect to data charges for its mobile TV service, and directed Videotron to confirm its compliance¹³ with the determinations set out in that decision and to ensure that any new mobile TV service complies with those determinations. The Commission also found that Bell Mobility and Videotron were not using any ITMPs that fell within the scope of its ITMP framework and, as such, were not in violation of that framework.

Purpose of this proceeding

20. In light of the Unlimited Music proceeding and the proceeding concerning Bell Mobility's and Videotron's mobile TV services, it is clear that differential pricing practices are occurring in Canada and will likely become more prevalent as data consumption increases¹⁴ and ISPs compete with one another by leveraging their networks and relationships with application providers.
21. The Commission considers that, rather than making decisions on such matters on a case-by-case basis, it is appropriate to launch a proceeding to analyze the policy issues surrounding differential pricing practices for Internet data use and to establish a clear and transparent regulatory approach. Doing so will provide a measure of certainty for all stakeholders, including consumers, application providers, and ISPs.

¹² This decision is currently before the Federal Court of Appeal.

¹³ Specifically, Videotron was to have confirmed, by 31 March 2015, that it completed its planned withdrawal of its illico.tv app for BlackBerry- and Android-based phones, thereby removing any undue preference for its mobile TV service.

¹⁴ For example, according to the Commission's 2015 *Communications Monitoring Report* (CMR), in 2010, 2.0% of residential Internet service subscribers had a data plan with a speed of 16 megabits per second or higher. By 2014, that percentage had increased to 41.6%. See Table 5.3.10 of the CMR.

22. The Commission notes that, as a result of this proceeding, it could impose additional obligations on some or all ISPs, whether or not they choose to become parties to this proceeding.
23. This broader process will also enable the Commission to gain a deeper understanding of the issues to be decided in the Unlimited Music proceeding. As such, the record of the Unlimited Music proceeding will be placed on the record of this proceeding, and the Commission will rule on the Unlimited Music proceeding based on this broader record.

Issues to be examined

24. To determine which differential pricing practices, if any, constitute an undue or unreasonable preference, a disadvantage, or unjust discrimination under subsection 27(2) of the Act, the Commission will consider the following policy questions:
 - How should differential pricing practices be defined, in relation to the provision of Internet data plans over wireline and wireless networks?
 - What are the benefits and concerns about these practices, and do these concerns outweigh the benefits such that regulatory intervention is justified?
 - What regulatory measures, if any, should the Commission implement?
25. The Commission will review the matters raised in this proceeding in light of the policy objectives set out in section 7 of the Act. Any regulatory policy or framework the Commission develops with respect to differential pricing practices must contribute to achieving the policy objectives of the Act, including, in particular, the following:
 - 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;
 - 7(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;
 - 7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
 - 7(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;
 - 7(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services; and
 - 7(h) to respond to the economic and social requirements of users of telecommunications services.

26. The Commission will also take into consideration the 2006 Policy Direction,¹⁵ and draws particular attention to the following directives under the Policy Direction:

1(a)(i) The Commission should rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives;

1(a)(ii) The Commission should use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

Call for comments

27. Parties are invited to comment, with supporting rationale, on the issues raised in this notice. Specifically, parties are invited to address the following matters:

Defining differential pricing practices

Q.1: What types of billing practices constitute differential pricing practices for the purpose of developing a regulatory framework to govern such practices?

Q.2: To what extent do these practices exist in Canada's Internet access service market? Provide specific examples.

Q.3: Are there Internet access differential pricing practices that may not raise regulatory concerns (for example, applications that enable consumers to monitor their data usage that may not count towards a data plan, or plans that zero-rate data traffic during a particular time period)? If so, please explain.

Identifying any concerns with differential pricing practices

Q.4: What are the potential benefits to consumers, application providers, and ISPs associated with some or all Internet access differential pricing practices?

Q.5: What are the potential risks to consumers, application providers, and ISPs associated with some or all Internet access differential pricing practices?

Q.6: How should the benefits and risks identified above be weighed and how might they inform whether any specific Internet access differential pricing practice contravenes subsection 27(2) of the Act?

Q.7: To what extent, if any, do differential pricing practices give ISPs the ability to act as "gatekeepers" that are able to determine or influence which Internet applications are more likely to be accessed than others by consumers? If so, explain whether this is appropriate.

¹⁵ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

Q.8: Are differential pricing practices examples of market forces working as they should, or are they examples of anti-competitive behaviour?

Q.9: Are ISPs being sufficiently transparent with respect to the information they provide to consumers about the Internet access differential pricing practices they use? How aware are consumers about the implications of these practices?

Applying regulatory measures, if any

Q.10: To what extent do Internet access differential pricing practices fall within the scope of section 36 of the Act?¹⁶ If any such practices engage section 36 of the Act, what considerations ought to guide the Commission in assessing whether to approve these practices under this section?¹⁷

Q.11: Having regard to the responses to the questions above, what restrictions, if any, should be placed on any specific differential pricing practices associated with retail Internet data usage?

Q.12: Should specific types of applications, such as those associated with social needs, be treated differently or be exempt from a regulatory framework on differential pricing practices, and if so, why? How might any such applications be defined, categorized, and assessed?

Q.13: Do any other factors influence whether differential pricing practices should or should not be permitted in certain cases? For example, should permission depend on whether

- the ISP controls multiple parts of the supply chain, including the transmission facilities and the data applications;
- the differential pricing practice is based on economic or purely technical parameters;
- the differential pricing practice affects the success of the application or service in question;
- there is a societal benefit to doing so;
- the ISP makes the offer available to all application providers offering the same or similar services or applications; or
- the practice affects broadcasting policy?

¹⁶ Section 36 of the Act states that 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.

¹⁷ Note that in Telecom Decision 99-4, the Commission granted approval under section 36 of the Act to the involvement of any Canadian carrier in the content of that carrier's own Internet service, whether such services are tariffed or forborne. In the context of a carrier's Internet service, this means that it is permitted to create a home page and select links to other websites.

Q.14: Should the Commission's ITMP framework be modified to address differential pricing practices and, if so, how?

Q.15: Describe how any transparency concerns about the information that is made available to consumers with respect to differential pricing practices could be mitigated.

Procedure

28. The *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) apply to this proceeding. The Rules of Procedure set out, among other things, the rules for the content, format, filing, and service of interventions, answers, replies, and requests for information; the procedure for filing confidential information and requesting its disclosure; and the conduct of public hearings. Accordingly, the procedure set out below must be read in conjunction with the Rules of Procedure and related documents, which can be found on the Commission's website at www.crtc.gc.ca, under "[Statutes and Regulations](#)." The guidelines set out in Broadcasting and Telecom Information Bulletin 2010-959 provide information to help interested persons and parties understand the Rules of Procedure so that they can more effectively participate in Commission proceedings.
29. The record of the Unlimited Music proceeding forms part of the record of this proceeding.
30. The Commission will hold a public hearing, beginning on **31 October 2016 at 9:00 a.m.**, at the **Conference Centre, Phase IV, 140 Promenade du Portage**, in **Gatineau, Quebec**.
31. Interested persons who wish to become parties to this proceeding must file an intervention with the Commission regarding the above-noted issues by **17 June 2016**. The intervention must be filed in accordance with section 26 of the Rules of Procedure, must clearly put forward the party's positions with respect to the issues set out in this notice, and must include one of the following statements in either the first or the last paragraph:
 1. I request to appear at the public hearing.
 2. I do not want to appear at the public hearing.
32. Parties are permitted to coordinate, organize, and file, in a single submission, interventions by other interested persons who share their position. Information on how to file this type of submission, known as a joint supporting intervention, as well as a [template](#) for the accompanying cover letter to be filed by parties, can be found in Telecom Information Bulletin 2011-693.
33. Parties who wish to appear at the public hearing must provide reasons why their written intervention is not sufficient and why an appearance is necessary. In addition, parties requiring communications support must state their request for such support on the first page of their intervention.

34. Only those parties whose requests to appear have been granted will be contacted by the Commission and invited to appear at the hearing. An organization and conduct letter, providing directions on procedure with respect to the public hearing, will be issued before the hearing begins.
35. Although the public hearing will be held in **Gatineau, Quebec**, parties may participate from the Commission's regional offices via videoconference. Parties interested in doing so are asked to indicate, at the time they file their interventions, the regional office where they wish to appear. A list of the Commission's regional offices is included in this notice. In addition, the Commission will consider providing videoconference or teleconference links to other locations should it receive requests to do so.
36. Persons requiring communications support, such as assistive listening devices and sign language interpretation, are requested to inform the Commission at least **20 days** before the commencement of the public hearing so that the necessary arrangements can be made.
37. The Commission may request information, in the form of interrogatories, from any party to the proceeding on or before **22 July 2016**. Parties will be provided with further procedural details for this stage of the proceeding, including the dates associated with any requests for further responses to interrogatories and the public disclosure of information designated as confidential arising from parties' responses, if and when the Commission issues requests for information. Parties are advised that the Commission may request additional information from them throughout the proceeding as the need arises.
38. All parties may file further interventions with the Commission by **21 September 2016**.
39. Following the hearing, all parties may file final submissions with the Commission on any matter within the scope of the proceeding, by **23 November 2016**. Final submissions, including an executive summary, are not to exceed 15 pages.
40. The Commission encourages interested persons and parties to monitor the record of this proceeding, available on the Commission's website at www.crtc.gc.ca, for additional information that they may find useful when preparing their submissions.
41. Submissions longer than five pages should include a summary. Each paragraph of all submissions should be numbered, and the line *****End of document***** should follow the last paragraph. This will help the Commission verify that the document has not been damaged during electronic transmission.
42. Pursuant to Broadcasting and Telecom Information Bulletin 2015-242, the Commission expects incorporated entities and associations, and encourages all Canadians, to file submissions for Commission proceedings in accessible formats (for example, text-based file formats that enable text to be enlarged or modified, or read by screen readers). To provide assistance in this regard, the Commission has posted on its website [guidelines](#) for preparing documents in accessible formats.

43. Submissions must be filed by sending them to the Secretary General of the Commission using **only one** of the following means:

by completing the
[\[Intervention form\]](#)

or

by mail to
CRTC, Ottawa, Ontario K1A 0N2

or

by fax to
819-994-0218

44. Parties who send documents electronically must ensure that they will be able to prove, upon Commission request, that filing of a particular document was completed. Accordingly, parties must keep proof of the sending and receipt of each document for 180 days after the date on which the document is filed. The Commission advises parties who file documents by electronic means to exercise caution when using email for the service of documents, as it may be difficult to establish that service has occurred.
45. In accordance with the Rules of Procedure, a document must be received by the Commission and all relevant parties by 5 p.m. Vancouver time (8 p.m. Ottawa time) on the date it is due. Parties are responsible for ensuring the timely delivery of their submissions and will not be notified if their submissions are received after the deadline. Late submissions, including those due to postal delays, will not be considered by the Commission and will not be made part of the public record.
46. The Commission will not formally acknowledge submissions. It will, however, fully consider all submissions, which will form part of the public record of the proceeding, provided that the procedure for filing set out above has been followed.
47. The Commission expects to publish a decision on the issues raised in this notice within four months of the close of record.

Important notice

48. All information that parties provide as part of this public process, except information designated confidential, whether sent by postal mail, facsimile, email, or through the Commission's website at www.crtc.gc.ca, becomes part of a publicly accessible file and will be posted on the Commission's website. This includes all personal information, such as full names, email addresses, postal/street addresses, and telephone and facsimile numbers.
49. The personal information that parties provide will be used and may be disclosed for the purpose for which the information was obtained or compiled by the Commission, or for a use consistent with that purpose.

50. Documents received electronically or otherwise will be posted on the Commission's website in their entirety exactly as received, including any personal information contained therein, in the official language and format in which they are received. Documents not received electronically will be available in PDF format.
51. The information that parties provide to the Commission as part of this public process is entered into an unsearchable database dedicated to this specific public process. This database is accessible only from the web page of this particular public process. As a result, a general search of the Commission's website with the help of either its search engine or a third-party search engine will not provide access to the information that was provided as part of this public process.

Availability of documents

52. Electronic versions of the interventions and other documents referred to in this notice are available on the Commission's website at www.crtc.gc.ca by using the file number provided at the beginning of this notice or by visiting the "Participate" section of the Commission's website, selecting "Submit Ideas and Comments," then selecting "our open processes." Documents can then be accessed by clicking on the links in the "Subject" and "Related Documents" columns associated with this particular notice.
53. Documents are also available from Commission offices, upon request, during normal business hours.

Commission offices

Toll-free telephone: 1-877-249-2782
Toll-free TDD: 1-877-909-2782

Les Terrasses de la Chaudière
Central Building
1 Promenade du Portage, Room 206
Gatineau, Quebec J8X 4B1
Tel.: 819-997-2429
Fax: 819-994-0218

Regional offices

Nova Scotia

Metropolitan Place
99 Wyse Road, Suite 1410
Dartmouth, Nova Scotia B3A 4S5
Tel.: 902-426-7997
Fax: 902-426-2721

Quebec

505 De Maisonneuve Boulevard West, Suite 205
Montréal, Quebec H3A 3C2
Tel.: 514-283-6607

Ontario

55 St. Clair Avenue East, Suite 624
Toronto, Ontario M4T 1M2
Tel.: 416-952-9096

Manitoba

360 Main Street, Suite 970
Winnipeg, Manitoba R3C 3Z3
Tel.: 204-983-6306
Fax: 204-983-6317

Saskatchewan

1975 Scarth Street, Suite 403
Regina, Saskatchewan S4P 2H1
Tel.: 306-780-3422
Fax: 306-780-3319

Alberta

220 – 4th Avenue Southeast, Suite 172
Calgary, Alberta T2G 4X3
Tel.: 403-292-6660
Fax: 403-292-6686

British Columbia

858 Beatty Street, Suite 290
Vancouver, British Columbia V6B 1C1
Tel.: 604-666-2111
Fax: 604-666-8322

Secretary General

Related documents

- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015
- *Filing submissions for Commission proceedings in accessible formats*, Broadcasting and Telecom Information Bulletin CRTC 2015-242, 8 June 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
- *Northwestel Inc. – Regulatory Framework, Modernization Plan, and related matters*, Telecom Regulatory Policy CRTC 2013-711, 18 December 2013
- *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013
- *Filing of joint supporting interventions*, Telecom Information Bulletin CRTC 2011-693, 8 November 2011
- *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Telecom Information Bulletin CRTC 2010-959, 23 December 2010
- *Modifications to forbearance framework for mobile wireless data services*, Telecom Decision CRTC 2010-445, 30 June 2010
- *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 2009
- *Stentor – Request for approval under section 36 of the Telecommunications Act*, Telecom Decision CRTC 99-4, 31 March 1999