



Telecom Notice of Consultation CRTC 2016-192
Examination of differential pricing practices related to Internet data plans
CRTC File No.: [1011-NOC2016-0192](#)

**Further Intervention of
OpenMedia Engagement Network (OpenMedia)**

21 September 2016

*OpenMedia is a community-based organization that works to
keep the Internet open, affordable, and surveillance free.*
www.openmedia.org

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Introduction and Executive Summary

1. *What is the nature of innovation? Whose innovation warrants priority, or protection? And how would innovation occur without the core structural integrity of equitable Internet access?* Based on comments submitted to date, these are key questions that this proceeding calls upon the Canadian Radio-television and Telecommunications Commission to answer. In this second intervention responding to TNC CRTC 2016-192, *Examination of differential pricing practices related to Internet data plans*, OpenMedia Engagement Network (“OpenMedia”) hopes to assist the Commission in answering them to the benefit of all Internet users across Canada.
2. With this proceeding, the Commission has the opportunity to ensure that Canadians continue to benefit from innovation of an unbound nature, from any actor so inclined, supported by a functioning telecommunications system that maintains the integrity of Internet access. In this scenario, the nature of innovation is not beholden to contrived path-dependency, unequal distribution of power or wealth, or incumbent views and perspectives that dominate mainly by virtue of pre-existence. Individual and business innovators who have or own little would enjoy as much protection and opportunity to succeed as those who already have and own a lot. Maintaining the critical infrastructure of common carriage would ensure that the Internet continues to give rise to as wide, creative, and unpredictable a range of innovation as the human spirit allows.
3. Generalizing from the comments of zero-rating proponents on record, however, their positions regarding the questions above would lead to an impoverished Internet and limited innovation bound within the confines of a highly concentrated telecommunications market. The nature of innovation would become short-term, superficial, and rent-seeking in one way or another, rather than anything truly revolutionary or of long-term benefit to Canadians. Those already ahead or well-resourced enough to skip the line would systemically benefit, disproportionately receiving priority access and a small cushion from failure, regardless of the relative merit of their particular offerings. Lastly, innovation without access and structural integrity would prove necessarily limited in scope, imagination, and perspectives, in contrast to the innovation without permission that has become a byword for the open Internet and equal, unimpaired access to it.
4. It is notable how interveners in this proceeding do not divide along lines of industry versus public or consumer interest groups. Bell Canada, a zero-rating proponent, relies on a report by the Multicultural Media, Telecom and Internet Council (“MMTC”), which appears ostensibly to be a civil society group of sorts. On the other hand, a major industry player such as Rogers calls for the Commission to implement guidelines that would prohibit differential pricing practices such as zero-rating, while U.S. industry counterparts T-Mobile and Netflix have turned against data caps and/or zero-rating. OpenMedia submits that this is rather a division between those who are willing to lead at the forefront of innovation and protect what the future of innovation in Canada could be, and those who prefer to focus on shorter-term gains at the expense of long-term good.
5. In hopes of assisting the Commission towards the former, this submission will respond to positions proffered in the first-round interventions and provide evidence to further support OpenMedia’s earlier comments regarding the harmful effects of zero-rating on the core functioning of the Internet, and on Canadian telecommunications and innovation by extension. The contents are set out as follows.

6. Part I will demonstrate that differential pricing practices such as zero-rating do not benefit consumers, nor do consumers find them more beneficial than alternatives. Part II reviews ostensibly pro-consumer arguments common among zero-rating proponents, and demonstrates why they do not stand. Part III provides evidence that zero-rating, in addition to data caps, will decrease competition and disincentivize investment and growth in Canada's telecommunications industry. This is supported by the fact that part of the industry itself supports eliminating data caps and prohibiting zero-rating. Part IV examines specific forms of rhetoric that zero-rating proponents employ, such as analogies and focusing disproportionately on motive and intent rather than consequence. Part V argues that broadcasting policy should not play a role in this proceeding, and emphasizes maintaining a clear distinction between access and content in the Commission's determinations.
7. The balance of this summary will provide a brief overview of each Part.
8. First, zero-rating does not address consumer interests. For one thing, Internet users are not just passive consumers, but creators and active participants in their respective online communities, with Canadians particularly engaged compared to other countries, and set to become only more so. This means they require a telecommunications system that will enable that level of growing engagement. Zero-rating is not part of that system, as an Alliance for Affordable Internet (A4AI) report surveying 1,000 mobile wireless users in eight different countries with emerging markets found that zero-rating neither met users' needs nor brought new users online. Zero-rating and similar practices are not a way to efficiently allocate resources to highest need, as this erases the concept of affordability, the solution to which is to make Internet access as a whole more affordable, not to sell people subpar service. Canadians overwhelmingly oppose data caps and call upon the Commission to protect their interests through protecting net neutrality and banning zero-rating—approximately 39,371 signed OpenMedia's petition to this effect, and nearly 5,500 people submitted comments through OpenMedia's Internet Voice Tool to express their views to the Commission, selections of which are included in and attached as appendices to this submission.
9. Second, seemingly pro-consumer arguments that zero-rating proponents make are wrong, for a number of reasons. Some arguments involve conflating Internet access itself with the content that consumers choose to engage with after obtaining access. This then removes consumers' freedom of choice and places that choice inappropriately with the ISP at the access level. Other arguments again erase the notion of affordability and the role that ISPs play in charging users high prices for small amounts of data. Zero-rating is furthermore not a solution to consumer confusion and transparency issues, but OpenMedia provides recommendations that would be real solutions for subscribers, such as an ITMP Portal and minimum service quality requirements. Finally, the Commission should look to the voices of everyday Internet users to determine what is in their best interest, rather than industry groups who purport to speak on behalf of consumers.
10. Third, zero-rating, along with entrenched data caps, will decrease competition and investment in the Canadian telecommunications landscape. Countries such as the Netherlands and Austria offer a preview of what happens when zero-rating and data caps combine with highly concentrated telecommunications markets such as Canada's: data use decreases and price increases. However, implementing and enforcing meaningful net neutrality rules achieves the opposite, such as in the Netherlands where banning zero-rating resulted in an eventual quintupling of data volumes, for lower prices. Zero-rating will not help smaller providers and new entrants, and in fact Internet service and content providers large

- and small are in favour of eliminating data caps and prohibiting zero-rating practices. One practice that OpenMedia emphasizes is not a problem, however, is regional pricing; this is an example of genuine competition working.
11. Fourth, analogies meant to portray zero-rating in a favourable light break down upon closer analysis. These include comparisons to grocery store coupons, movie tickets, airline flights, general retail goods, voice services, and TV and radio ad sponsorships. Similarly, arguments meant to reassure the Commission and concerned users regarding the effects of zero-rating fail because they focus on potential intentions or motives behind zero-rating, rather than the consequences that would flow from such practices, regardless of cause.
 12. Fifth, the Commission must ensure that it does not impair the structural integrity of Canada's telecommunications system for the sake of advancing broadcasting policy. A full examination of proposals by broadcaster interveners, such as reviewing the status of Internet service providers, zero-rating Canadian content, or considering regulatory approaches to convergence between the telecommunications and broadcasting sectors, would require a separate proceeding in its own right to do these issues justice. In the meantime, a long line of decisions from the Supreme Court of Canada, Federal Court of Appeal, and the Commission itself maintain that ISPs are not broadcasters and are to have nothing to do with content in their role as access providers. Protecting and promoting Canadian content is not the same thing as preserving old legacy industry broadcasting models traditionally tied to such content, and evidence suggests that, as a crowdsourced OpenMedia report on the topic is titled, "The Future of TV is the Internet".
 13. OpenMedia would like to emphasize that it has seen little on the record of this proceeding that persuades it to depart from the notion that data caps, as well as differential pricing practices like zero-rating, contravene both section 7 policy objectives in the *Telecommunications Act* and the Policy Direction, as outlined in its first intervention. Moreover, both data caps and zero-rating appear to be symptoms of larger structural problems resulting from the highly concentrated nature of Canada's telecommunications market, which may need more fundamental policies such as improved wholesale market rules and, ultimately, structural separation to resolve.

I. Zero-Rating Fails to Address Consumer Interests

A. Internet Users Are Not Just Consumers

14. When it comes to those who use the Internet, "consumer" is a limiting term; subscribers are also increasingly creators, coders, facilitators, or mobilizers, for example, and this seems to be particularly and increasingly the case in Canada. According to the 2015 CIRA Factbook, Canada saw online photo and video sharing increase by 46% in 2013, "likely due to the popularity of Instagram, Snapchat, Vine and related services"¹—all of which inherently rely on user-generated content to thrive. Similarly, YouTube users went from uploading 35 hours of

¹ "[T]he Canadian Internet", .ca Factbook 2015 (2015), online: CIRA <<https://cira.ca/factbook/current/the-canadian-internet.html>>.

video per minute in 2010, to 400 hours per minute in 2014.² Considering that Canada currently holds the record for “world’s most engaged users”,³ and has done so since at least 2012,⁴ it stands to reason that Canadians might also be involved in much of that content creation as well as consumption. In fact, a 2015 Media Technology Monitor survey of more than 4000 Canadians over 18-years-old found that one in eight YouTube users had also posted videos to the platform.⁵

15. The nature of technological growth, adoption, and usage, particularly where the Internet is concerned, suggests that such trends will continue to point upward. In its Canadian Internet Use Survey, Statistics Canada recorded that the percentage of Internet users who reported they “contribute content (blogs, photos, discussion groups)” rose from approximately one-fifth of users in 2007 to over one-quarter of users in 2009.⁶ More recently, Tamara Small, *et al.*, found that approximately 1 in 13 Canadians are “engaged in online political participation activity”,⁷ with “some evidence that young Canadians...are more engaged in online political activity than other Canadians”.⁸ As further generations are born into and grow up in the digital age, more and more Canadians are likely to contribute to the shifting ratio between passive consumption and active participation, in favour of the latter. A future-focused regulator such as the CRTC must keep this in mind and accordingly keep Canada’s digital infrastructure open for them.
16. This type of Internet usage going beyond mere consumption has garnered little attention thus far in this proceeding, but is a key reason why initiatives such as data caps and zero-rating are inappropriate for Canada’s telecommunications system. To reiterate what OpenMedia emphasized in its first intervention, data caps harm and limit Canadian consumers and creators in a number of ways; zero-rating mechanisms exacerbate that harm by entrenching and legitimizing unjustified data caps while amplifying their anti-competitive effects.
17. Regarding data caps specifically, OpenMedia acknowledges that several interveners consider them to be out of scope in this proceeding,⁹ and respectfully disagrees. Data caps are necessarily within scope of this proceeding by virtue of being a pre-requisite to differential

² “48 hours of video uploaded to YouTube every minute” *Phys.org* (25 May 2011), online: Phys.org <<http://phys.org/news/2011-05-hours-video-uploaded-youtube-minute.html>>; and Miguel Helft, “YouTube CEO Wojcicki: YouTube today is like Google ten years ago” *Fortune* (7 October 2014), online: Fortune <<http://fortune.com/2014/10/07/youtube-ceo-wojcicki-youtube-today-is-like-google-ten-years-ago/>>.

³ “Desktop internet use by Canadians highest in world, comScore says” (27 March 2015), online: *CBC News* <http://www.cbc.ca/news/business/desktop-internet-use-by-canadians-highest-in-world-comscore-says-1.3012666>. See also “Canada Digital Future in Focus 2015” (27 March 2015), online: comScore <<https://www.comscore.com/Insights/Presentations-and-Whitepapers/2015/2015-Canada-Digital-Future-in-Focus>>.

⁴ “Canada Digital Future in Focus 2015” (1 March 2012), online: comScore <<https://www.comscore.com/Insights/Presentations-and-Whitepapers/2012/2012-Canada-Digital-Future-in-Focus>>.

⁵ Chris Powell, “Nearly 70% of Canadians Watch Youtube Monthly (Report)” (11 November 2015), online: *Marketing* <<http://www.marketingmag.ca/media/nearly-70-of-canadians-watch-youtube-monthly-report-161240>>.

⁶ Statistics Canada, *Canadian Internet Use Survey*, “Internet use by individuals, by type of activity (Internet users at home)” (10 May 2010), online: *Statistics Canada* <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/comm29a-eng.htm>>.

⁷ Tamara Small et al, “Online Political Activity in Canada: The Hype and the Facts” (2014) Canadian Parliamentary Review 9 at 15.

⁸ *Ibid.*, at 15.

⁹ See *e.g.*, Cogeco Intervention, *supra* note 113 at para 11; Eastlink Response to Bragg (CRTC) 22 July16-1(a-c); and Rogers Response to Rogers(CRTC)22July16-2, at para 8.

pricing practices. The relationship between data caps and the possibility and nature of differential pricing requires examining both alongside each other. This ensures that the Commission regulates the latter appropriately, having taken the full context into account, rather than approaching integrated aspects of the same telecommunications system in silos.

B. Zero-Rating Neither Meets Users' Needs Nor Brings Users Online

18. Zero-rating proponents argue that this practice benefits consumers,¹⁰ that it represents giving consumers what they want,¹¹ and that it increases Internet adoption.¹² Evidence suggests otherwise.
19. First, the Alliance for Affordable Internet (“A4AI”) recently released a report finding that Internet users in developing countries do not prefer zero-rated plans when given a choice.¹³ According to this study, 82% of survey respondents selected time or data restrictions rather than content restrictions, if there had to be restrictions at all: “When asked what condition would be most acceptable to get ‘free data’ or zero-rated data, a majority (82%) of users prefer to have the ‘free plan’ valid for a short time or with a data cap, with no restriction on the websites and applications that can be accessed.”¹⁴ This is the opposite of what some Canadian ISPs engaging in zero-rating, ostensibly for the sake of their users, have done.
20. Second, the A4AI results indicated that differentially priced plans failed to meet users’ needs in any event: “zero-rated plan users are more likely than any other type of user to combine their plan with other options (75%)”¹⁵ and “are more likely to use WiFi than non-zero-rating users”.¹⁶ Both these findings suggest that selecting a restricted-access plan is not merely a matter of “choice” and “customization”, as some claim, but rather a stopgap solution to help make ends meet when Internet access is unaffordable. A true and lasting solution does not consist of giving users subpar service, but in making the service itself more affordable to begin with, whether through incentivizing greater investment or promoting fair competition.
21. Third, A4AI also confirmed that plans with app and content restrictions “did not bring most mobile Internet users online for the first time”; approximately nine in ten subscribers “report[ed] having used the Internet before accessing it through a zero-rated plan”.¹⁷ While only roughly 10% of subscribers had not gone online before using a restricted plan, about three times that number eventually transferred from a restricted plan to a plan with

¹⁰ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Bell Canada) [Bell Intervention].

¹¹ Nanos, “Canadians’ impressions and opinions on service providers offering services with no data usage charges” (June 2016), in Bell Canada Intervention [Nanos Survey].

¹² Bell Intervention, Table 1, row (vi), *supra* note 10 at page 19; First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Facebook), at para 12 [Facebook Intervention]; First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of TELUS), at para 25 [TELUS Intervention].

¹³ The report features the results of surveying 1,000 mobile phone Internet subscribers in each of Columbia, Peru, Ghana, Nigeria, Kenya, India Bangladesh, and the Philippines, between December 2015 and February 2016. Dhanaraj Thakur, “The Impacts of Emerging Mobile Data Services in Developing Countries” (June 2016), online: A4AI: Alliance for Affordable Internet <http://a4ai.org/wp-content/uploads/2016/05/MeasuringImpactsofMobileDataServices_ResearchBrief2.pdf>, at pages 3-4.

¹⁴ Thakur, *supra* note 13 at page 3.

¹⁵ Thakur, *supra* note 13 at page 3.

¹⁶ Thakur, *supra* note 13 at page 10.

¹⁷ A4AI, “Digging into the Data: Is Zero-Rating Connecting the Unconnected?” (1 June 2016), online: A4AI: Alliance for Affordable Internet <<http://a4ai.org/is-zero-rating-really-bringing-people-online/>>; and Thakur, *supra* note 13 at page 3.

unimpaired Internet functionality, and another third used both together.¹⁸ Furthermore, “anecdotal evidence similarly suggests that for many zero-rating users, these plans allow them to remain online, rather than to get online for the first time.”¹⁹ This again indicates that affordability plays more of a role than interest or awareness, when it comes to Internet adoption, and to reiterate, the best solution to affordability is greater investment and competition among Internet service providers.

C. Zero-Rating Supporters Mistake What Consumers Can Afford for What They Need

22. Like the active and participatory nature of much Internet usage, the role that (un)affordability plays in the differential pricing discussion with respect to consumers also seems to escape the notice of some zero-rating proponents. For example, the Information Technology and Innovation Foundation (ITIF) in the United States, which has intervened in this proceeding, claims that “[m]onthly data plans allow limited capacity to go to those who value it most”.²⁰ Putting aside the question of whether or to what extent such capacity is in fact limited, this notion completely ignores the fact that not all who value something equally have the means to obtain it. Someone might opt for an inferior Internet access plan because they cannot afford sufficient access, not because they do not value or need it.

23. Similarly, TELUS states:

Competitive price discrimination occurs in markets in which some consumers have a more elastic demand (are more price sensitive) and others have a less elastic demand (are less price sensitive). Consumers with a more elastic demand pay a lower price, and those with a less elastic demand pay a higher price. ... For example, business travellers who fly more frequently, and who are likely less able to vary their schedule, are charged a higher price than leisure travellers who are price sensitive.²¹

24. First, as OpenMedia and several other interveners demonstrated in the first round of comments, ISPs’ imposition of data caps reverses this correlation: more price-sensitive subscribers, if taken to mean lower-income subscribers, end up paying more for the service they get relative to what less price-sensitive, i.e. higher-income, subscribers pay for the service that they get. Not only do price-sensitive subscribers pay more for less, however; they also pay more in overage fees, and indirectly subsidize the data usage of subscribers to larger plans, without receiving any benefit themselves.²² Second, TELUS’s flight analogy breaks down because *price-sensitive Internet users are not leisure Internet users*. The indispensability of Internet access, and corresponding inelasticity of pricing,²³ was made clear

¹⁸ Thakur, *supra* note 13 at page 8.

¹⁹ Thakur, *supra* note 13 at page 7.

²⁰ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Information Technology & Innovation Fund), at page 4 [ITIF Intervention].

²¹ TELUS Intervention, *supra* note 12 at paras 20-21.

²² First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of OpenMedia), at paras 79-87 [OpenMedia Intervention]. See also First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of the Equitable Internet Coalition), at paras 50-52 [EIC Intervention].

²³ “As penetration rises, however, broadband becomes a necessity and demand, as the economists say, becomes inelastic to price. In other words, consumers will keep buying even as prices rise. Then providers no longer need to offer low-cost plans -- exactly what has happened in Canada and exactly why adoption is not a proxy for affordability.” Appearance of OpenMedia, Transcript (28 April 2015), *Review of basic telecommunications services*, TNC CRTC 2015-134 (9 April 2015), *infra* note 24 at para 19178.

at the Commission's review of basic telecommunications services.²⁴ Determinations on Internet data plans must ensure those are taken into account.

25. Without appearing to make the erroneous assumption that ITIF and TELUS seem to, Bell also notes, "There will always be a range in how different people value their Internet services. ... When consumers value Internet services differently, uniform pricing will not be economically efficient."²⁵ While economic efficiency is important, the Commission might consider two additional points. First, section 7 of the *Telecommunications Act* sets out other, also important policy objectives alongside economic efficiency, such as "to render reliable and affordable telecommunications services" and "to respond to the economic and social requirements of users".²⁶ Sometimes achieving one or both of these objectives may require departing somewhat from another. Happily, that may not be the case here, due to the second point.
26. The second point, which OpenMedia and other interveners have argued and provided evidence for, is that the current state of Canada's telecommunications market is already less economically efficient than it could and should be. This is due to lack of competition, high market concentration, unjustified data caps, and their associated consequences for both subscribers and independent ISPs.²⁷ The solution, however, is not in allowing differential pricing practices such as zero-rating, which would simply worsen the situation and take the market even further away from genuine competition and economic efficiency.
27. The solution is to ensure that the Canadian telecommunications market is a level playing field, where service, app, and content providers rise and fall on the basis of fair competition. The Commission could achieve this through prohibiting data caps and zero-rating, and moreover through policies such as mandated wholesale access, fair roaming and tower-sharing agreements, MVNO activation, and ultimately, inherent conflict of interest-eradicating structural separation.

D. Canadians Oppose Data Caps and Zero-Rating

28. At the start of this proceeding in June 2016, OpenMedia launched a public campaign to engage everyday Internet users in Canada, on the topic of data caps and zero-rating specifically. This public engagement initiative consisted of two parts, a petition and an open call for comments. Both have made clear that Canadians are opposed to data caps and zero-rating, with many calling upon the Commission to prohibit or place restrictions on ISPs' exploitation of one or both practices.
29. The petition calls upon the Commission to end data caps on wireline Internet; ensure affordable unlimited mobile wireless data plans; ban differential pricing practices such as zero-rating; reinforce protection of net neutrality and the open Internet; and implement meaningful transparency and enforcement measures in addition to the current rules under the Internet Traffic Management Practices (ITMP) Framework.²⁸ At time of writing, 39,371

²⁴ *Review of basic telecommunications services* (9 April 2015), Telecom Notice of Consultation CRTC 2015-134 [Basic Services Review].

²⁵ Bell Intervention, *supra* note 10 at para 39.

²⁶ *Telecommunications Act*, SC 1993, c 38, ss 7(b) and 7(h).

²⁷ See *e.g.*, EIC Intervention, *supra* note 22 at para 118; and First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Canadian Media Concentration Research Project), at paras 105-32 [CMCRP Intervention].

²⁸ "We have a huge opportunity to end data caps", online: OpenMedia <<https://act.openmedia.org/datacaps>>.

people have signed the petition, knowingly adding their endorsement and personal information to the public record in support of the petition's points. This is approximately 38,000 more Canadians than are represented in the Nanos survey that Bell submitted.

30. As for the open call for comments, nearly 5,500 Canadians wrote in (at time of this submission's writing) to make their opinions and experiences known to the Commission.²⁹ OpenMedia identified nine commonly recurring themes through a random sampling of 250 unique comments,³⁰ which are attached to this submission as Appendix A. Specifically, the comments addressed concerns with: competition in Canada's telecommunications market; differential pricing; consumer harm resulting from data caps; how data caps stifle innovation; net neutrality; network congestion and data caps; and usage-based billing in data. Comparisons between Canada and other jurisdictions were also popular, as were calls upon the Commission to protect Canadians. Comments in the selection below represent each of these themes, drawn from the wider pool of individuals' submissions (i.e. not necessarily the 250 in the sample).
31. Selection of Canadian Internet Users' comments to the Commission:

Competition in Canada's Telecommunications Market
<p>Sky high prices for data that costs them almost nothing to provide amounts to price gouging. There is no real competition, all major providers set their prices high secure in the knowledge that they will not undercut each other. They are a cosy little non-competitive group. Data should not be capped, or at least priced somewhat in accordance with cost to provide.</p> <p>Alex Armstrong, Barrie, Ontario</p>
<p>I am writing to you as a fed-up Canadian. It appears that Canadians are being overcharged in comparison to other G7 countries by our telecoms. It would be just and fair for Canadians to have an affordable option of unlimited data instead of mean-spirited data caps. Recently, we had to increase our data cap by Rogers. As a consumer who uses the internet daily for work purposes as well as personal use, I feel that I am being held hostage to predatory pricing. Canadians need net neutrality instead of differential pricing that gives advantage to those willing to be price-gouged. The web shouldn't have toll booths. I look to the CRTC to ensure telecoms stick by the rules of net neutrality and that they are not able to take advantage as an oligopoly to force Canadians to overpay for what is an essential service.</p> <p>Gordon Doctorow Toronto, Ontario</p>

Data Caps Harm Consumers
<p>Hello, I am opposed to data caps because I homeschool 3 children, and they are always downloading their lessons, assignments, and projects from the internet. If they have to pay a fee for downloading the ""data"", then the cost would be impossible to pay. We tried out online data with Bell, and in one week, we were billed over \$300. In one month, that would be over \$1200. That is highway robbery for something that does not cost these service providers anything. I would also lose access to Skype - free long distance calling to anyone else that has Skype. Downloading movies would make the price skyrocket and make this impossible to afford. This would definitely retard our position as</p>

²⁹ OpenMedia collected comments through an Internet Voice Tool hosted at <https://act.openmedia.org/datacaps/comment>.

³⁰ With thanks to Erin Knight, Loran Foundation 2015 Intern at OpenMedia.

leaders in the internet community. Canadians pay among the highest prices for our cell phones among all G7 countries and Australia, in some cases up to three times as much. In provinces where there is more competition, like Manitoba and Saskatchewan, prices drop by up to half, and data caps become much less restrictive, showing that telecom companies take unfair advantage of Canadians if given the opportunity. The quality of our internet will also suffer making our internet slow to very close to unacceptable. I definitely am against data caps and any extra ""fees"".

John Osi
Calgary, Alberta

Whenever we have international visitors, they all tell us that our phone/internet bills are really high compared to other countries. During a recent hospital stay I faced really high data charges because the hospital didn't have free wifi. I just wanted to keep in touch with my friends on Facebook, & not feel so lonely. We know we have a problem please do your job to protect ordinary Canadian citizens & fix it. Thank you.

Helen McInnes
Nanaimo, BC

Data Caps Stifle Innovation

To whom it may concern:

As a Canadian, and a small business owner working hard in the technology field, I have to say that the current wireless options are shameful. Data caps have simply got to go.

Simply put, data caps throttle growth for untold number of start ups. As the rest of the world rushes headlong into the age of streaming media, the typical plans here penalize anyone for going in that direction. It's simply not financially possible for the average Canadian to participate in the internet de jour.

It seems backward that mobile data plans have failed to evolve (and in many cases, have devolved) over the last several years. This is simply not reasonable. We need more options, more flexible options, and better yet, more affordable options. We need these options to move forward collectively into the connected future. We need these options if Canadian tech startups (potentially tomorrow's giants) are to have a chance at earning a piece of the pie. We need an open, fast and accessible internet to make this happen.

Sincerely,

Ryan Dennis
East Gwillimbury, ON

Hi, we are Canadian startup company providing cloud based machine learning video analytics. We provide to end user a service to have real-time data analytics for their Cell cam, Web cam or video file. As such due to data cap in Canada our own Canadian user has to high cost to enjoy the service while Europe, Latin America, USA and Asia enjoys latest cloud technologies. Please open Canada market to Cloud based startups.

Viachaslau Hrytsevich
Scarborough, Ontario

Net Neutrality

Rogers' internet data caps are really just a way to rip off consumers. Providers' incremental costs for delivering bandwidth are ridiculously low but their retail charged for overages are ridiculously high. I am increasingly dependent on Internet data for my needs as an informed citizen but have to ration my consumption of news and entertainment because of prohibitive profit margins.

Also, it is essential that the principle of net neutrality be enforced. Internet in the modern world should be a right not a privilege. Service providers cannot be trusted to act in the public interest. They are only interested in profits which they will get anyway they can, even if it means gouging consumers.

Norm Bolen
Ottawa, ON

Use of the Internet has become unavoidable in modern Canadian life. The big telecom companies in Canada should not be permitted to limit access to/"cap" use of Internet resources, nor should they be allowed to offer preferential access to either their own or financially partnered websites. The CRTC should strenuously uphold Net Neutrality rules.

Also, these companies should not be allowed to charge inflated "overage" prices per gigabyte of data when that data is delivered for pennies per gigabyte. Canadians pay some of the highest prices for wired/wireless access and data use and the CRTC must stand up for Canadian citizens against the telco monopoly in this country.

Mark Dunham
Newmarket, ON

Please consider banning price fixing practices. The marketplace for internet packages in Canada is embarrassing for a developed country. There is an agreement between all service providers that is visible after 5 minutes of researching prices online - both for wired and wireless internet access.

On the topic of Net Neutrality:

All internet destinations should be accessible without submitting to a "pay-for-visibility" racket- a tiered web will only stunt innovation and economic growth.

Dante Sanchez
Whitchurch-Stouffville, ON

Network Congestion and Data Caps

A data cap is an arbitrary limitation which isn't supported by either an infrastructure load analysis or calculus determining the right price for the demand based on availability. Furthermore, assuming limited bandwidth availability, the rigid and arbitrary price structure for overage fees are anti-competitive and create an unnecessary barrier to entry for competition. If we truly want a free market, arbitrary overages need to be eliminated. If the product is generic, competition will result in improved service, increased investment in infrastructure for product differentiation and better prices for Canadians. On the other hand, if we maintain the status quo, we forego innovation for stagnation and sloth. By submitting to the greed of the incumbents we forego growth. Please don't be afraid of the loss of what is and use it as the basis to justify the loss of innovation and certain growth. What we have today was made possible by incremental change and the courage to embrace it. Even if it means losing a little of what we have today.

Arya Sangwen
Laval, QC

I can see reasonable data caps being used to prevent network oversaturation, but the caps that we are forced to accept are purely in place to bolster corporate profits. The caps are unreasonable and the cost of the "unlimited" options are absurdly high. It is very frustrating for my family to always worry if we will have enough usage for the month. Please use your power as governing body to protect the internet and its users, end unaffordable data caps now!

Kurtis Walker
Grande Prairie, AB

As a computer scientist for over 15 years, I cannot think of a single need for data caps other than to artificially line the pockets of the telecom selling the data cap. It's not something to control bandwidth, as that's something different (which the telecoms already charge for). Charging more for higher bandwidth is perfectly legit, but data caps? They make zero sense.

Furthermore, the data caps sold are incredibly low. Currently, the cheapest internet package by Rogers includes a measly 5Mbps/1Mbps download/upload bandwidth, with a shamefully small 25GB data cap. While Rogers could say "1GB/day is plenty for anybody", the truth is 25GB is ridiculously small. A software update for your iPhone can be over 1GB; a single album download from Apple Music is 100MB; a complex application for your computer (such as a video game) can easily reach 10+GB. The Internet is the standard means of distribution, and something like a 25GB cap, even within a crazy make believe world where data caps are okay, is crookery.

The fact is we never used to have data caps, and then the Big 3 realized they could make an enormous amount of money by using them. However, data caps have no impact on how fast you can download, or on the wear/tear of infrastructure, or anything else. They are complete crap.

Ryan Baldwin
North York, ON

Usage-based Billing for Data

Internet should be compared to hydro. They're both services you have to pay for monthly. They're both considered essential to modern life. Can you imagine saying something like, "I need to buy another ice block for the fridge because I washed too much laundry and went over my power cap." The prices don't reflect the cost of maintenance either. We need government-set pricing for landline-style internet to assure reasonable prices. We can then offer direct subsidies for businesses working to expand their networks and indirect subsidies to maintenance companies.

Andrew Vander
Peterborough, Ontario

International Comparisons

I have lived in four countries and Canada is the only one with data caps--in the US I had unlimited internet for \$50 per month, and virtually unlimited data on my cell phone plus unlimited North America calling for \$52 per month. In the Netherlands a cell phone with internet cost about 20 Euros and they had never even heard of data! The internet is as necessary for our daily lives as electricity--my 76 year old parents use it to pay bills, chat on Skype, and check the news.

R. Thomas
Halifax, NS

I'm a Canadian living in South Korea, where there is free wireless almost anywhere you go, and my unlimited data plan is dirt cheap compared to Canada (if Canadian telecom companies actually

OFFERED unlimited data). If South Korea can offer cheap wireless Internet service, why can't Canada? It's time the CRTC stopped working for big telecom and started working for Canadians.

Owen Nagels
Quebec City, QC

Having lived in other countries I am appalled when I returned to Canada and saw the prices for internet connections. In a modern, world leading country, it makes no sense to have prices be the highest in the world. The internet is no longer an option for people anywhere in the world. It is the only way to do business, stay in touch and be connected to others. There should be no selecting of speeds or websites from big companies of telecom providers. The internet has the possibility to be a truly open and democratic space. It is already moving more in the direction of being controlled every day. I am very concerned that the internet will become a non-transparent area and that there will be no way to enforce unfair rules. I believe in fair and equal access to the internet and to websites. If I were to start a business I would be incredibly angry to learn that my website could be relegated to a 'slow lane'. I ask that Canada lead the way and show its citizens how the internet should be regulated for fairness to all.

Megan Macdonald
Charlottetown, PEI

Call Upon the Commission to Protect Canadians

Canadians are done with being the most overcharged country in the developed world for data rates. The data caps we have to endure are ridiculous, they don't even exist in most of the rest of the world. Internet is essential to society and being a functioning citizen in 2016, and we need regulations to reflect that.

Salina Perry
Lethbridge, AB

Data Caps are a licence to print money. Nationalize all major telecommunications so that accountability of their actions becomes possible. Until then properly tax these criminal enterprises and strictly control pricing and make full disclosure obligatory!

Dann Zealley
Roberts Creek, BC

Postal service used to be considered an essential service and was (still is) a crown corporation with all citizens having equal access to use it. Internet access has now replaced the postal service as an essential service for communication across Canada (and the world). Let's look at it in this way and act FOR the population, and NOT FOR the companies. We ALL know that Canadians are paying far too high a price for modern telecommunication and this is not in the best interest of the population. There is a strong argument here, not only for NOT limiting access, but nationalizing this service as well. Communications are too important to be held hostage by private for profit enterprises who DO NOT work towards the best interest of the population. If we do not reign in these companies now, they will control more and more of our country as time goes on. It is only natural for them to do it. It is not a nefarious act, but only a natural consequence of a power having close to absolute control over the most important aspect of human behaviour.....our communication system.

Sheldon Spier
Chemainus, BC

32. Internet users across Canada have spoken clearly. OpenMedia invites the Commission to review the nearly 5,500 comments entered into the public record as individual interventions. The majority of submissions reiterate similar concerns, recommendations, and points as those cited above. Overwhelmingly, Canadians want an end to data caps, the first step toward building an equal playing field upon which telecommunications service providers have no choice but to compete fairly.
33. While the vast majority of individuals commented on data caps, many expressed concerns regarding zero-rating, as well. Their views directly contrast the conclusions of the Nanos survey that Bell submitted,³¹ including: generally or emphatically negative impressions of telecommunications service providers (TSPs) in Canada engaging in zero-rating practices; active opposition to the Commission allowing TSPs to engage in such practices; and outright requests for the Commission to ban zero-rating in Canada, as well as eliminate data caps:

Canadians' Views on Zero-Rating / Differential Pricing Practices
<p>Enough with the money gouging data caps already! These days affordable internet access is more important than ever, for everything from finding and applying for work, to keeping in touch with family and friends, entertainment, you name it. For lower income people especially, an affordable cell/data plan may make a huge difference in their lives. I have friends who are low income and cannot afford cell/data plans, for fear of outrageous overage charges. This needs to change.</p> <p>Zero rating data should not be allowed either, and net neutrality needs to be upheld. I don't want any telecom provider deciding for me which websites and services I should be able to easily access, by slowing others down and making them harder to use.</p> <p>Aimee Brooks Hammonds Plains, NS</p>
<p>For young adults like myself who are now out of university (but with large school debts hanging over our heads) affordable internet access is absolutely essential. For work, for entrapenuerial endeavours, networking, it is stifling not only our ability to compete and grow our careers but also the very canadian economy itself! telecom companies are taking advantage of this need and because there is little competition here in Ontario, there is little to no limit to their price gouging. As Canadians we pay as much as three times more than other G7 countries! And in the few Canadian provinces where there is more competition, their prices are cut in half. Please address the issues of data caps, data cost, and the "zero-rating" of data.</p> <p>Carolyn Quinn Kitchener, ON</p>
<p>I am greatly disturbed by the data caps on Internet services. This is a constant problem as the Internet usage needed by my household varies month to month. Without an affordable option for unlimited Internet, we can receive unexpected charges for over usages that are extremely high. There is no excuse for this gouging. I understood the need to make a profit but the rates and options in Canada are not designed to mutually beneficial both customer and provider, rather, to take advantage of the customer.</p> <p>There are a multitude of problems with the big Internet providers in this country and with how they want the Internet distributed. We need affordable, unlimited Internet for everyone as it is no longer possible to live in our society without it. Even elementary school students require Internet access from home in order to complete assignments. To have the price gouging and data caps that we currently have, is to deprive children of the education they are legally entitled too.</p>

³¹ Nanos Survey, *supra* note 11 at page 2.

Zero rate data must not be acceptable in our country as it gives big telecom power to make websites they don't like slower and more expensive to access. This unacceptable.

We must have transparency regarding the Internet and there must also be accountability when big telecom breaks the rules. I have been lied to by Telus twice regarding my Internet service costs and I am the one stuck paying the bills that are not following what we agreed to.

Canadians already expressed ourselves regarding net neutrality and won open Internet rules once we should not have to worry that websites and services we want to access will be forced into a slow lane. I am sick this, Canadians have already spoken won the battle. Our net neutrality needs to be upheld and telecom companies need to be held accountable.

Christine Swanson
Lazo, BC

I would like to bring to your attention that data is not electricity, which has to be generated, then transported and then used in almost real-time. Data doesn't need to be generated, it does not use up, or wear out the equipment used to render it as a service. Charging for traffic would make sense if that were the only way a telecom markets its services, but this isn't the case - we are paying for traffic on top of paying monthly fees for a plan.

We are being double-charged for the use of the same infrastructure.

Carriers try very very hard to make it sound as if without data caps and the inevitable traffic charges on top, those monthly fees would be even higher, yet when data caps were first introduced those same monthly fees did not go down and did not spur a large number of cheap affordable mobile plans out there. Please look at the offerings from the Big 2 Telecoms over the past 3-4 years and see for yourself, prices did not go down and, in fact, have further increased. FURTHERMORE mobile networks also haven't improved significantly: while the rest of the world is talking about 5G, Canada still only enjoys LTE in metro areas. Where did the extra money go exactly? Public companies should be accountable, yes?

What I did notice is that all the "cheap alternatives" like Mobilicity and Wind got bought up for some fantastic sums of money and then their data plans they used to offer were immediately cut and their prices were increased. Shouldn't prices be generally going DOWN with time?

We are still paying some of the highest fees in the industrialized world. My friend told me less than an hour ago that 7GB of mobile data costs \$5/month in Russia, a country with a lot of the same problem Canada has. I challenge you to find a plan with 7GB of data for less than \$50 in Canada. Our prices are even higher than the US ones! We are already being price-gouged and data caps are an attempt to drive up costs for mobile service even further. And the worst part is, the added income does not appear to be reinvested into better/faster service, but in order to further monopolize the telecom sector.

And then there is the disturbing trend to zero-rate services that give mobile telecoms here a cut of their profits. While this looks like a boon at first sight, it is actually a serious net neutrality concern as it penalizes services that refuse to "cough up" their profits to telecoms. As a consumer I feel I am being increasingly robbed of service I am paying for, robbed of hard-earned income just to keep the EXISTING services I am currently enjoying, robbed even further of choices as now services I like to use are being "penalized" for not sharing profits.

I urge you to step in and be the regulator you were appointed to be. This needs to stop. These guys are causing damage to all the rest of us. Please stop paying attention to their bullshit excuses and reinstate a hopefully more fair and competitive market.

Thank you!

Kamen Angelov
Scarborough, ON

I ask for serious consideration regarding the abolition of the arbitrary and punitive data caps forced on Canadian internet users. The motivation for the imposition of these caps is clearly monetary: elsewhere in the world data cap overage charges are lower or non-existent. I have personally had my internet bill double due to overage fees from data caps. Of equal concern is the "zero rating" of data that threatens net neutrality and essentially our access to information. These issues are of great import to me, as well as countless other Canadians, and I ask that the CRTC consider them seriously.

Alexandra Caldwell
Toronto, ON

As a heavy internet user who regularly exceeds his cap, I don't particularly like data caps. But I also don't necessarily disagree with them in principle, providing the cap is large enough to not be punitive. Wired services (at least in my part of the country) are getting to be high enough that even I'm not hitting them, but wireless caps are still very low and rather expensive.

What I most strongly disagree with though is the corruption and violation of net neutrality -- a core principle that keeps the internet working. This includes any sort of "fast lane/slow lane" concept which explicitly prioritizes large companies that can afford the fast lane markup. It also includes "zero-rate" services which is less explicit, but still ends up prioritizing large companies who are able to leverage better zero-rate contracts because users will of course tend towards using free (to them) services over services that cost them money. Unfortunately this will require long-term vigilance. Companies are unlikely to stop trying to find subtle ways to violate net neutrality and similar rules in order to charge additional fees for services that are currently included and "competition" (such as it is in Canada) has continued to fail to be a sufficient check against our existing communication service providers. Just as we prevent manufacturers from dumping waste into our water supply -- prioritizing public safety over corporate profit -- we should also prevent our service providers from polluting and corrupting our internet -- prioritize public freedom and choice over the short-term and short-sighted goals of a few large companies.

Justin Dolan
Whitehorse, YT

As a consumer and small business owner I feel that the data caps on phone plans and internet plans are stifling Canadian business development as well as customers' ability to access our market. I work in the arts sector which is as you can imagine image intensive and have heard many times by clients their frustration at their chosen telecom's data usage policy and data caps.

I believe Canada has fallen very far behind the rest of the world in our access to the internet. Every time I travel I speak with people in Europe, the USA and other areas where people laugh at Canada for our pitiful data caps. Did you read that? THEY LAUGH AT US.

"Zero Rate" data is wrong. An ISP should NOT have traffic shaping ability for websites, plain and simple.

My cell phone company has lied to me and ripped me off for data many times. I used to get charged for incoming texts that I could not control.

Please stand up for Canadians, this is 2016 not 1996, we need internet and rules that provide us with service and decency.

Ted Hamer
Ajax, ON

As actual costs for data transmission become lower--as they continue to do--customers should be able to download more and pay less. Instead, Canada's big telecom providers continue to gouge us with entirely fictitious and unnecessary "data caps" and play favourites with "zero-rate" schemes. We need to become competitive with other G7 countries!

Wayne Brehaut
Athabasca, AB

Caps on wired internet is cruel, greedy and archaic!!! In the developed world, access to the Internet is essential for everyday life from work to school to simple access to information. While the rest of the world is ELIMINATING DATA CAPS (see Sprint and Verizon just recently) the Canadian government wants to impose them on wired Internet. We are a joke on the world stage. We already pay the most (by far!) for cellular and Internet of any developed nation. If this is supposed to be the best country in the world, why are we making it unaffordable for average to lower income families to have access to some of the very tools that can lift them up in society?

All this is doing is protecting large corporations that are already bloated and flush with cash.

Zero rating data is not equitable and hurts not only smaller websites but will penalize those sites deemed unimportant to the telecom giants. This entire concept is UNCANADIAN and will limit innovation which is essential to compete in the global market not to mention stifle free expression. Again: UNCANADIAN. The only innovation this will foster is new ways for average Canadians to steal the Internet they need.

We are grateful to big Telecom for providing the infrastructure for cellular and Internet but there is no doubt that they will get a colossal return on investment so why is the government possibly capitulating to their proposal? What our tax dollars should be doing is ensuring that caps are never imposed and that our favorite and most useful websites are not relegated to an inferior stream just because they don't protect the venal interests of these corporations.

The Government of Canada should in fact be watching over these companies to ensure Net Neutrality and to monitor and penalize those telecoms that don't honour their own agreements with Canadians by breaking the rules.

Do not allow data caps in Canada!! Let's keep up with the rest of the world's leading nations and not be held back by outmoded, unnecessary limitations and rules and ideas that will hurt average Canadians and be an even greater source of embarrassment and financial hardship than our already astronomical cellular and Internet fees.

Thank you for hearing us,

Silvano Figaro
Toronto, ON

Data caps are completely unreasonable. Moore's law predicted a doubling of computing power and data density every year. While that is not completely accurate (it actually takes around 18 months nowadays), it still shows that data has been growing at an exponential rate.

Data caps do not change to accommodate this growth. The telecom companies put in caps they believe are "reasonable" at the time of inception, then never adjust the plans for the ever-expanding amount of information and connected services that are available.

With the induction of services such as Netflix, Hulu, and other streaming sites, it is possible to use 3-7GB of data per hour. On most plans that would mean reaching your data cap in 17-40 hours of use.

That is between half an hour to an hour of streaming per day.

Allowing telecom to create "zero-rate" data is a step in the wrong direction. That would simply give them the power to slow down any competitors, while giving access to their service priority. Canadians should have access to a neutral internet; Net Neutrality must be preserved!

If we look beyond simply entertainment, the world is becoming ever more interconnected. Many consumer goods utilize internet connections to bring the most advanced features to their owners. Data caps are a means to keep Canadians in the dark. They limit the use of innovative new tools.

On another note, there is no such thing as having "too much internet". It is a necessity of modern life and cannot be overused in the same way as our natural resources.

Telecoms should be forced to adhere to strict rules and maintain transparency with the consumers. They only exist today because of the work of the taxpayers and government in setting up a national groundwork for them to manage. They should listen to the needs of Canadians first and foremost.

Thank you for your time.

Daniel Szymczak
Ancaster, ON

Data caps are nothing more than a money-grab for a service that has no real physical resource. It makes sense for resources that actually cost more for more use, like water, oil or gas, but not for something that is incorporeal. The concept of Data caps is itself a fallacy. Providing access to the internet is simply an on/off switch. Do you have data/internet? yes or no, not some or more. Speeds may vary, but the content is static.

We did not have data caps way back before people were using it for everything, but when the corporations noticed that they can make more cash for no extra cost or effort, they jumped on it. It's simply a price gouging plot.

The amount of data used is only going to continue going up, Moore's Law forces it to, so the services powering them need to keep up with it as well. Get with the times, 1 or 2 Gigabytes is a pittance these days and even Terabytes are starting to become more and more trivial. Get rid of Data Caps and let us consumers get what we need for our businesses and regular lives.

The internet has slowly become an integral part of human life, wanted or unwanted, sought or unsought and regulating it to a specific point has become a ridiculous notion, like saying you're only allowed to use X litres of water per month before you're cut off. The internet has almost become an essential service and needs to remain neutral. Try it, shut your phone/internet off for a month or more and see what happens to your business/career, I dare you.

Access to the internet should not be capped, throttled, zero-rated or biased. It is proven that Canada has the worst home or wireless internet plans/contracts available in the world and we pay far more than anyone else for far less service. Why? For a country in the top 10 of places to live, why are we dead last for our internet costs? Fix it.

Jeremiah Brown
Armstrong, BC

34. OpenMedia has gathered for the Commission a set of unique comments that specifically reference zero-rating or similar practices, attached to this submission as Appendix B. As with ending data caps, Canadians are unequivocal on this point: they consider zero-rating and similar practices a cheat around fair competition; a threat to the functioning and integrity of Canada's telecommunications system; and a distraction from ISPs' investing in their core competency of providing unimpaired, affordable Internet access to users for reasonable compensation.

II. "Pro-Consumer" Arguments for Zero-Rating Are Wrong

35. Various interveners with close ties to the telecommunications industry (and predominantly based in the United States), such as the ITIF, Sandvine, the MMTC (through Bell), and others offer seemingly consumer-friendly or consumer-oriented arguments in their interventions in favour of differential pricing practices such as zero-rating. Each of these positions, however, either mischaracterizes the situation, overlooks major relevant matters, or misses the central point of the issue altogether. Their arguments broadly fall under three categories: the alleged empowerment of consumers with "choice" and "control"; the purported "relief" from data caps and the "price of consumption"; and zero-rating as ostensibly a response to consumer confusion and need for transparency.

A. Conflating Access and Content Gives the Illusion of "Choice" and "Control"

36. Zero-rating proponents claim that such a practice, and related differential pricing practices, gives "choice", "empowerment", and "control" to consumers; this notion is the opposite of what occurs in reality, and requires two errors in reasoning to maintain. First, the argument requires conflating access and content,³² confusing what it is that consumers are purchasing from their telecommunications service providers. The second error flows from the first: reversing order of operations and misplacing the locus of choice when it comes to what apps or content a user consumes, by placing it with the ISP instead of with their customer.
37. Examples of these two errors combined arise in the interventions of Roslyn Layton, ITIF, TELUS, and Bell, the latter citing the Multicultural Media, Telecom and Internet Council (MMTC). For example, TELUS states that differential pricing in Internet data "offers consumers more options, thus increasing the choices available to them"³³ and the MMTC report that Bell cites characterizes those opposed to zero-rating as also "opposed to providing consumers with more control over their data consumption".³⁴ The MMTC calls such discriminatory pricing schemes a "trend toward greater consumer empowerment", and Layton implies that the Commission might trample such "empowerment", by using the misleading phrase "mandated all or nothing offers" to describe long established common carriage principles that protect the underlying structural integrity of telecommunications transmissions for the common good.

³² Throughout this submission, OpenMedia will use the term "content" interchangeably with the level of content, applications, and online services that consumers engage with once they are connected to the Internet.

³³ TELUS Intervention, *supra* note 12 at para 28.

³⁴ MMTC, "Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector" (9 May 2016), online: MMTC <http://mmtconline.org/WhitePapers/MMTC_Zero_Rating_Impact_on_Consumers_May2016.pdf>, at page 2.

38. While many layered models of the Internet exist, what people generally think of as “the Internet” could be described as comprising two layers: (1) the access layer, which consists of ISPs and the Internet connection they sell to users; and (2) the layer of apps, content, and online services over top of the access layer, which users consume and engage with *after* they obtain access to the Internet through their ISPs. For ease of reference, the term “content” will be used to refer to the entire second layer of apps, content, and online services.
39. Identifying that structural distinction between access and content makes it clear why users should not be paying Internet access providers for anything that goes beyond the access layer itself. If a subscriber orders Internet access from an ISP, they are paying that ISP for Internet access. The subscriber is not paying the ISP to specifically reach an Etsy store, a tumblr blog, or a SoundCloud playlist. *If* the subscriber decides to visit one of those sites after connecting to the Internet, it is up to Etsy, tumblr, or SoundCloud to charge the subscriber for their content or use of service. It is not the ISP’s place to co-opt the relationship between one of those providers and the user. The ISP’s relationship with the user is executed and completed as soon as the user is connected to the Internet. After that point, it is legally and functionally the ISP’s job to simply *get out of the way*.
40. To defend differential pricing practices such as zero-rating, however, ISPs and others present a muddled concept of the Internet where the access and content layers are melded into one, then sliced up like so many pieces of multilayer cake. This perverts what it means to have a functioning telecommunications system. If access and content were one and the same, as zero-rating proponents would have users and the Commission believe, only then might it seem acceptable for the Internet *access* providers to ration out that access according to what specific *content* it’s attached to. Content and access, however, are not one and the same.
41. Where ISPs are concerned, content is not the point, and by definition, content *cannot* be the point. The Supreme Court of Canada confirmed this in *Reference re Broadcasting Act*, 2012 SCC 4, as did the Commission in the Bell Mobile TV decision, Broadcasting and Telecom Decision CRTC 2015-26.³⁵ The *raison d’être* of an ISP is *access*: that is what the user pays for and the line of business the ISP purports to be in. What the user does or where the user goes with that access, after having obtained it (in exchange for compensation that the ISP profits from), is none of the ISP’s concern. Thus, rather than allow the fractured, piecemeal, rationed Internet that would arise from conflating the access and content layers to the detriment of both, the Commission must ensure that access and content remain structurally and conceptually distinct, in order to preserve the functional integrity of access while preserving users’ freedom of choice in content.
42. Allowing ISPs to select for their subscribers beforehand which app and content providers receive special treatment impairs users’ freedom of choice. Zero-rated plans would not result in consumers having “the ability to pick and choose”.³⁶ Rather, it represents a situation where

³⁵ “In the Commission’s view, just as the TSP provides a telecommunications service when it transports the mobile TV service accessed by a subscriber using Wi-Fi, so too is Bell Mobility providing a telecommunications service when it provides the transport, and data connectivity, so that the mobile TV service can reach its subscribers’ mobile devices.” *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* (29 January 2015), Broadcasting and Telecom Decision CRTC 2015-26, at para 24 [“Bell Mobile TV”].

³⁶ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Roslyn Layton) [Layton Intervention]; Roslyn Layton and Silvia Elaluf Calderwood,

- ISPs assume what consumers want, then pick and choose for them. No matter how popular that pre-selected option, it will still only be a preferred choice of *some* consumers, but now that option gets embedded as the preferred choice for *all* consumers.
43. Sandvine's response to the Commission's RFI here is telling:
- For example, an offer that allowed users to zero-rate just one application within a class can be consistent with Network Neutrality if the subscriber chooses that application from a menu that represented 'the full class'. Sandvine's own data shows that the top 25 streaming protocols (both video and music streaming) consume over 95% of the total, so it doesn't take that many applications to create a proxy for the full class.³⁷
- Internet users do not pay their Internet service providers to get a "proxy" of the Internet. The whole point is so that one can access the actual full class of what is available, and not a pre-determined "representation" of it.
44. The problem with catering to specific "preferences and constraints"³⁸ is that it is impossible to cater to *all* of them, thus by necessity the ISP ends up building in a preference for some choices over others. This then leads to anti-competitive and discriminatory effects as discussed in OpenMedia's first intervention.³⁹ Subscribers trust their ISPs to provide access alone, separate from content, and to transmit app and content data neutrally precisely so that users may access whatever they choose on an equal basis, regardless of what that specific choice actually is. To interfere with that core functionality of Internet service providers is to corrupt the nature of telecommunications access, which today includes the open Internet as part of its central nervous system.
45. The abovementioned conflation of access and content, incidentally, is why emotionally loaded hypothetical examples such as zero-rating assistive hotlines and medical or health care apps⁴⁰ seem so compelling at first blush.⁴¹ They divert the Commission's attention from the access layer to the content layer, to downplay the fact that what ISPs are asking for involves fundamentally impairing and fracturing the nature of telecommunications access, as provided through an Internet connection. Moreover, allowing such distortion of access for the sake of designated content simply keeps data prices high, including for other assistive hotlines and medical care apps that do not happen to partner with an ISP for special treatment. The solution is to make access as a whole more affordable, not break it into a million little pieces, one for each piece of content a user can afford to buy the associated chip of access to.

B. Data, Access, and Affordability: A Non-Solution to an Artificial Problem

46. In arguing for zero-rating, interveners also make several inaccurate or incomplete claims regarding data, Internet access, and affordability. These include statements that focus on the

"Zero-Rating: Do hard rules protect or harm consumers and competition? Evidence from Chile, Netherlands and Slovenia" (15 August 2015), in Layton Intervention, at page 4. [Layton and Calderwood].

³⁷ Sandvine Response to Sandvine(CRTC)22July16-1(b), at para 21.

³⁸ Layton and Calderwood, *supra* note 36 at page 2.

³⁹ Intervention of OpenMedia, *supra* note 22 at paras 19-22.

⁴⁰ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Xplornet), at para 52 [Xplornet Intervention].

⁴¹ Hypothetical, as despite the many altruistic examples listed by zero-rating proponents, the only zero-rating programs that have come to fruition in reality for the most part involve commercial entertainment alone.

idea of “free data”;⁴² on the notion that zero-rating is a “workaround to data cap costs”⁴³ for low-income consumers and will help consumers avoid “exceeding their data limits”⁴⁴ and associated overage fees; and on the assumption that the “popularity of data-intensive streaming media services is a likely culprit” of “higher-than-expected monthly wireless bills due to overages”.⁴⁵ Supporters of zero-rating also suggest that “something is better than nothing”⁴⁶ and that zero-rating will promote affordable Internet access and adoption. These arguments are wrong and misguided, for the following reasons.

47. First, the data is not really “free”. Consumers are paying for it through overall higher Internet plan prices, lack of true or fair competition, slower network upgrades due to lagging investment, and potentially subsidizing others’ plans with higher data caps or premium-only zero-rating (as with Videotron’s Unlimited Music).
48. Second, subscribers would not require a data cap “workaround”, or have to be sensitive to data limits and overage fees, if data caps did not exist to begin with. ISPs speak as if data caps are an inevitable force of nature that they are beneficently helping the customer deal with, rather than a crisis that the ISPs themselves created and may remove at any time.
49. Third, ISPs and zero-rating proponents speak as though users’ activities are the reason for their high Internet bills, which ignores the fact that it is the ISPs charging their customers such high prices, and for low data caps, to begin with. As for “something is better than nothing”, this yet again erases the role that ISPs play and are responsible for in the (un)affordability of Internet data in Canada: the choice is not between “something” and “nothing”, but between “something” and “everything”, *i.e.*, affordable, unimpaired Internet access. The Commission should not permit pro-zero-rating ISPs and their supporters to perform this rhetorical sleight-of-hand that conceals their role in customers’ difficulties, and the agency they have to address the problem at its roots, rather than with a superficial “workaround” that only further entrenches the underlying problem.
50. Fourth, Bell, citing MMTC, claims that differential pricing practices will mean that “the amount each user pays for service will more accurately reflect their actual consumption of mobile services”.⁴⁷ Clearly, this would not be the case with zero-rating, where the central claim is that users do not pay for the data they use (though, as OpenMedia submitted above, in reality users pay indirectly and over the long run). As for data caps themselves, the first intervention of OpenMedia and other public interest interveners explained why they also do not effectively match payment to users’ purported level of consumption.⁴⁸
51. Fifth and lastly, Sandvine and Bell (again citing MMTC) suggest that zero-rating media, for example, could “preserve”⁴⁹ or “free up” data for subscribers to use in “other, more meaningful ways”.⁵⁰ Three points here:

⁴² Bell Intervention, *supra* note 10 at paras 44 and 47.

⁴³ MMTC, *supra* note 34 at page 10, cited in Bell Intervention, *supra* note 10.

⁴⁴ Bell Intervention, *supra* note 10 at para 44.

⁴⁵ MMTC, *supra* note 34 at page 11.

⁴⁶ ITIF Intervention, *supra* note 20 at page 9.

⁴⁷ MMTC, *supra* note 34 at page 6, cited in Bell Intervention, *supra* note 10 at para 47.

⁴⁸ See *e.g.*, OpenMedia Intervention, *supra* note 22 at para 79.

⁴⁹ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Sandvine), at para 47 [Sandvine Intervention].; ITIF Intervention, *supra* note 20 at page 12.

⁵⁰ Bell Intervention, Table 1, *supra* note 10 at pages 18 and 20.

52. First, as mentioned above, "freeing up" data would not be a major concern if ISPs charged more reasonable and affordable prices to begin with, or if data caps did not exist. Second, if ISPs believe there are "more meaningful ways" for subscribers to use data, and they are engaging in differential pricing for the sake of their customers, it seems they should be zero-rating those other uses of data rather than the data of a category of usage that happens to be facing intense OTT competition.
53. Third, the "frees up data for other uses" line of reasoning again demonstrates confusion and reversed order of operations in terms of where choice is located when it comes to users, content, and access. How telecommunications works is that consumers first obtain access to the system and then decide what they will do with it. For example, one would install a phone line and then decide who to call, not decide who to call and then install a phone line that is only able to reach that one person. Similarly, consumers expect to buy access to the Internet, and then afterward have the ability to decide for themselves where on the Internet they will go.
54. The idea that zero-rating benefits consumers by "freeing up data" is only valid if the subscriber was planning to use their data on the zero-rated app or content to begin with, even if it were not zero-rated. Otherwise, they lose out because the choice of how to spend that data has been taken away from them, as the ISP pre-made that app or content choice for their customer and embedded it at the access level. This results in discriminatory pricing between customers who would have chosen the zero-rated app or content in any case, and those who would not have or do not in any case. And if a customer had not intended to select the zero-rated app or content in its own right, but then did so because of the zero-rating itself, then that is precisely the anti-competitive market distortion that makes zero-rating a threat to the integrity of Canada's telecommunications system.
55. Rather than accept the current state of data caps that are so low and so expensive that telecommunications service providers are seemingly going out of their way to purportedly help consumers solve the problem the TSPs themselves have created, the Commission should aim higher. This involves asking Canada's TSP to aim higher and do better, through investing more intensely in their networks and making Internet data plans more affordable for everyday Canadians, with reliable, basic access whose core function is not sacrificed for the sake of skirting fair competition or arbitrarily boosting preferred content.

C. Consumer Confusion and Transparency: When the Cure Is Worse than the Disease

56. Sandvine claims that the "true innovation" of zero-rating is the way it addresses consumer confusion and understanding, and ISP transparency around data caps.⁵¹ The record of this proceeding should make clear that this is not the case. Moreover, if the driving force at the heart of zero-rating is indeed as Sandvine says, then the response represents an abdication, not innovation, on the part of Canada's telecommunications service providers. It is no solution to "solve" a problem of understanding by removing the need to understand altogether. That would be equivalent to eliminating books from school curricula and calling it an innovative response to child illiteracy. It may be an acceptable solution if there were no collateral damage in terms of fundamentally significant things lost, but that is the case with neither books nor Internet data plans.

⁵¹ Sandvine Intervention, *supra* note 49 at paras 15, 17, and 50.

57. If transparency is the main concern, then ISPs must do more work to ensure consumers understand what they are paying for, rather than shirking the responsibility in a way that incidentally devastates the rest of the Internet ecosystem and calling it “innovation”. Of course, Internet access plans would be even easier for consumers to understand if ISPs removed data caps altogether. There would be nothing simpler and more transparent than that.
58. Having said that, Sandvine is incorrect in any case: subscribers do not find that zero-rating makes their data usage experience easier or less confusing. A4AI elaborates in its report:

Almost 15% of respondents noted that they switched to a paid plan because the zero-rated service was “too difficult to use.” This finding has been reflected in other research; interviews with zero-rating users in Ghana highlighted a lack of understanding — both around how to use zero-rated services and around how the operator would ensure the user would not be charged for use — as a barrier to use. Similarly, interviews with mobile Internet users in India found that some were unclear and sometimes sceptical about the billing mechanisms used for zero-rated services.⁵² (footnotes omitted)

D. The Commission Should Look to Consumers to Determine Consumer Interest

59. It is worth noting that some involved in this proceeding appear to be acting in the consumer or public interest, but in fact enjoy close ties with the telecommunications industry in both Canada and the United States. Evidence indicates that such ties directly influenced the opinions that these groups submitted to the Commission in this proceeding.
60. For example, the MMTC, whose report Bell relies on throughout its own intervention, underwent much public scrutiny in the United States after a Center for Public Integrity (CPI) investigation in 2013 “noted that MMTC’s position on [telecommunications and net neutrality] issues reversed just as donations poured in from the likes of Verizon, Comcast, and a who’s who of other telecom giants”.⁵³ The CPI investigation into MMTC revealed:

From 2009 through 2011 MMTC received at least \$725,000 in contributions and sponsorships from network neutrality foes including Verizon, Time Warner, and the National Cable and Telecommunications Association, according to MMTC tax filings and sponsorship lists.

Among the group’s most generous donors is cable giant Comcast, which, according to MMTC documents has spent at least \$375,000 on fundraising luncheons and conferences in Washington hosted by MMTC between 2009 and this year.⁵⁴

⁵² Thakur, *supra* note 13 at page 8.

⁵³ Jacob Long, “Comcast uses stake in news outlet to censor criticism” (2014), online: *GeekSided* <<http://geeksided.com/2014/08/02/comcast-uses-stake-news-outlet-censor-criticism/>>.

⁵⁴ Jason McLure, “Civil rights group's FCC positions reflect industry funding, critics say” (13 May 2014), online: *Center for Public Integrity* <<https://www.publicintegrity.org/2013/06/06/12769/civil-rights-groups-fcc-positions-reflect-industry-funding-critics-say>>. See also: Lee Fang, “Leading Civil Rights Groups Just Sold Out on Net Neutrality” (24 July 2014), online: *Republic Report* <<http://www.republicreport.org/2014/leading-civil-rights-groups-just-sold-out-on-net-neutrality/>>; Grant Gross, “Advocacy groups accused of obscuring corporate ties in net neutrality debate” (24 October 2014), online: *PC World* <<http://www.pcworld.com/article/2838952/advocacy-groups-accused-of-obscuring-corporate-ties-in-net-neutrality-debate.html>>; “Minority Astroturf Group Gets Comcast-Affiliated News Site To Remove Article About Minority Astroturfing On Net Neutrality” (4 August 2014), online: *Techdirt* <<https://www.techdirt.com/articles/20140802/07022828089/minority-astroturf-group-gets-comcast-affiliated-news-site-to-remove-article-about-minority-astroturfing-net-neutrality.shtml>>.

61. Similarly, the ITIF, Sandvine (albeit based in Canada), Facebook and AT&T put forth arguments in the name of consumer interest, but also appear to be tied to if not clearly part of the U.S. telecommunications industry, and have a track record of advocating for zero-rating in that jurisdiction as well as in others globally. As for ties to the Canadian telecommunications industry, OpenMedia notes that the MMTc, whose report is cited by Bell, in turn cites a recent blog post by economist Hal Singer,⁵⁵ who authored and co-authored reports in support of Bell's Cabinet Appeal challenging the Commission's mandated fibre decision in Telecom Regulatory Policy CRTC 2015-326.⁵⁶
62. These groups and individuals with established, significant financial relationships with the U.S. and Canadian telecommunications industries, are of course entitled to contribute to the Commission's proceeding, and the record benefits from diverse perspectives. However, they do not necessarily speak for everyday Internet users in Canada, whether low-income, from communities of colour, or otherwise. The evidence above suggests they may not even speak for everyday Internet users in the United States. In light of this, OpenMedia encourages the Commission to focus on the voices of Canadian Internet users themselves, such as the approximately 5,600 individual submissions in this proceeding, when making determinations on the future of their Internet access and telecommunications system.

E. A Better Way: Recommendations that Genuinely Address Consumer Interests

63. In terms of genuine ways in which ISPs can substantively address consumer interests, OpenMedia offers the following recommendations on transparency as well as Internet access service quality.
64. For meaningful transparency mechanisms that may be more effective, the following recommendations respond to Questions 9 and 15 in the Notice of Consultation for this proceeding. They refer to ITMP matters generally as well as differential pricing practices, particularly if the Commission brings the latter into the framework of the former.
65. First, the Commission should create an ITMP Complaints Portal, similar to that created by Michael Geist in 2011,⁵⁷ or perhaps modelled after Respect My Net, a net neutrality monitoring tool in the European Union.⁵⁸ The current ITMP Framework lacks effective transparency when it comes to meeting users' needs, whether concerning complaints, clarity of terms, or basic concepts required to understand important information. For example, while the Commission reports the number of ITMP complaints each quarter, there are no details about the complaints themselves, such as who the subject of each complaint was, the nature of the complaint, and the outcome.⁵⁹ In its current form, the ITMP Status Report provides no

⁵⁵ MMTc, *supra* note at note 2.

⁵⁶ It is further worth noting that both Hal Singer and Jeffrey Eisenach, who authored a report for TELUS in this proceeding, were recently featured in a *New York Times* examination of the close ties between think tanks, scholars or researchers, consultants, lobbyists, and industry, particularly in the U.S. telecommunications sector: Eric Lipton, "Think Tank Scholar or Corporate Consultant? It Depends on the Day" (8 August 2016), online: *New York Times* <http://www.nytimes.com/2016/08/09/us/politics/think-tank-scholars-corporate-consultants.html?_r=0>.

⁵⁷ Michael Geist, "Canada's Net Neutrality Enforcement Failure," (8 July 2011), online: <<http://www.michaelgeist.ca/2011/07/net-neutrality-enforcement-fail/>>.

⁵⁸ Respect My Net, online: <<https://respectmynet.eu/start/>>.

⁵⁹ Canadian Radio-television and Telecommunications Commission, "Status Report – Complaints Related to Internet Traffic Management Practices (ITMPs)" (30 June 2016), online: CRTC <<http://www.crtc.gc.ca/eng/internet/pub.htm>>.

- information that would be meaningful to consumers or that they could act on or incorporate into their decisions.
66. The information presented on the cited Geist webpage should already be publicly available and easily accessible to the average Internet user, rather than require the Canada Research Chair in Internet and E-commerce Law to pursue a number of Access to Information requests to obtain.⁶⁰ Consumers have a right to know the number and nature of ITMP complaints that have been levelled against the carriers they are subscribed to or considering subscribing to. Consumers should also know the outcome of each complaint, such as whether or not the complaint was justified, and if it was, what was done about it, and if or how it was resolved to the customer's satisfaction.
67. Second, the Commission should track and publish all ITMP-related data, trends, and information in the *Communications Monitoring Report*.⁶¹ This data should be measured independently, not be self-reported by TSPs. It would include all the information in the ITMP Complaints Portal and information related to differential data practices and associated complaints, in addition to the number and type of ITMPs that ISPs implemented each year. This section of the report could also include tracking of data plans and differential pricing practices (if implemented) over time, in terms of cap and price levels, broken down by date and carrier. This would assist, for example, in identifying simultaneous data cap drops or price hikes for further scrutiny, if necessary.
68. Third, the Commission should mandate that ISPs make overt efforts to meaningfully inform consumers of what implemented ITMPs mean for them. This may involve publishing basic primers explaining technical concepts, posting user-friendly glossaries or infographics, or training customer service representatives to communicate the relevant concepts and consequences of ITMPs more effectively to customers. This should also involve mandating an ISP ITMP reporting requirement, as Bram Abramson suggested in a recent conference paper:
- [C]reate a post-hoc ISP reporting requirement designed to provide consumers with transparency on the actual impact of technical ITMPs that have been deployed. Regular reporting such as this could demonstrate the actual impact on Internet services by providing aggregate data about key metrics, such as the percentage of customers actually affected by the measures, and typical or range of actual impact on customers' speeds or use of affected protocols or applications. Moreover, this kind of transparency report would provide a clearer dashboard on industry practices for ITMPs, helping to demonstrate the range of approaches and appropriate context for comparing industry practices to implementing ITMPs. Of course, Commission staff could then include aggregated analyses of these transparency reports in the following year's Communications Monitoring Report.⁶²
69. Fourth, the Commission should consider implementing industry-wide standards and terms of reference when it comes to imparting information about ITMPs, as recommended in PIAC's report, *Transparency in Broadband Advertising*.⁶³ This would involve consistent units (per MB or per GB?), an agreed-upon conversion rate (is 1 GB assumed to be 1000 MB or 1024

⁶⁰ Geist, *supra* note 57.

⁶¹ See also Bram Abramson, "Network Neutrality in Canada" (Paper delivered at the 18th Biennial National Conference: New Developments in Communications Law and Policy (6 May 2016), at page 7-14: "[R]eport on full-year ITMP results in its annual Communications Monitoring Report. This would make their historical and more in-depth analysis, and therefore the identification of trends, more challenging."

⁶² *Ibid.*, at page 7-14.

⁶³ Laman Meshadiyeva and Janet Lo, "Transparency in Broadband Advertising to Canadian Consumers" (January 2013), online: Public Interest Advocacy Centre <https://www.piac.ca/wp-content/uploads/2014/11/piac_transparency_broadband_ads_final.pdf>, at page 60.

- MB?), and per MB or per GB breakdown of all prices for wireline and mobile wireless Internet data plans, particularly if data caps are not eliminated altogether. All TSPs as well as the Commission should also make publicly available and easily accessible a consumer-friendly document explaining these standards and terms of reference.
70. As for Internet service itself, OpenMedia reiterates its call from the basic services proceeding to implement minimum quality of service (QoS) standards with respect to Internet access offerings from ISPs.⁶⁴ Bell refers to zero-rating as a way to improve customer satisfaction;⁶⁵ however, it seems customers would be even more satisfied if ISPs improved the core service that their subscribers go to them and understand they are paying for: Internet access.
71. Recent surveys of Canadian consumers' satisfaction with their Internet service providers, such as those conducted by the Commissioner for Complaints for Telecommunications Services (CCTS) and by EKOS for the Commission's basic services review, suggest consumers would be satisfied if ISPs improved their core services, did not charge as much for their services, or were more transparent and upfront with consumers. In the 2015 CCTS Annual Report, for instance, the top five issues that complaints raised involved non-disclosed or misleading contract terms; incorrect charges; legitimacy and amount of early cancellation fees; intermittent or inadequate quality of service; and the 30-day cancellation policy.⁶⁶ Differential pricing practices such as zero-rating would alleviate none of these problems.
72. Similarly, while the Commission's EKOS survey indicated a high level of dissatisfaction with price, consumers displayed not insignificant levels of dissatisfaction with speed and reliability, as well, in both wireline and wireless services.⁶⁷ Speed, reliability, and price (or affordability)—the price and affordability of straightforward Internet access, not differentially priced, zero-rated, content-biased, or otherwise impaired Internet access—are three metrics inherent, not extraneous, to providing quality Internet service.⁶⁸ It would seem that for an Internet service provider, investing in improving one or all three metrics that are inherent to its offering, rather than adding on ancillary perks with significant longterm collateral damage, is likely the best and most effective way to the heart of customer satisfaction.

⁶⁴ CNOC makes a suggestion along similar lines of protecting service quality, in the specific context of differential pricing practices: "ISPs should be prohibited from applying differential pricing practices if doing so negatively impacts their network (e.g. network congestion resulting from the increased use of the differentially priced services) in a manner that degrades all services and applications or the services and applications within service/application categories that are not subject to differential pricing." CNOC Response to CNOC(CRTC)22Jul16-1, at page 6.

⁶⁵ Bell Intervention, Table 1, row (viii), *supra* note 10 at para 37.

⁶⁶ Commissioner for Complaints for Telecommunications Services, "Making the Tough Calls: Annual Report 2014-15" (2015), online: CCTS <<http://www.ccts-cprst.ca/wp-content/uploads/pdfs/en/2014-2015/CCTS-Annual-Report-2014-2015.pdf>>, at page 11 [CCTS Annual Report].

⁶⁷ EKOS Research Associates, "Let's Talk Broadband: Findings Report" (8 January 2016), online: *Library and Archives Canada* <<http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/crtc/2016/030-15-e/report.pdf>>, at pages 38-39 (Table 2.12) and 42 (Table 2.13). [EKOS Survey].

⁶⁸ Rogers, for example, invested in upgrading its speed and data caps to address its customers' interests more directly: "By increasing data cap and speed levels, Rogers has been able to effectively respond to data usage trends and maintain/enhance customer satisfaction. This growth in speed and data caps was only possible, however, due to the continued enormous investments made in Rogers' broadband and wireless networks." Rogers Response to Rogers(CRTC)22July16-2, at para 3.

III. Zero-Rating Will Decrease Competition and Investment

73. OpenMedia has maintained throughout this proceeding that zero-rating and similar differential pricing practices are rooted in the existence of data caps, and thus the latter should be eliminated, or drastically raised in the case of mobile wireless providers. Among ISPs' responses to the Commission's requests for information, the ability to raise data caps appeared to revolve around two key factors: consumer demand, and network capacity or resources, which are a result of investment.⁶⁹ There appears to be ample evidence of the former, and OpenMedia submits that ISPs themselves are equal to fulfilling the latter, creating a virtuous cycle of intense investment resulting in further network growth and innovation, which in turn allows consumer demand to be properly met. In this scenario, all boats rise: consumer interest, affordability, innovation, growth and investment in industry, the public good, and Canada's telecommunications system as a whole. However, this requires the Commission to envision this future and implement policies that will make it possible, including prohibiting anti-competitive practices such as zero-rating.

A. Banning Zero-Rating Will Promote Competitive Behaviour Among ISPs

74. Not only will zero-rating practices work against consumer interests, but they will also work against competition and innovation in the telecommunications market, particularly over time. Evidence from various countries in Europe has already demonstrated what happens in terms of anti-competitive behavior among ISPs, their Internet data plan prices, and their respective markets when telecommunications service providers are allowed to distort common carriage principles and sell fractured access to users.

75. For example, multiple OECD mobile wireless service providers simultaneously raised their prices and began zero-rating online video in 2014:

The most alarming finding by far was sharp hikes in the price of mobile internet usage (€/Gigabyte) by operators that have launched during 2014 own zero-rated data-hungry video services such as on-demand film stores and mobile TV. Similarly a European operator that has launched zero-rated unlimited YouTube access over 4G has at the same time tripled the price of open mobile internet usage (€/Gigabyte).⁷⁰

76. According to Digital Fuel Monitor, such effects "were particularly pronounced in recently consolidated mobile markets. In the Austrian market, where the number of mobile operators went down from four to three, post-merger mobile internet usage prices have almost doubled".⁷¹ This is particularly concerning in the context of the rapidly consolidating

⁶⁹ See e.g., Shaw Response to Shaw(CRTC)22July16-1; Xplornet Response to Xplornet(CRTC)22July16-1(b); Eastlink Response to Bragg(CRTC)22July16-1(b); and Bell Response to Bell(CRTC)22July16-3(b). OpenMedia notes that TekSavvy identified just and reasonable wholesale rates as its key factor to higher data caps, which speaks to larger issues of competition and how the telecommunications market is structured. TekSavvy Response to TekSavvy(CRTC)22July16-1(b).

⁷⁰ "EU28 & OECD mobile internet access competitiveness report Q4 2014" (17 November 2014), online: *Digital Fuel Monitor* <http://www.dfmonitor.eu/insights/2014_nov_premium_q4_update/>.

⁷¹ Antonios Drossos, Rewheel, "The real threat to the open Internet is zero-rated content" (2014), online: *Digital Fuel Monitor* <http://dfmonitor.eu/downloads/Webfoundation_guestblog_The_real_threat_open_internet_zerorating.pdf>, at page 5.

- Canadian landscape, where Shaw has recently bought Wind Mobile, where Bell is in the process of buying MTS, and where chatter has risen about the potential sale of SaskTel.⁷²
77. Digital Fuel Monitor further noted that the above three operators in Austria, “which post-merger collectively control over 90% of the mobile internet access market, have launched potentially anti-competitive zero-rated mobile TV and film streaming apps for flat fees of few Euros per month”.⁷³ This, too, seems familiar. Bell, Rogers, and TELUS together control 90% of the Canadian retail mobile wireless market,⁷⁴ and Bell has already attempted its own mobile video streaming app for a flat fee of a few dollars per month.⁷⁵ Even CNOC, which proposes a version of zero-rating, emphasizes that the proposal “assumes the existence of a retail Internet service market that is competitive and characterized by a range of competitive offers (including unlimited usage offers) that are available to end-users”.⁷⁶ This arguably does not exist for Canadian users right now, and Europe consequently provides a preview of Canada’s potential dark telecommunications future if the Commission allows anti-competitive practices such as zero-rating to flourish.
78. Fortunately, however, the phenomenon that Digital Fuel Monitor observed also works in the other direction. As CMCRP noted in its first intervention, the carrier KPN in the Netherlands doubled its mobile wireless data caps—while keeping prices the same—in direct response to meaningful action that regulators took to preserve backbone common carriage principles of their telecommunications system.⁷⁷ Today, “[c]ompared with January 2014, KPN offers now 5 times higher volume (10 Gigabytes versus 2) for a lower price”,⁷⁸ demonstrating “empirical evidence of the pro-competitive benefits of real net neutrality rules that ban zero-rating and all other forms of price discrimination”.⁷⁹
79. OpenMedia notes that some have suggested zero-rating will encourage competition among TSPs on other grounds, such as through the specific selection or combination of apps and content zero-rated.⁸⁰ Quebecor, for instance, quotes ITIF in stating, “With zero-rating offers, mobile operators are looking beyond price, network performance, and devices to differentiate

⁷² CBC News, “Premier Brad Wall discusses the potential sale of SaskTel” (23 August 2016), online: *CBC* <<http://www.cbc.ca/news/canada/saskatchewan/premier-brad-wall-discusses-the-potential-sale-sasktel-1.3733267>>.

⁷³ Drossos, *supra* note 71 at page 5.

⁷⁴ CRTC, “Display 5.5.0: Key indicators for the wireless retail sector” (October 2015) *Communications Monitoring Report*, online: CRTC <<http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/crtc/2016/030-15-e/report.pdf>>, at page 219.

⁷⁵ Bell also notes the possibility of zero-rating impacting ISPs’ data caps, in its response to Bell(CRTC)12Aug16-3(d): “If zero-rating becomes more widespread in Canada in the next two years, and in the absence of regulations limiting the practice, it is possible that it could be a factor considered in setting usage caps. Zero-rating could also be a consideration in setting data caps if one or more of the applications being zero-rated accounts for a substantial amount of subscribers’ typical data usage.”

⁷⁶ CNOC Response to CNOC(CRTC)22July16-1(d).

⁷⁷ “In January 2014 KPN used to sell a Gigabyte of mobile internet access for €5.8. By November 2014 the price had dropped to €2.3 and days after ACM announced its zero-rating decision KPN lowered the price to €1.1. Having no more room to manoeuvre, not being able to favour its own video services or gate keep the internet in the Netherlands KPN decided to encourage carefree usage of online video by massively (80%) discounting the price of mobile internet usage (€ per Gigabyte).” Rewheel, “In the Netherlands, where zero-rating is banned, KPN just doubled (free of charge) the mobile internet volume caps to encourage a carefree usage of its online videos” (6 February 2015), online: *Digital Fuel Monitor* <http://dfmonitor.eu/downloads/Banning_zerorating_leads_to_higher_volume_caps_06022015.pdf>, at page 1 [Rewheel, “KPN”].

⁷⁸ Rewheel, “KPN”, *supra* note 77 at page 2.

⁷⁹ Drossos, *supra* note 71 at page 5.

⁸⁰ Xplornet Intervention, *supra* note 40 at para 52.

themselves from competitors.”⁸¹ This is not a benefit, however, but part of the fundamental problem: zero-rating distorts the telecommunications market by shifting the grounds of competition away from the core service—providing reliable, high-quality Internet access—to ancillary content and service markets that neutral conduits responsible for access infrastructure should have no business being in.

80. In its first intervention, OpenMedia submitted that in addition to derailing fair and genuine competition in the Internet access market, zero-rating by ISPs will also distort the markets of the applications and contents subject to the differential treatment.⁸² True, various application and content providers told the Commission in response to RFIs that they have not held back from launch, ceased offering service, scaled down, or otherwise lost out due to an ISP engaging in differential pricing. However, responses to this particular question from these particular businesses—Deezer, Google, and Facebook⁸³—mean little, for two reasons. First, the harm that flows from zero-rating would emerge as a long-term consequence, thus may not necessarily appear obvious immediately or in the short term. Second, Google, Facebook, and Deezer are precisely the already dominant and successful applications and content providers who would unfairly systemically benefit at the expense of new entrants in the event of zero-rating. They would also be able to resist their competitors being zero-rated, due to network effects, incumbent advantage, and being better financed. The Commission asked the wrong parties that question, or at least asked insufficient parties—some of whom may not yet exist, as one of the harms of zero-rating is about foreclosing on future innovation and unforeseen possibilities that might never come to fruition in the absence of an open Internet.
81. Internet service providers should compete on Internet service. This means addressing customer satisfaction with their business head-on, by increasing Internet speed; increasing data caps; lowering prices; or lowering latency, packet loss, and jitter—all inherent aspects of Internet access service, the service consumers pay ISPs for. Diverting consumer attention or assuaging consumer dissatisfaction with derivative features such as music, news, or other content, both disincentivizes ISPs from competing on their core access functions and thus investing more in upgrading their networks, and moreover distorts competition in the ancillary content-layer markets the zero-rating ISP has inappropriately extended into.

B. Smaller Players Will Not Benefit from Zero-Rating

82. Several zero-rating proponents also suggest that allowing the practice will give new entrants and smaller players, whether ISPs, app providers, or content providers, an additional tool they may leverage to succeed in competition with dominant or incumbent businesses.⁸⁴ There are two problems with this. First, leverage of that sort would only work effectively if new entrants and smaller providers alone engaged in zero-rating or similar differential pricing practices, while larger service, app, and content providers were barred from doing so. If

⁸¹ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Quebecor), at para 12 [Quebecor Intervention]. ITIF Intervention, *supra* note 20 at page 11.

⁸² Intervention of OpenMedia, *supra* note 22 at para 126.

⁸³ Google Response to Google(CRTC)22July16, at paras 3-4; Facebook Response to Facebook(CRTC)22July16-2 and -3; Deezer Response to Deezer(CRTC)22July16-1 and -2.

⁸⁴ Xplornet Intervention, *supra* note 40 at para 53: “Application providers may also benefit. For example, zero-rated data for their applications would reduce costs to consumers of trying new applications, thereby overcoming a barrier to potential consumer adoption of the new applications. ... Such a differential pricing practice would have a positive effect of facilitating new product entry into the application market.”; ITIF Intervention, *supra* note 20 at page 12; Bell Intervention, *supra* note 10 at para 106.

- everyone equally engages in zero-rating, then whatever leverage the new or smaller entrant has will find itself cancelled out by larger incumbent providers also leveraging zero-rating, and everyone involved is back where they started, except now with the additional disadvantage of having foreclosed upon even smaller or newer providers who could not afford to engage in zero-rating themselves.⁸⁵
83. Second, the experience in Canada to date shows that smaller providers leveraging zero-rating to get ahead is not what happens; rather, it has been the most dominant providers zero-rating the most dominant online services, moving away from a more competitive market by further entrenching and promoting already established services. For example, it was Bell which rolled out Mobile TV, and not WIND, and it was Videotron which launched Unlimited Music, not Ice Wireless. Similarly, the majority of music services benefiting from Videotron's zero-rating for instance—Google Play Music, Spotify, Deezer, Stingray Music, 8tracks, Groove, Jango, and Bandcamp⁸⁶—were already well-established, popular, successful businesses at the time they joined Videotron's program.
84. In fact, that pre-existing popularity and success was one of the reasons they were able to join the program so easily to begin with: "To this end [that of enhancing commercial attractiveness], Videotron has proactively approached many of the most well-known providers to inform them of the service and invite them to participate."⁸⁷ While zero-rating proponents cite leveraging and increasing network effects as another potential benefit of zero-rating,⁸⁸ network effects simultaneously demonstrate why zero-rating is more likely to weaken competition and distort market forces in favour of already well-known and popular services and content. Consumers will flock towards zero-rated services, apps, and content presented as "free", thus contributing disproportionately to network effects on all of those platforms, relative to what each platform would have earned on its own merit. This would induce a snowball effect, however, that would accumulate as time progresses, while foreclosing on other and perhaps better and more innovative apps, services, or content that were not zero-rated.
85. Thus, contrary to lending a meaningful assist to the little known, obscure, tiny start-up, zero-rating more commonly tilts the market towards those who already least need it. As CNOC puts it,

The distortive market effects on application providers will be particularly pronounced with new application providers trying to break into the market for the first time. Newer application providers will face discoverability obstacles as end-users will be less likely to seek out applications, or content, that is not subject to a beneficial differential pricing practice. In addition, smaller or newer application providers are less likely to have the fiscal resources necessary to participate in a sponsored data program. Thus sponsored data programs could become economic moats for established application providers and a barrier to entry for new application providers. Overall,

⁸⁵ Distributel provides a good description of how this situation might play out. First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Distributel), at paras 9-11 [Distributel Intervention].

⁸⁶ Videotron, "Unlimited Music", online: <<http://www.videotron.com/unlimitedmusic>>.

⁸⁷ Supplementary Comment (13 January 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Supplementary Comment of Videotron), at para 15.

⁸⁸ See, e.g., TELUS Intervention, *supra* note 12 at para 25.

differential pricing practices could have a chilling effect on innovation by new application providers, contrary to the policy objective contained in subsection 7(g) of the Act.⁸⁹

86. This already occurs outside of Canada. In South America, for instance, ISPs “often zero-rate the top three social messaging applications or the top three social networks” alone.⁹⁰ Where ISPs aren’t zero-rating already established services, they are zero-rating their own instead: among OECD and European countries, for instance, Digital Fuel Monitor found that 36 ISPs zero-rated their own online video apps and ten ISPs zero-rated their own cloud storage apps (while charging data for competitors such as DropBox and Google Drive).⁹¹
87. In light of all of the above, one of the key potential benefits of zero-rating cited by its proponents seems to be exactly what has not happened, and seems the most unlikely to happen. This is not surprising, considering the relative financial resources and profit margins of smaller providers compared to larger ones. In fact, allowing zero-rating poses a threat to independent ISPs and competition generally, as once enough providers start engaging in the practice, all others will have no choice but to do so as well, as zero-rating will become part of the new table stakes.⁹²
88. Furthermore, while there may be “mavericks” in the United States, as ITIF describes,⁹³ not only are the mavericks not the ones leveraging zero-rating in Canada, but no mavericks even exist in Canada any longer to do any such leveraging at all, with the loss of WIND Mobile to Shaw and now permanent loss of Public Mobile and Mobilicity. While Ice Wireless, through Sugar Mobile, has tried to do something new in a somewhat separate context, it also faces difficulties.⁹⁴ Lastly, to the extent any non-incumbent service provider might be considered a maverick, the record shows that many in this proceeding oppose zero-rating in its more egregious forms, thus would be less likely to take it up unless forced to.⁹⁵

⁸⁹ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Canadian Network Operators Consortium), at para 26(b) [CNOC Intervention].

⁹⁰ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Barbara van Schewick) [van Schewick Intervention]; Barbara van Schewick, “Network Neutrality and Zero-rating” (19 February 2015), at page 5, in van Schewick Intervention [van Schewick, “Network Neutrality”].

⁹¹ *Ibid.*

⁹² Eastlink, for example, notes that while it does not currently zero-rate data or factor zero-rating into its data package, that could change as “it will depend on the nature of zero-rating occurring in the market and the specific considerations at the time. ... any internet and wireless service packages we offer need to respond to our customers’ needs and interests, balanced by business considerations and technical limitations. As such, zero-rating may be a useful tool for this purpose. A competitive retail internet market, by nature, will require that we provide attractive offers...” Eastlink Response to Bragg(CRTC)22 July16-1(d). Similarly, TekSavvy notes, “Zero-rating does not factor into cap setting now, because neither TekSavvy nor its competitors zero-rate usage for wireline services. However, were TekSavvy’s competitors to begin doing so, TekSavvy would have to carefully consider the nature of such competition, and consult its end-users as to their preferred competitive response.” TekSavvy Response to TekSavvy(CRTC)22Jul16-01(d).

⁹³ ITIF Intervention, *supra* note 20 at page 11.

⁹⁴ Robin Levinson King, “Discount start-up Sugar Mobile fighting Rogers for roaming access” (17 February 2016), online: *Toronto Star* <<https://www.thestar.com/business/2016/02/17/discount-start-up-sugar-mobile-fighting-rogers-for-roaming-access.html>>.

⁹⁵ See *e.g.*, CNOC Intervention, *supra* note 89 at para 39; Distributel Intervention, *supra* note 85 at para ES 4; and First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of tbaytel), at paras 7-9 [tbaytel Intervention].

C. Ending Data Caps and Banning Zero-Rating Has Industry Support

89. Despite industry opposition to zero-rating and insistence on the necessity of data caps, this proceeding and recent events have demonstrated notable industry support for both banning zero-rating and ending data caps. Specifically, support has emerged from Rogers, one of Canada's three largest TSPs; T-Mobile, the self-styled "maverick" U.S. mobile wireless provider; and Netflix, the over-the-top (OTT) online video streaming service.
90. In its first intervention in this proceeding, Rogers set out a position that opposes differential pricing practices such as zero-rating and sponsored data:

Rogers believes the Commission should adopt two guiding principles that would govern the data plans of all Internet service providers (ISPs) and mobile carriers...:

(i) all applications and content provided over the Internet and mobile networks should, in general, be subject to an ISP's standard data charges; and

(ii) all customers should pay an ISP's standard data charges when they consume data, regardless of the nature of the content or application they access.⁹⁶

91. Rogers, a major ISP, goes on to note that "[d]ifferential pricing practices do give ISPs the ability to act as gatekeepers in every case",⁹⁷ and that they "are examples of anti-competitive behaviour".⁹⁸ The ISP's intervention indicates that its "proposal will eliminate the incentive for ISPs to establish differential data pricing plans that are designed to prefer their own content and applications, as well as content and applications that they do not own (e.g. a class of online applications, such as streaming music services), and to disadvantage the offerings of third parties".⁹⁹ These statements undermine other interveners' claims that there is no gatekeeping or anti-competitive effect in differential data pricing practices, that there are no incentives worth taking into account in the absence of financial compensation, or that the desire to harness network effects will act as a disincentive to treating data preferentially in an undue or unjust manner.
92. Rogers additionally states, and OpenMedia agrees, that its guidelines that all subscribers and all application- and content-providers be subject to their respective ISP's standard data charges "has the added benefit of being simple and easy to understand [and] can be applied...in an efficient and transparent manner"¹⁰⁰—contrary to Sandvine's claim that zero-rating is about "transparency".
93. Lastly, Rogers' intervention reinforces several more key points that OpenMedia and other public interest groups have made in this proceeding: banning zero-rating will "ensure that the market for audiovisual services and content delivered online remains open and non-discriminatory, which will support innovation and ensure greater choice for Canadians"¹⁰¹; "potential benefits [of zero-rating] are vastly outweighed by the risks"¹⁰² and "pales in

⁹⁶ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Rogers), at para 4 [Rogers Intervention].

⁹⁷ *Ibid.*, at para 42.

⁹⁸ *Ibid.*, at para 46.

⁹⁹ *Ibid.*, at para 11.

¹⁰⁰ *Ibid.*, at para 12.

¹⁰¹ *Ibid.*, at para 14.

¹⁰² *Ibid.*, at para 38.

comparison to the significant harm that differential pricing will inflict”¹⁰³; and in any case, “potential benefits...could be achieved through other business models”.¹⁰⁴

94. It is worth noting, as potentially relevant to the cable companies’ positions in this proceeding, that Rogers has demonstrated evidence of more aggressive investment in its networks than have telecommunications companies such as Bell and TELUS. For example, Rogers’ network spans the country, while Bell and TELUS have only built out to parts of Canada and share a network between them in each other’s main territory.¹⁰⁵ Rogers was also the first TSP in Canada to roll out its LTE wireless network.¹⁰⁶ Furthermore, despite being disputed by Bell, independent speed data from Measurement Lab (M-Lab), which CIRA uses for its Internet Performance Test,¹⁰⁷ shows that Rogers has in recent years maintained the highest average Internet access download speeds among the largest ISPs in Canada (Figure 1)¹⁰⁸:

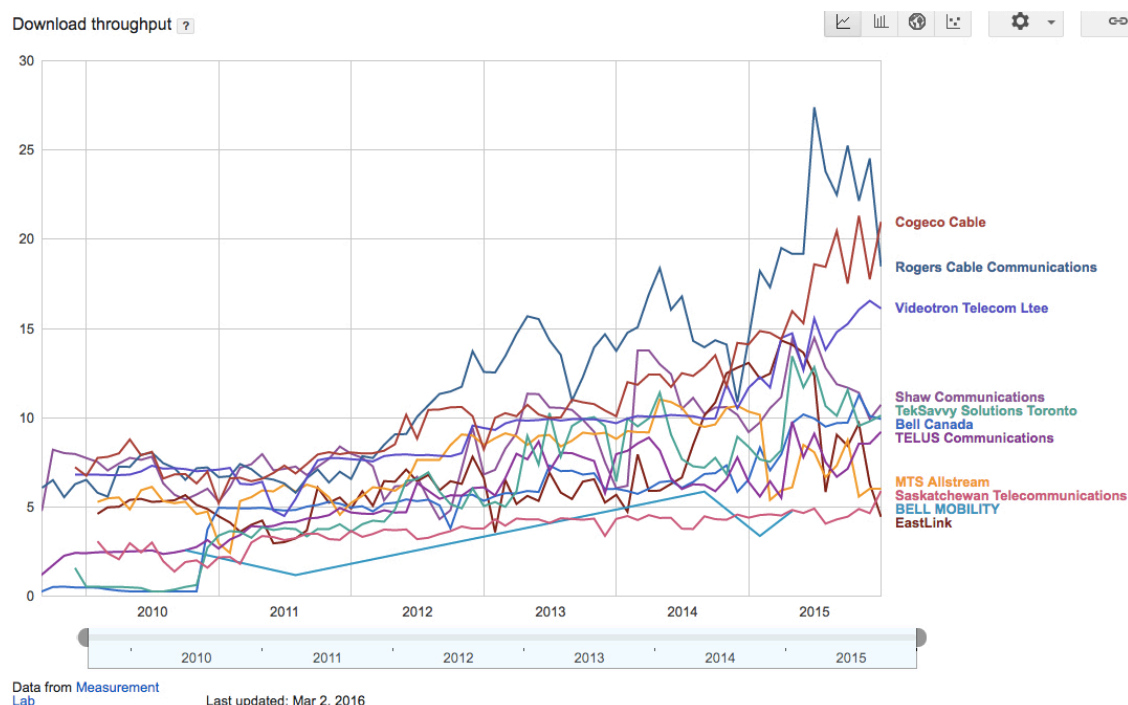


Figure 1

¹⁰³ *Ibid.*, at para 38.

¹⁰⁴ *Ibid.*, at para 33.

¹⁰⁵ Jamie Sturgeon, “Telus and Bell’s wireless partnership still a sore spot for competitors” (12 June 2012), online: *Financial Post* <<http://business.financialpost.com/fp-tech-desk/telus-and-bells-wireless-partnership-still-a-sore-spot-for-competitors>>; and Emily Jackson, “Rogers Communications Inc, BCE Inc CEO trade barbs over which company has the fastest mobile network” (13 September 2016), online: *Financial Post* <<http://business.financialpost.com/fp-tech-desk/rogers-communications-inc-ceo-disputes-study-calling-bce-incs-bell-the-fastest-mobile-network-in-canada>>.

¹⁰⁶ Iain Marlow, “Rogers powers up LTE wireless network” (7 July 2011), online: *Globe and Mail* <<http://www.theglobeandmail.com/globe-investor/rogers-powers-up-lte-wireless-network/article586008/>>.

¹⁰⁷ “How the Internet Performance Test Works”, CIRA Internet Performance Test, online: CIRA <<https://cira.ca/build-better-internet/cira-internet-performance-test/how-internet-performance-test-works>>.

¹⁰⁸ Public Data, Broadband performance using M-Lab data (2 March 2016), online: Google <https://www.google.com/publicdata/explore?ds=e9krd11m38onf_&ctype=m&strail=false&bcs=d&nselm=s&met_s=number_of_test_s&scale_s=lin&ind_s=false&met_c=download_throughput&scale_c=lin&ind_c=false&ifdim=country&hl=en_US&dl=en_US&ind=false&xMax=180&xMin=-180&yMax=79.97571094413946&yMin=84.17339026552769&mapType=t&icfg&iconSize=0.5>.

95. The above observations reinforce OpenMedia's position that zero-rating (in addition to data caps) disincentivizes network investment, and allows TSPs to remain lax in terms of improving access services where the market does not provide other forms of competitive discipline (such as regional competitors). Rogers' voluntary compliance with Broadcasting and Telecom Decision CRTC 2015-26, the Commission's Bell Mobile TV decision¹⁰⁹ recently affirmed by the Federal Court of Appeal in *Bell Mobility Inc. v. Klass*, 2016 FCA 185,¹¹⁰ lends further credence to the idea that network investment increases in the absence of zero-rating, when combined with this statement by Rogers' CEO:

Guy Laurence said Monday that he didn't even consider offering unlimited data usage for Spotify Premium...because the whole point was to encourage subscribers to get comfortable with using more mobile data. [...] "A lot of plans these days, voice is virtually free, texts are virtually free – you've got to pay the bills somehow, right? So we're paying for it through the monetization of data".¹¹¹

Presumably, Rogers expects to be prepared for the increased data usage it is deliberately encouraging among its subscribers, increasing and improving its supply of network speed and capacity to meet the demand the company itself is stoking.¹¹² While retaining data caps still unnecessarily restricts demand, as OpenMedia detailed in its first intervention, Rogers' positions, actions, and statements all together suggest that zero-rating is equally tied to artificially depressed network investment, and the Commission should accordingly prohibit such practices from interfering with the growth of Canada's telecommunications system.

96. Incidentally, OpenMedia notes that the next three fastest networks in Figure 1—Cogeco, Shaw, and Videotron—are all cable companies. Cogeco, second only to Rogers and surpassing at points, supports differential pricing practices in its intervention, but also does not use them nor has plans to use them in the next two years.¹¹³ This suggests that (Videotron's situation notwithstanding) there could be a connection between seemingly better performing Internet networks and lack of pressing interest in applying differential pricing practices, contrary to incumbent telecommunications companies such as Bell and TELUS. This again raises the notion that zero-rating, if allowed, would act as a disincentive to invest in truly improving network quality and other core aspects of Internet access services.
97. While Rogers maintains its use of and support for data caps, along with the rest of the industry in Canada, both a major wireless service provider and top online content provider in the United States are proceeding otherwise: T-Mobile and Netflix. T-Mobile recently eliminated data caps in its mobile wireless plans, charging a flat fee for unlimited data on its 4G LTE network.¹¹⁴ While this comes with the caveat that users above 26 GB/month may

¹⁰⁹ Bell Mobile TV.

¹¹⁰ *Bell Mobility Inc. v. Klass*, 2016 FCA 185

¹¹¹ Christine Dobby, "Rogers CEO hopes Spotify partnership will increase mobile data usage" (14 September 2015), online: *Globe and Mail* <<http://www.theglobeandmail.com/report-on-business/rogers-ceo-hopes-spotify-partnership-will-increase-mobile-data-usage/article26361464/>>.

¹¹² See also Rogers Response to Rogers(CRTC)22July16-2, at para 3: "As data traffic rapidly increases, Rogers must continually invest in expanding the capacity of our wireline and wireless networks to meet this demand. ... Rogers has steadily been introducing over time new service plans with expanded data caps and higher speeds to respond to a general increase in usage patterns."

¹¹³ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Cogeco), at para 4 [Cogeco Intervention]; and Cogeco Response to Cogeco(CRTC)22Jul16-1(d).

¹¹⁴ "Unlimited everything, for everyone" (2016), online: *T-Mobile* <https://explore.t-mobile.com/t-mobile-one?icid=WMM_TM_1325SMPLCH_U2VUOZ4QFZ75942>.

experience reduced speeds during congestion,¹¹⁵ 26 GB/month for \$70 USD (\$92.48 CAD at time of writing) is nearly twice as much as Bell Mobility's highest cap of 15 GB/month, which sells in a phone plan for \$120 CAD per month.¹¹⁶ If a "maverick" pureplay wireless provider can do it, OpenMedia questions why Canada's largest, multiplay, in-part vertically integrated telecommunications service providers cannot.

98. As Canadian ISPs might take their cue from T-Mobile, so Canadian application and content providers might take their cue from Netflix, in rejecting zero-rating and data caps. In a filing recently submitted to the U.S. Federal Communications Commission (FCC), Netflix stressed that "[d]ata caps can impede the use and availability of advanced telecommunications capabilities", seeing as "today's 'above-average' Internet consumer is tomorrow's average Internet consumer".¹¹⁷ Netflix also noted the illegitimacy of data caps on wireline subscriptions in particular:

Data caps on fixed-line networks do not appear to serve a legitimate purpose: they are an ineffective network management tool. Fixed-line BIAS [broadband Internet access service] providers have stated that data caps on fixed line networks do not serve a traffic management function. They have been described alternatively as a way to align consumers' use of the network with what they pay. As a method of price discrimination however, data caps and UBP are redundant to the speed tiers that consumers are used to. Data caps and UBP raise the cost of using the connections that consumers have paid for, making it more expensive to watch Internet television. The Commission should recognize that data caps and UBP on fixed line networks are an unnecessary constraint on advanced telecommunications capability. (footnotes omitted)¹¹⁸

99. Netflix goes on to describe to the FCC the negative impact of discriminatorily pricing data, including limiting consumer choice, obstructing fair competition, and incentivizing artificially low data caps:

In addition to data caps that apply to all broadband Internet content, a BIAS provider could also employ data caps in a way that explicitly discriminates in favor of one content source or another, further limiting consumer choice. By imposing limits only on certain video services, BIAS providers effectively increase the cost that consumers must pay to access those services while making exempt content comparatively cheaper, steering consumers toward the exempted services. The effect is even more significant when combined with a low data cap, and can materially impact how a consumer watches Internet television.

Because of a low data-cap, an online service may need to pay an ISP to zero-rate its traffic to enable that ISP's customers to access the online service. Such arrangements create an incentive for ISPs to maintain artificially low caps. The Commission should clarify that discriminatory application of data caps skew consumer choices and work against consumer-driven incentives to deploy advanced telecommunications capability.¹¹⁹

100. Rogers' opposition to zero-rating, T-Mobile's departure from data caps, and Netflix's advising the FCC against both, all suggest that the telecommunications industry as a whole would do

¹¹⁵ *Ibid.*

¹¹⁶ "Share plans" (2016), online: *Bell Mobility* <https://www.bell.ca/Mobility/Cell_phone_plans/Share_plans>.

¹¹⁷ United States Federal Communications Commission, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 16-245, Comments of Netflix, at page 5 [Netflix FCC Filing].

¹¹⁸ Netflix FCC Filing, *supra* note 117 at page 5.

¹¹⁹ Netflix FCC Filing, *supra* note 117 at page 7.

well to follow their lead. This is the direction chosen by a seemingly ambitious cable company competing against the historical monopoly of telephony providers; a “maverick” wireless provider of the kind it seemed most hoped Canada’s fourth wireless provider would be; and one of the biggest disruptors in this space known for upheaving broadcasting and, to a somewhat lesser extent, telecommunications. This is the direction of investment and innovation for the future, and the Commission should encourage the rest of the telecommunications industry to follow suit in taking this particular lead.

D. Regional Pricing Is Not a Concern and Constitutes Beneficial Competition

101. OpenMedia notes Sasktel’s concern with regional pricing as a form of pricing that should be banned along with practices such as zero-rating. This concern is misguided as explained below, and the Commission should reject it out of hand.
102. To begin with, differential pricing is a problem when it negatively influences consumer behaviour with respect to the relevant market, usually the criteria that the pricing differs over. For example, differential pricing based on speed alone is acceptable, as it does not harm the wider market, nor downstream markets, to incentivize consumers to purchase one particular speed of Internet over another, in the current context. Differential pricing based on specific content, however, actively harms the Internet ecosystem and distorts market forces to incentivize consumers towards one or another particular service or content, the harms of which OpenMedia described in its previous intervention.
103. With regional pricing, the only incentivizing or influencing factor is geographical region—and users are not likely to move from Ontario to Saskatchewan purely because the latter has lower cell phone prices. The factor being differentiated upon—geographical region—has nothing to do with the product or service itself, and thus does not risk distorting either telecommunications service, the retail Internet market, or ancillary and downstream markets that depend on unimpaired Internet access. Differentiating based on content or application, however, distorts the telecommunications system on a fundamental level.
104. As far as OpenMedia is aware, the Commission as a regulatory body is not responsible for nor concerned with interprovincial migration, including the effects of telecommunications services on it, if any. At the same time, regional pricing is arguably one of this country’s only examples of competition working properly, as the mere presence of another competitor results in more affordable and better services for consumers, because competitors are forced to compete harder on their merits. For this reason and the others described above, the Commission should decline to address regional pricing as a problem of any sort, and in fact should encourage regional competition alongside implementing policies to induce more national competition in telecommunications.

IV. Rhetoric of Zero-Rating Proponents Is Misguided

A. Zero-Rating Analogies

105. Multiple interveners in this proceeding have relied on various analogies¹²⁰ to explain why they believe zero-rating Internet data plans is an acceptable practice; however, each of these analogies inaccurately parallel the practice of zero-rating, and the Commission should reject them accordingly. In broad strokes, the analogies fail because they conflate the access and content layers of the Internet as explained above; they place the locus of choice with the ISP rather than with the user; they overlook the unique nature of telecommunications as an essential service and a regulated industry; or they track the wrong features or stages of the process involved in zero-rating, and thus do not parallel zero-rating at all. The rest of this section will address each analogy individually and explain why it provides no basis on which to legitimize zero-rating or similar differential pricing practices.

i. Grocery Store Coupons

106. Grocery store coupons discount content, not access. With such a coupon, one might obtain a discount on apples, but one pays the same amount of money for the public transit taken to the grocery store, regardless of whether one is going to buy apples or detergent. Moreover, distributing coupons for apples would not clog up the roads to the grocery store or increase the price of gasoline and make it harder or more expensive for people who are looking to buy detergent. Apple coupons would also likely not create congestion in the grocery store's aisles—and if they did, people are not paying for every square footage of aisle they walk to get to the apples or to the detergent.
107. Additionally, all of the “content” inside a grocery store does not run on the same network or in the same network the way that all of the content on the Internet does. Since they are not connected the same way, discounting or incentivizing consumers to buy one item in a grocery store will have limited negative externalities on the grocery store system as a whole. With data, however, zero-rating an Apple streaming app will likely take up more bandwidth at the expense of those who have no interest in streaming Apple content, but simply want to read the Detergent Daily (an artisanal detergent newsletter).

ii. Airline Flights

108. The airline flight analogy fails on several grounds. First, passengers paying different amounts of money for economy flights and business flights are in fact paying for different types and

¹²⁰ “Differential pricing practices have been used in many industries throughout the economy for many years, including rail, airline travel, retail, entertainment, and countless other products and services, including telecommunications. [...] toll-free calling (1-800 calling) has allowed consumers to use network services with the content provider (the merchant or service provider selling the good) paying the network use fee.” First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Shaw), at paras 5 and 52 [Shaw Intervention]; “There is little difference between zero rating and common-place discounts that everyone accepts as normal. ... From an economics perspective, sponsored data is not much different from companies establishing toll-free 800 numbers or sender-pays shipping, where the provider of the service pays, not the consumer.” ITIF Intervention, *supra* note 20 at page 10; “Competitive price discrimination is common to a variety of industries including ticket pricing for the airline transportation industry.” TELUS Intervention, *supra* note 12 at para 21; “Another example is provided by the travel industry when tickets for air travel on the same flight have considerably different prices depending on a variety of factors... Consider the following examples in Canada’s communications industry...” Bell Intervention, *supra* note 10 at paras 17-18.

levels of service, and perhaps for additional products in some cases, rather than being charged different prices for the same thing.

109. Second, for the average Canadian, airline flights are not an everyday necessity required to function and participate meaningfully in today's digital society, the way Internet access is. Making the required price a proxy for level of need may work for non-essential goods and services where demand is elastic; neither of those criteria apply to Internet data.
110. Third, as with the grocery store analogy above, pricing one unit or category of unit differently (an apple, a bottle of detergent, or in this case, one seat on a plane) will not disrupt the entire system, let alone to the extent of foreclosing on future potential innovations in the system. With zero-rating of Internet data, however, this is a very real concern.

iii. General Retail (Non-Telecommunications)

111. Nearly all analogies that rely on general retail of a non-telecommunications or non-utility-like commodity, whether coupons, rebates, or loyalty programs, will likely fail for reasons similar to that presented for grocery store coupons and airline flights: the discount applies to content inside the store, not access to the store itself; the specific store itself is likely not critical to everyday life; and the discount will not destabilize and corrupt the underlying structural integrity of that business's respective market.
112. For instance, whether or not Hallmark sells greeting cards at a discount, its notepads will likely remain at an appropriate set price independent of the greeting cards. If they were all made of data, however, then discounting the greeting cards is what keeps the price of the notepads high. And to reiterate once more, this involves differentially pricing content—the greeting cards and notepads—not access to walk into the store itself.
113. There is a reason the government has not seen fit to establish a Canadian Casual Wear Commission, or National Furniture Board. These are not essential commodities, nor regulated industries. There are no section 7 policy objectives or equivalent. This is why discounts and coupons are acceptable for retail goods in a way that does not translate to Internet access in the form of wireline or wireless data plans.

iv. Toll-Free Voice and Long-Distance Voice

114. On the whole, analogies to voice services are ineffective due to the difference in how access and content are related to each other in the telephone system, compared to the Internet system.
115. With respect to toll-free voice, subscribers are not likely to call a different number because one is toll-free and another is not. It would depend on the destination, and usually the caller already has a destination in mind. Callers do not usually end up in a situation where they can call one of two destinations, with all other things being equal, and thus decide to call the destination with the toll-free number. With data, however, there are many possible destinations to choose between, so the toll can make a difference.
116. Another difference between toll-free voice and zero-rated data is that with telephony, the caller picks up the phone *after* deciding what "content" (person) to access through the telecommunications service. With Internet, however, the subscriber goes online *before* necessarily having decided on their content destination, and they use the access itself to

- inform that decision. Unlike when on the Internet, nobody “surfs the phone lines” or calls random numbers to explore what they get on the other end.
117. Generally, where the Internet is concerned, or where data is concerned, content is access to the extent that the content only lives online. The content is only data, and cannot be accessed without an Internet connection, unless the company or a third party has taken the extra step to make the content available offline. Where Internet-based services and apps are concerned, however, the “content” is not available at all, as their very function and existence only makes sense in an online context.
118. With voice, however, the “content” is accessible predominantly outside the network, rather than exclusively inside the network. Whoever or whatever a user is calling, they are able to experience that person, place, or thing, outside of the telephone, or they would not be calling in the first place.¹²¹ The telephone connection itself cannot give rise to or influence a person’s desire to call. By the time a user picks up the phone, they have already chosen their destination. The marketplace precedes the connection, or *content precedes access*, whether through television, in-person exposure, or indeed, the Internet. Thus, zero-rating voice does not have downstream effects on the market the same way that zero-rating Internet would have, as the market precedes the access. The equivalent of zero-rating for voice would be to zero-rate and charge for different parts of the phone book (assuming the latter was still in constant and ubiquitous use).
119. With Internet, however, the connection precedes the marketplace, or *access precedes content*. The user’s choice of destination can be influenced after the point of connection. The market is predominantly inside the network, not outside of it like with voice. Zero-rating data thus causes harmful downstream effects because you are influencing access, which precedes the marketplace of content, as opposed to with voice, where access is what comes after the user has already made their decision of who or what to call. Voice content does not only live in the phone lines; Internet content often lives only on the Internet, and thus access plays a fundamentally different role in relation to each form of telecommunications access, such that zero-rating may be acceptable for the former (voice), and destructive to the latter (Internet data).

v. Call Forward and Call Display for Voice

120. These are administrative features of the sort that would be exempt under the “administrative” category of the framework that OpenMedia proposed in its first intervention, and thus do not raise regulatory concerns. They would be the equivalent of zero-rating data monitoring, payment apps, account management, and other such services. If there were competing third-party call-forwarding and call display applications, then concerns might arise, but that does not currently seem to be the case.

¹²¹ “Businesses typically offer toll free lines as a support mechanism; they do not operate their businesses entirely on toll free telephone lines. Customers call the toll free line when they have a specific issue with a particular business, the situation is not analogous to choosing a Zero Rated service or not.” Vishal Misra, “Net Neutrality: Misconceptions and Misdirections” (10 April 2015), online: *Medianama* <<http://www.medianama.com/2015/04/223-net-neutrality-misconceptions-and-misdirections/>>.

vi. TV and Radio Ad Sponsorships

121. Television and radio are subject to the *Broadcasting Act* and its section 3 broadcasting policy objectives, which allows for the selection and control of content. This is different from that of telecommunications and its policy objectives in the *Telecommunications Act*. In fact, the presence or absence of interference with the user's access to content may be the defining difference between broadcasting and telecommunications. OpenMedia offers further comments below on the relation of broadcasting policy to this proceeding.

B. Consequence Matters More than Cause or Intention

122. Throughout the first-round interventions, supporters of differential pricing practices such as zero-rating make a number of arguments that seem to turn on the cause or motive behind why a service provider might engage in zero-rating, rather than focusing on the zero-rating itself and the implications and consequences that flow from it. Examples of this include: the Competition Bureau stating that zero-rating and similar practices are not a concern if monetary compensation and organizational affiliation is not involved;¹²² TELUS noting that zero-rating would be a concern in the context of a vertically integrated company, but not otherwise;¹²³ Videotron pointing out its "intentions are much less nefarious than those suggested"¹²⁴; and Bell suggesting that ISPs would not be incentivized to gatekeep as it would be against their own interests if they wanted to benefit from network effects.¹²⁵
123. OpenMedia submits that this focuses on the wrong side of the equation, and that the negative impact of zero-rating stems from the act of zero-rating itself, regardless of why a given ISP put the differential pricing practice into place. For the purpose of assessing the advisability of zero-rating to Canadian telecommunications, therefore, it does not matter if no money changes hands, if the ISP is vertically integrated, or if the ISP doesn't *mean* to gatekeep, foreclose on innovation, introduce negative externalities into the Internet ecosystem, and destabilize Canada's telecommunications backbone. The Commission should focus on the practice itself in its determinations, and pay more attention to the consequences of zero-rating, regardless of any particular cause.

i. Financial Compensation and Affiliated Content

124. With respect to monetary compensation and affiliated content and services, the Competition Bureau is concerned that ISPs will be financially motivated to zero-rate apps and content, but what it overlooks is that they are already motivated. The concern is not what is driving the ISP but what will drive consumers after the ISP acts and the preferred or specially selected app or content is zero-rated. From the perspective of users and future innovators, the result is the same either way.

¹²² First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of Competition Bureau), at paras 5-7, 13-17, and 31-32 [Competition Bureau].

¹²³ TELUS Intervention, *supra* note 12 at 64-71.

¹²⁴ Supplementary Comments of Videotron (13 January 2016), Videotron Unlimited Music, at para 50.

¹²⁵ "The incentive for carriers like T-Mobile and Videotron to be inclusive and broaden the number of applications that work with their service should not be surprising given that communications markets exhibit both direct and indirect network effects. As a result of network effects, firms have an incentive to serve as many customers as possible. Bell 72. The incentives to work with as many content providers and attract as many customers as possible indicate that broadband providers are unlikely to behave as 'gatekeepers'. Bell Intervention, *supra* note 10 at paras 68 and 72.

125. What the Competition Bureau does not seem to realize is that regardless of money changing hands or not, consumer switching behaviour still “results not from a superior product being offered in the market, but instead from the strategic behaviour of the ISP”.¹²⁶ The Competition Bureau describes a number of negative effects resulting from zero-rating, categorized under “(a) prevent[ing] the launch of innovative new services, and (b) distort[ing] competition ‘for’ the market”.¹²⁷ These consequences can take effect even without any financial exchange between the ISP and the benefiting app, service, or content provider; their activity distorts the market and harms competition nonetheless. That distortion occurs if *consumers* are incentivized after the fact, not how ISPs were incentivized to implement zero-rating in the first place.
126. The record shows that ISPs in Canada are already incentivized to engage in zero-rating. Once that is established, it is about the consequences that follow, not whether the original motivation was rooted in money or not. Monetary exchanges between the access provider and content provider do not affect the end result of how the consumer behaves.
127. Moreover, arguably the ISP does obtain a financial benefit, indirectly and in the long run: zero-rating preserves its ability to maintain low data caps at high prices, with corresponding profit margins. Additionally, benefits other than outright financial compensation still accrue, whether in brand name, good will, network effects,¹²⁸ or future business.
128. In excusing zero-rating without overt financial exchange, the Competition Bureau states, “In this circumstance, the ISP’s motive in imposing differential pricing can only be to strengthen its competitive offer vis-à-vis its competitors.”¹²⁹ Regulating the future of critical infrastructure must not rely on motives, however, but outcomes and impact. The end result of zero-rating is the same whether or not the ISP is being paid to favour particular content, apps, or services. Distorting the market through unwitting or good intentions has the same negative outcome as distorting the market intentionally because one was paid to do so, and the Commission should keep this in mind when assessing the practices in question.
129. This approach by the Competition Bureau also illustrates why general competition law alone does not suffice to address concerns related to zero-rating and similar, despite some indicating the contrary.¹³⁰ Telecommunications, including Internet access, is an essential service and a regulated industry subject to more than just the *Competition Act*. The *Telecommunications Act* and section 7 policy objectives exist to ensure that Canada’s telecommunications system attends to Canadians’ needs beyond abstract economic policy. These objectives explicitly take into account, and require the Commission to take into account, public interest concerns and social welfare issues. This also includes applying meaningful cognizance of the texture of Canadians’ everyday lives in the Commission’s decision-making, including the role and implications of maintaining strong

¹²⁶ Competition Bureau, *supra* note 122 at paras 17-30.

¹²⁷ “By favouring its affiliated content, the ISP could increase the network effects of that content by directing consumers towards it. This could harm rival content by causing its network effects to be diminished or lost, thereby making it a less effective competitor to the ISP’s affiliated content. ... In an extreme case, differential pricing can cause the ‘tipping point’ to happen in the “wrong” direction, such that content with lower intrinsic value ‘wins’, contrary to what market forces would prescribe. When either of these effects happen, content that is not affiliated with the ISP loses at least some of its attractiveness to consumers – not on the merits – but because an ISP strategically disadvantaged it.” Competition Bureau, *supra* note 122 at paras 17 and 27-29.

¹²⁸ Competition Bureau, *supra* note 122 at para 24.

¹²⁹ Competition Bureau, *supra* note 122 at para 31.

¹³⁰ Xplornet Intervention, *supra* note 40 at paras 6, 12-16, 32-35; TELUS Intervention, *supra* note 12 at para 43.

telecommunications infrastructure such as Internet access, and fundamental principles such as common carriage that give it function and meaning.¹³¹

ii. Vertical Integration

130. As for vertical integration, OpenMedia agrees with TELUS that compared to the situation addressed in the Vertical Integration Framework, “a similar opportunity and incentive arises in the case of differential data pricing on the provision of affiliated broadcasting services by a vertically integrated entity”.¹³² However, OpenMedia would also go further and submit that concerns arising in the context of vertically integrated companies remain even where an ISP is not vertically integrated, with respect to zero-rating and Internet data plans.
131. According to TELUS, zero-rating where vertical integration exists is a problem because “entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control”.¹³³ Even without the ownership relationship, however, ISPs have the opportunity and incentive to give undue preference to certain apps or content, in order to attract market share.
132. While the ISP may not be able to deny competing ISPs the same opportunity to give preferential treatment to certain apps and content, as is one fear with vertical integration,¹³⁴ the zero-rated relationship would nonetheless compel subscribers to subscribe to a certain ISP if they were sufficiently attached to a certain unduly preferred app, service, or content provider, or if they could not afford to do otherwise. This would similarly distort competition and market forces the way it would in a vertically integrated context.
133. In the Vertical Integration Framework, the Commission also recognized the importance of preventing a “head start” effect:

The Commission agrees with independent BDUs that the practice whereby a programming undertaking makes its service available to a BDU without also making it available to all other distributors on reasonable terms and in a timely manner is effectively a form of exclusivity, since the result is a linear programming service that is made available solely on one distribution system for a certain period of time. ...

The Commission has concluded that it is possible to prevent head starts and avoid the undesirable consequence of postponing ready-to-launch programming.¹³⁵

¹³¹ Dwayne Winseck states, “[C]alls to transfer authority from the CRTC to the Competition Bureau are thinly veiled bids to put a stop to the CRTC’s newfound willingness to address the toughest issues across the whole of the communications and TV landscape – e.g. concentration, integration and market power. They are also a bid to bring the regulator to heel with respect to the vastly more open and public-oriented processes that have long distinguished the CRTC from the closed door processes of the Competition Bureau – a trait that has only become all the more apparent in recent years under the leadership of a chair who speaks openly about consumers, the public interest and citizens. Dwayne Winseck, “From the BDU-Model of TV to Radical Unbundling: Common Carriage & Culture Policy for the Internet Age” (June 2016), online: CMCRP <http://www.cmcrp.org/wp-content/uploads/2016/04/CMCRP_State_of_TVCMF_Rpt_17062016.pdf> at page 55.

¹³² TELUS Intervention, *supra* note 12 at para 70.

¹³³ TELUS Intervention, *supra* note 12 at para 65, citing Vertical Integration Framework, *infra* note 134 at para 19.

¹³⁴ “The potential increase in the market share of the distribution services that form part of the VI entity would provide an incentive for a VI entity to deny competing distribution systems access to popular programming.” *Regulatory framework relating to vertical integration* (21 September 2011), Broadcasting Regulatory Policy CRTC 2011-601, at para 19 [Vertical Integration Framework].

¹³⁵ Vertical Integration Framework, *supra* note 134 at paras 68 and 70.

134. OpenMedia submits that this kind of head start is precisely what would occur if ISPs were allowed to give special treatment to certain apps, services, or content providers. Videotron Unlimited Music has already illustrated this, where several streaming services enjoyed immediate membership in the zero-rating program due to their pre-existing popularity and incumbent status, thereby enjoying a significant head start over any other services that a customer might bring to Videotron's attention at a potentially significantly later time.

iii. Schrödinger's Gate

135. In arguing for the Commission to allow undue and unjust preference in the guise of "differentiation" for seemingly its own sake, zero-rating proponents attempt to waive concerns of ISP gatekeeping by emphasizing, "The wall is low and the gate is open."¹³⁶ Considering that neither the wall nor the gate should be there at all, that is not reassuring.
136. This claim also leads to a question: if the wall is low and the gate is open, then what is the point of having them at all? ISPs and zero-rating proponents cannot have it both ways, where the wall and gate simultaneously exist but also have no effect on the surrounding environment of competitive growth and innovation.
137. Even less reassuring is ITIF stating with respect to Facebook's Free Basics, "In fact, the platform is remarkably open to participation, only requiring that applications be designed to use data efficiently and be compatible with both feature and smartphones."¹³⁷ First, the very assumption embedded in that sentence is that the platform could have easily been less open. That openness is not something that should be in question. With functioning, structurally sound Internet access, observers should not be in a position to consider it "*remarkably* open". Internet access should be open, period.
138. Facebook's "protective criteria" and others who stress alleged openness, transparency, and non-exclusivity in zero-rating appear to be attempting to bring zero-rating practices as close as possible to non-existent.¹³⁸ If such walls, gates, and other anti-competitive fences will truly do nothing, however, then why implement them at all to begin with? The more efficient and straightforward solution would be to remove data caps altogether, keeping the environment truly open, as it should be, and charge a fair and reasonable price for Internet access plans.
139. If ISPs and app or content providers truly believe in principles of openness, transparency, and non-exclusivity, they should integrate those principles to apply automatically, meaning no one has to opt in to benefit. This means removing data caps. Xplornet states, "Where all content providers who want to participate can participate, this gatekeeping function may be negated."¹³⁹ The best way to negate a gatekeeping function is to *remove the gatekeeper*.
140. Otherwise, the very existence of constructing walls, gates, and fences through zero-rating does in fact make a difference, and some gatekeeping remains. This impairs core principles of common carriage and the functionality of Internet access, and for that reason should not be allowed. The Internet is a treasured common good, and the last thing Canada's digital future needs is for the Commission to allow practices that would fracture it into privatized enclosures that each go to the highest bidder.

¹³⁶ ITIF Intervention, *supra* note 20 at page 5.

¹³⁷ ITIF Intervention, *supra* note 20 at page 6.

¹³⁸ Facebook Intervention, *supra* note 12 at para 15; Sandvine Intervention, *supra* note 49 at paras 58-60.

¹³⁹ Xplornet Intervention, *supra* note 40 at para 29.

V. Broadcasting Must Not Harm Telecommunications Policy

141. Perhaps nowhere does the recurrent and dangerous conflation between access and content arise more clearly than in the interventions of broadcasters who have participated in this proceeding. OpenMedia submits that many of their proposals¹⁴⁰ are antithetical to principles of access established at the Supreme Court of Canada, in Commission decisions, and in the *Telecommunications Act*. They are also completely outside the scope of this proceeding. While OpenMedia offers preliminary comments on the issues below, the Commission should launch a separate, dedicated proceeding if it wishes to take on in earnest issues that involve undermining common carriage principles and impairing Canadians' Internet access for the sake of the traditional Canadian broadcasting industry. This also includes reviewing the broadcasting status of Internet service providers, and considering regulatory approaches, if any, to convergence between telecommunications and broadcasting.
142. First, Internet service providers are not, and are not supposed to be, and cannot be broadcasters. The courts, the Commission, and Parliament have all established this in various ways throughout the years. For example, in court proceedings between 2010 and 2012,
- [A] coalition representing the Canadian cultural industry argued that ISPs should contribute towards the funding of Canadian content the way traditional broadcasters do since they are "Integral to the transmission of broadcasting and should be viewed as equivalent to the role played be cable and satellite broadcasting distributions who are subject to regulation as broadcasters under the *Broadcasting Act*." The Supreme Court decided that ISPs simply provide the means of transmission and should not be subject to regulations in the *Broadcasting Act*.¹⁴¹
143. That FCA decision¹⁴² affirmed by the Supreme Court noted two other decisions that contributed to the conclusion that ISPs do not and are not to be treated as if they have anything to do with content. First, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, "found that, given their role as a mere conduit of information, ISPs do not communicate to the public pursuant to paragraph 2.4(1)(b) of the Copyright Act".¹⁴³ Second, in *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, (1891), 20 S.C.R. 83., the ISP, or "owner of the mode of transmission, in this case Bell, was found not to be engaged in the transmission itself".¹⁴⁴ Similarly, the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, "concluded that a single transmission to a single individual is not a communication to the public".¹⁴⁵
144. To overturn a long line of Supreme Court of Canada, Federal Court of Appeal, and CRTC decisions on a bedrock principle of Canada's telecommunications system would require a proceeding of its own to build an adequate record that does the issue justice, rather than be treated as an incidental or side aspect of a separate proceeding dedicated to a separate issue, such as the current one. OpenMedia submits that the same applies to the extremely broad and

¹⁴⁰ See, for instance, the interventions of ADISQ and the Canadian Media Producers Association (CMPA).

¹⁴¹ Michael Rimock, "Regulatory Issues Concerning New Media Alternatives to Television" (2013) 11 Can J L & Tech 335 at page 337. (footnotes omitted).

¹⁴² *Canadian Radio-television and Telecommunications Commission (Re)*, 2010 FCA 178 [*Re CRTC*].

¹⁴³ *Ibid.*, at para 21.

¹⁴⁴ *Ibid.*, at para 21.

¹⁴⁵ *Ibid.*, at para 22.

far-reaching issue of convergence between telecommunications and broadcasting, including whether laws should change to address convergence in its own right.

145. These same reasons mandate against allowing differential pricing practices such as zero-rating, for the sake of Canadian content (“CanCon”), or the traditional Canadian broadcasting industry. Additional reasons not to zero-rate Canadian content include: it represents further erroneous conflation of content and access as well as confusing ISPs’ relationship to each; it requires applying broadcasting policy in a way incompatible with the *Telecommunications Act*; it would protect the legacy Canadian broadcasting industry more than it would necessarily protect content deemed “Canadian”; the Internet is itself a rising source of unique Canadian content and the Commission should encourage, not discourage or foreclose on this; and initial rationales that contributed to CanCon policies in broadcasting do not apply today in the online context.
146. First, the cases above established that as an integral part of a functioning telecommunications system, ISPs are to have no role in controlling content; yet this exactly would occur if the Commission allows or forces them to zero-rate certain programming based on the type of content it features. The Supreme Court noted that the *Broadcasting Act*, “makes it clear that ‘broadcasting undertakings’ are assumed to have some measure of control over programming”,¹⁴⁶ and the Supreme Court in the same decision, as well as the *Telecommunications Act* and other legal authorities, makes it equally clear that ISPs are assumed and mandated to have no control over programming at all:

An ISP does not engage with these policy objectives when it is merely providing the mode of transmission. ISPs provide Internet access to end[]users. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. We agree with Noël J.A. that the term “broadcasting undertaking” does not contemplate an entity with no role to play in contributing to the *Broadcasting Act*’s policy objectives.¹⁴⁷

147. Philip Palmer further articulates the dangers of approaching convergence haphazardly without maintaining clarity of thought regarding the distinction between access and content, including key differences between the two Acts and their objectives:

While technological convergence has certainly occurred, no compelling argument has emerged to suggest that there is any convergence in the *objectives* of telecommunications and broadcasting policy. [...]

Broadcasting regulation is all about the selection of the voices that will be heard on the airwaves and ensuring that those so favoured use their privileges to further state ends: attaining the objectives of the Broadcasting Act. ... The key to understanding the Broadcasting Act is that it is all about the messages and who produces them. [...]

In contrast, the Telecommunications Act is devoid of content-inspired objectives. It is an assumed good thing that Canadians be able to communicate with one another, and the content of those communications is of interest neither to the government nor to the carriers who transmit those communications over their facilities. [...]

¹⁴⁶ *Reference re Broadcasting Act*, 2012 SCC 4, at para 4 [ISP Reference].

¹⁴⁷ *Ibid.*, at para 5.

[T]elecommunications and broadcasting regulation require very different mindsets, knowledge and sensitivities. ... Technological convergence does not necessitate regulatory convergence.¹⁴⁸

If the Commission allows ISPs to zero-rate particular types of content for the sake of broadcasting policy objectives, that would constitute a reckless opening move to ill-considered merging of Canada's broadcasting and telecommunications systems, at the expense of the latter, and as OpenMedia will explain next, not even necessarily to the benefit of the former.

148. Not only will zero-rating Canadian content impair Canada's telecommunications system and undermine its bedrock principles and core policy objectives, but it may not in fact benefit Canadian content in the long run, as opposed to the specific industry model that is currently tied to CanCon today, and may not be in the future. In pursuing broadcasting policy objectives, the Commission must be careful not to consider Canadian content, and legacy models historically tied to Canadian content, the same thing. As Dwayne Winseck writes, "why a model that has been at the centre of the TV landscape for thirty years should be kept forever, or preserved for as long as possible, the [Miller] report does not say. ... [T]here's no reason to tie the future of TV to BDUs."¹⁴⁹
149. Broadcasters' concern with Canadian content in and of itself, as opposed to sustaining the industry at all or high costs, is undermined in their concern with competing for licenses of non-Canadian content, such as that emerging from Hollywood.¹⁵⁰ *Canadians* still have access to this content, and more affordably, through OTT services such as Netflix. That is the ultimate goal, rather than preserving the legacy broadcasting industry no matter what happens.
150. Maintaining focus on what Canadians want out of their broadcasting system today is particularly essential in light of the fact that former rationales that gave rise to current broadcasting policies no longer apply in the online context today. For example, in her article, "The Limitations of Regulatory Oversight on Online Video", Jennifer Simpson details how the development of broadcasting law and policy was intimately tied to its underlying technology at the time, including the scarcity of spectrum, which is not a relevant factor in broadcasting today.¹⁵¹ CIPPIC echoes this.¹⁵² Simpson also notes that the "history of regulating

¹⁴⁸ Philip Palmer, "Why Broadcasting and Telecoms belong in Different Legislation" (23 January 2015), online: *Philip Palmer Law* <<http://philippalmerlaw.ca/broadcasting-telecoms-belong-different-legislation>>.

¹⁴⁹ Winseck, *supra* note 131 at pages 11-12.

¹⁵⁰ "Canadian broadcasters have expressed this concern to the CRTC and suggested that OTT companies' low cost structure could enable them to outbid the Canadian companies for some of the content they rely on." Rimock, *supra* note 141 at 336.

¹⁵¹ "In the digital online world justifying regulatory action based on a shortage of spectrum seems inappropriate, as the Internet is limited only by the capacity of the network and not by access to a public good. The limits of broadband networks is an issue widely dealt with in telecommunications regulation, but not broadcasting." Jennifer Simpson, "The Limitations of Regulatory Oversight on Online Video" (2012) 10 Can J L & Tech 287 at pages 306-07.

¹⁵² "In the twenty-first century it is no longer necessary to limit, or allocate, the use of space by video distributors, producers and artists for online video. This has meant a great expanse in the availability of content from Canadians, and from others around the world. Through the Internet, Canadians are able not only to receive this content but to actively participate as creators of video content. In this environment, equal access to the creation and provision of OTT video is available to Canadian corporations, Canadian individuals as well as non-Canadians." Submission, *Fact-Finding Exercise on the Over-the-Top Programming Services in the Canadian Broadcasting System*, Broadcasting and Telecom Notice of Consultation CRTC 2011-344 (Comments of Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic), at page 14 [CIPPIC Fact-Finding].

broadcasting in Canada is the history of reactionary responses to perceived threats”.¹⁵³ The Commission should ensure that the integrity of Canada’s telecommunications system, including common carriage principles at the core of Internet access, do not fall casualty to such reactionary responses.¹⁵⁴ This includes disallowing ISPs zero-rating for the sake of the legacy broadcasting industry and what it considers Canadian content.

151. As for what the Commission might do instead, OpenMedia crowdsourced a report, “The Future of TV is the Internet”, based on Canadians’ input on this topic during the Let’s Talk TV proceeding.¹⁵⁵ Key recommendations for promoting and cultivating Canadian content in today’s digital landscape included supporting public broadcasting, such as the CBC, and supporting digital media and independent creators being able to produce and distribute their own media in a decentralized market, without requiring them to go through BDU gatekeepers¹⁵⁶—some of whom could, due to vertical integration, also be the very ISPs doing the zero-rating asked for, if not of their own content then at least of the industry whose model they benefit from preserving.
152. Vertically integrated TSPs who care about Canadian content should also be eager to take up NCRA/ANREC’s call to unblock free access to FM radio receivers already installed in certain cellphones:
- In April 2016, the NCRA/ANREC began a nationwide awareness campaign (freeradioonmyphone.org) to inform Canadian consumers about the fact that many telecommunications service providers and cell phone manufacturers in Canada are currently blocking access to already installed FM Radio receivers (“FM chips”) in android phones. If unblocked, these phones could work as radio receivers with the simple addition of a pair of headphones to act as an antenna. A similar campaign was launched in the United States in 2015, and over 2 million American consumers convinced four major American telecommunications companies (Sprint, TMobile, Blu and AT&T) to enable the FM chips for use in their phones since the launch of the campaign.¹⁵⁷
153. While the legacy broadcasting industry perhaps enjoys a relatively overstated tie to Canadian content, digital media, online services, and by extension Canadians, risk losing out on the Internet’s under-recognized role as an increasingly valuable source of unique Canadian content. The Commission should further cultivate this source by allowing online services and independent creators to compete on a level playing field, without tilting the market towards legacy broadcasters through zero-rating.
154. For example, in Broadcasting and Telecom Notice of Consultation CRTC 2011-344, *Fact-finding exercise on the over-the-top programming services in the Canadian broadcasting system*, CIPPIC noted:

¹⁵³ Simpson, *supra* note 151 at 302.

¹⁵⁴ Section 5(2)(f) of the *Broadcasting Act* also states, “The Canadian broadcasting system should be regulated and supervised in a flexible manner that does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians.” *Broadcasting Act*, SC 1991, c 11, s 5(2)(f).

¹⁵⁵ Access Pillar Team, “Canadians weigh in on CRTC’s Let’s Talk TV hearing through report released today: “The future of TV is the Internet” (19 September 2014), online: *OpenMedia* <<https://openmedia.org/en/press/canadians-weigh-crtc-s-lets-talk-tv-hearing-through-report-released-today-future-tv>>.

¹⁵⁶ Josh Tabish and Steve Anderson, Report, “Connecting Canadians: The Future of TV is the Internet” (19 September 2014), online: *OpenMedia* <<https://openmedia.org/sites/default/files/OpenMedia-FutureOfTVisInternet.pdf>>.

¹⁵⁷ First Intervention, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (Intervention of NCRA-ANREC), at para 3 (footnotes omitted).

Canadians as individual and professional producers of video content are actively participating in the digital-information sector. Limiting their access to online tools or websites that assist in their production of content through rigorous regulation will not only harm online innovation, but will have the counterproductive effect of inhibiting the development of this industry.¹⁵⁸

CIPPIC goes on to articulate a defence of user-generated content (UGC) as Canadian content, and explains the harms of overlooking it in achieving broadcasting policy objectives:

Because of the potential of the UGC platform to contribute to the development of Canadian artists, it has become an important part of the broadcasting ecosystem of creation and exhibition. By neglecting this segment of the market in discussions of online video content, the Commission is overlooking an important incubator for emerging Canadian talent which should be accounted for in any assessment of whether the Commission's new media exemption should be rescinded in favour of regulating online video streaming content platforms.¹⁵⁹

155. The Internet is both a rising platform for and source of Canadian content. Regarding the former, CIPPIC found in 2011 that “the CBC provides over 200 hours of Canadian content online via third party OTT services”¹⁶⁰. As for the latter, YouTube provides one example in its annual top ten videos list, broken down by country and type. Excluding music videos, Canada's top-ten list included only five videos from the global list, with the remaining five constituting presumably uniquely Canadian content.¹⁶¹
156. The Commission must keep in mind the ultimate goal of Canadian cultural policy as advanced through the *Broadcasting Act*. Arguably, new and digital media increasingly do more to achieve objectives such as “providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view”,¹⁶² by enabling individuals and diverse groups on the ground in Canada to create and distribute their own media.
157. What is “Canadian” content, and moreover what is content in Canada, should not be left predominantly to the few media companies holding market power to decide and perpetuate. Everyday Canadians, particularly those historically and currently marginalized, are for the first time in history able to create their own Canadian content to an extent never seen before, and the Commission would be remiss to impair the access and telecommunications infrastructure that makes that possible, for the sake of a more narrowly construed, increasingly outdated take on “Canadian content”.
158. Having said all of the above, there is one issue where broadcasting and telecommunications combine in a way that potentially does fall within the scope of this proceeding: telecommunications companies offering IPTV services. Technically, such services could be considered another form of zero-rating, as the online video service is delivered through the same data and pipes that deliver the subscribers' Internet connection. OpenMedia submits

¹⁵⁸ CIPPIC Fact-Finding, *supra* note 152 at page 4.

¹⁵⁹ CIPPIC Fact-Finding, *supra* note 152 at page 7.

¹⁶⁰ Tabish and Anderson, *supra* note 156 at page 5, note 22.

¹⁶¹ Eric Emin Wood, “YouTube reveals the 10 videos Canadians watched most in 2015” (11 December 2015), online: *itbusiness* <<http://www.itbusiness.ca/news/youtube-reveals-the-10-videos-canadians-watched-most-in-2015/62613>>.

¹⁶² *Broadcasting Act*, SC 1991, c 11, s 3(d)(iv).

that IPTV may require a review proceeding of its own, to examine implicated issues such as data caps, zero-rating, and convergence in the context of such services.

Conclusion

159. To conclude, OpenMedia rejects the notion that access and the future of innovation are mutually exclusive. Rather, each depends on the unhindered functionality of the other to flourish in its own right. Innovation cannot occur without access—full, uncontrolled, non-gated access. Similarly, improvements in access will not occur unless players and competitors are allowed to innovate without permission. This necessitates that future or aspirational innovators have fair, open, and unimpeded access to begin with. Breaking this virtuous cycle by impairing access through the injection of undue preference for certain application or content providers may simply lead to a race to the bottom in both access and innovation.
160. OpenMedia thus calls upon the Commission to listen to the more than 5,500 Internet users who wrote to it, as well as to the over nearly 40,000 Canadians who signed the petition asking for eliminating data caps, banning zero-rating, and reinforcing meaningful net neutrality rules. Internet users across the country are depending on the Commission to spur competition and investment in Canada's telecommunications system, as well as guide its core principles and infrastructure into the future, through policies that will promote and cultivate an open Internet that enables innovation to emerge from anyone, anywhere, and at any time.

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