



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

**Oral Remarks of**  
**OpenMedia Engagement Network (OpenMedia)**

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

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## Seating Plan

Katy Anderson	Cynthia Khoo	Josh Tabish	Laura Tribe
Commissioners			

## Introduction

1. Good morning, Commissioners, and Commission staff. Before we begin, we wish to acknowledge that we are on unceded Algonquin territory, and recognize that acknowledgement is only a start towards reconciliation.
2. My name is Cynthia Khoo and I'm external legal counsel to OpenMedia. My colleagues and I commend the Commission for taking on the critical issues in this hearing, and especially for directly engaging with tech-savvy, informed Canadians on the record—holding one's own in Reddit is no mean feat.
3. My name is Laura Tribe, and I'm the Executive Director of OpenMedia. We are a community-based organization that works to keep the Internet open and affordable, empowering people to build a more connected and collaborative world. Listening to our pro-Internet community while working toward this goal has made us overwhelmingly aware that for Canadians to participate in today's digital society, they require affordable and equitable, neutral access to data for the content and applications of their choice.
4. My name is Katy Anderson. As an access-focused Digital Rights Specialist at OpenMedia, I hear from average Canadians everyday about their challenges with practices such as data caps and differential pricing. Internet users across Canada have made clear to us that they reject these practices and are depending on the Commission to prioritize consumer protection and the public interest in its determinations.
5. My name is Josh Tabish, and I'm the Campaigns Director at OpenMedia. On behalf of our panel, I would like to extend thanks and appreciation to the members of OpenMedia's community, whose voices we have the privilege of presenting to you today. In fact, many of them are here in the audience right now. We also thank OpenMedia's amazing staff, who have contributed to us being here this week.

## Overview

6. Commissioners, this hearing has covered much ground over this past week. Today, OpenMedia hopes to narrow the issues for you into three simple requests:
7. First: **listen to Canadians**. Over 56,000 Internet users have called for eliminating data caps and banning zero-rating. As you've heard this week, they are joined by public interest groups and Canada's largest cable company alike. This remarkable consensus would seem to provide an inordinately clear compass to the Commission in deciding what is truly best for Canadian telecommunications going forward.
8. Second: **aim higher for Canada's future**. Whether by banning zero-rating or listening to users' pleas to eliminate data caps, the Commission has an opportunity to drive Internet service providers to reinvigorate their investments in network capacity. Aiming higher means doing what is necessary to galvanize industry towards building a genuinely world-class telecommunications system.
9. Third: **protect innovation for all**. Banning zero-rating through an *ex ante* framework would safeguard everyday creators and innovation from the edge, while enabling the Commission to retain regulatory flexibility. This approach ensures that all manner of innovators, large and small, are able to compete on a fair and meritocratic basis.
10. I'll now hand the floor to Laura.

## I. Listen to Canadians: Internet Users Reject Differential Pricing and Data Caps

11. OpenMedia's first message to the Commission is this: *listen to Canadians*. Over the course of this proceeding, Canadians on the public record have made clear that as far as they are concerned, when it comes to Internet plans, data caps are always in scope. Understanding this is key to understanding citizens' views on zero-rating. They told the Commission this through individual interventions, Reddit, and OpenMedia's Internet Voice Tool. As of yesterday, over 52,000 Canadians have signed a petition to eliminate data caps in addition to banning zero-rating, reinforcing net neutrality rules, and improving transparency and enforcement in the ITMP Framework.
12. When OpenMedia invited Canadians to express their views to the Commission on these topics, over 6000 comments flowed in. We encourage anyone interested in reading the informed and passionate views of the pro-Internet community to visit

<[openmedia.org/datacaps](http://openmedia.org/datacaps)>. Data caps and zero-rating are without doubt an issue that Canadians care and feel strongly about.

13. For example, Wilma Green from Estevan, Saskatchewan, said: “What an opportunity for the CRTC to stand up to telecom Giants on our behalf... For a lot of us users, it’s an honest struggle. We rely on internet services as everyone does, but overage fees are a CONSTANT stressor financially. Give us the benefit of stronger enforcement of rules, no zero-rating data & strong net neutrality.” You will hear more from users like Wilma throughout our presentation.
14. The Commission’s laudable Reddit initiative resulted in similar views and adamancy from Canadians. The Commission asked: “What do you think are the benefits of differential pricing?” On the whole, Reddit responded: none, negligible, or would only benefit providers. User “xhiggy” said, “This will amount to large companies determining what the poor can afford to read/watch” and user “hanexar” warned, “If [a] zero-rating package goes unregulated, we will have a cable-like Internet in a few years”.
15. Reddit users on the record also support a ban on zero-rating. User “ayjee” wrote, “Step in by banning it. Please do not do half measures, this is too important.” And user “Station0ise” said, “Do not allow differential pricing. It is the worst thing that could happen to our internet. Instead remove the overly restrictive data caps.”
16. As media headlines and other parties this week have noted, the approximately 1200 comments on Reddit were overwhelmingly critical of differential pricing, many of which also denounced data caps. Combined with the Internet users we heard from, that makes approximately 56,000 Canadians asking the Commission to take action. Thus, when it comes to zero-rating, the Commission has two camps before it. In one, you have 56,000 engaged Canadians, 75 individual interventions, public interest and civil society groups, independent academics, small ISPs, independent broadcasters, and Rogers Communications, Canada’s largest cable and mobile wireless company. In the other camp, you have a mere handful of ISPs, who are fighting for a practice that even its purported beneficiaries have shown no interest in defending at this proceeding. Who will the Commission listen to? We hope this particular decision is clear. Canada’s Internet users and the integrity of our telecommunications system depend on it.

## II. Aim Higher for Canada's Future: Ban Data Caps and Incentivize Network Investment

17. OpenMedia's second message to the Commission today is this: *aim higher for Canada's future*. Rather than allowing ISPs to demand ever increasing sacrifices from Canadians to remain connected, the Commission should instead demand more of Canada's ISPs. In sharing their views regarding Internet data plans, users across the country have made one thing undeniable: data caps are inherently relevant to differential pricing practices. Given that zero-rating can only exist due to data caps, it stands to reason that Canadians would want to see the Commission resolve this root problem before considering unfair practices that would entrench it. One way to do this is through incentivizing more aggressive network investment among Canada's largest ISPs.
18. Whether from the perspective of people's everyday struggles, international comparisons, or limits on innovation, data caps are actively holding Canada back. To invest in our country and its citizens, we must first invest in our networks. Falling short on this leads to frustration by users like Erica Procnier from Toronto, Ontario, who says: "Canadians are not allowed to compete globally within a data cap system. The giant telcom companies will continue to make record profits off of Canadians and fail to re-invest in infrastructure because they are allowed to do so [...]." To achieve a world-class telecommunications system, the Commission must implement enforceable policies that will incentivize ISPs to build out and up, rather than keep citizens down.

### i. Data Caps: Traffic Management or Marketing Tool?

19. Data caps are especially frustrating to subscribers as they often appear to be for little legitimate purpose, and zero-rating further calls this purpose into question. Max Hussey from Chesley, Ontario, had this to say: "Data is not a non-renewable resource that require capping. In today's digital landscape, where accessibility to the internet is nearly a requirement for day-to-day living, the idea of data capping or manipulation is nothing more than a cash grab."
20. Regarding network congestion as justifying current data practices, Internet service providers have yet to substantiate anything with concrete evidence on the public record. Indeed, Xplornet yesterday told us that for them, data caps are foremost a marketing technique--not a matter of network management, but an economics-driven offering built

through their marketing group. Earlier this week, we heard that Sandvine, a leading traffic management equipment manufacturer, “doesn’t feel data caps effectively manage congestion.” Meanwhile, industry counterparts like T-Mobile and Netflix in the United States have begun moving away from or outright opposing blunt data caps, in response to consumer demand or in filings to the FCC.

21. Regulators, industry insiders, and researchers have stated or implied that the base costs of transporting Internet data is as low as a few pennies per gigabyte. Non-profit ISPs that operate near cost while still growing their operations charge much lower rates for much more or unlimited data. ISPs in Canada exclusively possess the best evidence to show they are not using data caps to upgrade revenues in lieu of upgrading networks. However, they refuse to show this evidence and expect us to take them at their word, even while they arbitrarily zero-rate music and remove caps for IPTV. Canada’s Internet service providers cannot have it both ways; the time has come to call at least one of their bluffs.

#### ii. Data Caps Harm Consumers

22. What we do have evidence for is that data caps harm consumers. This is key to understanding why Canadians oppose zero-rating, which are predicated on preserving data caps. For example, Anne Lacoste from Aylesford, Nova Scotia, shared: “I am the caregiver to a permanently injured veteran and to keep up with his needs I require unlimited data abilities on the Internet.... Right now it's costing more than I can afford, yet I can't afford not to have it.”
23. Between mental transaction costs and hyper-sensitivity to hitting limits, data caps cause Internet users to over-suppress their usage for fear of punitive overage fees. As Vincent Laurin from Lemoyne, Quebec, said: “There is a point where people suffer and panic over going over data, [and] people who can't afford it usually need it more.” Diffraction Analysis was able to demonstrate that one-fifth of penalized customers at a mid-sized North American ISP could not possibly have contributed to disruptive network congestion. Similarly, Videotron’s wireless data plans punish lower-tier subscribers more harshly than higher-tier subscribers, in light of Unlimited Music.
24. In an Internet services market as concentrated as Canada’s, people cannot vote with their feet, or their money. Jennifer Massie from Red Deer, Alberta, told us: “[T]o be without

data can literally make or break a student. We all want the best for our kids but I personally can't afford large data packages. [...] I feel like a prisoner.”

25. The top ISPs in Canada control approximately 90% of the retail wireline and wireless markets--both of which continue to shrink, with the recent losses of MTS, Wind, and Mobilicity. Lack of real competition means that the artificial scarcity and sheer expense of data impact Canadians even more. Four-player provinces like Quebec, Manitoba, and Saskatchewan show that data does not have to be that scarce or that expensive. To everyday citizens like Anne Hill from Charlotte, New Brunswick, “It seems as though the internet providers own the roads to communication. They can get together and charge whatever they want; a complete monopoly.”

### iii. Revisit the Legitimacy of Data Caps

26. In 2009, the Commission legitimized data caps as an economic Internet traffic management practice under the ITMP Framework, because they purportedly linked Internet service rates to user consumption, for the sake of network congestion. The intervening years, and the record of this proceeding, have now shown that link to be tenuous. This may be why wireless data caps have risen and wireline data caps have disappeared elsewhere around the world. While it's true that data caps have also risen in Canada, they have clearly not kept pace with demand. Differential pricing would worsen this situation by freezing exploitative data caps where they are, or otherwise prolong their inhibiting effects on Canada's Internet users and digital economy. Meanwhile, such outdated Internet plans would perpetuate the stress, panic, and over-suppressed usage that caps evoke in those who rely on data every day.
27. In light of this, OpenMedia recommends that the Commission revisit the legitimacy of data caps under the ITMP Framework. Prohibiting ISPs' use of this blunt approach would bring Internet data plans more into line with the section 7 policy objectives, while restoring suppressed market forces such as consumer demand and meaningful incentives to compete. The Commission can and should aim higher for Canadians by shaping a future where ISPs are compelled to rise to the occasion of users' skyrocketing demand, through robust investment in network capacity and Internet service quality.

### III. Protect Innovation for All: Ban Zero-Rating and Implement an *Ex Ante* Framework

28. In our intervention, OpenMedia asked: Whose innovation warrants protection? To us—and we hope to the Commission—the answer is everyone's. Our third message to the Commission is this: *protect innovation for all*. Zero-rating and similar practices shield dominant players from fair competition, and if unleashed, would turn the public forum of the Internet into privatized enclosures. The Internet would be reduced to little more than Cable 2.0--which, as we heard yesterday, even some broadcasters reject. This is exactly the wrong direction in which to take the backbone of Canada's digital society, whose defining characteristic of common carriage made possible the previously unimaginable, for so many.
29. Mariella Villalobos from Calgary, Alberta, put it best: "The Internet has become a utility almost as necessary to modern life as electricity or water, and as such should remain neutral and as accessible as possible. [I]f we allow private companies free rein to parcel it off and create differences in access/speed to different websites and content, then we open the door to a future where the very information available to us is based on financial gain and access, and where these companies become the gatekeepers of truth and information."

#### i. Banning Zero-Rating Will Prevent Gatekeeping and Incentivize Investment

30. Make no mistake: zero-rating and similar practices will result in gatekeeping. This occurs regardless of good intentions. Rogers Communications itself stated that DPPs are anti-competitive and "do give ISPs the ability to act as gatekeepers in every case". In Unlimited Music, Videotron deliberately excluded radio stations and rejected an unnamed service for unknown reasons.
31. Furthermore, small or new entrants are unlikely to benefit. Small ISPs such as tbaytel have said they do not even have the capacity to implement DPPs, and the record of this proceeding suggests that content or app providers are ambivalent at best. Meanwhile, everyday creators and future innovators would lose out. For competition and innovation, zero-rating represents a race to the bottom, where ISPs chase low-hanging fruit when they should instead be planting new trees, lest the entire orchard wither.



32. Banning zero-rating will promote genuine competition and investment in network quality and Internet services. Digital Fuel Monitor showed that across the OECD, zero-rating is correlated with lower data caps and higher prices. Conversely, banning zero-rating will lower prices for consumers and give them more data. For example, when faced with strong net neutrality rules, a ban on zero-rating, and meaningful enforcement, KPN in the Netherlands doubled its data ceilings while prices stayed the same, slashing the price of data to one-fifth of the year before.
33. Similarly, a Free Press report found that network investment in the United States increased after the FCC implemented its Open Internet Order, rather than stalling or decreasing as providers said it would. Similar patterns have played out here in Canada in the wholesale services context, and prohibiting zero-rating would likewise only advance the development of Canadian telecommunications.

#### ii. Internet Service Providers Should Compete on Internet Service

34. By creating a genuinely level playing field for all potential innovators, the Commission would force the major Internet service providers in Canada to do something that otherwise seems rare and difficult: compete on the quality of Internet service itself. Without the ability to rely on content partnerships as a crutch, ISPs would have no choice but to compete within their actual line of business: providing high-quality, high-speed, reliable Internet connectivity. This would involve investing in differentiators inherent to their core function—such as price, speed, contract clarity, or guaranteed minimum service—rather than turning the Internet *access* market into a *content* popularity contest.
35. As Andrei Arkhanguelski from Toronto, Ontario said: “I’m tired of paying more than I should, because neither player in the market has an incentive to TRULY compete with each other. [...] Please come up with political will and solve this issue once and for all.”

#### iii. Implement an *Ex Ante* Framework

36. This Commission has the opportunity right now to solve this issue for Andrei and preserve net neutrality for all Canadians. To do this, OpenMedia recommends that the Commission incentivize meaningful investment and genuine competition by banning zero-rating. Proposals that match key elements of *Bell Mobile TV* should be considered

automatic violations of section 27(2) on the strength of that decision. Exceptions would have to obtain pre-approval by meeting an *ex ante* test under an expanded ITMP Framework.

37. Only an *ex ante* process would truly protect consumers and the public interest. It is one thing for the average Canadian to post a comment online, and quite another to gather the evidence, law, and procedure to launch an ITMP complaint or Part 1 against a derelict ISP. An *ex ante* approach also provides regulatory certainty and prevents provider exploitation of legal grey areas, furthering the section 7 policy objectives. However, the Commission still retains regulatory flexibility by determining exceptions on a case-by-case basis. The only difference from an *ex post* approach is that any risk now justly lies with those best positioned to bear it: the ISPs who would benefit from inducing the risk into the system and imposing negative externalities onto the rest of us.

## Conclusion

38. Lastly, OpenMedia urges the Commission to remember one key fact that many seem to have overlooked in this proceeding: zero-rating is not the only way. The future of Canadian telecommunications and innovation does not rest on the shoulders of zero-rating. On the contrary, it rests on rising above such cheap substitutions for meaningful competition. If ISPs want to innovate, there are countless paths open to them, which do not come with the same risks and collateral damage that zero-rating does. Let ISPs innovate—but on terms that create a win-win situation for all, not one where ISPs win and Canadians lose.
39. In closing, OpenMedia hopes the Commission takes its community's three messages to heart: listen to Canadians; aim higher for Canada's future; and protect innovation for all. Thank you very much, and we are happy to take your questions.