Undertaking of OpenMedia

Submitted to the
Canadian Radio-television and Telecommunications Commission

In the Matter of

TNC CRTC 2016-192
Examination of differential pricing practices related to Internet data plans
CRTC File No.: 1011-NOC-2016-0192

14 November 2016

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

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Introduction and Executive Summary

1. OpenMedia Engagement Network ("OpenMedia") hereby submits comments in response to an undertaking issued during its appearance, on 3 November 2016, at the public hearing of Telecom Notice of Consultation CRTC 2016-192, *Examination of differential pricing practices related to Internet data plans*. The undertaking was set out as follows:

> 4995 THE CHAIRPERSON: Zero rating engages Section 36?
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> 4996 MS. TRIBE: Yeah, when a user hits their data cap, they are effectively blocked from all content other than the zero rated content without being financially penalized for accessing the rest of that content.
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> 4997 THE CHAIRPERSON: Right.
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> 4998 MS. TRIBE: So then it's applied across the board. Without differential pricing packages it doesn't apply because that is them using the internet to that capacity. When suddenly zero rating is starting to differentiate between that content that is where the data cap comes into play with a differential pricing package.
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> 4999 THE CHAIRPERSON: Okay. Would you be willing to undertake to unpack that a little bit more?
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> 5000 MR. TABISH: We'd be happy to do that.
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> 5001 MS. KHOO: To clarify, to undertake how zero rating engages Section 36?
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> 5002 THE CHAIRPERSON: That's correct, yeah, if you could. The 14th of November please.
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> 5003 MS. KHOO: Yes.
>
> 5004 UNDERTAKING[1]

2. Accordingly, these comments will discuss how the differential pricing practice known as zero-rating engages section 36 of the *Telecommunications Act*,[2] divided into the submissions below.

3. First, zero-rating engages section 36 by virtue of the practice's interaction with data caps, and in light of the Commission's comments regarding blocking in Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* (the "ITMP Framework").[3] According to the ITMP Framework, blocking certain websites, content, or apps without Commission approval, as zero-rating does, violates section 36.

4. Second, zero-rating implicates section 36 in its blocking of content, due to Internet service providers (ISPs) being common carriers and having common carriage obligations, which are breached in the discriminatory delivery and blocking of content when users on zero-rating plans reach their data limits.

5. Third, whenever section 36 is engaged, the Commission should apply a broad and contextual approach to interpreting the provision. This approach is grounded in key principles of statutory interpretation, the historical development of section 36, and the section 7 policy objectives of the *Telecommunications Act*. Such an approach militates against accepting Bell's narrow interpretation of section 36 and common carriage generally, which reads in that control over content, or influence over meaning or purpose, must be only of a technical nature.

6. Fourth and lastly, in view of a broad and contextual approach, zero-rating engages section 36 in two additional ways. The first way is that bundling content for preferred access, as ISPs do with zero-rated edge providers, constitutes a form of editorial or curatorial control similar to

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[1] Appearance of OpenMedia, Transcript (3 November 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 4995-5004 ["OpenMedia Appearance"].

[2] Section 36 of the *Telecommunications Act* states: "Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public." *Telecommunications Act*, SC 1993, c 38, s 36.

[3] Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* (21 October 2009) ["ITMP Framework"].

broadcasting or print publishing. Second, certain forms of zero-rating, such as broad class-based zero-rating or programs that require the ISP to judge the legality of new innovators, may influence the meaning or purpose of users' telecommunications over time by distorting the meaning, purpose, or viability of emergent new services, platforms, or forms of content.

A. Zero-Rating Engages Section 36 by way of ITMP Framework and Data Caps

7. First, zero-rating engages section 36 by way of the ITMP Framework. The ITMP Framework establishes that traffic management practices that lead to, or amount to, blocking content from a user would require approval under section 36 of the *Act*:

> [W]here an ITMP would lead to blocking the delivery of content to an end-user, it cannot be implemented without prior Commission approval. Approval under section 36 would only be granted if it would further the telecommunications policy objectives set out in section 7 of the Act. Interpreted in light of these policy objectives, ITMPs that result in blocking Internet traffic would only be approved in exceptional circumstances, as they involve denying access to telecommunications services. […]
>
> With respect to non-time-sensitive traffic, the Commission considers that the use of ITMPs that delay such traffic does not require approval under section 36 of the Act. However, *the Commission is of the view that non-time-sensitive traffic may be slowed down to such an extent that it amounts to blocking the content and therefore controlling the content and influencing the meaning and purpose. In such a case, section 36 of the Act would be engaged* and prior Commission approval would be required.[4]

8. Zero-rating engages section 36 because it leads to, or amounts to, blocking the delivery of content to an Internet user. This is a consequence of how zero-rating operates in conjunction with data caps.

9. For example, imagine a mobile wireless plan that includes 2GB of data and a zero-rated bundle of content and apps, such as Facebook, Deezer, and the *Toronto Star*. If someone is on this plan, then after that user hits the 2GB data cap, they can still access the Internet. However, the user's Internet service provider (ISP) blocks them from all content, websites, and applications on the Internet other than Facebook, Deezer, and the *Toronto Star*.[5]

10. According to the ITMP Framework, any ITMP resulting in blocking content delivery requires section 36 approval from the Commission beforehand. Given that zero-rating is a form of managing Internet traffic, in both substance and effect despite a different motive, the practice—resulting in content blocking as it does—implicates section 36 as described above in the ITMP Framework.

11. To be clear, OpenMedia does not submit that data caps in and of themselves engage section 36. Data caps are relevant in this context only to the extent that they contribute to why *zero-rating* engages section 36. Data caps contribute in two ways: first, by making zero-rating possible to begin with; and second, by demarcating the point after which the ISP begins making editorial or curatorial choices for the user, and after which the user's Internet access is restricted to the zero-rated content alone, with everything else blocked. It is by way of their interaction with data caps that zero-rating practices engage section 36.

12. Professor Barbara van Schewick also described in her hearing appearance how zero-rating engages section 36, in the context of restrictive data caps in particular and how differential pricing practices can amount to the same as a technical ITMP in effect:

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[4] *Ibid.*, at para 122 and 127 (emphasis added).

[5] The assumption is that the user continues to have access to only the zero-rated content bundle after hitting their data cap, as opposed to the data from zero-rated content not counting but also being cut off once the user hits the cap through other data usage. Quebecor also confirmed during their hearing appearance that this is how *Unlimited Music* works: Appearance of Québecor Media Inc., Transcript (4 November 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 7350-58 ["Québecor Appearance"].

> 6449 [Many] zero rated plans directly limit user choice, and I think that implicates not just Section 27 but also Section 36. For example, T-Mobile's Binge On program allows customers to stream unlimited video from select providers included in the program. Customers on the lowest qualifying plan with a three gigabyte cap can watch as much video as they want from Netflix and other providers in the program but they can only watch four and a half hours per month or nine minutes per day from providers that are not in the program, and that's only if they only watch video and don't do anything else online.
>
> 6450 Now, unlimited video versus nine minutes per day is not a meaningful choice. It also makes it impossible for providers that are not zero rated to compete. And if you look at some of the data that the consumer groups have submitted in the Videotron proceeding, that works exactly the same way, where you can listen to the providers included in the program but the data caps are so low that you can't effectively use unaffiliated providers.
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> […]
>
> 6754 So that's -- or they say once you reach your cap, then everything else is either blocked or slowed down to a crawl, and so at that point that implicates the technical discrimination rules under the European net neutrality law. And T‑Mobile in the U.S. seems to share this interpretation because Binge On and Music Freedom only allow you to watch video and music until you hit your cap.
>
> 6755 So that will be one aspect to consider under section 36, that you know, we have always talked about differential pricing in this proceeding as if it never includes treating packets differently in a technical level. So to the extent those kinds of plans do involve the blocking of certain applications, either always as free basics, or after you hit your cap, that could be a section 36 case.
>
> 6756 The other kinds of categories for section 36 are what I mentioned once that really limit customer choice because the data caps are so low that you can't reasonably use alternative providers that are not included in the program. And that's a really large category, you know, Binge On, Music Freedom, Videotron, all float into that category. In Europe we have Cloud storage applications that are being zero rated where you can't really use a competing Cloud storage provider because that would immediately hit -- you would immediately eat up your cat -- cap.
>
> 6757 And so here, I think, because that effectively makes it impossible to use competing application, and if you want to use that kind of application you have to use the one that's zero rated, that that could raise -- or should raise to the level of a certain -- section 36 violation.[6]

13. As Professor van Schewick pointed out, T-Mobile's Binge On program, which zero-rates (and throttles) video streaming, does not continue to operate once the user has hit their data cap, unlike Videotron's Unlimited Music. Instead, past a data cap, T-Mobile slows down the entirety of their customer's traffic to 2G speeds, the same as with customers not using Binge On.[7] In this way, although T-Mobile's program and similar models remain extremely problematic and operate contrary to Canadian telecommunications law, as discussed elsewhere on the record of this proceeding, T-Mobile at least avoids the discriminatory content blocking that would otherwise result from a user hitting their data cap while participating in Binge On.

14. Zero-rating even more clearly engages section 36 in light of the ITMP Framework's definition of blocking: "Blocking content refers to an ISP preventing a user from *accessing the content of his or her choice*, or an ITMP that effectively severs a connection that a user may have to a website or

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[6] Appearance of Barbara van Schewick, Transcript (4 November 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 6449-50 and 6754-57 ["van Schewick Appearance"].

[7] "What happens when I run out of high-speed data? Because video streams free from your favorite video streaming services and almost all other video streaming is optimized so you can watch up to 3 times more video with your data plan, we think it will be hard to run out of data. But if you do, you will first draw from your Data Stash. If you exhaust your Data Stash your data, including all video streaming, will be slowed to 2G speeds, but you'll never get hit by an overage." T-Mobile, "Questions about this plan feature?", *Introducing Binge On*, online <https://www.t-mobile.com/offer/binge-on-streaming-video.html?icid=WMM_TM_MSCFRDMLP_MP0KKM7GVW4252>.

online application."[8] Preventing users from accessing the content of their choice is exactly what differential pricing practices do, as users are put in a position where their Internet access is restricted to specific content that the ISP has pre-selected for them, and where their respective connections to all other websites or applications have been severed.

B. Zero-Rating Engages Section 36 in Light of Common Carriage Obligations

15. When it comes to zero-rating and section 36 blocking as set out in the ITMP Framework, the key point is this: once a subscriber on a zero-rating plan has hit their data cap and is put in the situation described above, *they are still using their telecommunications service, but the ISP is delivering that service in a way that fails to meet its obligations as a common carrier*.

16. The common carriage obligations are why zero-rating beyond the limit of a user's data cap constitutes offside blocking.

17. At this point, OpenMedia would like to note that it is cognizant of the broader discussion that emerged throughout the public hearing, regarding the concepts of "common carriage" and "common carriers" as applied to telecommunications service providers in Canada. OpenMedia will provide further comments in its final reply, and for now submits that telecommunications common carriers in Canada, including ISPs, are indeed common carriers, and do have a common carriage obligation, as codified in sections 27(2) and 36 of the *Telecommunications Act*.[9]

18. If the Commission accepts that ISPs are common carriers, with common carriage obligations, then it follows that an ISP "holds itself out to the public as being ready to carry for hire…the goods of all persons who see fit to employ it, *without retaining the right as to what or for whom it should carry* or restricting shipments to full loads".[10] This means that the ISP does not retain the right to choose to carry, for example, the user's data to/from Facebook, but not to/from Reddit.

19. In the case of a subscriber who has used up their data cap on a zero-rating plan, assuming the base price of the plan covers only the data included within the cap, then what is happening is that the carrier has made a decision to continue offering its services for $0.00. That does not mean, however, that the carrier is now entitled to offer that service in a discriminatory manner, or that it is now relieved of common carriage obligations that would otherwise still attach if it were offering its services for a non-zero fee, such as the regular price of an Internet plan or a data top-up.

20. If the carrier wishes to offer its services for a null fee, then that is the carrier's decision, subject to potential competition law or other restrictions. However, the carrier must still offer the service in keeping with its legal obligations as defined by the nature of its role as a common carrier and the services it provides. For ISPs providing service after a user has hit their data cap, that means they must continue to provide Internet service, which they have chosen to provide for an additional fee of $0.00, without blocking any content, websites, or apps, and allowing the user to access the content of their choice anywhere on the Internet, as would be the norm otherwise and as the law requires of them as common carriers.

21. The fact that zero-rating ISPs do not adhere to their common carriage obligations even while continuing to provide Internet service beyond a user's data limit, but instead block every website, content provider, and application that has not partnered with the ISP, is why the practice implicates section 36 as established in the ITMP Framework.

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[8] ITMP Framework, *supra* note 3 at footnote 14 (emphasis added).

[9] See, for instance, discussion by Canadian Media Concentration Research Project (CMCRP) of the history of common carriage in Canadian telecommunications law: First Intervention of CMCRP, *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 5-48 [CMCRP Intervention]. See also Chairman Blais's comments regarding Parliament's decision to use "common carrier" specifically in the term "telecommunications common carrier": Appearance of TekSavvy, Transcript (3 November 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 5843-47 ["TekSavvy Appearance"].

[10] CED 4th (online), Carriers "General: Common Carriers" (I.1) at § 1.

C. The Commission Should Interpret Section 36 Broadly and Contextually

22. Not only does zero-rating engage section 36, but in applying the provision, the Commission should interpret section 36 broadly and contextually, for reasons grounded in principles of statutory interpretation and given the history of section 36. These principles mandate against Bell's narrow interpretation of section 36 and common carriage generally, in its attempt to read in that the control or influence in question must be of a technical nature.

23. Section 36 of the *Telecommunications Act* states: "Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public."[11]

24. Section 12 of the federal *Interpretation Act* states: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[12] The Supreme Court of Canada most recently relied on section 12 in *Musqueam Indian Band v. Musqueam Indian Band (Board of Review)*, 2016 SCC 36.[13]

25. The Supreme Court also recently affirmed the continued relevance of E.A. Driedger's steadfast approach to statutory interpretation, in both *Musqueam* and *Wilson v. Atomic Energy of Canada Ltd*., 2016 SCC 29:

> This is a distilled question requiring statutory interpretation and, accordingly, we must begin with the modern principle of statutory interpretation articulated in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

26. The above principles taken together lend themselves to a broad and contextual reading of section 36, as applied to zero-rating, with a view towards fulfilling the aims and objectives of section 36 and the *Telecommunications Act* more generally.

27. First, Section 12 of the *Interpretation Act* directs the Commission to interpret section 36 in a way that most furthers its remedial nature in view of the provision's object. In its intervention, Canadian Media Concentration Research Project (CMCRP) sheds light on this object by tracing the historical development of section 36 as a response to tensions between telecommunications (carriage) and cable broadcasting (content):

> [R]ecognizing the potential for established, dominant carriers to stifle cable's development, in 1968 Parliament amended Bell's charter to prevent it from directly or indirectly holding a broadcasting licence. The amendment read as follows:
>
> > "[…Bell] and its subsidiaries do not […] directly or by any other means, have the power to apply for or to be the holder of a broadcasting license […] or of a license to operate a commercial Community Antenna Television service […] and shall neither control the contents nor influence the meaning or purpose of [any] message emitted, transmitted or received" (as quoted in Winseck).34 33.
>
> According to Winseck, the following year the CRTC issued the "Licensing Policy in Relation to Common Carriers," which read as follows:
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> > "…it would not be in the public interest to encourage common carriers to hold licenses for CATV systems [except…] under certain circumstances [when] smaller common carrier companies may be the only entities

[11] *Telecommunications Act*, SC 1993, c 38, s 36
[12] *Interpretation Act*, RSC 1985, c I-21, s 12.
[13] *Musqueam Indian Band v. Musqueam Indian Band (Board of Review)*, 2016 SCC 36, at para 16 [*Musqueam*].

> capable of providing a CATV service […] in certain of Canada's smaller population centres" (as quoted in Winseck).35 34.
>
> It is clear that fostering the independent development of cable was at least a rhetorical concern of policymakers and regulators during the late 1960's and 1970's—and this meant ensuring that telecommunications companies could not themselves enter the field of competition with the upstart cable companies.
>
> […]
>
> In any case, there is something to be said for this recurrent principle: not only have prohibitions against unjust discrimination and undue preference found their way into broadcasting regulation (e.g. Broadcasting Distribution Regulations, Digital Media Exemption Order), but the very words prohibiting Bell from holding a broadcasting licence have been directly incorporated into the Telecommunications Act today:
>
> > 36 Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.
>
> As we consider the role of differential pricing practices in this present proceeding, it is useful to look back and consider the circumstances surrounding the development of this clause, which revolved not only around ownership of content, but of concern about control by carriers over distribution, packaging, and most importantly, competition and innovation.[14]

28. The legislative history of section 36, including its direct descendancy from the Bell Canada Charter and *Bell Canada Act*[15] as described, suggests that the main object of the provision and Parliament's intent for it was to maintain a strong structural divide between carriage and content, for the sake of alleviating concerns around "ownership of content, … control by carriers over distribution, packaging, and … competition and innovation". Given the range of harms involving those precise issues that interveners have raised about zero-rating in this proceeding, a "fair, large and liberal" interpretation of section 36 would militate towards close scrutiny of the practice.

29. Similarly, interpreting section 36 "harmoniously with the scheme of the Act [and] the object of the Act" points towards interpreting it in context of the section 7 policy objectives that guide all of the Commission's decisions under the *Telecommunications Act*. This includes objectives such as seen in the following sections:

    - 7(a) "facilitate…a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions";
    - 7(b) "render reliable and affordable telecommunications services";
    - 7(g) "encourage innovation in the provision of *telecommunications* services"; and
    - 7(h) "respond to the economic and social requirements of users of telecommunications services".[16]

    A modern interpretation of section 36 requires taking these polycentric aims into account, and the provision should not be read in a way that precludes or undermines these considerations.

30. This is why Bell Canada's interpretation of section 36 and common carriage cannot stand, as presented in the following excerpt from the public hearing:

> 2646 MR. DANIELS: Right. So we see common carriage *as an issue of how you are treating the traffic technically, not from a pricing perspective*. And -- because when we look back at the common carriage rules, and specifically, section 36 of the Act, in terms of

[14] Intervention of CMCRP (28 June 2016), at paras 32-36.
[15] "The Commission notes that section 8 of the *Bell Canada Act* was repealed and replaced by section 36 of the *Telecommunications Act*. Section 36 extends to all Canadian carriers the general prohibition with respect to the control of content, subject to a determination otherwise by the Commission." Telecom Decision CRTC 94-4, *Revisions to 900 Service* (26 February 1994).
[16] *Telecommunications Act*, SC 1993, c 38, ss 7(a), 7(b), 7(g) and 7(h) (emphasis added).

> influencing the meaning, we don't think any of that's happening, because at the end of day, we believe our proposal is consistent with net neutrality because consumers are able to access any content they want. […]
>
> 2650 COMMISSIONER MENZIES: So your view is then *narrowed down to your technical treatment* of the traffic?
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> 2651 MR. DANIELS: Yes.
>
> 2652 COMMISSIONER MENZIES: And that price -- you see price -- your argument, then, is -- just so I understand it -- *is that price is irrelevant to traffic treatment*? Because I mean, to use the -- I mean, it's been used earlier and we referred to it earlier in terms of, you know, the past practices and telephony, where you might have a different, you know -- over in mobile, you know, free evening calls and that sort of stuff.
>
> 2654 MR. DANIELS: Right, and so let's take the two examples on the telephony side.[17]

31. Nowhere in a grammatical and ordinary reading of the sentence does section 36 indicate that control over content or influence over the meaning or purpose of telecommunications must be of a strictly technical nature. The generality and brevity of the wording in section 36 also suggests that the Commission has room for broad interpretation in determining how to operationalize the provision.[18]

32. Furthermore, even if one were to concede Bell's argument about reading in "technical treatment" into section 36, Professor van Schewick made clear during her hearing appearance that "[z]ero rating has the same impact on the open internet as technical forms of discrimination and creates the same problems".[19] Thus, a "fair, large and liberal" approach to interpretation, as the Supreme Court has advanced, would still require that the Commission interpret section 36 broadly and apply it in context when assessing zero-rating practices nonetheless.

D. Zero-Rating Engages Section 36 through Bundling and Classifying Content

33. There are two additional ways in which zero-rating engages section 36.

34. The first way is that when ISPs select a group of websites, applications, or content providers and facilitate access to them, while blocking subscribers' access to everything and everyone else, that is a form of bundling akin to cable TV and print publishing. Those who control the content do not have to control the inner workings of the content itself; the fact that they are selecting what content is to be disseminated, and what content is not to be, itself fulfills an editorial or curatorial function that is contrary to the nature and obligations of a common carrier.[20]

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[17] Appearance of Bell Canada, Transcript (1 November 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 2646, 2650-54 (emphasis added) ["Bell Appearance"].

[18] The *Telecommunications Act* defines "control" in section 2(1); however, this particular definition seems to have been applied mostly in the context of Canadian ownership under section 16 of the *Act*. See, e.g., Telecom Decision CRTC 2009-678, *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime* (29 October 2009). Given the context, purpose, and history of section 36, and the distinction between controlling a corporate entity versus controlling content as a common carrier, it would be reasonable to apply a broader interpretation to section 36 than the definition in section 2(1) might otherwise suggest.

[19] van Schewick Appearance, *supra* note 6 at para 6451.

[20] See, e.g. Intervention of CMCRP, at para 216: "Following the plain definition, it is evident that carriers or ISPs, by engaging in differential pricing practices, make editorial selections about which content services are eligible to receive differential pricing and which are not. It is at the carrier's sole and arbitrary discretion which services to include and which to exclude—a form of control that stands in stark contrast to the long established role of telecommunications providers as agnostic carriers of messages." See also Appearance of CMCRP, Transcript (31 October 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at para 335 ["CMCRP Appearance"]: "The cable companies weren't doing anything other than selecting channels and distributing them to people, which is an editorial function in my view. They pick a bundle -- they bundle together channels and they offer those channels together to their customers."

35. The second way that zero-rating engages section 36 is through broad class-based zero-rating, where ISPs and edge providers are forced to classify, as well as judge the legality of, all content or applications for the sake of participating in a zero-rating program.[21] Given the versatility and multipurpose nature of an increasing number of online platforms, apps, and services, and given the complexity of how technological advancement often interacts with the law, it is possible that the very act of categorizing and labelling particular types of content or edge providers, then entrenching that categorization through a zero-rating program, will over time divert, narrow, or otherwise distort the meaning or purpose of the particular telecommunications facilitated through any given new service, app, or content provider.

Conclusion

36. Zero-rating engages section 36 of the *Telecommunications Act* in several ways. First, the practice engages the provision by virtue of blocking content as described in the ITMP Framework, after a user has hit their data plan limit. Second, zero-rating engages section 36 in this situation due to ISPs' common carriage obligations, as telecommunications common carriers. Third, this differential pricing practice engages section 36 by virtue of ISPs exercising editorial or curatorial control by bundling together select content for users to access, while blocking all others.

37. Fourth and lastly, zero-rating forces ISPs, edge providers, and Internet users to entrench unnecessary classifications in a way that may distort the purpose or meaning of users' telecommunications over time, with respect to given platforms, content, apps, or services that constitute innovation from the edge. This also includes potentially premature or erroneous, yet consequential, assertions regarding the legality of new innovations.

38. When considering section 36 in the context of zero-rating, the Commission should apply a broad and contextual interpretation. This includes rejecting Bell Canada's narrow reading of section 36 to encompass only control or influence through "technical treatment", and enables the Commission to assess zero-rating through a section 36 and broader common carriage lens.

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[21] Appearance of Canadian Network Operators Consortium, Transcript (31 October 2016), *Examination of differential pricing practices related to Internet data plans*, TNC CRTC 2016-192 (18 May 2016), at paras 1033 and 1117.