



**Canadian Network Operators Consortium Inc.  
Consortium des Opérateurs de Réseaux Canadiens Inc.**

February 1, 2011

DELIVERED VIA EMAIL ([minister.industry@ic.gc.ca](mailto:minister.industry@ic.gc.ca) and [Clement.T@parl.gc.ca](mailto:Clement.T@parl.gc.ca)),  
FAX (613-992-0302 and 613-992-5092) AND COURIER

Industry Canada  
Office of the Honourable Tony Clement  
Minister of Industry  
C.D. Howe Building  
235 Queen Street  
Ottawa, Ontario  
K1A 0H5

Dear Minister Clement,

**Re: Canadian Network Operators Consortium Inc. (“CNOCC”) Seeks Referral back of CRTC Usage-Based-Billing Decisions upon Proper Competitive Principles**

Canadian Network Operators Consortium Inc. (“CNOCC”) is the voice of Canadian network operators offering a wide variety of communications services, in competition with the former monopoly telephone companies and cable carriers (collectively “incumbents”). CNOCC currently has 23 members (listed in the Appendix), serving more than 2 million businesses and residential customers in 10 provinces, generating more than half a billion dollars in annual revenues and employing more than 2,000 Canadians in knowledge economy jobs. CNOCC members represent the most meaningful competition faced by the incumbents.

CNOCC members offer a wide variety of voice, data, video and Internet access services to the public. Many of these services are unique and innovative and not offered by the incumbents. In other cases, the competition represented by CNOCC members provides additional consumer choice and imposes price discipline on the incumbents. Some of the broadband services provided by CNOCC members are delivered over the Internet, while other broadband services do not touch the Internet.

The CRTC has previously found that if competition by other market participants (including CNOCC members) in certain services markets were unduly impaired, incumbent telephone companies and cable carriers would be able to operate as duopolies.

CNOCC members cannot deliver their services to Canadians without adequate access to the incumbents’ broadband connections. However, competitors are not merely resellers of these connections. Competitors combine these connections with their own network elements to create sophisticated networks and deploy a wide range of services.

At the same time, the incumbents’ broadband connections constitute the last mile bottleneck access without which competitors cannot reach their end-customers. Historically, with one exception, the wholesale customers of the incumbents have been charged only on a flat-rate basis for the access to these broadband connections, regardless of the amount of traffic the connections carry. This does not mean that the

incumbents have not been adequately compensated for all usage occurring via these connections when used by competitors. In fact, the flat-rate portion of the incumbents' wholesale service rates covers most, if not all, of the costs associated with usage of the connections, regardless of usage level.

CNOC is extremely concerned about a series of decisions made by the CRTC during the last 10 months. Telecom Decisions CRTC 2010-255, 2010-802 and 2011-44 ("UBB Decisions"). If these decisions are left to stand, they would significantly alter the rate structure for incumbent wholesale broadband connections in a manner that would unduly reduce competition in the provision of retail services and harm Canadian consumers, culture and the economy.

In the UBB Decisions, the CRTC approved a plan for Bell Aliant and Bell Canada (collectively "Bell") to place caps on the amount of traffic flowing through each individual incumbent wholesale broadband connection employed by another service provider (such as a CNOC member) that purchases such access from the incumbent to deliver its own services to a Canadian household. Household usage above the caps would be measured and billed as incurred. This wholesale usage-based billing ("UBB") rate structure is the same as the UBB rate structure that Bell has chosen to implement for its own individual residential retail Internet customers, subject only to a modest 15% discount mandated for wholesale UBB rates relative to Bell's own retail UBB rates. In addition, the UBB Decisions also confirm that this type of UBB framework for wholesale broadband connections would be acceptable if applied by other incumbents if they so choose.

The CRTC has attempted to justify this approach by stating that UBB is an economic Internet traffic management practice ("ITMP") that allows incumbents to reduce congestion caused by peak traffic in their networks and puts users in control of usage by having them pay for the amount of traffic they consume. However, this regulatory approach is fundamentally flawed because it:

- Regulates incumbent wholesale broadband access connections that can be used for a variety of services including voice, data, video, Internet and non-Internet broadband applications as if they were analogous solely to the incumbents' retail Internet services;
- Treats the end-users of an incumbent's wholesale customer in the same manner as the incumbent treats its own end-users, instead of treating the wholesale customer as a whole as the incumbent's customer and letting that wholesale customer determine how to provide service to its end-users based on market demand;
- Creates a disincentive for incumbents to meet demand for broadband capacity and reduce congestion caused by peak traffic loads by investing in their networks in order to meet demand, encouraging them instead to constrain network capacity and maximize revenues; and
- Constitutes a regulatory measure whose purpose is ostensibly to reduce the congestion created by peak period traffic in a manner that instead reduces the volume of all traffic carried by competitors of the incumbents, even though the bulk of such traffic is carried in non-peak periods at virtually zero cost and does not contribute to network congestion.

If allowed to stand, the UBB Decisions, which impose UBB on wholesale traffic based on individual broadband end-user access connections, will:

- Increase retail prices for Internet and other broadband services and constrain the use of such services by Canadians very significantly thereby reducing the use of broadband services as a catalyst of innovation and economic growth in both rural/remote and urban parts of Canada;
- Reduce the use of broadband as a means of distribution of Canadian content;
- Make it virtually impossible for competitive services providers, such as CNOC members, to innovate and differentiate their retail Internet services from those of the incumbents;
- Confer an undue advantage on the incumbents own retail telephony, video (e.g., IPTV or cable) and other services which will not be subject to UBB charges, while wholesale broadband traffic including the telephony, video and other service offerings will be subject to UBB charges – **for example, Bell excludes its IPTV service from the application of UBB, while competitors would not have that option;**
- Increase the financial risk of competitors who will have to charge their end-users for usage on a post-paid basis more than a month after the usage is incurred and billed by the incumbents, compared to the present industry practice whereby competitors typically require pre-payment of services purchased on a flat-rate basis from their end-user;
- Enable incumbents to game the system by providing promotions and discounts to their retail UBB fees, while wholesale broadband traffic of all types remains subject to the incumbents' tariffed UBB charges; and
- Generate additional revenues for incumbents at virtually no cost via the application of UBB rates to wholesale traffic resulting in improper, anti-competitive cross-subsidies that the incumbents can use to compete with their competitors.

The average end-user of a CNOC member consumes 30 GB per month over his/her broadband access connection. Usage is expected to increase at a minimum rate of 50% per year and reach 300 GB per month in approximately five years, barring any artificial constraints. If Canadians start shifting more of their viewing to broadband platforms (which is the current trend) this growth pattern could accelerate much more quickly. According to its very recently published *Project Canada Report*, Credit Suisse estimates that the average user would be consuming approximately 215 GB per month based on 2009 viewing patterns. Does the Government of Canada endorse an economic constraint that would only allow programming offered by the incumbent telephone and cable companies to be viewed by Canadians over incumbent broadband connections?

CNOC does not object to a requirement for incumbent wholesale customers (such as CNOC members) that also compete with the incumbents to pay for the network resources of the incumbents utilized by the wholesale customers to provide their own retail services. In fact, the CRTC has developed costing mechanism that it uses for rate setting purposes to ensure that this occurs. However, there are much more efficient and effective ways of accomplishing this objective than the implementation of end-user-based UBB charges applied to incumbent wholesale broadband access services.

The present UBB regime that conceptually treats wholesale services provided to wholesale customers the same as the incumbents treat their own retail Internet services is unworkable and interferes unduly with the operation of market forces.

Canada's status as a former leader in broadband has already largely evaporated. Canada now lags behind most OECD countries in broadband measures such as price and speed. One has to look no further than the CRTC's own 2010 *Navigating Convergence* report to see stark evidence of Canada's poor broadband performance these days. At the same time, while almost all components required to deliver Internet access have gone down in cost, prices for Canadian consumers are going up. Something is wrong with the state of broadband competition in Canada.

Measures such as the UBB Decisions would only serve to exacerbate the situation by reinforcing telephone and cable company duopolies, leading to declines in Canada's productivity and international competitiveness in the digital age.

To the best of CNOC's knowledge, no other OECD country is pursuing the kind of policies promoted by the UBB Decisions. Neither should Canada. In fact, UBB is not even applied to retail services in other countries. In the US for example, CNOC is not aware of any other major incumbent ISP other than Comcast that has imposed usage caps on retail traffic, and Comcast's cap is set at 250 GB or 10 times the 25 GB cap that Bell applies to consumers in Ontario and intends to apply to wholesale access broadband connections as well. To the best of CNOC's knowledge, no major US incumbent is applying UBB to its retail services.

The use of an end-user-based wholesale UBB regime with all of the anti-competitive consequences just described does not constitute regulation that is efficient and proportionate to its purpose, is minimally intrusive and maximizes reliance on market forces as required by this government's 2006 Policy Direction to the CRTC.

To date the damage caused by an end-user-based wholesale UBB regime has been limited. Although a number of cable carriers had obtained regulatory approvals in the last few years to apply UBB charges to wholesale services, only Videotron Ltd. ("Videotron") has actually levied such charges on its competitors and Videotron's wholesale customer base is relatively limited. So far, other major telephone companies have also not made any move to introduce UBB, proving that this kind of measure is not necessary. However, now that CRTC is allowing Bell to apply UBB charges to wholesale services, a number of major cable carriers are expected to introduce such charges. Other telephone companies may now also be emboldened and follow suit. If the application of UBB to wholesale services spreads to Bell and other incumbents, the anti-competitive impact will be swift and severe.

The concerns discussed in this letter are not just shared by CNOC alone. The UBB Decisions have caused a very significant public outcry and concerns both among residential consumers who feel unduly constrained in the use of broadband services and businesses that are now fearful that their rich content will no longer be viewed by consumers. During the course of the proceedings leading to the UBB Decisions, the CRTC received a tremendous number of submissions on UBB, and virtually all of them were opposed to the application of UBB to wholesale services. However, the CRTC, which is charged with upholding consumer interests, is not listening either to competitors or consumers. You can make the CRTC listen.

Based on all of the considerations discussed above, CNOC respectfully urges you to meet with your Cabinet colleagues and ask the Governor in Council, of its own motion, to refer the UBB Decisions back to the CRTC for reconsideration in accordance with the following pro-competitive principles:

- Wholesale broadband access services should be regulated as a broadband platform that can support many services, including voice, data, video, Internet and non-Internet high-speed services, instead of being regulated by comparison to (or so as to mimic) the retail Internet services of the incumbents;
- Competitors must be granted access to the incumbents' wholesale access services in a manner that allows the competitors to choose the attributes of the services provided to end-users, such as speed, throughput, quality of service, type of service, aggregation, bundling, etc.;
- Prices for wholesale services should be cost-based and not include other subjective concepts, such as value of service principles;
- Prices for wholesale services should not be based on whatever the market will bear as that will only lead to prices that allow incumbents to leverage their duopolistic market power when providing such services to competitors, as well as retail services to end-users; and
- To the extent that the CRTC is persuaded that incumbents may need to be compensated for use of usage-sensitive network resources by competitors, it should be required to explore devising an aggregated usage model that: (i) compensates incumbents appropriately for the use of such network resources without raising prices for the use of non-usage sensitive components; and (ii) provides wholesale customers greater flexibility to manage end-user pricing/service solutions.

Why are we coming to you directly rather than filing Petitions pursuant to section 12 of the *Telecommunications Act*? There are two reasons.

First, the UBB Decisions need to be reviewed together in order to provide a true sense of the magnitude of the problem that they cause to competition and consumers, but the 90 day time frame within which Petitions may be brought to the Governor in Council did not provide for that possibility since the gap in time between the dates the first two decisions were issued is greater than 90 days.

The second reason is urgency. The regular Petition process would take too long to provide an effective remedy. As recently as 25 January 2011, the CRTC rendered the most recent of its UBB Decisions. It is now crystal clear that the CRTC intends to implement UBB for the residential wholesale broadband access services of Bell effective 1 March 2011 (which is only 34 days after the date that the most recent of the UBB Decisions was issued) even though:

- The transition to UBB for Bell's wholesale services represents a significant and disruptive change to the Bell's wholesale customers, as the latter must also now move to charging residential end-users for usage in order to remain economically viable;
- Pursuant to consumer protection legislation and contractual terms between competitive service providers and their end-users, in many cases, competitors affected by the UBB Decisions have to

provide at least one month's notice to their end-users of their own changing rate structures and rates caused by the UBB Decisions;

- Competitors need a minimum of 90 days to adapt to such a major change, should it occur;
- Bell, which has the most significant interest in seeing its wholesale UBB rates implemented as promptly as possible, had indicated that it needed 60 days from the date of any decision to implement any rates approved in the proceeding leading to the most recent of the UBB Decisions;
- The CRTC has yet to dispose of Bell tariff notices that propose certain amendments to UBB rates, and until that occurs, wholesale customers of Bell do not even know all of the wholesale UBB rates that would apply as of 1 March 2011 if the UBB Decisions are allowed to stand; and
- The retail rates on which wholesale UBB rates are supposed to be founded constitute a shifting target, since retail Internet services are forborne and incumbents are unfettered in their ability to offer promotional pricing to end-users.

The CRTC's UBB Decisions are poorly conceived and being implemented too hastily. The regular Petition process authorized by section 12 of the *Telecommunications Act* would not enable a single Petition to be brought to the Governor in Council that applies to all of the UBB Decisions and could be responsive in the time available before the Bell wholesale UBB regime is scheduled to go into effect 1 March 2011.

However, under section 12 of the *Telecommunications Act*, the Governor in Council can within one year of any CRTC decision on its own motion, by order, vary, rescind the decision or refer it back to the CRTC for reconsideration of all or a portion of it. For these reasons we are asking you to urge your fellow Cabinet members to ask the Governor in Council, of its own motion, to refer the UBB Decisions back to the CRTC for reconsideration in accordance with the pro-competitive principles described above.

CNOC is encouraged by the statement you made yesterday regarding the most recent of the UBB Decisions. It indicates that you recognize the seriousness of the issues that are raised by these decisions. We urge to you to take the views expressed in this letter into account in your review and to stop the UBB Decisions from being implemented effective 1 March 2011 and refer the whole matter back to the CRTC for reconsideration upon more appropriate pro-competitive principles set out herein.

Should you have any questions or concerns, please do not hesitate to contact me. I am also available to meet with you and/or your staff at your convenience should you find that useful in dealing with this matter.

Yours very truly,



William Sandiford  
Chair of the Board and President

**APPENDIX**  
**LIST OF MEMBERS OF CNOC AS OF 31 JANUARY 2010**

Accelerated Connections Inc.  
B2B2C Inc.  
Colba.net Inc.  
Distributel Communications Inc.  
Durham.net Inc. dba Telnet Communications  
Egate Networks Inc.  
Electroman enterprises dba Network Connection  
Execulink Telecom Inc.  
Nucleus Inc.  
Odynet Inc.  
Oricom Internet Inc.  
Packet-Tel Corp.  
Primus Telecommunications Canada Inc.  
Radiant Communications Corp.  
Sentex Communications Corp.  
Start Communications  
Skyway West Business Internet Services  
TekSavvy Solutions Inc.  
The Internet Centre Inc.  
The Wire Inc.  
Velcom  
VIF Internet  
Yak Communications (Canada) Corp.