

Comments

by

Vaxination Informatique

regarding

**Petitions to the Governor in Council concerning
Telecom Decision CRTC 2021-181
Notice No: TIPB-002-2021**

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Introduction

1. Pursuant to Canada Gazette, Part I, Volume 155, Number 30, (July 24th 2021), Vaxination Informatique submits its comments on the Petitions to Governor in Council concerning CRTC decision 2021-181 filed by TekSavvy Solutions Inc. (Teksavvy) and Competitive Network Operators of Canada (CNOOC).
2. Jean-François Mezei, dba Vaxination Informatique has participated in CRTC processes between 2008 and end of 2016, and was the author of the 2011 Petition to Governor in Council seeking the overturn of the CRTC's UBB decisions.
3. Vaxination participated in the various tariff processes leading up to 2019-288 and processes between 2019-288 and 2021-181.

Executive Summary

- The CRTC, in decision 2010-632 found that competition from independent ISPs was required to avoid a duopoly. To be effective, such competition must allow ISPs to help drive prices down instead of being forced to remain near incumbent's own retail pricing.
- Since the overturn of UBB tariffs in 2011, the Commission has had a long succession of processes to adjust the CBB and access rates that were the result of the overturn of UBB. (CBB = Capacity Based Billing, and the access rates cover the last mile costs).
- The 2019-288 decision followed a long process started in 2015 that first looked at modernizing costing methodology and from 2016, after quickly calculated interim rates were set, 3 years of due diligence and due process to reach proper cost-based wholesale rates based on verified incumbent costing studies.
- The Commission admits it didn't want to do such a due diligence for its 2021-181 decision, so used the 2016 rates which never had proper process, nor due diligence.
- The un-implemented 2015-326 decision has denied consumers of competitive FTTH access, and because of the Commission's failure to implement it after 6 years, it appears the Commission feels the need to further sour the milk for the aggregated system (which is already prevented FTTH access) in order to make its disaggregated pet project appear less unpalatable.
- The Commission must return to its neutral roots of a administrative tribunal and ensure that it provides today the lowest possible wholesale rates to foster competition and cannot jeopardize the current system. A new system must win because it is better, more efficient, less costly not because the Commission purposefully cripples the old system.
- The Telecommunications Act's Policy Objectives seek to ensure affordable and reliable telecommunications services to citizens, it does not seek to protect incumbent's market power, does not seek to implement "facilities based" competition and the Commission needs to be reminded of that. The Commission's recent decisions and media reports have greatly reduced the trust Canadians may have in the organization and the Commission needs to take action to re-establish this trust.

History leading to 2021-181

4. In order to better understand the context of the current 2021-181 challenges, it is important to understand the history leading to this CRTC decision.
5. First, it is important to note that capital investments for telecommunications equipment and fibre links are measured by capacity. One does not buy a router capable of carrying 25 gigabytes per month (usage) , one purchases a router capable of processing 10 gigabits per second (capacity).
6. TN7181 (March 13 2009) Bell Canada files its UBB tariff for the "Gateway Access Service" (aka: wholesale high speed access). In July, Bell Canada files a cost study to support its UBB rates which uses "art" to convert real capacity-based costs into virtual usage based costs. Multiple decisions and R&V result in 2010-802 issued on October 28 2010.
7. January 2011 Vaxination Informatique files Petition to Governor in Council seeking to overturn the UBB tariffs. At the strong suggestion from Minister of Industry, the CRTC initiates 2001-11 public notice to review billing practices and in the spring, Bell Canada formally withdraws TN7181.
8. [2011-703](#) (Nov 15) The first Capacity-Based Billing (CBB) decision. It was first implemented in February 2012 which also marks the return to retail customers of "matching speeds" lost as a result of the 2006 Policy Direction. The rates were set by the Commission based on the March 2009 cost study filed by Bell. This means that costing, artistically converted by Bell from capacity to "UBB" in 2009 were now artistically converted back to capacity by the CRTC with 3 year old costing data. The rates happened to be revenue neutral for the usage levels of the time, so ISPs retail rates didn't change, except for the Rogers TPIA which lost its existing UBB component , allowing ISPs freedom to shape their retail offerings much more competitively.
Access rates for Bell Canada varied from between \$14.11 and \$25.00
Because the 703 (residential) and 704 (business) decisions were technically incompatible, a quick process in January 2012 resulted in a compromise to allow implementation by February 1 2012, and the CRTC made these tariffs Interim until issues were to be resolved.
.
Bell Canada \$2,213 per 100mbps of capacity.
Cogeco \$2,695
MTS \$281
Rogers \$1,251
Vidéotron \$1,890
(others remained on fixed rates as their choice).

History leading to 2019-288 (cont)

9. January 2013 Bell Canada offers off-tariffs rates to a number of its wholesale customers (ISP). ISPs continue to pay the tariffed CBB rate, but get a discount on the per user access rates from roughly \$25 to roughly \$15. A number of ISPs start offering lower retail rates as a result.
10. [2013-70](#) (Feb 21) Shortly after 703 rates were implemented in February 2012, a slew of R&Vs were filed (the -70 is the over arching decision, individual decisions for each R&V issued). Part of the process involved incumbents submitting costing information. The decision introduced final rates to be retroactively applied to February 1 2012 when the 703 rates entered into service as Interim. Note Bell Canada's CBB rate going from \$2213 to \$1036.
- | | |
|-------------|------------|
| Bell Canada | \$1,036.49 |
| Cogeco | \$2,556 |
| Rogers | \$1,400 |
| Vidéotron | \$2,031 |
11. [July 10 2013](#) In a response to a Bell Canada request for review of wholesale rates, the Commission announced that it has suspended a number of processes, pending the full review of wholesale services initiated as part of 2013-551 consultation which culminated with a decision 2015-326 in July.
12. [2013-603](#) (Nov 12) Telus submitted a R&V of 2013-73 (part of group of decisions with 2013-70). The 603 decision rejects the R&V but after having discovered errors in its calculations leading to the 703 rates still in effect, adjusted upwards by \$1.18 the access rate to \$19.18, retroactive to the date these rate came into effect, namely November 15 2011 (to Telus' advantage)
13. [2015-225](#) (May 28) Notice of consultation, review of costing inputs. This is a review of various Phase II costing issues to better deal with fast changing environment. This rejuvenated the costing process. For instance, there was discussion on how to lighten the regulatory burden whenever new access speeds are announced, a common occurrence. This also included discussion on traffic growth predictions as well as productivity gains (lower equipment costs) during the tariff period and working fill factors. This also included processing a previous CNOC Part-1 on many wholesale service issues.
14. [2016-117](#) (March 31) Decision on the 2015-225 review of costing principles. All rates made interim, incumbents asked to submit new costs studies (by end June) based on the new principles in this decision.

History leading to 2019-288 (cont)

15. [2016-396](#) (Oct 6) New revised interim rates. for most incumbents.

16. [2016-448](#) (Nov 10) New revised interim rates for Brag. (Eastlink)

"The Commission's revisions to the proposed rates are required in order to ensure that the interim rates are not based on overstated costs."

This was a never before seen message from the Commission which, after receiving new costing studies, had to admit that previous rates had been set based on overstated costs. Bell Canada went from \$1036 down to \$149 which shows the quantum of error for the previous rates.

Bell Canada	\$149.08
Cogeco	\$323.73
Eastlink	\$353.35
MTS	\$94.92
Rogers	\$319.68
Shaw	\$296.10
Videotron	\$395.36

17. [2019-288](#) (Aug 15) Final rates set.

Bell Canada	\$102.48
Cogeco	\$233.49
Eastlink	\$212.10
Bell MTS	\$57.81
Rogers	\$224.32
Videotron	\$227.05
Shaw	\$251.14

18. Challenges

Bell Canada and others mount all possible challenges:

-Federal Court of Appeals, rejected¹

-Petition to Governor in Council response: PC 2020-0553²

-Review and Variance (to CRTC)

19. [2021-181](#) (May 27) Response to R&V

Bell Canada	\$138.43
Cogeco	\$323.73
Eastlink	\$353.35
Bell MTS	\$88.14
Rogers	\$319.88
Vidéotron	\$395.36
Shaw	\$296.10

1 Federal Court of Appeal A-456-19, A-457-19
decision: <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/485009/index.do>

2 PC 2020-0553 Order to decline to vary, rescind or refer back for reconsideration Telecom Order CRTC 2019-288
<https://orders-in-council.canada.ca/attachment.php?attach=39521&lang=en>

Big Picture on what happened to 2019-288

20. The UBB debacle was triggered by a 2008 decision that required Bell Canada to offer matching speeds, (same speeds offered to wholesale as its own retail offering). Wholesale had been capped at 5mbps while Bell Canada's retail was offering a default speed of 6mbps with options to go as high as 15mbps.
21. Bell failed to comply with the decision, resulting in the CRTC issuing an order in early 2009 forcing Bell Canada to file "matching speed" tariffs. Bell Canada's response was to file its UBB tariffs that lacked matching speeds, and at same time filed a Petition to Governor in Council requesting the matching speed decisions be overturned.
22. In December 2009, the government responded with PC [2009-0007](#) which referred the issue back to the CRTC with a suggestion that the Commission ensure Bell was adequately rewarded. This was included in an existing consultation which resulted in landmark decision 2010-632 which confirmed the need for matching speeds but agreed to reward Bell Canada with a 40% markup instead of the normal 30%. Matching speeds did not become available to consumers until February 2012. Bell Canada justified that higher markup because it was using "Next Generation Networking" technology when in fact, the DSLAMs Bell Canada was installing were already discontinued (And Lucent no longer in business).
23. The 2011-703 decision was first to introduce matching speeds, the Bell Canada 40% markup, and the Capacity Based Model (CBB). However, it was based on a 2009 cost study which Bell Canada had submitted to support its UBB rates. This cost study used "art" to convert equipment costs (measured in capacity) to by-the-byte costs. The CRTC had to use its own art to convert those by-the-byte-costs back to capacity costs leading to inaccurate costing data.
24. What followed were a series of challenges and reviews of rates from 2012 until 2015 when the CRTC initiated a review of rate calculation to not only reflect new technologies but also provide updated costing manuals for more accurate and modern rate calculations. . (consultation 2015-225). Upon issuing its findings in 2016-117, the Commission started to recalculate rates with the new policy and by end of year sounded the alarm as it found the rates in effect were so grossly exaggerated that temporary interim rates were needed until due process could yield proper just and reasonable final rates. Therefore, the 2016 rates were not the result of due process, not challenged and not deemed just and reasonable. Hence the needs to have them as interim with retroactive application once just and reasonable rates would be set.
25. These just and reasonable rates arrived after much due diligence with 2019-288. This decision also removed the extra 10% markup telcos got for their "Next Generation network" equipment that now belongs in museums, so the drop in price looked worse than it was. The incumbents didn't like rates that would finally allow ISPs to compete both on price and service hence their challenges on every possible front. At the federal court of appeals, Bell Canada even admitted that such rates would introduce price competition that may force its retail services to lower its rates. Imagine that: price competition in Canada !
26. A reminder that the Telecommunications Act and the policy directions all have goals of increased market forces that drive prices down as a means to avoid retail price regulation. And even Bell Canada admitted it would happen with 2019-288.

27. The Review and Variance process at the CRTC was last to complete with the 2021-181 decision. The Federal Court of Appeals rejected the incumbent's appeal, and the Petition to Governor in Council issued PC [2020-553](#) which while declining to vary/rescind the decision, noted that some felt there were some inaccurate rates in the 2019-288 decision without giving specifics, nor naming the persons (lobbyists) who had that opinion.
28. It needs to be repeated that the Commission spent 3 years of due diligence and due process/consultation to arrive at 2019-288 while it spent a few weeks without due process to arrive at the temporary 2016 rates needed urgently because they previous rates were too egregious to remain in force. The 2021-181 decision implements the 2016 rates with the 40% to 30% markup change.

Cue 2015-326

29. In July 2015, the Commission put the wrecking ball to wholesale by denying the existing system access to FTTH. 6 years later, no consumer has competitive access to modern networking and the telcos still have full monopoly on reliable FTTH service. This is because access to FTTH was conditional on hundreds of ISPs deploying their own links to over 890 Bell Canada central offices in Québec and Ontario, and repeat (to a lesser extent) that exercise to connect to each cable company for wholesale. A totally unrealistic scenario.
30. 6 years later, the Commission still has a process going to try to find a way to make disaggregated work. In the latest plan, it would cost each ISP over \$140,000 in payment to Bell to connect to a central office to reach about 300 customers and that does not include the cost of building the actual link from the ISP's facilities to the CO. This is just money going to Bell Canada so it can install a small switch. And because Bell will only enable 2 central offices per month, it will take over a decade to deploy the CRTC's wet dream of "facilities based competition". Consumers lose, incumbents win.
31. On May 20th 2021, the current Chair of the Commission admitted during an interview at the Canadian Club that he has a bias for "facilities-based competition". In a normal court of law, a judge would have to recuse himself from a case after making such a public statement. But for the CRTC, it's par for the course.
32. This is all the more important since "facilities based competition" is not an expression which appears in the Telecommunications Act, nor any of the 2 Policy Directions. In fact it is an expression that originated in incumbent-funded studies both in Canada and USA and accompanied with the claim that incumbents provide sufficient competition and that service-based competition is neither necessary nor beneficial.
33. It is ironic that the 2006 Policy Direction, in section 1-(c)-(ii) mentions the construction of competing telecommunications infrastructure, but the context of part (c) is to streamline the regulatory process and make it faster. The CRTC's attempt to implement this facilities-based competition with 2015-326 has been neither fast nor efficient and in fact is a total failure depriving consumers of modern service for 6 years and counting. The 2021-181 decision makes matters worse.

Discussion of 2021-181

34. Having spent much time setting up context, the issue of 2021-181 can finally be dealt with and tie all the different threads together.
- 3. The Commission's long-term objective in the wholesale HSA service market is to encourage competition and, in particular, facilities-based competition. With this objective in mind, the Commission reviewed its framework for the provision of wholesale HSA services, with a view to encouraging competitive participation in the market on a disaggregated basis.*
- 5. ... The Commission's primary goal with respect to wholesale HSA service is to complete the transition to disaggregated wholesale HSA service in an appropriate manner such that Canadians can benefit from the increased facilities-based competition it will bring, including access to the incumbents' FTTP facilities...*
35. "Facilities-based competition" is not a Telecommunications Act Policy Objective, it is an incumbent supplied buzzword. Offering affordable and reliable communications is an Policy Objective, so is ensuring that regulation, where required, is efficient and effective. That the Chairman's personal bias is heard in an interview is one thing but when this bias is blatant in the text of decision resulting in consumers paying more for Internet access, it should be a matter of serious concern because this bias has put the Commission in a direction that veers away from Policy Objectives instead of towards them. Filed tariffs count. Wet dreams of a future "facilities based competition" don't because in the end, what matters is what is on the bill NOW.
36. The subtext of Paragraph 3 and others is clear: the Commission wants to sour the aggregated milk in order to make its disaggregated "facilities based" plans less unpalatable. Paragraph 5 is all the more important since the Commission hasn't even decided what level of disaggregation it will next try and what the costing would be. You cannot initiate a migration to a nonexistent wholesale framework.
37. A Commission that is focused on Policy Objectives would have implemented 2019-288 AND added FTTH to the aggregated system right from the start and then worked to see whether disaggregated could beat the aggregated model based on the Policy Objective metrics (cost, reliability, coverage of urban/rural etc).
38. The Telecommunications Act requires the Commission to choose the best system based on the metrics in the Policy Objectives. It does not specify nor privilege the incumbent-supplied buzzword "facilities based". In fact, the 2019 addition to Policy Direction explicitly instructs the Commission to consider all forms of competition. So when the Chair expressed a bias for only one form of competition, he was not honouring the Policy Direction and when this bias makes it to written decision, it requires government action to correct.
39. In the Olympics, every competitor gives his/her best. May the best one win. The Commission's role is to find the best one. It isn't to cripple one to favour the one the chairman personally prefers even though he knows the first one may still be better.

Just and Reasonable Rates

6. The Commission's determinations below attempt to balance the need for certainty and accuracy in the aggregated wholesale HSA service rates with the realities of undertaking complex costing-based rate setting with respect to services that will be phased out in the foreseeable future.

40. The Commission spent 3 years of due diligence, and this is after spending over a year studying costing methods and finding out that the then pre-2016 rates were grossly exaggerated. The Commission spent much time earlier in the decade developing expertise in how the wholesale system works and what sort of costs are involved. By the time the 2016-2019 due diligence work began, it already had a very good grasp of costing mechanics and was able to see through all the tricks incumbents use to artificially inflate costs. (for instance, claiming a router has a capacity of 1gbps when its capacity is 10gbps, which changes the cost per gbps of capacity by a factor of 10).
41. The work was done. This was a mere R&V where an incumbents is supposed to point to very specific errors. This is the equivalent of spell checking a document, not rewriting it.
42. It is therefore clear that the Commission has failed in its mandate of finding the best possible wholesale rates that foster Policy Objectives and benefit consumers NOW, and that it was intent on making aggregated less competitive in order to push its private agenda of "facilities based competition", an agenda which has protected the incumbent's monopoly on FTTH service for 11 years. (Bell Canada started deploying in 2010, Bell Aliant a year or two before).

Action needed by the Governor in Council

43. Section 12(1) of the Telecommunications Act grants the Governor in Council the power to vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.
44. The Governor in Council may have until May 27th 2022 to respond, but consumers and industry who depend on telecommunications service have waited long enough and require quick government action especially if the resulting Governor in Council action will result in the Commission taking another 3 years before making its updated decision public.
45. The message to the Commission must contain a number of important points:
 - (a) Policy Objectives apply to the current wholesale system which must have the lowest possible prices NOW. Work on a replacement must not hinder availability, competitiveness or affordability of the current wholesale system. Migration to a new system must only happen if the new system is more affordable/efficient and naturally attracts ISPs to migrate.
 - (b) The rates in effect should be based on those on which the Commission spent the most due diligence and due process, namely those of 2019-288 with whatever minor specific corrections may be needed due to specific errors found during the R&V process leading to 2021-181.
 - (c) Policy Objectives require consumers have competitive access to FTTH services NOW, and the Commission should prioritize the integration of FTTH access within the existing aggregated wholesale system. This will quicken the pace at which the telcos can begin decommissioning the old copper infrastructure and reap huge savings which will greatly increase efficiency of Canada's telecommunication system.
 - (d) The Commission must work to regain the trust of Canadians by showing that its actions reflect the Telecommunications Act's goals of providing telecommunications services that are reliable, efficient and more affordable. The Commission must recognize that its recent actions have greatly eroded this trust.

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