Telecom Notice of Consultation CRTC 2020:

Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services

Submission from Cybera Inc.

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1. This document constitutes Cybera's intervention in response to "Telecom Notice of Consultation CRTC 2020-406: *Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services*."[1]

2. Cybera is the not-for-profit, technology-neutral organization responsible for driving Alberta's economic growth through the use of digital technology. One of its core roles is the operation of Alberta's Research and Education Network. This is the dedicated network for unmetered, not-for-profit internet traffic used by Alberta's schools, post-secondary institutions, and business incubators to enable research, innovation, and enterprise.

Introduction

3. Cybera notes that there is currently significant uncertainty in the regulatory environment pertaining to wholesale high-speed access (HSA) at this time in Canada. This relates both to ongoing uncertainties regarding the price of wholesale access to incumbent networks, and the appropriate framework within which disaggregated wholesale HSA can be deployed. This regulatory uncertainty is particularly concerning in light of:
    a. The necessity of this regulatory certainty in order for service-based competitors to deploy fibre-to-the-premises (FTTP) services to retail end-users, and;
    b. The well established importance of enabling multiple service-based providers in order to contribute to a competitive and affordable telecommunications market in Canada.

4. With respect to the latter concern, the Competition Bureau has noted:

    "Wholesale-based competitors fulfill a meaningful competitive presence in the marketplace. They currently serve more than 1,000,000 Canadian households, and act as an alternative for countless others, who use the presence of wholesale-based competitors to negotiate lower prices and better terms from other competitors in the marketplace."[2]

5. The result of this uncertainty has been a significantly delayed deployment of a consistent regulatory regime wherein service-based competitors can reliably understand the costs relevant to them to operate and provide services to their customers at affordable prices. This includes both the cost of capacity based billing (CBB) rates related to aggregated wholesale HSA (an issue that is subject to a number of Commission, Governor in Council, and judicial proceedings), and the costs associated with the planned migration to a disaggregated wholesale HSA model, as is relevant to this proceeding.

6. As such, Cybera welcomes this opportunity to provide comments to the Commission on the appropriate approach to the disaggregated wholesale HSA. We also ask that the Commission view these comments with an understanding of the above-noted importance of service-based

[1] Telecom Notice of Consultation CRTC 2019-406. Available at: https://crtc.gc.ca/eng/archive/2019/2019-406.htm
[2] https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04470.html

competitors in advancing both the Commission's stated objectives and those defined by Section 7 of the Telecommunications Act.

Background

7. In its Telecommunications Regulatory Policy 2015-326, the Commission mandated that competitors migrate from an aggregated wholesale HSA model to a disaggregated wholesale HSA model. In the aggregated model, competitors were required to connect at a single Point of Interconnection (POI) in order to access both the access portion and transport portion of the incumbents network, incurring tariffed charges and Capacity Based Billing (CBB) charges.

8. The CRTC 2015-326 decision further mandated a fully disaggregated HSA model, requiring instead that competitors connect at numerous POIs. It also required competitors to either build their own transport services, or lease those services from a third party.

9. One of the Commission's primary reasons for moving away from this wholesale HSA model was the determination that transport facilities represented a competitive marketplace, which was sufficient to justify the Commission's forbearance on regulating these services going forward. Subsequent to this decision, the CRTC would go on in CRTC 2016 - 379 to further configure the disaggregated wholesale HSA model. In doing so, it rejected the recommendation from some intervenors to allow for *less* disaggregation on the networks of some incumbent ISPs.

10. In keeping with the Transition Plan outlined in CRTC 2015-326, the Commission implemented a "phased approach" to the migration to disaggregated wholesale HSA services in Quebec and Ontario. This was achieved by setting out interim rates, terms and conditions for deployment in these regions in Telecom Order CRTC 2017-312.

11. As the Commission states in its Call for Comments relevant to this proceeding, it is not clear that the above-noted framework has led to any meaningful migration towards the disaggregated wholesale HSA model. Crucially, this means that service-based competitors have not, as of yet, meaningfully begun to provide wholesale wireline services utilizing FTTP solutions. This service currently only applies to the new disaggregated regime and not the aggregated model.

12. This is a significant consideration as the Commission invariably tries to implement its Transition Plan in other regions of Canada. Numerous ISPs have already questioned the feasibility or necessity in applying this framework to areas such as Manitoba and Atlantic Canada, citing lack of demand and density.[3]

13. This calls into question the appropriateness of the disaggregated wholesale HSA model, as outlined in CRTC 2015-326. More generally, it also highlights the appropriate level of disaggregation that

[3] http://www.cnoc.ca/wp-content/uploads/2018/11/CNOC-Application-to-R-and-V-TRP-2015-326-and-TD-2016-379-20181107-with-Attachments-Final.pdf

should be required to maintain competitiveness in the service-based competitor marketplace, as well as the general Canadian telecommunications marketplace.

14. In its Call for Comments for this proceeding, the Commission asked intervenors to:

> "Provide your view, with supporting rationale and evidence, on whether or not the existing disaggregated wholesale HSA service regime supports an orderly, cost-effective transition from aggregated to disaggregated wholesale HSA services. If not, provide your view on how disaggregated wholesale HSA services should be modified to facilitate the deployment of the services."

Response

15. In Cybera's view, the existing disaggregated wholesale HSA service regime does not support an orderly, cost-effective transition from aggregated to disaggregated wholesale services.

16. It should be noted that one of the issues the Commission strongly considered in its determination in CRTC 2015-387 was the negative effect the CBB rates then in place had on overhead costs incurred by competitors under the aggregated wholesale HSA model. The Commission itself indicated that the costs incurred by service-based providers in order to access transport facilities at the CBB rates constituted an undue economic burden that would stifle their competitiveness. Due to this, many competitors welcomed the migration to the disaggregated model.

17. However, the Commission would find shortly after this decision that the CBB rates in place at the time were in many instances based on inaccurate costing analysis, and were actually severely inflated. The decision to revisit this question in a number of further proceedings ultimately resulted in the Commission finding in favour of the service-based providers, and significantly lowering these rates in Telecom Order 2019-379. While this decision is currently subject to a number of Governor-in-Council and legal proceedings initiated by a petition from the incumbents, the decision by the Commission to lower these rates significantly undermined one of its justifications to implement a fully disaggregated wholesale HSA model.

18. While several wholesale providers welcomed disaggregation as a means to lower the overhead costs associated with the interim CBB rates, the reversal of that decision now places those providers in a position where the costs saved by the reduction in rates for wholesale access are outstripped by the significant connection costs of a disaggregated wholesale HSA model. To make matters worse, many of those same providers are now in a position of regulatory limbo. They cannot access fibre wireline wholesale HSA due to the prohibitive up-front costs of disaggregation, and they are also subject to the existing 100 Mpbs speed cap on the existing aggregated framework. For this reason, they are at a significant disadvantage in being able to offer competitive services in the marketplace. Further to this, the significant delay in implementing a workable disaggregation model has allowed, and will continue to allow, incumbent ISPs to maintain a significant head start in capturing a segment of the market that is demanding higher internet speed offerings. This

demographic is projected to experience significant growth in the coming years. As such, this framework calls into question whether the policy, as currently formulated, actually furthers the long-term competitiveness of Canada's telecommunications market, and thus, whether it is in keeping with the Telecommunications Act's Policy Objectives as written or in spirit.

19. As such, Cybera finds that both the disaggregated HSA model and the 100 Mbps speed cap, as applicable to aggregated HSA services, no longer serves its intended purpose. This measure is now, in effect, punitive because it provides insurmountable barriers for other ISPs to cross. This, in turn, strands competitors and their customers on service speeds that are becoming competitively irrelevant.

20. In addition, as several service-based ISPs have shown in proceedings before the Commission, the move from aggregated to disaggregated wholesale HSA implies an enormous increase in costs for competitors, and one that would render their service totally uneconomic. In analysis done by Prof. Roger Ware, for example, one-time costs associated with connecting an ISP to all points of interconnection (POI) on incumbent networks, under a disaggregated wholesale HSA regime, can total up to $200 million in some cases.[4]

21. In addition to this, Cybera also challenges the Commission's determination that transport services are sufficiently competitive to warrant blanket forbearance. As shown by geographic analysis done by several service-based competitors, except for a few densely populated urban areas, ISPs have either one or two options available to meet their transport requirements. One of these will likely be the incumbent wholesale HSA provider, who has been allowed to adopt a monopoly position over what under the aggregated case would in effect be a regulated service. An important reason for having disaggregated services is the principle of not regulating services that are duplicable by reasonably efficient competitors. But in the case of transport services, this would not appear to be a correct application of this principle.

22. As such, one of the key justifications for the migration to a fully disaggregated wholesale HSA model can be called into question on purely factual grounds. Further, this would call into question whether the Commission's decision with respect to CRTC 2015-326 is in compliance with Section 34(2) of the Telecommunications Act.

Recommendations

23. **The Commission should revisit the disaggregated wholesale HSA framework as defined in CRTC 2015-326:** In Cybera's view, the policy objectives of the Telecommunications Act and the 2019 Policy Directive are not met by a move to a disaggregated wholesale HSA model "to the maximum" extent feasible. Cybera recommends that the Commission significantly soften the language of this

[4] https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB_Broadband_Market_Study___Ware_Report_for_CNOC_20180831_Final.pdf/$file/CB_Broadband_Market_Study___Ware_Report_for_CNOC_20180831_Final.pdf

direction to allow for less disaggregation in those geographic areas where transport facilities are less competitive.

24. **Implement a "case-by-case" forbearance framework for disaggregation, rather than a blanket directive:** In Cybera's view, it would be more in keeping with the policy objective of the Telecommunications Act if the Commission abandoned the approach to disaggregation outlined in CRTC 2015-326. While Cybera agrees that there are many benefits to a disaggregated wholesale HSA model, and that this model should not be abandoned in its entirety, a more appropriate approach would be to implement competitive analysis in regions to determine where transport services are sufficiently competitive. This would result in a more gradual and measured move to disaggregated wholesale HSA services, and would eliminate prohibitive interconnection costs where they are appropriate to avoid it, as well as eliminate service gaps.

25. **Eliminate the 100 Mbps cap on aggregated wholesale service until such as time as the disaggregated wholesale framework is workable:** As stated, Cybera finds that the current framework is unduly punitive in the way it 'freezes out' service-based competitors from providing service offerings at more competitive levels. Currently, service-based competitors are prohibited from doing so in both the aggregated and disaggregated wholesale HSA models. Over time, this will place these competitors at a significant disadvantage in developing market share in key market segments. Removing the existing 100 Mpbs cap would allow service-based competitors to offer higher speed services while they a) build up their transport capacity, where it is possible to do so, and b) wait for the Commision to implement a more effective disaggregated regime.

26. **Uphold the CRTC 2019-976 decision to lower wholesale rates:** While this matter is currently before several proceedings, in Cybera's view, the current shortcomings for the disaggregated wholesale HSA regime can be traced, in large part, to distorted and inflated pricing in the wholesale market. This has put service-based ISPs at a significant competitive disadvantage. As these rates were also part of the justification for the migration to a disaggregated framework, the consistent uncertainty in the setting of these rates has created significant regulatory uncertainty for competitors. Cybera recommends that the Commission uphold its August 15, 2019, decision to lower these rates. Doing so would allow wholesale ISPs to remain competitive while other proceedings, such as the current one, are resolved.

Conclusion

27. Cybera thanks the Canadian Radio-Television and Telecommunications Commission for the opportunity to provide comments on this issue, and we welcome the opportunity to intervene in further follow-on proceedings. Cybera represents more than 100 member organizations in Alberta, including post-secondary institutions, K-12 school districts, libraries, and municipalities, and is a partner in Canada's National Research and Education Network (NREN). We operate a publicly-funded, ultra-high-speed network that connects researchers, entrepreneurs, students and Albertans to each other and to the wider world. As such, we are well positioned to provide insight on

the connectivity needs of Canadians, while balancing the technical challenges of deploying broadband-capable networks in underserved areas.

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