British Columbia Broadband Association
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NOTES FOR REMARKS

BY
TIMOTHY DENTON

Commissioner,
Canadian Radio-television and
Telecommunications Commission

To the
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Introduction

Thank you for your introduction, and thank you for this opportunity to join you for your conference. It's always a pleasure to travel to British Columbia and enjoy the hospitality and scenery.

The remarkable growth of the Internet over the past couple of decades is a testament to human ingenuity. My first observation is that it is engineers and computer scientists who created it, in the open, collaborative fashion which governs the Internet Engineering Task Force. The Internet protocol suites, the domain name system, the protocols that govern the exchange of traffic among autonomous systems: these were not the creation of parliaments and legislatures.

This brings me to the central concern I have about being regulator: how not to mess this up, how best to obey the maxim of the Hippocratic oath – "Above all, do no harm." The reason I am concerned is that the job of a commissioner is essentially to make judgments on limited and imperfect information on the basis of statutes that were not fashioned with the Internet in mind.

The Commission's goal is to ensure that Canadians have access to a choice of innovative Internet services.

In our view, the best way to achieve this goal is by fostering a dynamic marketplace where there is room for both large companies with expansive networks and smaller, more nimble companies.

Let me start by explaining the Commission's regulatory approach to the Internet.

Internet access and digital media

When a new technology arrives on the scene, the regulator has to assess its impact on the communications system and its contribution to public policy objectives. In other words, the computer scientists created the Internet, with the assistance and under the protection of the research arms of government, a story with which you are all familiar. The Internet was launched upon the world, it took off with the development of the world wide web in the early 1990s, and as it grew in importance regulators were called upon to assess it by means of a pre-existing legal framework. Think of statutes as the twenty- and thirty-year-old firmware governing bureaucracies.

In the case of the Internet, there are two distinct statutes to consider. The first is the question of access to Internet services, both for independent Internet service providers (ISPs) and Canadians. Guided by the *Telecommunications Act*, we promote competition, innovation and greater consumer choice in the provision of Internet services.

The Commission has adopted a market-based approach for retail Internet services. There is enough competition to give consumers a real choice in terms of prices and packages. Your companies play an important role in this respect.

However, we recognize that building a network is a hugely expensive proposition. Even the large companies that have been in business for decades do not have networks that stretch from one end of the country to the other. To foster a sustainable level of competition, and to ensure competitors have access to the facilities they need at reasonable rates, we have adopted a wholesale regulatory regime. We cause larger carriers to lease capacity to smaller ones. This is a policy decision which is the subject of constant adverse criticism from certain schools of economists, and the debate on it will never end. At its simplest, the decision was made that a duopoly of telephone and cable suppliers was not sufficient competition.

Many of you are likely very familiar with this regime, and I will return to this point in a moment.

Before I do, let me turn to the second major statute which a regulator must consider in regard to the Internet: the availability of media content. Enter the Broadcasting Act, which is wholly distinct from the Telecommunications Act, and is essentially directed towards

the promotion and production of Canadian content. Should traditional broadcasting regulations be applied to digital media carried over the Internet? In 1999, the Commission decided to exempt services that offer broadcasting content over the Internet. Later on, we extended this exemption to services that deliver content over mobile devices.

The importance of this decision cannot be sufficiently emphasized. The Broadcasting Act derives from ideas about spectrum scarcity prevalent in the early parts of the 20th century. It is worth noting that if I try to speak to you through airwaves, I have to get a licence from the state. If I speak to you through a wire, I do not. If I try to speak to you through a book or a pamphlet, likewise I do not have to be licensed by the state.

The control of broadcasting is basically a control on who gets to speak through broadcast spectrum. Now, for you sitting in this audience, the notion that the Internet should be assimilated to a broadcasting system, and that everyone who writes, blogs, sends out video, uploads to YouTube or sends music across the Internet, that all creators and users of the Internet use it by prior permission of the government : such an idea would spark riots. Yet the idea that the Internet can and should be regulated for the purposes of Canadian content creation is an idea that will not die. It rises from its crypt periodically at Canadian content conferences, though recent court decisions may have finally put a stake through its heart.

The next time you look at the bottom or back of your computer, you will look in vain for the sticker saying that this is an exempt communication apparatus under the Broadcasting Act. May it ever continue as such, because there has never to my knowledge been an exemption order which was not conditional upon the performance of certain obligations. Exemption from regulation usually means regulation by means of general conditions.

Thus the Internet continues to be governed by the older system of law, that of printing and publishing. You can be sued for what you write, you can even be imprisoned for it, but you do not write with the prior permission of the state, or, what turns out to be the same thing, an order exempting you from regulation, as long as you conform to the standards of expression that are contained in the exemption order.

Today the Western world is a better place – more open and transparent, more bubbling with creativity and ideas, more commercially vibrant – because the *ex post* regime has been applied to publishing. The Commission's guiding star has been the marketplace, supported by rule of law.

In June 2009, the Commission reaffirmed that it would maintain its approach to online and mobile programming services, and monitor trends as they evolve. We found that these services complemented traditional broadcasting.

The Commission has had to grapple with another interesting legal question: Should Internet service providers be required to contribute a percentage of their revenues to the production of Canadian content? After all, that's what the broadcasters and cable companies must do under the *Broadcasting Act*.

We asked the Federal Court of Appeal the question: Should the *Broadcasting Act* apply to ISPs when they provide access to broadcasting content? The Federal Court ruled that the Act did not apply to ISPs. This decision was then appealed to the Supreme Court, which concurred with the lower court's ruling last year. You should be grateful in passing for these decisions, because they exempt you from the large weight of broadcasting regulation. All Canadian users of the Internet owe a debt of gratitude to the courts for those decisions.

Wholesale high-speed access services

Large telephone and cable companies have been upgrading and expanding their fibre networks, bringing faster Internet services to Canadian homes and businesses.

You need access to some of this infrastructure to serve your customers. So as part of the regulatory regime, large telephone and

cable companies sell you access to their networks under specific terms and conditions set by the Commission.

Under this regime, you have captured six percent of the retail Internet market. Those residential customers who turn to you for service value their offerings. Many of those customers have told us that they consider the data plans offered by independent ISPs to be more attractive than those offered by the big companies.

In 2009, Bell asked for permission to charge its wholesale customers – companies like yours – according to how much their customers downloaded. This was known as the usage-based billing, or UBB, model. After a lengthy proceeding and a number of decisions, we approved this request in January 2011.

I realize that most of you obtain wholesale services from Telus, which charges a flat rate regardless of how much bandwidth your customers use. So while our decision may not have had much impact on you, independent ISPs and consumers across the country were not shy about voicing their concerns.

When I began my work as a Commissioner, the then Chairman told me that, if you make ten decisions, you will get eight of them right. One you may win or lose on appeal. But there will be one where you are wrong, and the only cure for error is to make another

decision. The message was, as I heard it: don't waste time being wrong.

As we learned from the public outcry that arose over usage based billing (UBB), it was interesting to see the extent to which social media mobilized public opinion on this issue.

It quickly became clear that we failed to consider the impact a price structure like UBB would have on the plans many of the independent ISPs offer their customers.

We learned that, by some estimates, the price charged by Bell to independent ISPs could double. Some ISPs began to look at the option of becoming facilities-based competitors. That is fine for a company with access to deep pockets. But overall it would not help independent ISPs to offer innovative and competitive services to Canadians.

The issue under debate was whether you should pay for the size of the pipe – the capacity model – or how much data travels through that pipe – the usage-based model. Another option was a variation on the usage-based paradigm: the "95th percentile model," where charges would be based on the measured peak network traffic.

Last November we issued our decision. We favoured a model where an independent ISP can pay for the total capacity it expects to

need. The benefit of this solution is that independent ISPs have the flexibility to offer competitive plans, while the large companies can recoup some of their infrastructure investments.

The capacity-based model is, I believe, more consistent with how ISPs actually run their businesses and plan their networks. It is also a cost-based solution, meaning that the rates charged reflect what it would actually cost to provision a service.

After all the time and effort we spent on the question of wholesale high-speed access services, I think we are now on the right track. However, there are those who think we can get the costing part of the decision “more right.” We have received applications asking that we review the wholesale rates, which are currently being studied by the Commission.

Advanced communications networks

These days, the communications environment is evolving at an incredibly rapid pace. Changes in the speed of computations are translating into changes in the quality of devices. When tablets were introduced two years ago, not many people aside from Steve Jobs would have predicted their stunning popularity or usefulness. Regulation has to adapt to a universe governed by Moore’s Law.

The Commission is keeping a close watch on new technologies. We are studying how they will impact the competitive landscape and consumer behaviour. Our preference is to let market forces prevail as much as possible. However, there are occasions where we will need to adapt our regulations or establish incentives for the industry.

For example, we developed a policy to determine whether an Internet traffic management practice is acceptable. The policy balances an ISPs need to protect the integrity of its network with giving users the freedom to develop innovate applications. If I may be permitted to say so, that decision met with the approval of the Internet community and the carriers. It has solved a problem principally by looking at the issue from the perspective of allowable degrees of traffic management, rather than as deviations from an ideal of “net neutrality”.

To ensure Canadians can participate in the digital economy, we set a national speed target for broadband Internet services. By 2015, we expect all Canadians – regardless of where they live – to have access to download speeds of at least 5 megabits per second (Mbps) and upload speeds of 1 Mbps. We are monitoring the industry’s progress, and are confident that it will respond to consumer demands for faster Internet connections in all areas of the country.

I have no doubt that the members of the British Columbia Broadband Conference will play a part in helping to reach our target.

We also recently reviewed the rules governing how the large companies must transfers telephone calls to and from networks that use Internet Protocol (IP). We have established the basic principles that will guide the industry's evolution to integrated IP-based network – in other words, the convergence of voice, data and video services.

The bottom line is that the market will dictate the pace of the transition, though we hope it will be achieved sooner rather than later.

Conclusion

Both the industry and the regulator are becoming more responsive to the public that they serve.

In your case, it is by offering unique Internet service packages that meet the specific needs of your customers. It is encouraging to note that some of you are also offering wireless services. In some parts of the country, newer players are beginning to offer bundles of Internet, wireless and television services.

As more competition is introduced into the market, Canadians will have a greater choice of services at competitive prices. If this proves to be the case, then as issues of market power diminish in

importance, the need for regulatory intervention will continue to decrease.

The Commission's role in this environment will be to set the frameworks that will enable competitors to respond to new market realities, while acting to protect consumer interests and resolve competitive disputes.

We always welcome and appreciate the BCBA's views. Are there any regulatory hurdles standing in your way? We want to hear from you and we promise that we will listen.

Thank you.