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Telecom Notice of Consultation CRTC 2012-557

Proceeding to Establish a Mandatory Code for Mobile Wireless Services

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**Intervention of the Samuelson-Glushko Canadian Internet Policy &
Public Interest clinic (CIPPIC) & OpenMedia.ca**

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Introduction

1. The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) and the Open Media Engagement Network (OpenMedia.ca) are grateful for this opportunity to provide our input into the development of a mandatory national consumer protection code for wireless mobile services.
2. The need for a code for mobile wireless is pressing. Mobile connectivity is rapidly becoming an integral and necessary component of our daily lives, and, for many, is already a basic service essential to participation in Canadian society.¹ At the same time, Canadians appear increasingly frustrated by a number of endemic and recurring features of the mobile market.²

We are both on low, fixed incomes and the only way we can get a decent cell phone without huge upfront costs, is to sign a three year contract with Rogers. With spurious billing add-ons, such as "system access fees", the monthly cost is prohibitive! For many Canadians, a dependable and affordable mobile phone is an absolute necessity. – Daryl, Submission 304, Batch 1, p. 343

3. A number of Provinces have responded to this increasing frustration by legislating consumer protections in the context of mobile service contracts.³ Within this broader

¹ Canadian landline cord cutting, for example, is beginning to gain momentum, with 11.4% of all households 'wireless only' at the end of 2010, 14.8% by the end of 2011, 18.1% by the end of this year, and 21.6% projected for year-end 2013: R. Trichur, "More People Ditching Home Phones in Favour of Wireless", April 2, 2012, The Globe and Mail, <<http://www.theglobeandmail.com/report-on-business/more-people-ditching-home-phones-in-favour-of-wireless/article4097015/>>. While, due to high historic mobile phone rates, this lags behind other countries such as the United States (31% wireless-only households at 2011), it is undeniable that significant and increasing numbers of Canadians are relying on mobile as their primary or sole means of communication: The Canadian Press, "Two Million Canadian Homes Landline-Free in 2011", September 20, 2011, CBC News, <<http://www.cbc.ca/news/technology/story/2011/09/20/technology-landline-wireless.html>>.

² Perhaps the clearest example of this is the fact that of the close to 8,000 complaints received by the Commissioner for Complaints for Telecommunications Services in 2010-2011, roughly two-thirds related to wireless services (about 5,000 in total), an increase of 2.5 times year over year: Commissioner for Complaints for Telecommunications Services, Comments to Telecom Notice of Consultation CRTC 2012-206, May 3, 2012.

³ Bill 35, "The Consumer Protection Amendment Act (Cell Phone Contracts)", S.M. 2011, c. 25, (Status: Assented to June 16, 2011, Manitoba), <<http://web2.gov.mb.ca/laws/statutes/2011/pdf/c02511.pdf>>; Bill 60, "An Act to amend the Consumer Protection Act and other legislative provisions", 2009, c. 51, (Status: Assented to December 4, 2009), <<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C51A.PDF>>;

context, the Commission's decision to establish a clear and concise list of rights and obligations relating to mobile services is a welcome and necessary step. It is particularly necessary in light of the Commission's obligation to facilitate the development of a telecommunications system that enriches the social and economic fabric of Canada, that is accessible and affordable, that furthers competition so that market forces can be relied upon to increasing degrees, and that is generally responsive to the economic and social requirements of individual users.⁴

4. Our submission below touches on several areas of the mobile landscape that have led to particular problems for customers of wireless services. Our submissions are informed by a letter writing campaign hosted by OpenMedia.ca, which prompted the submission of roughly 2,565 letters from various individuals who have expressed their concerns, over 2,000 of which included personalized accounts of customer dissatisfaction and problems. We refer to these throughout our submission at various points.⁵ These accounts have been placed on the record of this proceeding as individual submissions.

I. Contents

5. Below we suggest a number of features that should be included within the Code. Many of these suggestions are informed by past and ongoing Provincial legislative efforts at providing solutions to the many consumer protection problems we have identified in the context of wireless.

Bill 6, "An act to amend the Consumer Protection and Business Practices Act", 1st Session, 47th General Assembly, Newfoundland and Labrador, 61 Elizabeth II, 2012, <<http://www.assembly.nl.ca/business/bills/Bill1206.htm>> (Status: Assented to June 27, 2012); Bill 5, "Wireless Phone, Smart Phone and Data Service Transparency Act, 2011", 1st Session, 40th Legislature, Ontario, 60 Elizabeth II, 2011, (Private Member's Bill, Status: expired with the legislative session), <http://www.ontla.on.ca/bills/bills-files/40_Parliament/Session1/b005.pdf>.

⁴ *Telecommunications Act*, S.C. 1993, c. 38, sub-sections 7(a), (b), (f) and (h).

⁵ The individual comments have been divided into six batches and submissions are numbered in ascending order from 1 to 2,565. References to these submissions will be by batch and submission number.

(a) Clarity of contract terms and conditions

6. Clarity of contract must begin with an obligation to ensure individuals are aware they have *entered* into a contract with specific parameters. Often individuals are not aware that they have entered into or extended a fixed term contract:

They say I have a year left on my contract. How can this be I ask, I signed a 3 year contract not a 4 year contract. They said that a year into my contract I signed another contract. I did not, however, if I did there was no mention of this or any communication...to even hint at this. I argued with them but they insisted I have a year left. -Dave, Submission 1811, Batch 4, p. 377

The simplest way to ensure individuals are aware they have entered into a contract is to mandate the provision of an actual copy of the definitive contract. The Code should therefore include an obligation to provide a definitive paper copy of the contract, written clearly and in plain language.⁶ Where the contract is concluded in person, the paper contract must be provided before it is concluded.⁷ Where it is concluded remotely, a paper or electronic copy of the definitive contract must be sent to the customer within 30 days.⁸ This applies equally to any renewal of a term contract, even if renewal occurs under pre-existing terms. In addition, in order to ensure receipt, electronic copies of a contract require affirmative confirmation of receipt to qualify. Finally, the Code should obligate service providers to maintain a copy of the definitive contract in question and to provide customers with an additional copy of said contract upon request.

7. The Code should additionally provide for a mandatory cooling off period. Customers entering a mobile service arrangement should be able to assess the service and any ancillary products prior to 'locking in'.

⁶ See Ontario Wireless Transparency Act, *supra* note 3, section 3(1).

⁷ See, for example, Manitoba CPAA, *supra* note 3, section 183.

⁸ Newfoundland CPBPA, section 35.3.

The cell service itself was awful. The phone had fatal design flaws that when held, would cause the reception to drop entirely. Needless to say, I cancelled within 90 days. I owed money on my bill, and Fido (rightfully) took the security deposit to cover the balance, refunding me the remaining \$81 via mailed check. –Michael, Submission 2456, Batch 6, p. 238

The cooling off period should begin after the latter of: a.) when the customer receives their first monthly bill; or b.) in the case of a remotely concluded contract, receipt of the paper or electronic version of the contract.

8. Under the Code, the above-referenced definitive version of the contract must clearly indicate the time and manner in which the contract was entered. The manner might include an in-store appearance or through a service call, but must be clearly indicated in a definitive contract. It should also indicate *who* the contract applies to. Merely granting an individual *access* to one's account should not *bind* that individual to the terms of the contract in question.⁹

(b) Changes to contract terms and conditions

9. Unilateral changes to the terms and conditions of service are a source of great frustration to customers. Strict limits should be placed on unilateral changes of both fixed term and indeterminate contracts.

Fixed Term Contracts

10. With respect to fixed term contracts, no unilateral changes should be permitted during the term of the contract. Any amendments should require the express and

⁹ See Jennifer, Submission 1898, Batch 4, p. 488: "one day I wished to take over my mother's phone because she never used it. We switched and SUDDENLY just because my name appeared under my dad's name to have full access to the account, *BOTH* of us were now suddenly locked into a contract." See also CCTS, Complaint Number 89014, May 13, 2011, <<http://www.ccts-cprst.ca/wp-content/uploads/2011/05/CCTS-Complaint-89014.pdf>>.

explicit consent of the customer¹⁰ and should enjoy a cooling off/rejection period that begins upon receipt by the customer of the first bill that reflects the changes in question. Any proposed amendment must be sent to the customer in paper or electronic written format and must include: the new/amended clause, any displaced clause and the effective date of the amendment, if accepted.¹¹ In addition, in order to qualify for 'explicit consent', the proposed amendment must envision a positive act of customer affirmation (continued use of the service, for example, would *not* qualify).¹² If explicitly accepted by the customer, a service provider must send the customer written confirmation of the amendment, as well as a copy of the definitive contract, as amended, within 15 days.¹³

11. The Code may provide an exception to the general requirement for explicit consent for amendments to fixed term contracts for non-material amendments. However, if so, 'non-material' should be defined within the Code as:

- falling within one of an exclusive list of activities clearly itemized within the Code. The list cannot include any activities that would have the effect of changing the term/expiration date of the contract, any costs associated with the contract, or anything else currently defined as 'material' in section 188 of the Manitoba Consumer Protection Amendment Act;
- must clearly and unambiguously benefits the customer without increasing any of her or his obligations or decreasing any of those undertaken by the service provider under the contract;¹⁴ and
- does not change the nature of any goods or services at issue.¹⁵

¹⁰ Ontario Wireless Transparency Act, section 5(1): A fixed term contract "...shall only be amended if the consumer expressly consents to the amendment."

¹¹ See for example the itemized list in Newfoundland CPBPA, section 35,5(1)(b)(i)-(iii).

¹² For guidance on explicit consent in an online medium, see: Compliance and Enforcement Information Bulletin CRTC 2012-548, Guidelines for the interpretation of the Electronic Commerce Protection Regulations (CRTC), October 10, 2012, <<http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>>, and Compliance and Enforcement Information Bulletin CRTC 2012-549, Guidelines on the use of toggling as a means of obtaining express consent under Canada's anti-spam legislation, October 10, 2012, <<http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>>.

¹³ For a comparable example, see Ontario Wireless Transparency Act, section 5(2).

¹⁴ Manitoba CPPA, section 194(1)(a).

If the Code ultimately permits non-material unilateral changes of this manner, it should nonetheless ensure the amendments comply with all conditions set out in the previous paragraph except for the obligation to seek explicit consent.

Indeterminate Term Contracts

12. The Code should additionally provide protection for customers operating under indeterminate contracts. At minimum, customers should be notified of any proposed unilateral changes well in advance and by the mechanism highlighted above. The Code should provide that any amendment to an indeterminate length contract provision is void and invalid if it does not conform to the notice requirements set out above. In addition, notice of amendment should inform customers of how they may terminate their contract without penalty and immediately (or within sixty days of receipt of the first bill that reflects these changes) if they so choose.
13. If termination of an indeterminate term contract subsequent to an amendment (or a material amendment) will have the effect of triggering indemnification costs for a mobile handset or other service-associated product subsidy as set out in paragraph 20 below, then the indeterminate contract should be treated as 'fixed term' for the purposes of assessing changes to contract terms or provisions.
14. Further, *any* change to the length or term of an indeterminate contract *must* benefit from the same protections under the Code as it would if it were classified a material amendment to a fixed term contract.

(c) Contract cancellation, expiration and renewal

15. The lack of customer protection with respect to the cancellation, expiration and renewal of contracts imposes heavy and unjustified restraints on competition. Current practices are a source of ongoing confusion for customers, and can impose heavy costs on individuals.

¹⁵ Newfoundland CPBPA, section 35.5(2).

My father transferred...recently and got charged a huge contract severance fee despite the fact that his contract [had] ended a few months back and he is contract less. When he called...to get his money back they refused, citing that he needed to give one month notice before changing providers. They told him that he broke contract therefore he was charged. When...they checked to see he actually had no contract, they told him they can only give back \$10. -Gia, Submission 2404, Batch 6, p. 184

Under current conditions, where handset ownership is implicitly premised on long term ownership, fixed term contracts become effectively perpetual. Individuals wishing to benefit from changes in the marketplace or in need of a new mobile handset must either extend their term with the same provider or face prohibitive withdrawal penalties. Customers with legitimate reasons to exit prior to the conclusion of a fixed term cannot do so. Individuals who do reach the terminus of their fixed term and decide to switch providers often find themselves saddled with *additional* costs due to automated renewal periods. Meanwhile, the mingling of handset discounts with monthly rates leads to difficult comparisons and, hence, minimal competition over the full price of mobile handsets.

16. Fixed term contracts are not only antithetical to competition, but impose penalties onto customers well beyond what might be considered as 'damage' for contractual breach. 'I am stuck paying monthly fees for a phone I cannot use' has become an all-too-common refrain:

I have a three year contract...When I moved to Europe last year to do an academic exchange, not only did [they] refuse to suspend the contract during the time I was away, but made me pay a ridiculous "minimum fee" despite the fact that my phone was turned off...and I never used it. Not only is this illogical, but unfair to charge for something that a customer is not even using. - Monica, Submission 1304, Batch 3, p. 351

A three year term is very long in terms of the competitive marketplace, the lifetime or technological relevance of mobile handsets and general life changes. There are many legitimate reasons for an individual to wish to terminate a contract. Handsets are lost, stolen, succumb to wear and tear or are simply outdated on much shorter time spans.¹⁶ Individuals move to other countries, or to locations that do not support the same equipment. In short, there are many legitimate reasons why an individual might wish to change or end a fixed term contract, and no legitimate reasons to penalize them for doing so. Further, an effective competitive landscape requires some severance of handset prices from service rates.

Termination Effective Immediately Upon Notice

17. To remedy these various flaws, the Code must adopt a strong stance with respect to termination, expiration, renewal, as well as unlocking of mobile handsets (unlocking of mobile handsets, while intricately linked to this section, as it imposes unjustifiable barriers to switching providers, is nonetheless discussed in section I(h) below). The Code should grant customers the right to terminate fixed or indeterminate term contracts immediately or, alternatively, to specify a termination date in the notice of termination.¹⁷ The Code should obligate service providers to provide written (paper or electronic) confirmation of receipt of a cancellation request, with the date of cancellation specified in the notice.

¹⁶ See, for example, Amanda, Submission 2387, Batch 6, p. 163: "I had my blackberry stolen, and couldn't afford to buy a new one with no contract so I was charged \$300.00 because I had to change the data from blackberry to not." Also: Joel, Submission 2418, Batch 6, p. 199: "I realized the only way I could afford one was to get a subsidized one by getting a 3 year contract...It was a great phone, I loved it. However, after less than four months, I found out that Rogers was dropping support for my phone...I was being cut out from upgrades to my phone...was running Android 1.6, while almost all other phones were running 2.1 or higher..."; Amie, Submission 303, Batch 1, p. 342: "...I have been swindled into signing a new 3 year contract with Rogers unknowingly. My cell phone died, and they sent me a new one. Nowhere did I sign a new contract for three years, but I cannot remove myself from this contract because I cannot afford to pay the cancelation fees."

¹⁷ Manitoba CPPA, section 196(1): "A customer may, at any time, cancel a contract by giving notice to that effect to the supplier. The cancellation takes effect on the day that the notice is given, or on a later date that may be specified in the notice."; Newfoundland CPBPA, section 35.8(2): "Cancellation of a distance service contract is effective on the date the notice is provided to the supplier unless a later date is specified in the notice."; Quebec CPA, section 214.6: "The consumer may, at any time and at the consumer's discretion, cancel the contract by sending a notice to the merchant. The cancellation takes effect by operation of law on the sending of the notice or the date specified in the notice."

Termination Penalties – Fixed Term

18. Second, penalties for withdrawal need to be strictly and expressly limited by the Code, and clearly specified at the time the contract is entered into. For fixed term contracts that included a handset subsidy (or a subsidy for any product associated with use of the service), the maximum termination fee must not exceed the cost of that subsidy, if and only if that amount is clearly set out in the initial contract, pro-rated over the entire fixed term of the contract. Any amount paid towards reducing that subsidy over the course of the contract should be subtracted from the subsidy amount. In a fixed term contract that does not involve a handset or service-associated product subsidy, a termination fee cannot exceed the *lesser* of \$50 or 10% of services remaining on the contract (calculated as: 10% * monthly rate * # remaining months).¹⁸

I am in a 3 year contract...when my Blackberry started malfunctioning...When I finally got a customer rep, I told him my phone was malfunctioning, he checked something, presumably, and says 'it sure is malfunctioning, unfortunately your warranty expired yesterday" I was dumbfounded. It would cost \$260 to get out of my contract, they offered me \$100 off and a brand new phone if I signed up for another 3 years. – Susan, Submission 2094, Batch 5, p. 119

19. It is important, however, to distinguish between account termination and account adjustment. If an individual wishes simply to maintain a fixed term contract and merely switch to a lower monthly rate, the Code should ensure outstanding handset or service-associated product subsidies are transferrable, as is the expired 'term' of the contract.

Termination Penalties – Indeterminate Term

20. For indeterminate term contracts that include no handset or service-associated product subsidy, no penalty for termination can be imposed at all.¹⁹ Where a service-associated product subsidy is associated with an indeterminate term contract,

¹⁸ Manitoba CPPA, section 198(3); Quebec CPA, section 214.7; Newfoundland CPBPA section 35.9.

¹⁹ Manitoba CPPA, section 199(3); Quebec CPA, section 214.8; Newfoundland CPBPA, section 35.10.

outstanding subsidy balances can be recovered upon termination but if clearly specified in the service contract.²⁰ The subsidy *must* also be pro-rated (a common example is to reduce the outstanding subsidy amount or ‘tab’ each month by a fixed and specified amount or, alternatively, by %10 of the monthly bill).²¹ The ultimate indemnity sought at termination cannot exceed a comparable indemnity pro-rated over a one year term (calculated as: specified subsidy amount – [1/24 * specified subsidy amount * number of months completed under contract] = Indemnity). Any additional amounts applied by the customer directly towards paying down the subsidy should be subtracted from the indemnity.

Renewal upon Expiration

21. Contract renewal mechanisms are an ongoing source of customer confusion. On the one hand, renewal is often triggered without clear awareness on the part of the customer. On the other, customers expecting some form of renewal are often surprised by sudden changes to once-fixed terms and conditions.
22. This confusion reaches its apex as the end of a fixed-term contract approaches. Customers expect a fixed term contractual term to cease at the end of a fixed term, yet often find themselves subject to 30 day notice cancellation obligations.

My 3 year contract with [Alice] expired on Oct 26, 2012. After checking their plan and competitors I decided to change to [Bob]. I signed on with [Bob] on October 25, 2012 at 4pm. I received my final bill for [Alice] and was charged \$100 for early cancellation of the contract and then I was charged for the next months usage when I have no contract with [Alice] and no service on my old phone. –
Doug, Submission 2357, Batch 6, p. 132

²⁰ As per Manitoba CPPA, section 185(1)(n).

²¹ Quebec CPA, section 214.8: “If the consumer unilaterally cancels an indeterminate-term contract...the cancellation indemnity may not exceed the amount of the unpaid balance of the sales price of the goods at the time the contract was made. The indemnity decreases as prescribed by regulation.”; Manitoba CPPA, section 199(2). Newfoundland CPBPA, section 35.10(2).

This discovery typically occurs after a customer has registered with a new service provider and receives an outgoing bill for a month of service they will never use. This particular concern can be remedied, in large part, by granting customers the right to terminate a contract immediately, upon notice, and with clearly specified limitations on indemnification.

23. Additional confusion occurs where a fixed term expires, and the service provider unilaterally imposes new terms, conditions or fees onto an individual as part of a new indeterminate term contract.

I signed up for a 3 year plan with a specific plan that most fit my expected usage. After 8 months, my phone broke. I was forced to purchase, at a very high rate a new phone. 2 years and 4 months later, I got my bill...and it was \$100 more than usual. I had been using the phone a lot and thought that careless use was to blame for the high charge. The next month, the same thing happened...I called the company and they told me that my 3 year plan had expired, and they reverted me to the highest possible charge they had. There was no attempt to inform me that the original contract had expired and that my rates were about to change. -Mark, Submission 1526, Batch 4, p. 615

Again, discovery of these changes often occurs upon receipt of the first post-expiration date bill. Such concerns are to some extent mitigated by limitations on unilateral changes to fixed and indeterminate term contracts, as highlighted above.

24. The Code should additionally obligate service providers to send a customer written notice when contract expiry approaches (two notices should be sent: one when 90 or 60 days remain, and another when 30 days remain).²² The written notice should clearly establish the date on which a fixed term is set to expire, that the contract will continue as is on an indeterminate monthly basis following the expiration date, and

²² Manitoba CPPA, section 200(1): "The supplier must, between 60 and 90 days before the expiry date of a contract, give a written notice to the customer..."; Newfoundland CPBPA, section 35.4.

that the customer may terminate the contract at any time on or after the expiration date without incurring any additional fees (see para. 20, above). In addition, the Code should impose a 'safety period' to ensure service providers do not impose unilateral changes with the intent of pushing a customer towards new fixed term obligations before they have had the opportunity to canvass the market for alternatives. Hence, for three months following expiration of a fixed term contract, the Code should treat an indeterminate contracts as fixed term²³ for the sole purpose of assessing any unilateral changes consistent with the conditions set out above for such changes.

Renewal in General

25. Finally, the Code should take steps to prohibit the renewal of a *fixed term* contract with the express and explicit consent of the customer. It should clearly specify that agreement by a customer to a change in the service conditions of the contract does not constitute a renewal of a fixed term contract, as term extension constitutes a material change.²⁴ Before a fixed term contract can be considered 'renewed', the customer should be provided with a copy of the new definitive contract, a cooling off period, and all other rights associated with the initiation of a fixed term contract as set out above.

Hardware Restrictions

26. There is simply no legitimate reason to lock mobile handsets or other service-associated devices or products. Locking limits important uses of a device during a fixed contract term, such as use of a foreign SIM card in a mobile handset while on vacation. It also imposes an onerous barrier on those wishing to change providers.

²³ For a comparable example, see Ontario Wireless Transparency Act, section 6(3)-(4).

²⁴ Manitoba CPPA, section 195: "For greater certainty, if a customer accepts an amendment [to a non-material term], that acceptance does not constitute consent by the customer: (a) to any other amendment of the contract; (b) to renew or extend the contract; or (c) to enter into a new contract. See also Ontario, Wireless Transparency Act, section 5(3) with respect to amendments to fixed term contracts which receive explicit consent: "The consent of a consumer to amend an agreement...does not constitute consent to renew the agreement."

I purchased a cellular phone FOR FULL PRICE...I paid for it outright. There was no contract as I had been with them for four years already. The phone was \$250. Later I left the country for a trip and when I asked if I could get my phone unlocked, the phone I paid full price for and am the owner of, I found that it was locked...and they were going to charge me \$250 to unlock it. There is absolutely nothing in the consumers' interest in having a service provider lock a cellular phone onto their network. It stifles competition and choice, and perpetuates an atmosphere of corporate control over what we do with our own tools. – Mike, Submission 1936, Batch 4, p. 541

27. The Code should either include an outright prohibition on the practice of using technical or physical mechanisms that restrict the use of a particular device with another service provider, or include an individual right to have their devices unlocked by their service provider upon request and free of charge.²⁵

(d) Clarity of advertised price

28. Customers need to be clearly aware of what prices they will be charged, as well as what and *when* their actions are going to incur additional fees. Without clear and consistent pricing, competition is lacking as customers are unable to effectively compare services. Further, customers need to be able to assess what costs they are undertaking at point of purchase. Current pricing mechanisms obscure the actual cost of service a customer will ultimately be called upon to pay, making comparisons between competing services difficult and generally impeding the ability of Canadians to predict what they are signing on for.

We once received a cell phone bill for \$5000. After contacting [our provider] for several months, we were able to lower it to about \$1500 because [our provider] had forgotten to add a texting plan. However, they refused to lower it any further and refused to even tell us why they were charging us so much. We eventually ended up paying it off... –Zain 1307 (3:592)

²⁵ For a loose example, see Ontario Wireless Transparency Act, paragraphs 3(3).1-3(3).2.

Hidden levies, short term discounts and fees for 'add-ons' that many consider to be part and parcel of the basic service offering exacerbate the matter.

29. The Code should obligate service providers to advertise the actual monthly rate individuals will pay once the service is commenced. Where the rate is not calculated on a monthly basis, it should nonetheless be expressed in terms of monthly cost.²⁶ Additionally, if the advertisement in question presents the rate of component services, the actual full monthly rate to be charged should be displayed more prominently.²⁷ This full monthly rate must reflect what a customer will actually pay for the basic service offered and should include all hidden fees other than sales taxes.²⁸ That is, it must be inclusive of monthly fees such as 911 service fees, 'system access fees',²⁹ and any other regulatory fees that customers will be obligated to pay. If a temporary discounted rate is advertised, the Code should require service providers to display the number of months for which the discount will persist as well as the rate that will be applied after this term expires with equal or greater prominence.
30. In addition, the advertised price should include, with equal prominence to any other presented rate, "the total cost to the consumer...of all services to be provided under the agreement".³⁰ It may not be practical to display the cost of any and all add-ons and other costs, but the Code should specify particular service elements that are part of the basic service basket and expected by most customers to comprise part of the service. In particular, customers expect voice messaging, unlimited local and incoming text messaging and caller ID as part and parcel of a wireless voice

²⁶ Manitoba CPPA, section 184(2); Newfoundland CPBPA section 35.2(e); Quebec CPA, section 214.2(f); Ontario WTA, section 3(2)(5).

²⁷ Newfoundland CPBPA section 35.14(1)(a); Quebec CPA, section 224.

²⁸ Newfoundland CPBPA section 35.14(1)(a); Quebec CPA, section 224.

²⁹ See *Microcell Communications Inc. v. Frey*, 2011 SKCA 136, leave to appeal refused, [2012] S.C.C.A. No. 42, <<http://www.canlii.org/en/sk/skca/doc/2011/2011skca136/2011skca136.html>>.

³⁰ Ontario WTA, section 8.

package.³¹ Advertised monthly rates should, therefore, include the cost of these basic service elements or otherwise prominently display the cost of adding these.

I am gouged an extra \$10 per month simply because I need to know who's calling me. Call display is an ancient technology that costs my carrier nothing to provide me, but I have no other options... – Edward, Submission 285, Batch 1, p. 318

31. In addition, advertisements must prominently describe the rate at which any additional services will be charged. This should include, at minimum, the per MB incremental data rate and the incremental per minute rate for exceeding voice allowances. Further, any one time activation or set up fees should be listed as well.
32. Finally, as noted above, the Code should sever the current practice of intermingling handset rebates with monthly service rates in non-transparent ways. Handset discounts should therefore be displayed prominently and distinctly from the actual monthly plan rate to facilitate ready comparison.

(e) Application of the Code to bundles of telecommunications services

33. A wireless service that is bundled together with other telecommunications or broadcasting services remains a 'wireless service' and, hence, remains subject to the Code. This may require clearer accounting on the part of service providers in order to ensure customers are well aware which component of their monthly fees are covering wireless services, and which are not.

³¹ These three features are included in all but the most basic of service baskets in the CRTC's 2012 Communications Monitoring report, for example: CRTC, Communications Monitoring Report 2012, September 2012, Table A.4.2, <<http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2012/cmr2012.pdf>>. Voice mail is even part of the basic service obligation for wired voice: Telecom Notice of Consultation CRTC 2012-43, Proceeding to review access to basic telecommunications services and other matters, CRTC Reference Nos.: 8663-C12-201000653, 8663-C12-200912437, 8663-C12-200909658, October 25, 2010, <www.crtc.gc.ca/eng/archive/2010/2010-43.htm>, footnote 4.

(f) Notification of additional fees

34. Where micropayments are employed, individuals need timely notification and warnings when they are about to incur additional fees. Micropayments are inherently problematic for the general deterrent effect they have on usage of telecommunications services – high mental transaction associated with measuring *actual* usage coupled with punitive penalties for overuse and a tendency by customers to over-estimate actual use means that the mere presence of a micropayment scheme leads customers to curtail usage well in excess of what is optimal.³² In addition, bill shock is becoming a regular feature of the mobile service experience of Canadians. Further, bill shock is rarely the result of informed decision-making. Rather it is an indicator that customers lack the tools necessary to gauge what micropayments they might incur.

...the need came up again to tether my Blackberry to a computer...Nothing crazy, some windows updates and anti-virus updates, less than 200mb. The next day, I recieved a txt message...which said my bill has surpassed \$900, would I like to update my plan? ... I had been charged a "standard rate" of \$8/mb! allow me to be clear, eight dollars a megabyte. not a gigabyte (which would still be outrageous).
– Chris, Submission 1523, Batch 4, p. 23

35. The Code should obligate service providers to develop technical means of a.) allowing customers to monitor ongoing usages; and b.) warning customers in a timely manner whenever they approach a usage threshold that, if exceeded, will lead to added costs. Specifically, the Code should follow the proposed Ontario Wireless Transparency Act and obligate service providers to alert customers where 80-90% of any service limit is reached and before additional fees are incurred.

³² For a detailed discussion of this in the context of Internet usage-based billing, see: CIPPIC/OpenMedia.ca, Reply Comments, Telecom Notice of Consultation CRTC 2011-77, Review of billing practices for wholesale residential high-speed access services, April 29, 2011, <http://www.cippic.ca/uploads/ReplyComments-2011_77.pdf>, pp. 23-27.

I had a phone... with a My10 plan. One month I changed those numbers and they did not save properly. I found out this at the end of the month when I got my \$2,000 phone bill. When I called them, they said they could only give me \$100 credit. – Celyne, Submission 2390, Batch 6, p. 166

36. The Code must also address the accumulation of excessive fees. It should first establish a 'high charge' threshold – \$40 in additional usage fees, perhaps. The Usage of a particular service amounting to 80% and 100% of the threshold mark should trigger an immediate real-time alert to the customer.³³ In addition, the Code should establish an 'excessive charge' threshold – \$80 in additional usage fees. This threshold should trigger cessation of the particular service, subject to customer override or to a categorical customer opt-out of the cut-off.³⁴ Given the interactive nature of a mobile handset, service providers can provide customers with readily available mechanisms for issuing such warnings as well as for facilitating customer responses to triggered responses. For example, alerts can be sent by SMS, as can customer intent to override a particular usage cut-off. Further, mobile applications can be developed that permit customers to adjust their own thresholds, or to opt out of usage cut-offs altogether.
37. While bill shock is most closely associated with mobile roaming, data over-usage and long distance fees, the excessive cost protection mechanisms referenced above should at minimum apply to each of these services. With respect to some of these fees, alternatives should be examined. For example, for data overage, the Code surpassing the excessive charge threshold as an absolute cap, as other mechanisms such as

³³ See OECD, Council Recommendation on International Mobile Roaming Services, February 16, 2012, C(2012)7, <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=271&Lang=en&Book=False>>, Article 4(c).

³⁴ See OECD, Council Recommendation on International Mobile Roaming Services, February 16, 2012, C(2012)7, <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=271&Lang=en&Book=False>>, Article 4(b).

ITMPs can be imposed once this threshold has been surpassed in place of additional fees.³⁵

I went to NB to visit my parents in summer of 2011 I guess I had roaming service on or something like that...I get back next week and my service was disconnected and I had an \$850 bill. – Derek, Submission 148, Batch 162, p. 581

38. Finally, the Commission should consider initiating a proceeding examining whether current mobile roaming and data overage rates are justified or misleading and discriminatory. With respect to the former, the need for regulatory intervention in mobile roaming markets has been recognized widely, most recently by the OECD.³⁶ It should be noted that while international roaming rates are excessively high across the board, Canada is among the most expensive countries for mobile data roaming and MMS across almost all service baskets.³⁷
39. In addition, roaming and data overage charges are often incurred without any direct customer control (such as when checking a voice message that is longer than expected, or when an automatic software upgrade is initiated by a mobile handset). These inadvertent activities can nonetheless lead to exorbitant fees. With respect to domestic overage rates for mobile data, customers are often given the impression these are ‘cost recovery’ based when in fact, they are not.³⁸ This suggests the non-

³⁵ Or hybrid solutions are possible. For example, service providers can permit customers to set their own ‘excessive charge’ thresholds, *and* to determine for themselves whether reaching this threshold triggers: (a) temporary cut-off until reinstated; (b) technical restriction of speed to 50% for the duration of the month; or (c) nothing.

³⁶ OECD, Council Recommendation on International Mobile Roaming Services, February 16, 2012, C(2012)7, <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=271&Lang=en&Book=False>>.

³⁷ OECD, “International Data Roaming”, May 20, 2011, WPCISP, DSTI/ICCP/CISP(2010)12/FINAL, <<http://www.oecd.org/sti/broadbandandtelecom/48127892.pdf>>.

³⁸ See: CIPPIC filings in TNC CRTC 2011-77, available at: <http://www.cippic.ca/netneutrality/UBB>.

cost-based elements of such fees are misleading, and might not be justified under existing service contracts.³⁹

Premium Text Messaging

40. Another point of contention for customers is premium text messaging. Most mobile wireless platforms permit premium text services to establish subscriptions with customers through their platforms. Billing for such services occurs through the mobile platforms and, hence, costs for premium texting are directly integrated into customers' monthly mobile bills. Although text messages are a frequent source of billing disagreement, customers have no means to directly dispute such services with the primary service provider and, at the same time, operators of mobile platforms take no responsibility for erroneous billing.
41. Premium text messaging services comprised the second largest category of complaints relating to wireless services received by the CCTS in 2011-2012. While the soon to be in effect Canadian Anti-Spam Legislation, S.C. 2010, c-23, may, to some extent, curb this practice, the Code should mandate mobile providers to offer customers the option of turning off all mobile texting.

(g) Privacy policies

42. The Code should clearly state that any of its obligations do not supplant existing obligations already set out in the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, and in S.C. 2010, c. 23, the Canadian Anti-Spam Legislation, to the extent the latter applies to privacy and software. Additionally, as privacy policies comprise a component of the terms of service, Code obligations applying to contractual changes should apply to these equally, whether material or non-material.

³⁹ *Microcell Communications Inc. v. Frey*, 2011 SKCA 136, leave to appeal refused, [2012] S.C.C.A. No. 42, <<http://www.canlii.org/en/sk/skca/doc/2011/2011skca136/2011skca136.html>>

(h) Hardware warranties and related issues

43. The Code should ensure warranty information (whether third party or first party) should be clearly and prominently conveyed to the customer by the service provider. In addition, the Code should prevent customers from being charged monthly or any other recurring fees while their device is being repaired (whether by means of warranty or otherwise) unless the service provider provides the individual with a temporary replacement handset or the customer has access to one and asks the service provider to activate it for the duration of repairs.

Hardware Restrictions

44. There is simply no legitimate reason to lock mobile handsets or other service-associated devices or products. Locking limits important uses of a device during a fixed contract term, such as use of a foreign SIM card in a mobile handset while on vacation. It also imposes an onerous barrier on those wishing to change providers.

I purchased a cellular phone FOR FULL PRICE...I paid for it outright. There was no contract as I had been with them for four years already. The phone was \$250. Later I left the country for a trip and when I asked if I could get my phone unlocked, the phone I paid full price for and am the owner of, I found that it was locked...and they were going to charge me \$250 to unlock it. There is absolutely nothing in the consumers' interest in having a service provider lock a cellular phone onto their network. It stifles competition and choice, and perpetuates an atmosphere of corporate control over what we do with our own tools. – Mike, Submission 1936, Batch 4, p. 541

45. The Code should either include an outright prohibition on the practice of using technical or physical mechanisms that restrict the use of a particular device with

another service provider, or include an individual right to have their devices unlocked by their service provider upon request and free of charge.⁴⁰

(i) Disconnection and other penalties

46. Given the growing importance of wireless services, strict guidelines for when and how service providers can impose penalties on customers need to be put in place. Service cancellation can have wide-ranging negative consequences for customers. In addition, mobile platforms impose other types of penalties that are similarly detrimental, such as applying sever and restrictive ITMPs that render data services effectively useless, or referring matters to collection agencies.
47. Given the stringent potential impact of such penalties, the Code should put in place clear guidelines on how and when such penalties might be appropriate. The disconnection process should *only be initiated* where specific charges in excess of double the monthly service rate have been past due for over two months.⁴¹
48. Once triggered, the service provider must send the customer periodic notices of disconnection at the 30 days in advance of an actual disconnect, another 14 days in advance of disconnection, and a final notice 24 hours prior to disconnection. Notice should be written, and must include: the reason for the proposed disconnection; the outstanding fee(s) that triggered the disconnection; the date on which this fee(s) was incurred; the scheduled disconnection date; the availability of a deferred payment plan; and should clearly set out the customer's options for disputing the underlying fee.
49. The Code should prevent disconnection of one service on the basis of another. For example, mobile services cannot be disconnected on the basis of overdue cable

⁴⁰ For a loose example, see Ontario Wireless Transparency Act, paragraphs 3(3).1-3(3).2.

⁴¹ CCTS, Deposit and Disconnection Code, Article 3.1(a) imposes a \$50 limit but given the extremely variable nature of mobile wireless services, a more flexible triggering amount is necessary.

television fees. Additionally, disconnection of wireless *voice* should not be premised on wireless *data* charges.

50. The Code should prevent disconnection on the basis of any disputed fee. Disputing a fee can begin with

I bought a phone (HTC Legend)...in 2011...I went in with no contract, was told at their store and by phone I can cancel at anytime and pay off the remaining balance of the phone and I am done with them. 4 months later a collections agency calls (without [my provider] contacting me by any means before) saying I owe...\$450 since I was in a data-plan and left that contract early...Of course I paid it not wanting my credit rating destroyed over a stupid phone at the age of 26... -Andrew, Submission 643, Batch 2, p. 171

The Code might contemplate a time limit for informal disputes. It might indicate, for example, that disconnection can only occur [x] days following the disputation of an underlying payment, assuming the dispute is not resolved. At that point, disconnection might occur, and the matter might be referred to the CCTS. In either case, however, the Code should prevent fees from being referred to a collection agency if they remain under dispute.

II. Scope of Application

51. The Code should apply to all providers of mobile services and to all such services, and to all Provinces and territories. Any differentiation in rights required by the nature of the service (pre-/post-paid) can be resolved within the substance of the Code itself.

52. The Code should apply to all Telecommunications Service Providers that provide in-scope services in order to ensure the protections it offers are available to *all* consumers of mobile services in Canada.⁴²
53. Finally, no deference is necessary on the basis of substantially similar Provincial and Territorial legislation, as any inconsistencies can be resolved within the Code itself (see next section).⁴³

III. How should the Wireless Code be enforced and promoted

54. The Code should be incorporated by reference into service provider's general terms of service for mobile.⁴⁴ Such incorporation by reference would require mobile service providers to include the following express term in their respective terms of service:

Section [x]. Wireless Consumer Protection Code.

By accepting this [Agreement], you are agreeing to the Wireless Consumer Protection Code ("Code"), which will apply to any wireless services provided by or through [x service provider]. The Code can be found at: <http://company.ca/Code>

55. By such means, the rights and obligations set out within it will become contractually binding and can be enforced in a flexible manner, including by recourse to the Commissioner for Complaints for Telecommunications Services, who has the capacity to ensure relevant service providers perform any applicable contractual obligations

⁴² As was the case in Telecom Regulatory Policy CRTC 2011-46, Review of the Commissioner for Complaints for Telecommunications Services, CRTC Reference No.: 8665-C12-201007229, January 26, 2011, <<http://www.crtc.gc.ca/eng/archive/2011/2011-46.htm>>, comprehensive coverage is necessary to ensure all consumers benefit from the protection of the Code.

⁴³ See also Telecom Decision CRTC 2012-556, Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services, CRTC Reference Nos.: 8661-C-12-201204057, 8620-R28-201202598, 8661-P8-201116807, October 11, 2012, <<http://www.crtc.gc.ca/eng/archive/2012/2012-556.pdf>>, para. 11.

⁴⁴ For an example of such incorporation of a set of rules and policies by reference, see: Canadian Internet Registration Authority, "Registrant Agreement", Version 2.0, October 12, 2010, <<http://www.cira.ca/assets/Documents/Legal/Registrants/registrantagreement.pdf>>, Article 2.1.

in carrying out its optional arbitration function.⁴⁵ To ensure greatest flexibility, free selection of remedies must be assured within the Code (see next paragraph, proposed sub-section 2).

56. However, given the contractual nature of the underlying obligations in question, a supremacy clause should be added within the code itself. In addition, as many Provinces and Territories already impose various rights on individuals undertaking consumer contracts,⁴⁶ the Code should default to jurisdictional legislative obligations in cases of direct conflict:

Article [x]. Conflict.

- (1) The substantive and procedural rights and obligations set out in this Code apply despite any agreement or waiver to the contrary.
- (2) Without limiting the generality of subsection (1), no term or acknowledgement will prevent the use of any procedure or remedy otherwise available at law as a means of ensuring the rights granted in this Code.
- (3) In the case of a conflict between a provision of this Part and any legislative Act or Regulation of a Province of Canada that imposes relevant requirements on contractual terms, the greatest protection to the consumer prevails, to the extent such obligations are consistent. Any direct inconsistency should be resolved in favour of the legislative or regulatory obligation.⁴⁷

57. Finally, with respect to promotion of the Code, mobile providers should provide printed copies of the Code upon registration, should host a copy of the Code alongside their other contractual documents on their websites and should expressly bring the Code to individual's attention during any interaction that implicates the rights and

⁴⁵ Commissioner for Complaints for Telecommunications Services, Procedural Code, as amen., <<http://www.ccts-cprst.ca/wp-content/uploads/2012/01/CCTS-Procedural-Code-Jan-2012.pdf>>, Article 4.1.

⁴⁶ See, for example, *Richard v. Time Inc.*, 2012 SCC 8, <**Error! Hyperlink reference not valid.**<http://www.canlii.org/en/ca/scc/doc/2012/2012scc8/2012scc8.html>>, para. 43; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, <<http://canlii.ca/en/ca/scc/doc/2011/2011scc15/2011scc15.html>>, para. 38.

⁴⁷ Proposed sub-sections (1) and (3) are based on proposed sub-sections 2(3)-(4) of the Ontario Wireless Transparency Act, *supra* note 3. Proposed sub-section (2) is based on section 7 of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Schedule A, as amen.

obligations found therein. In addition, the CCTS should undertake to promote the Code through its website and additional outreach activities.

IV. How should the Wireless Code's effectiveness be addressed and reviewed?

58. The objective of this Code should be to enhance consumer confidence in wireless services in Canada by ensuring Canadians a basic level of protection in what is rapidly becoming an essential and necessary component of daily life. As the Code will compliment various Provincial legislative efforts that are either underway or already in place, it should be developed under the assumption that it will provide a long term basis for the protection of individual rights and interests with respect to telecommunications services.
59. It is difficult to benchmark the effectiveness of such initiatives, as many of the protections offered herein aim at issues at the core of mobile service provision. Nonetheless, indicators of success might include a reduction in wireless-related consumer complaints, increased consumer satisfaction with wireless services (survey-based) and an increase in competition in the wireless market.

V. Conclusion

60. In conclusion, CIPPIC/OpenMedia.ca commend the Commission on its decision to undertake this important initiative. We ask that you take our comments into consideration in resolving the underlying issues raised by this initiative.

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