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Telecom Notice of Consultation CRTC 2012-557

Proceeding to Establish a Mandatory Code for Mobile Wireless Services

CRTC Reference No.: 8665-C12-201212448

Additional Comments 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 to the Commission for this opportunity to provide additional comments on this important initiative to establish a national Wireless Consumer Protection Code ("Code").

2. The proposed Code has potential to address many recurring issues in an increasingly critical element of Canada's telecommunications landscape – wireless services. A truly effective Code will ensure Canadians have the tools they need to more effectively navigate a competitive wireless market. This involves ensuring that customers have the information they need to make informed decisions and empowering customers to participate effectively in the wireless market.

3. Empowering customers should alleviate growing levels of frustration. Effective participation involves not only ensuring customers are able to make informed decisions, but further ensuring that customer decisions and preferences are better able to resonate, through competitive pressures, into the Canadian wireless landscape.

4. Below, CIPPIC/OpenMedia.ca provide comments on select elements of the Code and their potential to achieve its objectives, as set out above. In addition, Appendix B to these comments provides CIPPIC/OpenMedia.ca's input on elements of the Commission's Wireless Code Working Document (henceforth "Draft Code"), issued in Telecom Notice of Consultation CRTC 2012-557-3.[1] Finally, Appendix A to this submission consists of a non-exhaustive list of resolutions setting out consensus reached by several public interest interveners, including CIPPIC/OpenMedia.ca, on

[1] Telecom Notice of Consultation CRTC 2012-557-3, Proceeding to establish a mandatory code for mobile wireless services, January 28, 2013, CRTC Reference No.: 8665-C12-201212448, <http://www.crtc.gc.ca/eng/archive/2012/2012-557-3.htm>.

some of the more contentious issues that have arisen in this proceeding ("Consumer Consensus Document").

I. Proposed ETF: Can it live up to its objective?

5. The somewhat unique 3 year contract model which incumbent Wireless Service Providers (WSPs) have made the predominant model in Canadian mobile services, has problematic consequences for customers of wireless services. These costs are measured in a lack of transparent decision-making, in diminished competition and in customer frustration. Most importantly, in the immediate context of this Code, this 3 year lock-in prevents individuals from participating effectively in a competitive mobile wireless environment.

6. It has become evident that, within the context of this Code, the ETF has been presented as a cure to numerous customer woes. If customers are unhappy with any feature or element of the service, the ETF will permit them to "leave at any point in time".[2] In its oral testimony, the Canadian Wireless Telecommunications Association (CWTA) explained this panacean effect:

> 856 And if there is one beauty with this Code, it makes it easy for consumers to cancel at any time, and we agree with that. They can cancel, pay off the handset subsidy, move on. They can tell the provider: You know, I don't like your service any more, here is the handset subsidy, this is how much I owe, I'm leaving. There is no additional penalty, there is no complication, there is no -- it doesn't take three hours to calculate how much it is, you pay what you use, you pay the handset subsidy and you move on.
>
> 857 That will provide a lot of flexibility for consumers and I believe will also provide incentive for carriers to change their behaviour, and ultimately that is the best thing you need for a marketplace. So we support that. It's clear.
>
> 858 I think any discussion we have has to keep that in mind, that that supersedes anything else. The same when we talk about…the length of contract. If a customer

[2] B. Lord, Canadian Wireless Telecommunications Association, Oral Testimony, Telecom Notice of Consultation CRTC 2012-557, February 11, 2013, TRANSCRIPT, vol. 1, <http://www.crtc.gc.ca/eng/transcripts/2013/tt0211.html>, lines 856-858.

> can decide after two years, "I'm out of here", does it really matter if they sign for three, two or one? They can leave at any time.[3]

CIPPIC/OpenMedia.ca respectfully submit that the ETF proposed in the Draft Code will *not* allow customers to 'leave at any point in time', and that it will continue to operate as an impediment to meeting a number of the objectives of the Code. It is important, at minimum, to expressly recognize the shortcomings of the proposed ETF.

7. To do so, we first analyze the objectives of the ETF and assess the problems it should address. We then assess the current ETF proposal in light of these objectives, and propose alternative proposals that might better achieve the objectives in question.

(a) Non-Transparent Pricing, Handset/Service Bundling & Customer Lock-in

8. The current practice of bundling device costs with service offerings is inherently non-transparent. While all customers understand that 'nothing is free', the practice of bundling handsets with service offerings obscures what exactly is being paid. The result of this is that customers are hindered in their ability to compare the agreement they are being offered to other agreements. As a result, prices are insulated from informed customer choice. Customer choice with respect to device renewal cycles is equally obscured. Further, such bundling activities have competitive impacts that are detrimental to customers on a broader scale. Finally, being locked in to a particular service provider effectively exacerbates a number of other customer problems that typically would not be problematic because customers would simply 'leave' if permitted to.

i.) Distinct device & service payments are obscured

9. First, it obscures the actual price customers are being asked to pay for their monthly service. While presented as 'free', the cost of the device is built into the monthly fee

[3] B. Lord, Canadian Wireless Telecommunications Association, Oral Testimony, Telecom Notice of Consultation CRTC 2012-557, February 11, 2013, TRANSCRIPT, vol. 1, <http://www.crtc.gc.ca/eng/transcripts/2013/tt0211.html>, lines 856-858.

customers are required to pay. As it is not clear what component of the monthly fee is, in fact, a hidden device payment and what component is a service fee, customers are unable to make clear comparisons between fixed-term contractual service rates, other non-fixed term service offerings.[4]

10. As noted above, customers generally understand that nothing is 'free'. However, customers are also familiar with receiving *truly* free incentives in exchange for service. One common example of this includes scenarios where a free device is offered as an inducement to open a checking account at a bank.[5] While it is clear the bank recoups the value of the free device in some manner, the free device is being used as a means of getting the customer to try the service. That is, the inducement is aimed at attracting the customer through the door. Once they are there, the bank relies on its superior offerings, customer service, etc., to keep the customer who has now agreed to try the service. The value of the inducement is certainly defrayed through service costs and, hence, is 'subsidized', there is no expectation that the customer will compensate the service provider for any outstanding balance on the free gift if she chooses to leave. It is a truly 'free' incentive.

11. WSP handset offerings are different. They are not used to 'get customers in the door' but rather to keep them from leaving once they have entered. It is clear (although not always clear to the customer) that WSPs expect to recoup the value of this device, in

[4] Service providers have made it clear that current pricing arrangements are not a straight arithmetic application of the market value of the device pro-rated over the length of the contractual term. This means that it is never fully clear to customers what service fee they are truly paying. See, R. Barber, Bell Canada, Oral Testimony, Telecom Notice of Consultation CRTC 2012-557, February 14, 2013, TRANSCRIPT, vol. 4, <http://www.crtc.gc.ca/eng/transcripts/2013/tt0214.html>, line 7058:

> 7058 There are a variety of methods that you could use to calculate an early termination fee, it could be something like an amount based on the number of months remaining in the contract, it could be any kind of formula. Perhaps the difficulty, as you expressed, was that consumers actually didn't understand, maybe we hadn't been very clear in our documentation or clearly explain to them at the point of sale what the cost was of exiting that term commitment.

[5] See, for example, First Bank, "FirstBank Free Checking", Attachment 1, Accessed February 28, 2013, <https://www.efirstbank.com/products/checking-savings/personal-checking/free-checking.htm>, offering new customers the choice between a free iPod Touch or a free Kindle Fire HD tablet in exchange for opening a free checking account. Offers only available in the United States, in Colorado, Arizona or parts of California. Canadian Capitalist, "TD Bank's iPod Offer", May 30, 2007, MoneySense, <http://www.canadiancapitalist.com/td-banks-ipod-offer/>.

full, one way or another. The customer can either pay through obscured monthly payments or through a lump sum payment for any unpaid balance of the device if they choose to leave early. Yet, as currently presented, it is not clear to customers that they are being asked to absorb a $700 device cost.

ii.) Device renewal cycles: non-transparent, non-optimal & anti-competitive

12. An additional effect of this arrangement is that customers are prevented from making transparent decisions on device renewal timeframes because it is the fact that they are incurring $700 costs triennially is obscured. There are undeniable benefits to having access to high end devices on short renewal cycles, and Canada boasts a relatively short average handset renewal rate of approximately 2 years and 9 months, according to one recent study from Recon Analytics.[6] While this is certainly a *short* renewal cycle, there is no indication that it is an *optimal* renewal cycle, because the prevalent handset/service bundling model obscures any choice relating to renewal rates. Customers are effectively offered a new handset every 3 years 'free' of immediate cost.

13. Some have suggested that this 3 year renewal cycle is a product of informed and non-transparent historical market forces. That Canadians had, at one point, shorter contractual options, including the option to choose between 1, 2 and 3 year handset amortization timeframes, and have uniformly rejected 1 and 2 year renewal options.[7]

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[6] R. Entner, "International Comparisons: The Handset Replacement Cycle", June 23, 2011, Recon Analytics, <http://www.mobilefuture.org/page/handset-replacement-cycle.pdf>, Table 1, p. 2: Canada's average device renewal cycle was 33 months in 2010.

[7] W. Oosterman, Bell Canada, Oral Testimony, Telecom Notice of Consultation CRTC 2012-557, February 14, 2013, TRANSCRIPT, vol. 4, <http://www.crtc.gc.ca/eng/transcripts/2013/tt0214.html>, lines 7128 & 7132:

> 7128 COMMISSIONER MOLNAR: One of the things I didn't hear -- I heard what you said about the history, and that you had two-year contracts and there wasn't take-up. And you told me, actually, the exact same story as the wireless providers who came before you, that, based on the history, if you go back forever, and you get to now, three-year contracts were what customers wanted.
>
> …
>
> 7132 MR. OOSTERMAN: But, I'm sorry, we did do that. We did have one-year contracts. We did have two-year contracts. There was no market demand, so we eliminated them.

However, this is not the case. While there were historical 1 and 2 year contractual offers, these were never transparent as they offered customers the same non-transparent option that current three year offerings do.

14. Perhaps not surprisingly given the competitive benefits a WSP reaps from locking in a customer for 3 years at a time, historical 1 and 2 year contractual offerings were never realistic offerings. While 3 year lock-in offerings would often permit customers amortize the entire device cost over a 3 year period, historical 2 year offerings would typically require customers to pay %80-90 of the device cost up front -- hardly a proportional offer. The Recon Analytics study summarizes these historical options:

> Another interesting note is that Canada is the only country in the world that has three-year contracts for the purchase of a new device for the lowest price. For most devices the price difference between a 3 year contract and a 2 year contract is more than $300, sometimes even $400, whereas the difference between a 2 year, 1 year or no contract is only an additional $30 per step. This provides Canadians with a significant incentive to commit to 3 year contracts. Nevertheless, Canadians replace their devices every 2 ½ to 2 ¾ years.[8]

However, then as now, this is not a transparent choice. While in all three contract length scenarios, the customer 'pays' for the device, in the 3 year option the brunt of the device cost is obscured in the monthly service fee. It is therefore no surprise that customers rejected 1 and 2 year options that did not *appear* to offer similar discounts.

15. Then, as now, the replacement cycle is not dictated by customer preferences, but by WSP lock-in preferences. Customers offered a 'free' phone after three years (or every 2.5 years, as some anecdotal evidence suggests WSPs will waive termination fees for existing customers willing to sign a new 3 year commitment within 6 months of a 3 year renewal cycle)[9] are likely to accept. However, this cannot be taken as indicating

[8] R. Entner, "International Comparisons: The Handset Replacement Cycle", June 23, 2011, Recon Analytics, <http://www.mobilefuture.org/page/handset-replacement-cycle.pdf>, p. 5.
[9] It is clear that WSPs do *offer* existing customers Early Device Upgrade options: Bell Mobility, "How Do I know if I'm Eligible to Upgrade My Phone or Smartphone?", Bell Mobility Support, Last Updated August 31, 2012,

that, with more transparent market choices, customers would want to purchase a $700 device every 3 years. It is simply not clear that the current handset renewal cycle in Canada is optimal.

16. Specifically, the choice presented to customers is 'FREE device + 3 year term commitment'. This presentation shifts customer focus away from the cost of the device as the customer assumption at point of purchase is that they will not terminate early and, hence, will never trigger any additional device costs. At the same time, the length of term customers are being asked to commit to at contract inception appears arbitrary to many, particularly in light of the ubiquity which 3 year contractual term offerings enjoy in the Canadian market.

17. Some WSPs have suggested that this is to the customer's benefit, suggesting that customers enjoy a lower monthly rate if the device is amortized over 3 years as opposed

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<http://support.bell.ca/Mobility/Rate_plans_features/How_do_I_know_if_I_am_eligible_to_upgrade_my_mobile_phone_or_smartphone>: "Bell offers different upgrade options depending on how many months have passed since your last upgrade or activation." However, it is not clear at what point in the contractual term remaining termination fees are waived if the customer agrees to commit to a new three year term. Anecdotal examples of such offers can be found on various online mobile service discussion forums, suggesting termination fees are often waived with 6 months remaining on a 3 year term commitment. For example: RedFlagDeals, "Who Can Help me Defeat Bell Mobility…", March 14th, 2012, 01:10 AM, RedFlagDeals.com Forums > Shopping Discussion:

> IIRC, Bell changed their HUP eligibility last year from 24 months into your contract up to 30 months into your contract, in-line with Rogers who also did the same thing. So that sounds correct, most likely the first time you called in to ask, the policy was that you would be eligible for a HUP with 12 months left on your contract, now it's 6 months left on your contract.
>
> This is standard HUP policy across the board for all Canadian carriers, being eligible for a HUP simply means you can get a new phone for the 3yr-contract price if you sign another 3yr-contract with that carrier before your current contract expires. That's all it is, HUP does not mean you get a free phone.
>
> Also it sounds like they're willing to bend their policy and let you get a HUP before you're technically eligible for it. So you either take it or you don't...I used to work for Bell. Hardware upgrade means you don't pay full retail price of the phone; it does not mean you get a free phone. OP should retitle thread as "Who can explain to me how HUPs work?"

Mobilesyrup, "Bell Upgrading Phones Every Year?", February 21, 2013, 01:43 PM, <http://mobilesyrup.com/forum/showthread.php?t=48410>:

> "I started my last contract (3-year) in March of 2010. In November 2010, I bought a new phone at full price because I realised my first one was crap. I was not offered any discount at that time as I was only 8 months in. I got a message from Bell in May 2012 that I was eligible for an upgrade which meant I can get the 3-year price on the phone if I sign up for another 3 years. I took them up on the offer in July of 2012 because my phone battery was dying on me. That was my experience with Bell regarding the upgrade."

to two.[10] Put another way, WSPs argue that the 'third' year of commitment does, in fact, have value for customers. To demonstrate this, WSPs point to examples from other jurisdictions where 2 year term contracts are the norm and, particularly, to the United States.[11] The suggestion is that U.S. customers in two year arrangements pay roughly the same amount as Canadian customers who decide to leave two years into a 3 year contract. While the United States may not offer the best of comparators as, historically, Canada and the U.S. have been known to offer some of the highest mobile service offerings among developed countries,[12] these claims warrant closer examination.

18. The iPhone 5 16 GB offers an easy point of comparison, as it is offered at comparable market rates in different jurisdictions. Below, we include service offerings from providers in the United States, the United Kingdom, France and Canada based on available commitment timeframes. Prices are offered in Canadian dollars (not adjusted for Purchasing Power Parity). The service basket used here includes unlimited voice, unlimited SMS, 1 GB of data, voice mail, caller ID and, as most service offerings in other jurisdictions appear to include 'national' within 'local' calling, at least 100 national long distance minutes for Canadian plans.[13] For additional ease of comparison, the total amount paid to the WSP over the term of service is provided as a pro-rated 'per month' rate (calculated by dividing total fees paid over the course of the term of service / total # of months the customer spent with the provider before leaving) is provided in brackets in the final column.

[10] For an example of this, see Bell Canada, Response to Information Request, The Companies(CRTC)14Feb13-1 TNC 2012-577, ATTACHMENT, February 22, 2013.
[11] *Ibid*.
[12] C. Li & B. Ninan-Moses, "An International Comparison of Cell Phone Plans and Prices", October 14, 2010, New America Foundation, Open Technology Initiative, <http://newamerica.net/sites/newamerica.net/files/policydocs/Intl_Comparison_Cell_Phone_Plans_0.pdf>.
[13] The inclusion of 1 GB of data, voicemail and caller ID, as well as 90 domestic long distance minutes in the service basket is based on the inclusion of these elements in the highest service basket used by CRTC, Communications Monitoring Report 2012, September 5, 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr_a.htm#a4>, Table A.4.3: Wireless Service Baskets.

Table 1: International Comparison: Blended Handset/Monthly Service

WSP	Initial Device Payment [Full Device]	Voice/Data[14] (monthly)	VMail/CID (monthly)	National LD (monthly)	ETF[15]	Total Paid: ($/month)
Bell	$179.95 @ 3 years [$699.95]	$65.00[16]	$7.00[17]	$10.00 [18]	1y: $346.67	$1,510.62[19] ($125.89)
					2y: $173.33	$2,321.28[20] ($96.72)
					3y: $0	$3,131.95[21] ($87.00)
Rogers	$179.99 @ 3 years [$699.00]	$70.00[22]	Incl.	$10.00[23]	1y: $346.01	$1486 ($123.83)
					2y: $173.00	$2,272.99 ($94.71)
					3y: $0	$3,059.99 ($85.00)
AT&T[24]	$205.69[25] @ 2 years [$668.51]	$87.42[26]	Incl.	Incl.	1 year: $210.84[27]	$1,465.57 ($122.12)
					2 years: $0	$2,098.08 ($87.42)

[14] Based on the CRTC's highest service basket in its 2012 Communications Monitoring report, this includes: unlimited voice and SMS, 1,200 voice minutes, Unlimited voice, 1 GB data.
[15] For convenience, the ETF is based on the formula included in the Quebec legislation: (Device Cost/# of months) * number of remaining months, as in: The Companies(CRTC)14Feb13-1 TNC 2012-577, February 22, 2013.
[16] Voice & Data 65 @ $65/month.
[17] Bundle 7 – Mobile TV included, 7$/month. This is the lowest price mechanism for acquiring Call Display and 'Message Centre Lite'.
[18] Unlimited Canada to Canada LD, $10/month add-on. This is the lowest cost mechanism Bell offers to cover 100 domestic long distance minutes monthly. There is a second add-on '100 Minutes Canadian LD', but it is priced at $12/month.
[19] [Initial Device Cost @] **$179.95** + [(Monthly Rate @ $65/month + $7/month +$10/month =) $82/month * 12 months @] **$984** + [ETF @] **$346.67** = $**1,510.62**
[20] [Initial Device Cost @] **$179.95** + [(Monthly Rate @ $65/month + $7/month +$10/month =) $82/month * 24 months =] **$1,968** + [ETF @] **$173.33** = **$2,321.28**
[21] [Initial Device Cost @] **$179.95** + [(Monthly Rate @ $65/month + $7/month +$10/month =) $82/month * 36 months =] **$2,952** + [ETF @] **$0** = **$3,131.95**
[22] Rogers 'Social – Share Ready' plan includes unlimited local calling, unlimited SMS, CID, Voicemail and 1GB of data for $70.00/month.
[23] Rogers offers a Canadian Unlimited add-on for $10.00/month.
[24] Current USD > CDN exchange rate is 1 CDN = 0.97 USD. In addition, the OECD assigns a 1.3 multiplier to this exchange rate in order to ensure the USD > CDN exchange rate reflects Purchasing Power Parity: OECD, Monthly Comparative Price Levels, Last Updated February 7, 013, <http://stats.oecd.org/Index.aspx?DataSetCode=CPL>.
[25] AT&T offers its iPhone 5, 16 GB for $649.99 USD = 668.51 CDN. With a 2 year commitment, the 'pay now' rate is $199.99 USD or $205.69 CDN.
[26] AT&T Mobile Shar 1GB w/unlimited Talk & Text with one 4G device charges $85 USD/month which = $87.42 CDN.
[27] For smartphones, AT&T imposes an ETF of $325 – ($10 * each full month completed). In this case, this amounts to $325 * ($10 * 12 months = $120) = $205 USD or $210.84 CDN.

WSP	Initial Device Payment [Full Device]	Voice/Data[14] (monthly)	VMail/CID (monthly)	National LD (monthly)	ETF[15]	Total Paid: ($/month)
EE (UK)	$257.41[28] @1 year [unkown]	$65.64[29]	Incl.	Incl.	1 year	$1045.29 ($87.11)
EE (UK)	$90.09[30] @2 years [unkown]	$52.78[31]	Incl.	Incl.	2 year	$1,356.81 ($56.53)
Bouygues Telecom (FR)[32]	$468.48[33] [$468.48]	$73.51 @1y[34]	Incl.	Incl.	1 year	$1,350.60 ($112.55)
		$60.12 @2y[35]			2 year	$1,911.36 ($79.64)
Bouygues Telecom (FR)	$321.20[36] [$468.48]	$93.59 @1y[37]	Incl.	Incl.	1 year	$1,444.28 ($120.36)
		$73.51 @2y[38]			2 year	$2,085.44 ($86.89)

19. Perhaps most notable from this comparison is the ultimate '$/month' rate provided in brackets in the final column, which reflects how much the customer has paid the WSP over the entire coarse of the service agreement, pro-rated on a monthly basis. Across all service

[28] 4GEE offers the iPhone 5 16 GB with a one year commitment for £166.66 (without tax) GB = $257.41 CDN.
[29] 4GEE an unlimited voice/SMS, 1GB data, voicemail and CID plan alongside a iPhone 5 16 GB and a one year commitment for £42.50 (without tax) GB/month = $65.64 CDN/month.
[30] 4GEE offers the iPhone 5 16 GB with a 2 year commitment for £58.33 (without tax) GB = $90.09 CDN.
[31] 4GEE offers an unlimited voice and SMS, 1GB data, voicemail and CID included plan for: £34.17 GB/month = $52.78 CDN/month.
[32] The current exchange rate is €0.75 Euros to $1 Canadian dollar.
[33] Bouygues Telecom offers the iPhone 5 16 GB at full price for €349.90 full price, or $468.48 Canadian.
[34] BT's Eden Smartphone package, if taken with an [unrebated] iPhone 5 @ $468.48, includes, for a one year commitment, a 42 Mbps 4G connection, unlimited voice and SMS, 2 GB data (after which usage is throttled, but no additional fees are incurred), voicemail, CID, and national calling for €54.90 which is $73.51 Canadian.
[35] BT offers the identical Eden Smartphone package with the same 'full price' --iPhone, but with a 2 year commitment, for €44.90 or $60.12/month.
[36] With this specific plan and a minimum 1 year commitment, BT offers the iPhone 5 for €239.90 EURO or $321.20 CDN.
[37] BT's Eden Smartphone package, if taken with an iPhone 5 @ $321.20, includes, for a one year commitment, provides the same package as described in footnote 34 above [a 42 Mbps 4G connection, unlimited voice and SMS, voicemail, CID, and national calling] except it provides 3 GB instead of 2 GB of data (after which usage is throttled, but no additional fees are incurred), for €69.90 which is $93.59 Canadian.
[38] BT offers the same Eden Smartphone package, taken with an iPhone 5 @ $321.20, for €54.90/month instead of €69.90/month if customers are willing to commit to two years service. The 2 year rate is therefore €54.90/month or $73.51 CDN/month.

providers, staying with the provider for a longer period of time yields a lower total monthly rate. However, an additional year of commitment in Canada does not lead to any additional savings when compared to other jurisdictions. In fact, the lowest 'total monthly rate' in Canada – $85-87/month – can be enjoyed with only a two year commitment the United States and France, and, in the United Kingdom, with a one year commitment.

Table 2: Length of Time Spent w/Provider before Reaching Low Price Point

WSP + Term of Service (years)	Total Rate (CDN $/month)[39]	Handset Replacement Rate (months)[40]	Smartphone Users (% of all mobile users)[41]
Bell 3 year	$87.00	33.0	45.95%
Rogers 3 year	$85.00		
AT&T 2 year	$87.42	21.7	41.8%
EE (UK) 1 year	$87.11	22.4	51.9%
BT (FR) 2 year	$79.64	30.8	40.0%
BT (FR) 2 year	$86.89		

This suggests that the third year Canadians spend with their providers has little effect in lowering their actual prices and, by extension, offers them little of real added value.

20. From a more macro perspective, we note that each of the countries selected have rapid access to new devices. As a benchmark, all four providers are already offering the recently released Blackberry Z10. Additionally, each of the countries selected for comparison (the United States, United Kingdom and France) have *faster* handset replacement rates than Canada and comparable smartphone penetration levels. So it is difficult to argue that the unique Canadian 3rd year of service is necessary to achieve fast smartphone adoption. Indeed, the putatively high smartphone penetration rate cited in Table 2 above (taken from comScore) is misleading, in that it

[39] Taken from Table 2, above.
[40] As measured in: R. Entner, "International Comparisons: The Handset Replacement Cycle", June 23, 2011, Recon Analytics, <http://www.mobilefuture.org/page/handset-replacement-cycle.pdf>, Table 1, p. 2.
[41] As set out in: comScore, "2012 Mobile Future in Focus", February 2013, comScore MobiLens, <http://www.comscore.com/Insights/Presentations and Whitepapers/2012/2012 Mobile Future in Focus>, p. 7.

presents smartphone penetration as a percentage of all *mobile customers* not as a percentage of *all Canadians*. As the objective should be to achieve high smartphone penetration among *all* citizens, this figure should be re-examined. When Canada's *total* smartphone penetration is analyzed as a proportion of total population, Canada drops in relative position to last among the four countries studied here:

Table 3: Smartphone/Mobile Penetration in Context

Country	Smartphone Penetration (as % of Mobile Users)[42]	Smartphone Penetration (as % of total pop.)	Wireless Broadband Subscriptions (per 100 inhabitants)[43]
United Kingdom	51.9%	45.25%[44]	60.0
United States	41.8%	31.41%[45]	76.2
France	40.0%	29.71%[46]	46.3
Canada	45.95%	26.40%[47]	41.4

This is perhaps not surprising, given Canada's unimpressive mobile broadband penetration rates (recent OECD figures place Canada 23rd of 34 OECD countries) with only 41.4 subscriptions per 100 individuals).[48] As high speed mobile broadband is

[42] As set out in: comScore, "2012 Mobile Future in Focus", February 2013, comScore MobiLens, <http://www.comscore.com/Insights/Presentations and Whitepapers/2012/2012 Mobile Future in Focus>, p. 7.
[43] OECD, "1d. Fixed and Wireless Broadband Subscriptions per 100 Inhabitants", June 2012, OECD Broadband Portal, <http://www.oecd.org/internet/broadband/oecdbroadbandportal.htm>.
[44] The United Kingdom Office for National Statistics estimates the entire population of England and Wales to have been 56.1 million on March 27, 2011: United Kingdom Office for National Statistics, "2011 Census & Where You Can Find it", accessed March 1, 2013, <http://www.ons.gov.uk/ons/guide-method/census/2011/census-data/census-data-factsheets/index.html>. comScore estimates that 25,386,000 citizens of the United Kingdom had smartphones in December of 2011.
[45] The United States Census Bureau estimates the entire U.S. population to have been about 311,591,917 as of July 1, 2011: United States Census Bureau, "Annual Population Estimates of the Resident Population for the United States", Population Estimates > State Totals: Vintage 2011, accessed March 1, 2013, <http://www.census.gov/popest/data/state/totals/2011/>; [xls]: <http://www.census.gov/popest/data/state/totals/2011/tables/NST-EST2011-02.xls>. comScore estimates that about 97,865,000 Americans had smartphones at the end of 2011.
[46] The French National Institute of Statistics and Economic Studies estimates the population of France to have been 63,236,000 at the beginning of July 2011: France, National Institute of Statistics and Economic Studies, "Demographic – Population at the Beginning of the Month – Metropolitan France", Last updated February 27, 2013, <http://www.insee.fr/en/bases-de-donnees/bsweb/serie.asp?idbank=000436387>. comScore estimates that 18,788,000 citizens had smartphones in France in December 2011.
[47] comScore states that 9,103,000 Canadians were smartphone users by the end of December 2011. According to StatsCan, Canada's total population on July 1, 2011 was: 34,484,000 (Statistics Canada, "Population by Year, by Province and Territory", Last updated September 27, 2012, accessed March 1, 2013, <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm>.
[48] OECD, "1d. Fixed and Wireless Broadband Subscriptions per 100 Inhabitants", June 2012, OECD Broadband Portal, <http://www.oecd.org/internet/broadband/oecdbroadbandportal.htm>.

available to most Canadians, something else must account for these shortcomings in penetration.[49]

21. So, it is by no means clear that the extra year of contractual service that is a unique feature of the Canadian wireless landscape offers any benefits to Canadians, hidden or otherwise. The most likely beneficiaries of this third year 'lock-in' are Canada's incumbent WSPs, who enjoy the highest wireless ARPU in the world.[50] These comparative figures strongly suggest that Canadian WSPs have succeeded in establishing an environment where customers effectively pay 3 years for what customers in other comparable jurisdictions can have in 2 years.

22. Finally, it is important to note the impact that a three year lock-in period has in the context unique Canadian competitive mobile landscape. The true competitive nature of this landscape is currently heavily reliant on a small number of new entrants who have succeeded in gaining a foothold after the 2008 AWS spectrum. These new entrants launched their services in late 2009/early 2010, meaning 3 years have barely passed since their entrance into the market. The AWS spectrum that these new entrants are building their networks upon includes a non-reversionary set-aside provision to ensure this spectrum will not revert to an incumbent for 5 years. The 5 year set-aside was deemed sufficient time to allow new entrants to gain a foothold before facing buy-out pressures from incumbents.

23. Three years is a long period of time to lock customers out of *any* mobile broadband market, given the highly innovative and constantly evolving nature of the services in question. Particularly in the Canadian context, however, 5 years (minus one year to

[49] In 2011, HSPA+ mobile broadband became available to (although was not necessarily adopted by) 99% of households, while LTE was available to 45%: CRTC, Communications Monitoring Report 2012, "Key Telecommunications Availability Indicators", September 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr5.htm#t534>, Table 5.3.4.
[50] CRTC, Communications Monitoring Report 2012, "Wireless ARPU – Monthly Revenues, Including Data Share, 2011", September 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr6.htm#f619>, Figure 6.1.9. Canadian WSPs are tied with Japan's for generating the highest Average Revenue Per User (monthly) at $58/user/month, well ahead of the United States ($50), France ($40) and the United Kingdom ($31).

set up services) may well come and go before some customers ever surface from their fixed contractual periods (particularly keeping in mind that these three year periods are often renewed in mid-term). In this sense, any steps that will ease customer's ability to re-enter the market on a shorter time-frame are likely to increase competition and benefit customers on a macro level. More robust competition might lead to lower ARPU and higher churn, but is also likely to lead to lower prices.

iii.) Shifting costs remain hidden and high

24. Finally, the current lock-in arrangement obscures the high switching costs customers will be forced to absorb if, at any point in their three year contractual term, they wish to leave their provider. Customers enter understanding the device is 'free', and that they are committing to a three year term. The assumption, for most customers entering into a three year agreement, is that they are not avoided a high one-time payment. However, in reality, if they wish to cancel the service at any time short of three years, they will discover that they have not, in fact, avoided large one-off payments but merely delayed these.

25. As noted in our initial comments, there are *myriad* legitimate reasons for a customer to terminate early.[51] These can range from life changes, to service dissatisfaction, to simply wishing to take advantage of an evolved service market. In addition, while it is not clear that a majority of handsets do not survive past the three year mark, over a three year time period a substantial number are likely to break or get stolen. In all of these contexts, customers presented with high *back-end* fees experience frustration, regardless of how these fees are justified.

[51] See CIPPIC/OpenMedia.ca, Initial Comments, December 4, 2012, TNC CRTC 2012-557, CRTC Reference No.: 8665-C12-201212448, <http://cippic.ca/uploads/2012-557_Comments.pdf>, pp 4-8.

26. High switching fees are, additionally, competition-inhibiting.[52] The Competition Bureau, in its comments on this matter, point to three types of competitive harms that high switching costs can have. First, they can prevent new or would-be market entrants from attracting customers, as these new entrants will need to find a way to compensate customers for the high costs they are asked to undertake in order to switch providers. Put another way, new entrants are not only forced to compete with incumbent prices and service offerings, but must *additionally* compete with their switching costs.[53]

27. Second, high switching fees can hinder innovation, as the "pressure on service providers to offer better prices or innovate is a function of consumer mobility."[54] If the pool of 'mobile customers' remains small, efforts at pricing and service innovation are less profitable than scenarios where innovation or pricing strategies can immediately attract significant numbers of customers.[55] Finally, by preventing new entrants from acquiring significant numbers of customers, high switching fees effectively raise rivals' costs by preventing them from enjoying the benefits that accompany economies of scale.[56]

28. While potentially problematic in the best of markets, these concerns are *especially* problematic in the context of telecommunications markets. Typical of such markets are high entrance costs, embedded incumbents, and high ongoing capital investment requirements. The manner in which handset/device-associated switching costs are being leveraged in this context, it should be noted, is reminiscent of typical customer foreclosure scenarios usually more typical in a horizontally merged context. While

[52] See Competition Bureau, Submission by the Commissioner of Competition, TNC CRTC 2012-557-3 Wireless Code of Conduct Working Paper, Online Consultation, February 6, 2013, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03531.html>, "Section 2: Switching Costs Inhibit Competition".
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

WSP incumbents do not *own* handset manufacturers, they *are* able to exert a significant amount of control over how handsets are presented to the public.

(b) The Proposed ETF: Can it live up to the hype?

29. The ETF formula proposed in D3.3 of the Draft Code will not address many of these issues. It lacks the transparency necessary for clearer customer choices and the switching costs it imposes remain sufficiently high to pose a significant barrier for any customer wishing to 'simply leave' for whatever reason.

i.) Device/Service costs will remain indistinguishable

30. The proposed ETF will be presented to customers as a subsidy + termination fee arrangement. As such, customers will continue to receive the following offers: FREE phone + $X/month for 3 years + ETF. The true cost of the service remains obscured. It is presented as '$60/month' when, in reality, it is comprised of '$45 service + $15 device amortization/month'. Ongoing obfuscation will ensure accurate comparisons between competing services that do not use the 3 year lock-in model will remain difficult if not impossible. This will continue to present a challenge for customers attempting to navigate the mobile wireless market effectively.

31. Proposed D3.3 of the Draft Code adopts terms such as 'subsidy' and 'incentive' to characterize the nature of the value exchange that occurs when a customer receives a 'free' device from a WSP. These reinforce a perception that, in some way, the customer is receiving a discount on the price of their handset. They are not. They are paying for it in full, one way or another. There is no subsidization or incentive. It is an amortization that will either be pro-rated over the course of the service or paid in full at early termination.

32. The *nature* of the ETF, which derives its value from the unpaid balance of any handset/device provided with the service, effectively codifies the perception that

customers are 'paying' for the device. Indeed, the *legitimacy* of the ETF derives from the reality that WSPs should be fully compensated for the devices they sell. Absent the need for such compensation, there can be little legitimate reason for an ETF at all (it is, at that point, a pure switching cost or penalty for leaving). Yet Draft D3.3, much like WSP marketing practices, aims to have it both ways. It continues to present the handset as 'free', 'subsidized' and an incentive. Yet, when it is time for customers to leave, amortization requirements materialize.

33. To correct this, a number of steps could be taken. First, the terms 'subsidy' and 'economic incentive' need to be excised from the Code. Instead, ongoing device debts should be classified as outstanding amortization balances. Additionally, obligating WSPs to expressly indicate what proportion of their monthly service offering is, in truth, 'device amortization' and what proportion is 'monthly service fee'. This will help make it clear to customers that they are expected to absorb the cost of the handset and that it is not, in fact, a free gift. Such a separation is further necessary to ensure transparent pricing so that customers are able to compare competing services effectively.

ii.) The Proposed ETF Will Not Reduce Lock-In

34. Prior to the recent adoption of a number of provincial legislation regulating customer protection, high penalties for termination were a common feature of any fixed-term wireless service contract. The typical penalty rate was, historically, $20 for each month remaining on the contract at point of termination, to a maximum of $400 (typically $500 for data plans).[57] By contrast, the ETF proposed in D.3.3 of the Draft

[57] See, for example, R. Entner, "International Comparisons: The Handset Replacement Cycle", June 23, 2011, Recon Analytics, <http://www.mobilefuture.org/page/handset-replacement-cycle.pdf>, p. 5: "If a customer would like to upgrade their phone before the contract expired, they have to pay an additional Canadian-$20 per month until the original committed period expires…"; Ontario Ministry of Consumer Services, "Stop Cell Shock: Frequently Asked Questions (FAQs)", last modified July 11, 2012, (Ontario, Queen's Printer for Ontario, 2008), <http://www.sse.gov.on.ca/mcs/en/Pages/cellphone_faq.aspx>. H. Thompson, "Now is the Time to Switch Wireless Providers", September 7, 2011, Globe and Mail, <http://www.theglobeandmail.com/technology/gadgets-and-gear/now-is-the-time-to-switch-wireless-providers/article600470/>: "Cancelling a Rogers Wireless contract six, 12 or 18 months into a three year contract could mean financial penalties of up to $500."

Code limits termination penalties to the outstanding cost of any handset provided with the service, pro-rated over the initial term of service agreed to by the customer.

35. While the proposed ETF is likely to often be lower (depending on the cost of the handset) than the previous penalty, it will not be *significantly* lower:

Table 4: ETF Switching Costs

Months Expired on Contractual Term	Termination Fee Schedule			
	AT&T/Verizon (2 year)[58]	Proposed ETF (iPhone 5 16 GB | 3 year)[59]	Proposed ETF (iPhone 5 64 GB | 3 year)[60]	Old Cancellation Penalty (3 year)
0	$350	$520	$620	$500
6	$295	$433.33	$516.67	
12	$230	$346.67	$413.33	$480
18	$170	$260	$310	$360
24	$0	$173.33	$206.67	$240
30		$86.67	$103.33	$120
33		$43.33	$51.67	$60
35		$14.44	$17.22	$20

At the 2.5 year mark, customers could still face ETFs approaching $100. Requiring a one-off payment on this order at point of exit is likely to act as an ongoing deterrent to those wishing to leave. To ameliorate this, a number of steps could be taken.

[58] Both AT&T and Verizon have adopted a similar early termination formula in their contractual agreements with customers. For smartphones, each adopts an initial termination fee ($325.00 for AT&T and $350.00 for Verizon). which diminishes by $10 for each completed month of service. See: Verizon: http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp; and AT&T: <http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#termCommitChargesBillingPayment>.

[59] All three major Canadian providers offer the 16 GB iPhone under the same conditions: $649.99 if purchased without a fixed term contract or $179.99 if one purchases the iPhone with a 3 year term contract: Bell: <http://www.bell.ca/Mobility/Products/Apple-iPhone-5>; Telus: <http://www.telusmobility.com/en/ON/iphone5_16gb/index.shtml>; and Rogers: <http://www.rogers.com/web/link/wirelessBuyFlow?forwardTo=PhoneThenPlan&productType=normal&productId_Detailed=IP516WHT&N=52+11+4294967107>.

[60] Again, all three major providers offer the 64 GB iPhone under the same terms: $899.99 if purchased without a fixed term contract, and $279.95 with a 3 year fixed term contract.

36. **End device/service bundling.** First, the Code could prohibit any bundling of device amortization and service provision. Activation fees will be the only remaining impediment to constant customer mobility, and switching to the best service offering will become easy. While some have voiced concerns this will lead to *higher* prices, lower monthly services prices can be an anticipated outcome of the heightened competition that will result from this greater ease of mobility. This is especially likely given the market dynamics in Canada, where WSPs operate with the highest ARPU in the world,[61] and a number of new entrants are seeking to gain market share.[62] The higher ARPU suggests that WSP profits are capable of absorbing lower prices, and the new entrants are already providing service offerings that are, on average, %20-40 lower than comparable incumbent monthly rates.[63] On the other hand, full unbundling would suggest that handset renewal cycles will increase significantly and this may, in turn, impact on smartphone penetration.

37. **Allow customers to 'pay down' the device amortization.** Allowing customers to make payments towards their base device cost at any point during the service agreement will provide a mechanism for customers to proactively defray what would otherwise be impeding one-off ETFs. While a definite customer benefit, it is unfortunately unlikely that this will solve the switching cost problem, as most customers will not anticipate 'leaving early'. The problematic nature of switching costs is precisely that they impose unanticipated costs on customers at an unanticipated decision-point: when they wish to leave. The customer does not anticipate service problems or dramatic life changes, and only wishes to leave when faced with them. Similarly, it is when the customer is presented with a new, more

[61] CRTC, Communications Monitoring Report 2012, "Wireless ARPU – Monthly Revenues, Including Data Share, 2011", September 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr6.htm#f619>, Figure 6.1.9.
[62] New entrants have succeeded in gathering %4 market share, but only %2 of revenue shares, and offer services that are, on average, 20%-40% lower than incumbents: CRTC, Communications Monitoring Report 2012, "Wireless TSPs' Subscriber/Revenue Market Share", September 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr5.htm#f554>, Figure 5.5.4 & Figure 5.5.5.
[63] CRTC, Communications Monitoring Report 2012, "Canadian Wireless Monthly Service Rates – Incumbents vs. New Entrants (2011)", September 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr5.htm#t559>, Table 5.5.9.

competitive service offering that she assesses the costs/benefits of leaving her existing service provider in exchange for another. It is at *that* point that an ETF may or may not be worth incurring, not before. However, at that point, the ETF is effectively a cost that competing offers must account for. In light of these exigencies, it is unlikely that simply allowing customers the option of 'paying down' their amortization balance will address concerns associated with the existing ETF.

38. **Limit Device Amortization Time to 2 years.** Limiting device amortization to a 24 month period would have the effect of indirectly lowering switching costs on a pro-rated basis. Because amortization of the same device will occur over two years instead of three, meaning that early termination fees will decrease at a much faster rate than under a three year arrangement. WSPs will have ongoing incentives to offer device amortization, as they will still be able to lock customers in. This means, of course, that customer lock-in will remain a reality. While, clearly, the amount of time that WSPs can foreclose customers from re-entering the market will be shorter, Table 2 suggests that renewal rates and smartphone adoption in Canada will not be detrimentally affected. In addition, there is a chance that up-front handset costs will not increase dramatically, although incremental increases can have net benefits in terms of transparent pricing and even lower back-end switching fees.

39. **Allow device amortization to survive service termination.** Obligating WSPs to permit departing customers to pay the ETF on an ongoing basis will cushion the frustration and anti-competitive effects that result from imposing high one-off fees onto customers at termination. As CIPPIC/OpenMedia.ca suggested in our Reply Comments to this proceeding,[64] such an option retains an incentive for WSPs to keep up-front handset costs low, as a higher amortization base rate will encourage

[64] CIPPIC/OpenMedia.ca, Reply Comments, December 18, 2012, TNC CRTC 2012-557, CRTC Reference No.: 8665-C12-201212448, <http://cippic.ca/uploads/2012-557_Reply.pdf>, para. 15. See also, Competition Bureau, Submission by the Commissioner of Competition, TNC CRTC 2012-557-3 Wireless Code of Conduct Working Paper, Online Consultation, February 6, 2013, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03531.html>.

customers to stay with the provider for a longer period of time. While terminating early will still impose an actual ETF cost onto the customer and, incidentally, permit the WSP to recoup device costs. At the same time, the impeding nature of high one-off switching fees will be defrayed.

40. In sum, the existing ETF proposed in the Code is inadequate. Given the critical role such lock-in plays in the Canadian market and the central importance of the ETF in achieving many of the objectives of the Code, CIPPIC/OpenMedia.ca is of the opinion that it is important to 'get it right'. As such, we urge the Commission to consider one or some combination of the suggestions above.

(c) Device Unlocking

41. CIPPIC/OpenMedia.ca remain highly sceptical that there are legitimate justifications for locking devices to particular WSP by technical means. WSPs point to concerns over parallel importation, fraud and organized crime. However, it is not clear, on the one hand, how the sale of unlocked devices or the unlocking of devices at point of sale can grow to such a scope as to impact on international handset markets. As handsets can only be purchased and unlocked one by one and, regardless, identification such as a credit card is typically required as a pre-requisite of acquiring one, accumulating enough devices in a short and cost-effective way does not appear practical.

42. On the other hand, it is not clear how a technical lock can be offer a serious impediment to a determined group of fraudsters. While legitimate customers must rely on WSPs to unlock their devices or risk sacrificing manufacturer warranty, there are numerous low-cost and easy to locate unlocking options available to those intent on fraudulent acquisition and therefore not limited by warranty concerns. Additionally, many other markets include valuable items that may be attractive in

other regions, yet few rely on these types of technical impediments as a means of preventing parallel import markets (whether legitimate, grey market or otherwise).[65]

43. In light of this, we are of the view that WSPs should be obligated to ensure customers have access to unlocked devices at point of sale. We note that ordering unlocked devices is likely the lowest cost (or, perhaps 'no' cost) means of achieving this objective. If, however, WSPs prefer to instead continue ordering locked devices, they should be obligated to unlock these upon request, as early as at point of sale and any time thereafter for customers who expressly request this. While very short term delays in unlocking may be reasonable in scenarios where there is individualized reason to believe an individual may be involved in fraud, the default rule should be that all customers can have their devices unlocked at the time of their choosing.

44. While there appear to be some costs associated with staff training and database maintenance necessary to provide this service, as these costs are incurred at the WSP's preference by forgoing what appears to be a low/no cost alternative, it seems reasonable that WSPs should bear these costs.

II. Bill Shock: Notifications & Caps

45. CIPPIC/OpenMedia.ca are of the view that real-time tools are necessary to empower customers to effectively use their services in an informed manner. We believe this involves mandating the use of real-time notification as well as hard notifications in the form of cut-offs upon reaching certain financial limits unless a customer-initiated override is used. We therefore strongly support the preservation of proposed sections D5.1 and D5.2 as is. Below we address claims that these tools should only be applied

[65] See,: *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, <http://www.canlii.org/en/ca/scc/doc/2007/2007scc37/2007scc37.html>, *Costco Wholesale Corp. v. Omega, S.A.* (2010), 131 S. Ct. 565, (Supreme Court of the United States), <http://www2.bloomberglaw.com/desktop/public/document/Costco Wholesale Corp v Omega SA 131 S Ct 565 178 L Ed 2d 470 96 >; R. Mann, "Argument Preview: Court Tries Again on Copyright Importation Problem", October 18th, 2012, SCOTUSblog, <http://www.scotusblog.com/?p=153984>.

selectively to certain types of services, that some notifications are infeasible from a technical perspective and that a financial limit is problematic.

(a) Usage management tools should apply to all services

46. While conceding that usage management tools are important and effective for informed data use, some have suggested that there is minimal benefit to providing such tools for voice and SMS. The rationale for this argument is that most people are accustomed to incurring usage fees for voice/SMS and have, over time, learned how to effectively estimate usage without the need for tools.

47. It is undeniable that data usage is a new medium for many users. In addition, data usage is inherently difficult to estimate with any accuracy, even for experienced users. This is for a number of reasons: costs are incurred in non-transparent increments (bytes) that do not necessarily bare any direct relation to the activity being undertaken. These challenges include the inability to predict how much usage the next 'transaction' will incur (opening an email client may lead to emails on the order of 10 KB or 10 MB; a graphics or video rich web page may generate several MBs of traffic whereas a primarily text-based URI will not). In addition, substantial data transactions such as automatic software updates can occur in the background without the individual even being aware they are occurring. Additionally, the combination oof unreliable WiFi and very high per MB costs can transform presumably free usage into extremely high costs.[66]

48. However, usage based models in general share many basic features that form serious obstacles to informed customer decision-making regardless of the medium. We summarized these in our reply comments to TNC 2011-77:

[66] See, for example, CCTS/CPRST, Complaint #86203, April 26, 2011, <http://www.ccts-cprst.ca/wp-content/uploads/2012/02/CPRST-86203.pdf>.

> The mere presence of usage-based fees imposes a disproportionate impact on user behaviour...A number of factors, primarily behavioural, lead to this result. Users are typically risk averse. In addition, and closely related, is a user tendency to overestimate how much they are using. Finally, the mental transaction costs or cognitive costs associated with the constant need to calculate usage force many users to simply err on the side of caution and under-use rather than constantly and closely monitoring usage so as to maximize value. Where per-transaction marginal costs are low for customers – where each additional unit of usage only incurs a small additional cost – customers are willing to commit less cognitive effort into determining optimal value. Instead of making these fine-grained calculations the user is likely to defer, when faced with such marginal per-transaction costs, to risk averse behaviour and overestimation of personal use, meaning Alice will curb her usage far below what an optimal value exchange would dictate. Alice will prefer to forgo certain online activity rather than undertake the constant effort that would be required to measure potential marginal cost against value in each transaction. Another way of putting this argument is to say that customers value the peace of mind that accompanies a 'flat rate' higher than they do the potential ability to achieve an optimally lower cost under a usage-based scheme.[67]

These features apply to any usage-based scheme, whether marginal user costs are driven by data, voice or SMS. While the nature of data usage exacerbates some of these issues, this does not diminish the fact that the issues remain when applied to voice and SMS.

49. This is, perhaps, most evident in roaming scenarios where the cost incremental cost of an SMS or a minute of talk time are very high, and where unlimited usage plans are an anomaly. However, even in domestic settings, similar issues arise:

> We once received a cell phone bill for $5000. After contacting [WSP] for several months, we were able to lower it to about $1500 because [WSP] 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, Submission 1307, Batch 3, p. 355**

[67] CIPPIC/OpenMedia.ca, Reply Comments, April 29, 2011, Telecom Notice of Consultation CRTC 2011-77, Review of billing practices for wholesale residential high-speed access services, CRTC Reference No.: 8661-C12-201102350, <http://www.cippic.ca/uploads/ReplyComments-2011_77.pdf>.

With SMS, confusion is common ever incoming/outgoing dichotomies, for example. Another cause of confusion: customers sign up for '250 texts a month' not realizing that incoming texts count as much as outgoing.[68] Additional confusion arises where customers enter into 'unlimited' texting plans, but are then charged for international SMS.[69] It is also important to include voice, given the rapid rate at which 'off plan' fees can accumulate. A two hour off-plan call can cost customers $60 under normal usage conditions.[70] In addition, an 'all in' approach to usage management tools will help avoid confusion for customers, who are more concerned over incurring excessive monthly fees than over what particular service generates those fees.

50. This 'all-in' approach is perhaps best reflected in the roaming context, where regulatory solutions, including an EU-wide regulatory obligation and a recent OECD Council recommendation which Canada signed onto late last year, typically apply usage notification and financial cut-off caps across *all* usage-based channels.[71] The Asia Pacific Telecommunity (APT) International Mobile Roaming Working Group similarly recommends that usage notifications and financial charge ceilings be applied to 'usage-based services':

[68] Dennis Hogarth, Consumer Council of Canada, Oral Testimony, Telecom Notice of Consultation CRTC 2012-557, February 11, 2013, TRANSCRIPT, vol. 1, < http://www.crtc.gc.ca/eng/transcripts/2013/tt0213.html>, line 6734.

[69] CCTS, Complaint #180521, August 1, 2012, <http://www.ccts-cprst.ca/wp-content/uploads/2012/09/CCTS-Complaint-180521.pdf>.

[70] Bell Canada, "Voice & Data Plans", accessed March 1, 2013, <http://www.bell.ca/Mobility/Cell_phone_plans/Voice_and_Data_plans>:
"Additional plan information:

- Additional local minutes and Canadian long distance minutes are $0.50/minute – excluding Voice and Data $95 plan
- International calling rates vary by country (see standard per-minute rates)
- Additional sent and received text messages5 are $0.20/message
- Additional data for share versions: $0.05/MB"

[71] 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; European Commission, "Regulation on Public Mobile Communication Networks within the Union", EC 531/2012, June 13, 2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:172:0010:0035:EN:PDF>, Article 15.

> In view of the important role of bill shock measures in addressing the issue of mobile bill shock, the WG has proposed during the Second IMR Workshop the following measures to be implemented by operators:
>
> - allowing customers to opt out of individual services;
> - allowing customers to set charge ceiling;
> - allowing customers to set usage ceiling for usage-based services (e.g. data roaming services); and
> - alerting customers through SMS when their pre-determined ceiling is reached or approached.[72]

Where domestic voice off-plan usage rates as high as they are, there does not appear to be a rationale for excluding domestic voice/SMS from usage management tools while including such usage in roaming management tools.

(b) Are some notifications technically infeasible?

51. In our collective consensus agreement, CIPPIC/OpenMedia.ca and other consumer groups have agreed that where it is technically infeasible to put in place specific usage management tools, WSPs can apply for a 'stay' on meeting such obligations until such time as it *does* become technically feasible to do so. The animating concern behind this requirement is to provide relief for scenarios where the technical upgrades would need to be implemented on a third party network over which the WSP has no control.

52. There has certainly been the suggestion that domestic WSPs do not always receive real-time usage information from their foreign counterparts in roaming scenarios. In light of the European Union and OECD instruments aimed at ensuring customers receive these types of notifications in real time when roaming, it appears likely that, at least for EU/OECD countries, such information will become available on a timely basis in the near future, if it is not already. In other scenarios, WSPs may need to negotiate for more immediate information with foreign WSPs as a component of

[72] APT, International Mobile Roaming Working Group, Working Group Report, May 15, 2012, <http://www.apt.int/sites/default/files/2012/05/APT_IMR_Working_Group_Report_Final.pdf>, pp. 18-19.

roaming arrangements. If necessary, this might take more time, and the Code should accommodate such efforts.

53. However, CIPPIC/OpenMedia.ca notes that domestic WSPs need not wait for foreign WSPs to transfer usage information in order to provide sufficiently accurate notification to customers. The APT International Mobile Roaming Working Group, for example, points to the use of in-phone applications as a means of estimating, in real-time, usage costs:

> In addition to the aforementioned bill shock measures, certain services made available by operators may also help address the issue of mobile bill shock. Apart from flat-rate daily plan for data roaming services mentioned above, the WG notes that an Asian mobile operator is intending to offer all its smartphone customers a "usage meter" application which will allow customers to obtain near real-time information on their data roaming usage. This would help customers to better monitor the data usage and thereby avoid mobile bill shock.[73]

While domestic WSPs may not always have real-time information on foreign usage, presumably all the information necessary (amount of usage; foreign network being used) to provide a sufficiently accurate estimate of usage costs being incurred *is* available to the handset and to an in-phone application.

54. Adding costing information to an application that collects this information should not be an infeasible or highly costly task. Such applications can be used to provide the requisite notifications to customers. They can also be customized to notify the domestic WSP when a financial cut-off threshold is approaching.

(c) Financial cut-off is necessary to address bill shock

55. The financial cut-off is a necessary component of a comprehensive usage management strategy. Usage threshold notifications are helpful, but a frequent

[73] APT, International Mobile Roaming Working Group, Working Group Report, May 15, 2012, <http://www.apt.int/sites/default/files/2012/05/APT_IMR_Working_Group_Report_Final.pdf>, p. 19.

feature of bill shock is that costs are accumulated rapidly. As noted above, $50 of additional usage can be accumulated in the course of a single two hour off-plan call. Individuals may not even check SMS-based notifications as they come in over the course of such a call. Roaming voice or text costs can be accumulated on an even shorter trajectory. Additionally, due to background downloading activities such as updates, data fees can often be incurred without any user knowledge at all. Meaning a $50 fee may come and go without the customer actually seeing a single one of the notifications that have been sent.

56. Some WSPs suggested that $50 is too low for a financial cap, or that the amount of such a cap should not be specified in the Code at all. CIPPIC/OpenMedia.ca do not agree. On the one hand, $50 in unplanned fees is no insignificant amount. On the other, customers will have the option of changing this default to whatever they think is most appropriate. This can even be done at point of sale, if desired. We note that the $50 amount is comparable to the equally specific €50 amount expressly mandated by the European Union's union-wide roaming regulation.[74]

57. Even in the rare case where a customer who is willing to incur more than $50 in additional fees experiences a cut-off, she need simply follow the indicated procedure to reconnect and, moreover, will be able to re-adjust her cap at that point to avoid future problems. Finally, we note that a cut-off might even be an effective fraud prevention tool as, depending on the circumstances, an override request might signal a red flag to fraudulent use.

58. Finally, we note again that other regulatory solutions to usage management and bill shock, including the APT International Mobile Roaming Working Group recommendation paper, the OECD Council Recommendation on international

[74] European Commission, "Regulation on Public Mobile Communication Networks within the Union", EC 531/2012, June 13, 2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:172:0010:0035:EN:PDF>, Article 15.

roaming, and the Union-wide EU Roaming Regulation all adopt a financial cut-off as a supplement to usage threshold notifications.[75]

III. Enforcement & Administration

59. A number of parties have urged the Commission to make the CCTS the primary enforcement body for the Code itself. In addition, there have been suggestions that the Code will supersede the various existing Provincial statutes that currently cover similar grounds, as the latter are *ultra vires* Provincial authority. The Commission is urged to assist this override of Provincial legislation by expressly 'occupying the space' through the Code.

60. CIPPIC/OpenMedia.ca are deeply concerned by these claims. Collectively, they have the potential to dramatically undermine customer protection with respect to mobile services by extinguishing access to the Courts and to important substantive remedies and mechanisms such as damages and class actions. While some of the outcomes that would bring about this diminished level of protection may well be outside of the Commission's hands, we are of the view that the Commission should take whatever steps possible to diminish the likelihood of such an outcome. We elaborate below.

(a) The Code needs to co-exist with overlapping provincial legislation

61. As a starting point, we generally disagree with the suggestion that provincial legislation is, in pith and substance, regulation of telecommunications services or of the telecommunications industry. They are, rather, designed to regulate the fairness and content of telecommunications *contracts*. This is clear from their nature and scope of application. They do not, for example, seek to address any of the broader

[75] APT, International Mobile Roaming Working Group, Working Group Report, May 15, 2012, <http://www.apt.int/sites/default/files/2012/05/APT_IMR_Working_Group_Report_Final.pdf>; 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; European Commission, "Regulation on Public Mobile Communication Networks within the Union", EC 531/2012, June 13, 2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:172:0010:0035:EN:PDF>, Article 15.

telecommunications or policy objectives that we have argued this Code should address. Instead, they are narrowly focused on ensuring wireless contracts are transparent, that they do not include unfair terms such as excessive termination penalties and that they are not formed or renewed without clear customer knowledge and consent. While certainly tailored to the complexities and general practice that surrounds wireless service contracts, the various provincial statutes nonetheless direct their protections expressly at the service contract and seek to address harms that flow directly from it. Nor do we accept that provincial protection acts in any way impair a 'vital part' of telecommunications. Quite to the contrary, they improve telecommunications by providing much needed protections for customers entering into wireless service contracts.

62. We note, however, that it is not within the Commission's mandate or power to rule on the constitutionality of provincial legislation. Some parties have urged the Commission to use this Code in a way that would help render relevant provincial laws unconstitutional on the grounds that this would provide greater certainty for Canadians as to what legal regime applies. We do not agree. Once the Code comes into power, it will take years if not longer for the constitutionality of each provincial law to be challenged, likely on a provision by provision basis – hardly the hallmark of 'legal certainty'. Regardless of the outcome of what will undoubtedly be numerous and protracted legal battles, it can be expected that the Code will have to co-exist with provincial laws for at least the first several years of its operation.

63. In addition, it is difficult to contemplate a scenario where the Code will not continue to co-exist with, in the language of proposed section A4, 'benefits from other provincial law which are more favourable to the consumer.' Provincial consumer protection statutes offer a broad range of protections that are of general application.[76]

[76] *Seidel v. TELUS Communications*, 2011 SCC 15; *Microcell Communications v. Frey*, 2011 SKCA 136, leave to appeal refused, [2012] S.C.C.A. No. 42, for example.

Many of these, particularly those aimed at preventing misleading representations or unconscionable practices, are likely to overlap with specific elements of the Code.[77] If the Code is truly intended to supersede these protections, it will need to be dramatically expanded to cover a number of other protections of general application. We assume this is not the intention, however, and as such the Code should ensure, explicitly, that customers can continue to benefit from provincial protections which are more favourable to them.

64. For these reasons alone, we recommend that the Code, at least until its first review period, be designed to operate in a manner that presumes the ongoing operation of provincial legislation. At minimum, proposed section A4 must be preserved as is.

(b) Code must not foreclose access to judicial processes and remedies

65. As noted above, the CRTC does not have the power to invalidate provincial statutes. Regardless, it should not seek to do so. Provincial protections offer important protections beyond the specific provisions being debated here. Access to the courts is critically important, and the Code as currently drafted relies on the CCTS as the primary mechanism for enforcing the protections it offers. The CCTS is an effective dispute resolution body and CIPPIC/OpenMedia.ca values the vital role it plays, within the mandate appointed to it, in assisting customers resolve their disputes with their wireless service providers. However, it cannot on its own provide the mechanism necessary to assure customers the rights granted in the Code. It is limited in the penalties it can offer and the procedural safeguards under which it operates.

66. Of greatest concern – the CCTS operates as a one on one arbitration body. Not only are public interest interveners blocked from initiating complaints before the CCTS, but they are further prevented from intervening on complaints initiated by individual customers. In addition, while the CCTS has been effective in publishing, without naming the offending organizations,

[77] See *Richard v. Times,* 2012 SCC 8.

select decisions in its annual report, it is under no obligation to publish *any* decision or complaint that is resolved. Where a claim involves any level of legal ambiguity, this process puts customers at a distinct disadvantage, as they are not as capable at formulating legal arguments as their counterparts might be. In addition, WSPs, as repeat parties, develop over time vast stores of precedents which they can use (or ignore) to their benefit in such disputes. While these issues are endemic, this is mitigated under normal circumstances as legal precedents can be developed by the Courts in parallel processes. However, this will not, apparently, be the case with the Code. Worse – the Code introduces a number of new rights that do not draw on any historical principles. It is of great concern to CIPPIC/OpenMedia.ca that the parameters and interpretation of the rights in this Code will occur without any input from entities with legal expertise and a public interest mandate.

67. The Supreme Court of Canada has recognized the public interest in ensuring that arbitration awards are not permitted to prevent customers from accessing the courts to resolve their disputes:

> Each one of these objectives — confidentiality, lack of precedential value and avoiding "the dispute getting into the public domain" — makes perfect sense from the perspective of TELUS, but equally each of them undermines the effectiveness of s. 172…"[78]

As noted above, precedential and secrecy concerns are significantly more pronounced in the context of a new Code setting out rights that have never been interpreted before. Additionally, superseding provincial rights in favour of a purely CCTS driven process will prevent any class action-based activity arising from the Code. Similar concerns arise with respect to class actions:

> Permitting forum selection clauses free reign in class actions puts an inordinate amount of power in the hands of a multi-jurisdictional company to "separate" their potential

[78] *Seidel v. TELUS Communications*, 2011 SCC 15

> class-action liability into different jurisdictions…None of these alternatives is palatable in a legal system that has embraced the public policy values of a national class action.[79]

Courts have recognized the important public policy need to ensure class action rights are not taken away from customers by means of resorting to mandatory dispute resolution processes. Both of these rights – the right to class actions as a mechanism for resolving rights and the right not to have arbitration imposed as a means of dispute resolution – are additionally encoded in several provincial consumer protection laws.

68. Centralizing provincial protections in one national Code with exclusive CCTS jurisdiction would defeat both of these policy objectives, while exacerbating procedural inequities inherent in a dispute resolution process. The protections offered in the Code, if they are to achieve their objectives, require an influx of judicial guidance. Comparable provincial protections should therefore be preserved.

(c) The Code should contemplate a private right of action

69. In addition, for the policy reasons stated in paragraph 66 above, the provisions in the Code should be made available for interpretation in the courts. As such, WSPs should be mandated to include the entire Code as a component of their contractual obligation to customers.

IV. Measuring Success & Concluding Thoughts

70. The appropriate empirical metrics for measuring the success of this Code will depend in large part on its objectives. We have suggested that the objectives of this Code should be, primarily, to ensure the development of an environment that is responsive

[79] *Microcell Communications v. Frey*, 2011 SKCA 136, leave to appeal refused, [2012] S.C.C.A. No. 42, para. 116. See also *Griffin v. Dell Canada Inc.,* 2010 ONCA 29:

> Both academic research and the common sense reflected by the findings of the motion judge in this case indicate that suppliers and sellers regularly insert arbitration clauses in order to defeat claims rather than out of a genuine desire to arbitrate disputes with consumers...The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding.

to the economic and social requirements of users of wireless services.[80] This requires, primarily, empowerment of customers to ensure they are able to make informed and effective decisions within a competitive wireless marketplace. We have argued that the Code should strive to empower customers in ways that will not only alleviate growing frustration with WSPs in Canada, but also will ensure that the choices empowered Canadians make will more effectively resonate, through competitive pressures, in the broader telecommunications landscape.

71. As such, indicators of a successful Code should include the following (we note some of these will require benchmarking before the Code comes into effect):

- **Improved clarity of service agreements:** The Code should improve the clarity of contract terms and conditions, through such tools as language simplicity indexes;
- **Less bill shock:** A decreased percentage of customers indicating they have experienced dramatic surprises on a monthly bill, as measured by survey;
- **Improved general customer satisfaction:** Improved general customer satisfaction with wireless services, as measured by opinion surveys;
- **Improved understanding of services:** Customer understanding of the nature of their services should improve. This might be measured through surveys matching customer perception of how their service operates against how it operates in reality; and
- **Improved general international standing:** Improvement in Canada's international standing in terms of price, advertised speed, penetration, etc.

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[80] *Telecommunications Act*, S.C. 1993, c. 38, section 7(h).