



## Telecom Decision CRTC 2016-67

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Ottawa, 24 February 2016

*File number: 8661-C182-201508417*

### **The Canadian Network Operators Consortium Inc. – Application for relief regarding the pricing and availability of Eastlink’s higher-speed retail Internet service for resale**

*The Commission **directs** Eastlink to continue calculating the rates for its higher-speed retail Internet service available to other Internet service providers for resale (resale Internet service) at a 25% discount from their retail Internet service rate, applied consistently to all competitors’ end-customers, regardless of the duration of any relevant promotions that Eastlink offers its retail Internet service end-customers. The Commission also **directs** Eastlink to provide resale Internet service in its serving territory in the Atlantic Provinces at all of the same speeds that it offers its higher-speed retail Internet service to its own end-customers. This direction is to be implemented according to the timelines and subject to the conditions set out in this decision.*

*Eastlink’s obligation to provide its resale Internet service in a given area within its serving territory in the Atlantic Provinces shall cease when Eastlink provides third-party Internet access service in that area pursuant to an approved tariff.*

*The Commission’s determinations in this decision will enhance the efficiency and competitiveness of Internet service providers in Eastlink’s serving territory in the Atlantic Provinces, to the benefit of end-customers in that region.*

### **Application**

1. The Commission received an application from the Canadian Network Operators Consortium Inc. (CNOc), dated 7 August 2015, relating to the higher-speed retail Internet service available to Internet service providers for resale (resale Internet service) offered by Bragg Communications Incorporated, operating as Eastlink (Eastlink).<sup>1</sup> Specifically, CNOc requested that the Commission issue a final order to require Eastlink to
  - continue providing its 20 megabits per second (Mbps) resale Internet service in any area in the Atlantic Provinces in which it is not offering third-party Internet access (TPIA) service, at rates calculated consistent with Telecom Decisions 99-11, 2003-87, and 2004-24 (the resale Internet service decisions) – that is, at a 25% discount from Eastlink’s retail

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<sup>1</sup> As defined in Telecom Decision 98-9, higher-speed Internet services consist of Internet services at speeds above 64 kilobits per second.

Internet service rate, applied consistently to all competitors' end-customers, regardless of the duration of any relevant promotions that Eastlink offers its retail Internet service end-customers; and

- start providing resale Internet service at the same speeds that it offers its higher-speed retail Internet service to its own end-customers (retail Internet service) in the Atlantic Provinces, if Eastlink does not offer TPIA service according to a Commission-approved tariff within a reasonable time frame, at rates calculated consistent with the resale Internet service decisions.<sup>2</sup>
2. CNOC also requested interim relief from the Commission, in the form of a directive prohibiting Eastlink from modifying the formula it uses to determine the rate that it charges for its resale Internet service. On 31 August 2015, the Commission issued a letter granting CNOC's request for interim relief.
  3. The Commission received an answer to CNOC's application from Eastlink. The public record of this proceeding, which closed on 19 October 2015, is available from the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the file number provided above.

## **Background**

4. Currently, Eastlink calculates the rate for its resale Internet service in an applicable serving area at a 25% discount from the lowest retail Internet service rate that it charges its own end-customers in that area during any one-month period.
5. According to CNOC, in May 2015, Eastlink informed competitors that subscribe to its resale Internet service in Halifax, Nova Scotia, that in its view, the formula it uses to calculate its rates for this service was incorrect. Eastlink indicated that therefore, it would modify the formula it uses to calculate its resale Internet service rates in its serving territory in the Atlantic Provinces by passing promotional discounts on to competitors for only the same period of time that Eastlink offers retail Internet service discounts to its own end-customers (referred to hereafter as Eastlink's resale Internet service rate formula modification).
6. Eastlink filed Tariff Notice 35, dated 15 September 2015, in which the company proposed to introduce TPIA service in Nova Scotia and Prince Edward Island. Eastlink submitted an amendment to Tariff Notice 35 on 14 January 2016. As of the date of this decision, the Commission's review of Tariff Notice 35 is ongoing.

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<sup>2</sup> For example, Eastlink currently offers its resale Internet service to competitors in Halifax, Nova Scotia, at a speed of 20 Mbps. However, it offers its retail Internet service at speeds of 20 Mbps, 100 Mbps, 150 Mbps, and 400 Mbps to its end-customers in Halifax.

7. Eastlink stated that implementation of TPIA service would take approximately 12 weeks following the Commission's approval of Tariff Notice 35 and the signing of service agreements with competitors that wish to subscribe to that service. Eastlink added that it intends to file a tariff application in which it would propose to introduce TPIA service in New Brunswick and in Newfoundland and Labrador immediately following the Commission's approval of Tariff Notice 35.

## **Issues**

8. The Commission has identified the following issues to be addressed in this decision:
  - Should Eastlink be permitted to implement its resale Internet service rate formula modification?
  - Should Eastlink provide its resale Internet service at the same speeds that it offers its retail Internet service to its end-customers in the Atlantic Provinces?

### **Should Eastlink be permitted to implement its resale Internet service rate formula modification?**

9. CNOC submitted that Eastlink had been correctly calculating the rates for its resale Internet service. CNOC added that the resale Internet service decisions establish that a 25% discount on retail Internet service rates is to be applied to the lowest rate offered by a cable carrier to any customer in an applicable serving area at any time, and not on a temporary customer-by-customer basis.
10. CNOC argued that Eastlink's resale Internet service rate formula modification would result in a sudden increase in Eastlink's resale Internet service rates. CNOC considered that this increase would lead to an undue lessening of competition and irreparable harm to competitors in Eastlink's serving territory in the Atlantic Provinces.
11. CNOC submitted that competitors in the Atlantic Provinces have been waiting many years for Eastlink to introduce TPIA service, which would result in enhanced competition. CNOC stated that the implementation of Eastlink's resale Internet service rate formula modification may remove the incentive for Eastlink to transition rapidly to TPIA service.
12. Eastlink submitted that it had erred in its calculations of its resale Internet service rates. Specifically, Eastlink stated that its promotions to its retail Internet service end-customers are available only to new customers for a specified time period (e.g. the company's current promotional period lasts three months). However, competitors currently receive Eastlink's resale Internet service at promotional rates for all of their end-customers indefinitely. Eastlink submitted that its use of bundle and promotional discounts had greatly increased since resale Internet service was implemented, leading to much greater discounts for competitors.

13. Eastlink argued that consequently, its resale Internet service rate formula, as it was being applied, was resulting in rates that were not just and reasonable. Eastlink added that CNOC's interpretation of the resale Internet service decisions would result in competitors being granted an undue preference regarding Eastlink's resale Internet service rates.

#### **Commission's analysis and determinations**

14. In Telecom Decision 99-11, the Commission required incumbent cable carriers to provide resale Internet service, at a 25% discount from their retail Internet service rate, until the incumbent cable carriers provide competitors with access to their telecommunications facilities through TPIA service, pursuant to a Commission-approved tariff. The Commission also introduced resale Internet service as a transitional measure to enable competition pending the establishment of TPIA service and to incent underlying cable carriers to provide TPIA service.
15. In Telecom Decisions 2003-87 and 2004-24, the Commission clarified that the 25% discount was to be applied to the lowest retail Internet service rate charged to a cable customer in a month in the applicable serving area. The Commission further specified that this discount would apply to all end-customers equally in the entire serving area. The Commission did not limit the duration of the discount on an individual customer basis. Accordingly, the 25% discount applies regardless of the duration of any promotion offered by the underlying cable carrier to any cable customer.
16. Eastlink did not provide sufficient rationale to support its position that its current resale Internet service rates are not just and reasonable.<sup>3</sup> This position is further weakened by the fact that Eastlink has been charging competitors these rates for several years, and is only now seeking to introduce the resale Internet service rate formula modification.
17. Regarding Eastlink's undue preference argument, its argument was, in effect, that its own pricing subjects itself to an undue or unreasonable disadvantage relative to its competitors. The Commission cannot find that where the company's resale Internet service rates depend on its own retail pricing, there is a breach of subsection 27(2) of the *Telecommunications Act* (the Act).<sup>4</sup> As well, no other incumbent cable carrier commented in this proceeding that resale Internet service rates are not just and reasonable or that the rate calculation leads to an undue preference or an undue or unreasonable disadvantage.

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<sup>3</sup> According to subsection 27(1) of the *Telecommunications Act*, every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

<sup>4</sup> According to subsection 27(2) of the Act, no Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

18. Eastlink's resale Internet service rate formula modification would not only result in increased costs to competitors that subscribe to Eastlink's resale Internet service, but would create uncertainty and increase their administrative burden. For example, competitors may be required to track their end-customers' eligibility to qualify for promotional discounts, and the promotional period for those discounts would be determined only by Eastlink. This result would be contrary to the telecommunications policy objective set out in paragraph 7(c) of the Act, which is to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.
19. In light of the above, Eastlink should not be permitted to implement its resale Internet service rate formula modification. Accordingly, the Commission **directs** Eastlink to continue calculating its resale Internet service rates consistent with the resale Internet service decisions. The resale Internet service rates must be applied consistently to all competitors' end-customers, regardless of the duration of any relevant promotions offered by Eastlink to its own retail Internet service end-customers.

**Should Eastlink provide its resale Internet service at the same speeds that it offers its retail Internet service to its end-customers in the Atlantic Provinces?**

20. CNOC argued that it is anti-competitive and unjustified for Eastlink to limit competitors that subscribe to Eastlink's resale Internet service to a speed of 20 Mbps. CNOC stated that to compete effectively and offer real choice to consumers, Eastlink's competitors that do not have access to TPIA service must be able to offer the full range of Eastlink's retail Internet service speeds to their end-customers.
21. Eastlink argued that it was neither necessary nor appropriate for the Commission to require the company to offer higher resale Internet service speeds for its resale Internet service at this time. Eastlink submitted that it intends to offer TPIA service shortly in all areas in the Atlantic Provinces where it offers retail Internet service to its own end-customers. Eastlink added that it would be required to provide higher speeds to competitors through this TPIA service, and that it needed to focus its resources on the implementation of this service.

**Commission's analysis and determinations**

22. In Telecom Decision 99-11, pursuant to section 24 of the Act, the Commission required the incumbent cable carriers to make available to competitors their higher-speed retail Internet service for resale until they provide TPIA service pursuant to an approved tariff. Eastlink's current offering of resale Internet service at a single speed is not consistent with this requirement.
23. The enforcement of the existing requirement that Eastlink's resale Internet service be made available to competitors at all speeds that are available to its own retail Internet service end-customers would further the Commission's goals of (i) promoting competition in the retail Internet services market, and

(ii) incenting incumbent cable carriers to implement TPIA service as quickly as possible.

24. While the Commission does recognize that some efforts are required by Eastlink to implement the required changes, Eastlink already provides its retail Internet service at higher speeds. Since the nature of resale is to repackage an existing service, it is likely that Eastlink can offer these same service speeds on a resale basis in a timely manner.
25. In light of the above, the Commission finds that under the section 24 condition set out in Telecom Decision 99-11, Eastlink is required to make all speeds of its retail Internet service available for resale in Eastlink's serving territory in the Atlantic Provinces, consistent with the rating structure, terms, and conditions specified in Telecom Decision 99-11.
26. Accordingly, the Commission **directs** Eastlink to abide by the condition to provide its resale Internet service in its serving territory in the Atlantic Provinces at all of the same speeds that it offers retail Internet service to its own end-customers, consistent with the rating structure, terms, and conditions specified in Telecom Decision 99-11, as further clarified in Telecom Decisions 2003-87 and 2004-24, and subject to the timeline and conditions below.
27. With regard to an implementation timeline, in Telecom Decision 2004-24, the Commission directed Shaw Cablesystems G.P. (Shaw) to make its higher-speed retail Internet service available to competitors within certain time periods, while recognizing that, at the time of that decision, Shaw intended to implement TPIA service shortly. Given the similarity of those circumstances to Eastlink's current circumstances, the same timeline is appropriate in this case.
28. Accordingly, the Commission **directs** Eastlink to meet the time periods specified below:
  - a competitor can inform Eastlink, in writing, of the first serving area where it wishes to subscribe to Eastlink's resale Internet service;
  - within 45 days of receiving this type of request, Eastlink shall make its resale Internet service available in that serving area;
  - once Eastlink makes its resale Internet service available in that first serving area for a competitor, that competitor may request the service in a second serving area. In the second serving area, Eastlink shall make its resale Internet service available within two weeks of receiving a written request; and
  - thereafter, for each additional request for another serving area, which shall be made sequentially, Eastlink shall make its resale Internet service available within two weeks of receiving a written request.

29. As set out in Telecom Decision 99-11, the requirement to provide resale Internet service remains in place until the incumbent cable carrier provides competitors with access to its telecommunications facilities, pursuant to a Commission-approved tariff.
30. Accordingly Eastlink's obligation to provide its resale Internet service in a given area within its serving territory in the Atlantic Provinces shall cease when Eastlink provides interconnection in the form of TPIA service in that area pursuant to an approved tariff.

### **Policy Direction**

31. The Policy Direction<sup>5</sup> states that the Commission, in exercising its powers and performing its duties under the Act, shall implement the policy objectives set out in section 7 of the Act, in accordance with paragraphs 1(a), (b), and (c) of the Policy Direction.
32. The Commission's determinations in this decision advance the policy objectives of the Act, especially the objective set out in paragraph 7(c). Specifically, these determinations will enhance the efficiency and competitiveness of Internet service in Eastlink's serving territory in the Atlantic Provinces, to the benefit of Internet service end-customers in that region.

Secretary General

### **Related documents**

- *Cybersurf Corp. v. Shaw Cablesystems G.P. - Enforcement of Telecom Decision CRTC 2003-87*, Telecom Decision CRTC 2004-24, 2 April 2004
- *Application by Cybersurf seeking resale of Shaw higher-speed retail Internet service*, Telecom Decision CRTC 2003-87, 23 December 2003
- *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities*, Telecom Decision CRTC 99-11, 14 September 1999
- *Regulation under the Telecommunications Act of certain telecommunications services offered by "broadcast carriers"*, Telecom Decision CRTC 98-9, 9 July 1998

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<sup>5</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006