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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

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

December 18, 2012

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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 pleased to provide reply comments in the above-noted proceeding. We reiterate the importance of this proceeding, as set out in Telecom Notice of Consultation CRTC 2012-556 – to address shortcomings in various telecommunications services that cannot be addressed by competition or, more particularly, to do so by ensuring protections offered to Canadians in a number of telecommunications-specific consumer protection laws.[1] In furtherance of this objective, this proceeding seeks to develop a Wireless Consumer Protection Code ("Code") to provide much needed protections for customers of wireless services.

2. We note with concern, however, the possibility that this well-meaning process might result in the opposite of its stated objective. A number of parties have suggested that this Code conform almost exclusively to the Quebec Consumer Protection Act (QCPA).[2] While, as parties have noted, the QCPA provided a template for a number of mobile-specific protection regimes, it is a first generation wireless protection statute, while legislative efforts since then have identified further flaws in the current wireless service market. In fact, while the QCPA is *informed* by the wireless context, its protections are of general application, while the other provincial regimes are more specifically tailored to the wireless context.

3. Of greatest concern are suggestions that consumer protections for Wireless Service Providers (WSPs) should be harmonized nationally at the lowest common

[1] Telecom Decision CRTC 2012-556, *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, CRTC Reference Nos.: 8661-C12-201204057, 8620-R28-201202598 and 8661-P8-201116807, <http://www.crtc.gc.ca/eng/archive/2012/2012-556.htm>, at paras. 25-27.
[2] Canadian Wireless Telecommunications Association, Initial Comments, December 4, 2012, TNC CRTC 2012-557, para. 2(iii); Bell Canada, Initial Comments, December 4, 2012, TNC CRTC 2012-557, para. 57; Rogers Communications, Initial Comments, December 4, 2012, TNC CRTC 2012-557, para. 69; Québecor Média, Initial Comments December 4, 2012, TNC CRTC 2012-557, Part IV, generally.

denominator.[3] The purported benefit of this approach, for customers and WSPs alike, is the clarity of providing a 'one-stop' solution for customer wireless concerns. This, it is argued, will avoid generating a confusing set of overlapping rights, venues and procedural mechanisms.

4. CIPPIC/OpenMedia.ca reject this harmonization approach. The key to standardization must be adoption of the *highest* common denominator, in addition to any further protections deemed necessary for a competitive, effective and responsive wireless market. Aside from eroding protections and remedies already offered to wireless customers and generally failing to adequately address consumer protection and competition concerns, this approach will not provide the single resolution point that it is intended to, as customers will necessarily have ongoing recourse to provincial protection statutes.[4] Indeed, it is our view that customers will be best served by a Code that is flexible in scope of application and enforceable by *whatever* procedural mechanism or venue a customer chooses. We elaborate on this scope of application below.

5. In addition, we provide comments below on various elements proposed by a number of parties regarding the Code. As noted above, our guiding principle in doing so is to ensure the Code reflects customer protection 'gaps' in the wireless market as reflected in the record of this proceeding as well as in the cumulative experience of various provincial legislative regimes and proposals.[5]

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[3] See in particular Canadian Wireless Telecommunications Association, "CWTA National Wireless Services Consumer Code", Appendix to Initial Comments, TNC CRTC 2012-557, December 4, 2012 ["CWTA Proposal"], particularly Article 1.2.

[4] *Seidel v. TELUS Communications*, 2011 SCC 15, para. 38; *Microcell Communications v. Frey*, 2011 SKCA 136, leave to appeal refused, [2012] S.C.C.A. No. 42, para. 116; *Richard v. Times*, 2012 SCC 8, para. 43.

[5] Bill 35, "The Consumer Protection Amendment Act (Cell Phone Contracts)", S.M. 2011, c. 25, (Status: Assented to June 16, 2011, Manitoba), <http://web2.gov.mb.ca/laws/statutes/2011/pdf/c02511.pdf> ("MCPAA"); Bill 60, "An Act to amend the Consumer Protection Act and other legislative provisions", 2009, c. 51, (Status: Assented to December 4, 2009), <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C51A.PDF> ("QCPA"); Bill 65, "An Act to Amend Chapter 92 of the Revised Statutes, 1989, the Consumer Protection Act, to Ensure Fairness in Cellular Telephone Contracts, 2012, c. 19, (Status: Assented to May 17, 2012), <http://nslegislature.ca/legc/bills/61st_4th/1st_read/b065.htm> ("NSCPA"); Bill 6, "An act to amend the

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6. We note that our substantive discussion below is intended to merely supplement the more comprehensive discussion set out in our initial comments and our comments are limited to what is necessary to address issues raised by other parties to this proceeding.

7. Before embarking on this analysis, we note that the Public Interest Advocacy Centre (PIAC), in its initial comments, has suggested a set of principles intended to provide a backdrop for more specific requirements of the Code.[6] We are of the view that these principles accurately reflect the animating purpose of the Code, and suggest that they be incorporated directly into the final Code as interpretive principles.

(a) Clarity of contract terms and conditions

8. In addition to the various requirements articulated in our initial comments, we reiterate the importance of ensuring a 'definitive' version of the contract exists and is accessible to the customer at all times. Our survey of comments in this proceeding identified a number of instances where service providers were unable to provide a customer with any definitive document setting out the explicit set of rights and obligations defining their relationship. Customers must have access to this definitive version, not only at the time of purchase, but also at any other time during the customer relationship and, in particular, subsequent to any change to the nature of the service relationship. The Code should also require WSPs to keep iterations of the customer contract as it evolves over the term of service, whether determinate or indeterminate.[7] In addition to requiring contractual terms to be written in clear, plain

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

[6] Public Interest Advocacy Centre, Initial Comments, December 4, 2012, TNC CRTC 2012-557, para. 12.

[7] See Consumers Council of Canada, Initial Comments, December 4, 2012, TNC CRTC 2012-557, para. 48.

and understandable language, certain elements of the contract need to be prominent.[8] Prominence should include an itemized list of key conditions to be included in the first few pages of the contract as well as a summary page setting out key costing terms, as suggested by PIAC and CCC.[9]

(b) Changes to contract terms and conditions

9. In our initial comments, CIPPIC/OpenMedia.ca suggested a categorical restriction on unilateral changes made during the duration of a fixed term contract. We further noted that excluding a finite list of non-material activities from this general prohibition would be acceptable. It is critical, in our view, that the Code immunize customers from haphazard changes imposed on them by WSPs. This becomes increasingly important in proportion to the extent customers are locked into an ongoing relationship with the service provider subsequent to the change.

10. A number of parties have proposed to limit unilateral changes, defined as 'essential terms' or as including price, make changes to the 'nature of the goods', or to the term, price or volume of fixed term services.[10] If termination obstacles are effectively removed, the prohibition on contractual changes need not be as restrictive. Under such conditions, a finite list of 'material' or 'essential' terms that cannot be changed throughout the length of a fixed term contract. CIPPIC/OpenMedia.ca propose the following proposal:

> **Article [X]: Definitions**
> **Material Change.** For the purpose of this Code, a material change is one that:
> **(1)** alters the length or term of any contractual obligation;

[8] Bell, Initial Comments, para. 16, suggests that 'prominent' is not necessary, but given the length and nature of cellular contracts, there are upper limits to 'understandability'.
[9] PIAC, Initial Comments; CCC, Initial Comments.
[10] See CWTA Proposal, Article 6.1 and TELUS, "Mandatory Code for Consumer Wireless Services: TELUS' Proposed", Appendix A to its Initial Comments, December 4, 2012, TNC CRTC 2012-557. ("Telus Proposal"), Article 4.

(2) alters any costs associated with the service, whether recurring or incremental;
(3) reduces the scope of activity a customer can undertake before triggering additional costs, including changes to usage allowances, time of day or week usage limitations or geographic designations;
(4) reduces the scope any usage allowance or abuse policy limit that, if exceeded, triggers a direct limitation on data access speeds;
(5) alters any technological or physical features that restrict the functioning of any handset or other service-associated product; or
(6) alters the nature of any goods or services offered under the contract.

Article [Y]: Unilateral Changes to Material Terms.
(1) Any material change to any element of the service is prohibited unless:
a. the customer consents explicitly and solely to the material change in question by a positive and express act of affirmation;
b. the material change will benefit the customer while not increase any customer obligations or reducing any service provider obligations; or
c. the customer is operating under an indeterminate term contract that may be terminated without incurring any indemnification fees.
(2) Following any material change, the Wireless Service Provider must:
a. provide the customer with a copy of the service contract that reflects the material changes in question;
b. provide the customer the opportunity to refuse the material change within 14 days of the next billing cycle.

(c) Contract cancellation, expiration and renewal

11. As noted in our initial comments, reducing unjustified barriers to service switching is central to ensuring customer satisfaction and effective competition in wireless services. While WSPs may view churn as a negative, it is, in fact, an indication of competition and especially so in a market that is reliant on the recent addition of a number of new entrants for its competitive edge. It is especially critical to separate device ownership from service fees. As matters currently stand, the bundling of these

two particular offerings operates to insulate both the device and the service from effective competitive pressures.

12. Handset subsidies are being employed almost primarily as a means to locking customers in and, hence, to reducing competition. Indeed, interrogatory responses to this proceeding strongly suggest that incumbents and regional incumbents do not appear to offer any competitive no-handset service offerings.[11] WSPs characterize the prevailing condition as 'win-win'. Customers are able to upgrade devices regularly, as technology steadily improves. At the same time, WSPs need invest less in advertising, customer service training, and other elements of their services as the handset subsidy insulates WSPs from other churn-inducing metrics.[12]

13. Under prevailing conditions, it is difficult to assess whether the customer benefit (a new handset every three years) is optimal. While, on the one hand, it is difficult to imagine why a customer would *not* accept a brand new handset every three years or so, it is not clear that the same customer would make that decision if offered any sort of comparable alternative incentive from the same provider. Further, just as incumbents have minimal incentive to provide competitive 'no-handset' offerings, incentives to compete on handset prices are even lower. Absent robust competition on actual handset prices, it is, once again, difficult if not impossible for customers to assess the benefits of a 'free' or subsidized handset.

[11] Of Bell, TELUS and Rogers (combined national market share: 91%: CRTC, Communications Monitoring Report 2012, Figure 5.5.4, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr5.htm#f554>), Bell offers a 10% discount from advertised plans, Rogers an TELUS offer *no* discount at all (Responses to Information, TNC CRTC 2012-577, December 10, 2012: Bell Mobility(CRTC)29Nov12-2; TELUS(CRTC)29Nov12-2; Rogers(CRTC)29Nov12-2, respectively). SaskTel, despite a sizable (20%) customer base operating with no service subsidy, similarly refrains from providing any competitive no-handset offerings, while MTS Allstream provides no *advertised* competitive offerings (SaskTel(CRTC)29Nov12-2; MTS Allstream(CRTC)29Nov12-2, respectively). Although some incumbents offer no-handset plans through different service offerings (Chatr, for example, is a Rogers subsidiary that offers no-handset plans).
[12] *Ibid*.

14. In addition, to the extent that handset lifecycles are shorter than the contractual terms attached to them, WSPs have a unique opportunity to lock customers in for another term by waiving any outstanding indemnification fees in exchange for a new fixed term contract. Finally, as we noted in our initial comments, lack of clarity of renewal periods and automatic 30-day cancellation periods for indeterminate contracts add additional costs to churn/competition. All of these features combine in order to greatly reduce the ability of customers to make competitive choices. As indicated in our initial comments, many individuals have indicated growing frustration with being unable to end a service interaction in spite of a desire to based on poor customer service, poor network service, and a range of other legitimate concerns.[13]

15. In light of this, CIPPIC/OpenMedia.ca suggest an alteration to our initial proposal for handset-related terminations. Our initial proposal suggested limiting termination fees expressly to indemnification for the outstanding cost of the handset, pro-rated over the remaining term of the contract (the following formula was suggested: [initial handset cost / # of months in the contract] – months since contract initiation). While this same formula should be retained, we suggest that WSPs should have the option of paying this outstanding indemnification in monthly instalments. This option should *particularly* be available if customers are subjected to material changes to the service of the type set out in sub-section (b) above.

(d) Hardware Restrictions

16. In our initial comments, CIPPIC/OpenMedia.ca pointed to significant customer concern over technical or physical restrictions on handsets. We sought an absolute ban on handset locking or, alternatively, for the Code to obligate WSPs to unlock any locked phone upon request and free of charge.

[13] See excerpts in sub-sections I(b) and (c) of our initial comments to this proceeding.

17. We reiterate that, in our perspective, there is no legitimate reason to allow service locking and many legitimate reasons animating customer preferences for full phone functionality. Notably, most phones are now capable of operating in other jurisdictions, and customers should not be obligated to purchase an additional phone solely for vacations. WSPs claim that the need to ensure customer compliance with term contracts justifies phone locking, at least for the duration of the contract itself.[14] This is, however, a somewhat exception protection with few examples in other contexts. WSPs have other remedies available to them for ensuring service or termination fees are paid including recourse to collection agencies. Indeed, recent amendments to our *Copyright Act* have recognized that WSPs do not require these extraordinary protections by categorically exempting such activities from general prohibitions on the circumvention of such technological protection measures adopted in the amendments.[15]

18. CIPPIC/OpenMedia.ca remain sceptical of WSP assertions that a high degree of cost is involved in unlocking a handset. It can be as simple as providing the customer with the unlock code.[16] Arguably, any costs associated with the maintenance of such a database should be included in core service costs. Even where a WSP undertakes to unlock a phone on behalf of a customer, this should not take longer than a few minutes, nor does it typically involve any technical sophistication beyond what is required of most mobile service representatives.

19. In spite of this, CIPPIC/OpenMedia.ca find TELUS' proposed handset unlock provision to be a reasonable alternative, modified as such:

[14] See, for example, Responses to Information, TNC CRTC 2012-577, December 10, 2012: Bell Mobility(CRTC)29Nov12-2; TELUS(CRTC)29Nov12-2; Rogers(CRTC)29Nov12-2.
[15] See *Copyright Act*, R.S.C. 1985, c. C-42, section 41.18.
[16] Some WSPs assert that there are significant costs involved with the maintenance of a database of unlock codes. It is not clear how the maintenance of a simple database can, on its own, amount to any material costs.

> **Article [Z]. Device Locks.**
> Where the Service Provider has provided a device for use with the service, the device may be restricted through technological means, to operate only on the Service Provider's network. The Service Provider must provide the Customer, free of cost, with the means to unlock the device after no more than 90 days of service, ~~if the device manufacturer allows it. The~~ If the Service Provider unlocks the phone for the Customer, it shall be entitled to charge a reasonable fee for doing so ~~unlocking the device,~~ provided the fee is disclosed prominently in the Service Contract as well as on the Service Provider's web site.

However, we note that WSPs can save any costs associated with this unlocking process by simply providing unlocked handsets.

II. Scope of Application

20. As noted above, proposals to use this Code as a means of harmonizing customer protections at the lowest common denominator will not only be harmful to customer interests, but will also fail to achieve the objectives of this proceeding. Further, we note that in spite of the effectiveness of the CCTS in addressing individual complaints, it remains a mandatory arbitration venue, focused on resolving individual complaints predominantly in secret, with limited precedential value (only unresolved complaints are published) and narrowed remedial ability. While CIPPIC/OpenMedia.ca envision a role for the CCTS in enforcing this Code, it cannot be the sole mechanism for doing so.

21. As noted recently by the Supreme Court of Canada, mandatory arbitration may be greatly beneficial to service providers, but, within the specific context of consumer protection legislation, is undesirable:

> 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…"[17]

Finally, we note that many issues initiated under this Code, while aimed at facilitating the objectives of the *Telecommunications Act*, may at the same time implicate general (that is, not WSP-specific) provisions under provincial consumer protection statutes.[18] As such, limiting scope of the Code to CCTS oversight would force customers to initiate actions in multiple venues.

III. Conclusion

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

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[17] *Seidel v. TELUS Communications*, 2011 SCC 15, para. 38, invalidating a mandatory arbitration clause under the British Columbia Business Practices and Consumer Protection Act. We note that prohibitions on mandatory arbitration or other mechanisms that, in effect, defeat procedural remedies are a common feature of many provincial consumer protection statutes. Note also: *Microcell Communications v. Frey*, 2011 SKCA 136, leave to appeal refused, [2012] S.C.C.A. No. 42, para. 116: "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 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."
[18] *Richard v. Times*, 2012 SCC 8, para. 43.