

Final Reply of
Campaign for Democratic Media



Telecom Public Notice CRTC 2008-19:
Review of the Internet Traffic Management Practices
of Internet Service Providers

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Table of Contents

Introduction.....	1
Part I: Applying the CDM Framework.....	2
Part II: Assessing the Framework:.....	5
(1) One Size Fits All.....	5
(2) Subjectivity of the Proposed Framework.....	6
(3) Content of the Test.....	7
i) The “Reasonableness” Standard.....	7
ii) Dropping the CDM Test in Favour of “Reasonableness” Guidelines.....	8
iii) The Benefits of Cost/Benefit Analysis.....	9
Part III: Future Enforcement of Framework.....	9

Introduction

- [1] CDM has submitted that ISPs lack incentives to tailor network management to the requirements of the *Telecommunications Act*. It is therefore unsurprising that many Canadian ISPs have developed and adopted practices that trench excessively on ss.27(2), 26 and 7 of the Act. Nothing pushes ISPs toward less intrusive solutions for meeting legitimate traffic management needs, even when non-intrusive solutions are equally available and effective in doing so. CDM's proposed framework provides ISPs with guidance so they can find new and innovative ways to meet their legitimate objectives in ways that do not ignore the Act. These will push ISPs towards provisioning as the primary response to congestion. Departure from that standard response would only occur when traffic volumes reached levels that could not be matched by reasonable provisioning alone. Only in such cases would more active traffic management practices be appropriate, and then such practices must be justifiable as consistent with the Act.
- [2] There is evidence on the record that, with the proper incentives in place, ISPs could develop economically viable alternatives to invasive traffic management practices that achieve their legitimate objectives, but do so in a ways that are equally effective and significantly less intrusive of the Act. The FCC provided Comcast with such an incentive after reasoning that Comcast's application-specific throttling practices were not reasonable:

We next must ask whether Comcast's means are carefully tailored to its interest in easing network congestion, and it is apparent that no such fit exists. As an initial matter, Comcast's practice is overinclusive for at least three independent reasons. First, it can affect customers who are using little bandwidth simply because they are using a disfavored application. Second, it is not employed only during times of the day when congestion is prevalent: "Comcast's current P2P management is triggered . . . regardless of the level of overall network congestion at that time, and regardless of the time of day." And third, its equipment does not appear to target only those neighborhoods that have congested nodes— evidence suggests that Comcast has deployed some of its network management equipment several routers (or hops) upstream from its customers, encompassing a broader geographic and system area. With some equipment deployed over a wider geographic or system area, Comcast's technique may impact numerous nodes within its network simultaneously, regardless of whether any particular node is experiencing congestion. Furthermore, Comcast's practice suffers from the flaw of being underinclusive. A customer may use an extraordinary amount of bandwidth during periods of network congestion and will be totally unaffected so long as he does not utilize a disfavored application.¹

In response to these findings, Comcast was able, within a matter of *months*, to develop a traffic management solution that was economically viable, equally effective, and carefully tailored to its stated legitimate objectives of relieving congestion.

¹ *Free Press v. Comcast*, No. 08-183 (F.C.C. 2008), 2008 WL 3862114 <online: http://www.fcc.gov/Daily_Releases/Daily_Digest/2008/dd080820.html> [Comcast].at para. 48.

[3] CDM's proposed analytical paradigm will similarly guide ISPs towards solutions that impact on the Act as little as necessary. This will in turn minimize the degree to which the Commission will be required to intervene in ISP practices to obtain compliance with the Act.

Part I: Applying the CDM Framework

[4] The CDM test requires ISPs to justify any traffic management practice that is discriminatory, a prima facie violation of s.36 or contrary to s.7. Current application-specific traffic management practices fit this description. CDM reiterates that both ss. 27(2) and 36 are salient in assessing ITMPs, as the two statutory provisions address different concerns.

[5] Section 27(2) protects against unjust discrimination, undue preference *and* subjecting any person to an undue or unreasonable disadvantage. Some ISPs have attempted to limit the scope of s.27(2) to protection against undue preference. CDM submits that there is no justification for such a narrow interpretation. Current ISP application specific throttling practices do discriminate against developers and users of such applications including those who rely on these to distribute legitimate content they have developed.² Recent evidence from BitTorrent confirms the deleterious effects of current Canadian traffic interference practices, strengthening arguments that such practices discriminate and must be justified.³

[6] Section 36 protects against different dangers: in the context of *Internet* communications, s.36 requires CRTC approval for actions that control the content or influence the meaning or purpose of a telecommunication in a manner that departs from Internet common carrier norms. Slowing down P2P file-sharing applications influences the meaning and purpose of these telecommunications, which is to transfer a file as quickly as possible. Any ISP practice that does this in a manner that departs from common carrier norms is, prima facie, in violation of s.36. Application specific throttling is, indeed, such a departure, as common Internet carriers traditionally have neither based traffic management decisions on the user's chosen application, nor departed from established IETF traffic management standards.⁴

[7] There is broad consensus among a number of parties, including some ISPs, that prima facie violations of ss.27 and/or 36 should be justified.⁵ In order to pass CDM's proposed test for doing so, an ISP must justify its traffic interference practice by showing that it:

² CDM, *Comments to Telecom Public Notice 2008-19*, February 23, 2009, at paras. 202-208; Zip.ca, *Testimony to CRTC: Telecom Public Notice 2008-19*, July 7, 2009; IFTA and CFTPA, *Joint Testimony to CRTC: Telecom Public Notice 2008-19*, July 8, 2009..

³ BitTorrent, *Reply to Telecom Public Notice 2008-19 Hearing*, July 28, 2009, at para. 23. See also CDM, *Testimony to CRTC: Telecom Public Notice 2008-19*, July 9, 2009, at para. 67-69.

⁴ D. Reed, *Statement of Dr. David P. Reed*, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives, July 17, 2008, available online at: <<http://www.reed.com/dpr/docs/Papers/ReedDPIHearing.pdf>>.

⁵ See CDM, *Comments to Telecom Public Notice 2008-19*, February 23, 2009; OIC, *Initial Comments to Telecom Public Notice 2008-19*, February 23, 2009; PIAC, *Comments of the Consumer Groups to Telecom Public Notice 2008-19*, February 23, 2009; Cogeco, *Reply submission to Telecom Public Notice 2008-19*, April 30, 2009, to name a few.

- i.) targets a legitimate ISP objective;
- ii.) adopts a practice that is proportional to that objective by:
 - a. being rationally connected to it;
 - b. being minimally intrusive of ss.27(2), 36 or 7; and
 - c. providing benefits that outweigh its detrimental impact on ss.27(2), 36 and 7.

Current ISP practices fail this test.

- [8] The legitimate objective of current ISP traffic management practices is congestion that cannot be met through reasonable provisioning alone. ISPs have stated that their primary response to congestion is capital expenditure. Those that employ traffic interference state that they do so only when they can no longer meet traffic loads with provisioning.⁶ CDM has submitted and reiterates that there is currently *no* evidence of traffic growth levels that cannot be met through reasonable levels of capital expenditure. Professor Odlyzko has demonstrated this in his testimony, and it has been confirmed by some ISPs.⁷
- [9] In addition, targeting P2P specifically is not a rational response to congestion that cannot be addressed through provisioning alone. The reasons this is not the case can be found in CDM's reply submission.⁸ P2P traffic does not raise unique problems that cannot be dealt with through provisioning alone. Nor do P2P applications generate excessive amounts of traffic.⁹ The only remaining rationale for throttling downstream P2P, is that such applications are not time sensitive. Time sensitivity, however, is extremely subjective.¹⁰ For example, a user who wishes to watch a 1 GB Canadian documentary at 9pm and begins downloading it at 7pm through P2P, would find P2P time sensitive. Another user, who wishes to watch the same documentary through live streaming from 7pm to 9 pm would consider live streaming or progressive download to be time sensitive. Perhaps more to the point, while some P2P applications that ISPs generally classify as 'time sensitive' (Skype and other VoIP applications, for example), most ISPs that use ITMPs throttle BitTorrent. BitTorrent is a P2P protocol used by a number of different applications, some of which span multiple categories of

⁶ Bell, *Submissions to Telecom Public Notice 2008-19*, February 23, 2009, at para. 53; Rogers, *Submissions to Telecom Public Notice 2008-19*, February 23, 2009, at para. 4; Shaw, *Submissions to Telecom Public Notice 2008-19*, February 23, 2009, at para. 3.

⁷ CDM, *Comments to Telecom Public Notice 2008-19*, February 23, 2009, at paras. 96-98, 177. See also, *ibid.*, Testimony of Andrew Odlyzko [Odlyzko], Attachment A, at para. 6, confirmed by Execulink, *Testimony to CRTC: Telecom Public Notice 2008-19*, July 9, 2009.

⁸ CDM, *Reply Submissions to Telecom Public Notice 2008-19*, April 30, 2009, at paras. 40-53.

⁹ When unthrottled, P2P only generates 27% of traffic on Bell's networks. Meanwhile 50% of Bell customers use P2P. This does not seem disproportionate (Bell, *Testimony at Telecom Public Notice 2008-19 Hearing*, July 14, 2009, at lines 6042, 6829 respectively).

¹⁰ CDM, *Reply Submissions to Telecom Public Notice 2008-19*, April 30, 2009, at paras. 41.

ISP 'time-sensitivity' (live-streaming programs).¹¹ Throttling BitTorrent, as most ISPs do, catches all these applications as well.

[10] With respect to throttling P2P uploads, ISPs have rationalized this decision by stating that consumers do not care about uploads, but only downloads. ISPs repeatedly claim that they do not understand why they must provision their networks in order to support the uploads experience of non-customers. However, BitTorrent has provided figures that demonstrate the impact of Canadian ISP's throttling of upstream traffic on its ability to function in Canada.¹² BitTorrent has indicated that throttling of upstream capacity in Canada has reached such extremes that it has driven consumers away from BitTorrent's product in Canada. Further, BitTorrent has demonstrated that the traffic management and provisioning policies of Canadian ISPs have led to the lowest offload percentage of any major network in the world – almost fully 1/3 that of the average.¹³ This means that upstream bandwidth is so limited in Canada for BitTorrent that its ability to disperse bandwidth usage is cut by almost 2/3 and more than anywhere else. Again, the rationale for throttling upstream P2P because it does not disrupt the ability to transfer files appears flawed.

[11] Moreover, there are far less intrusive methods available. These include the Comcast solution, which does not impair the Act to as great a degree as current practices.¹⁴ The Comcast solution only operates in the presence of congestion and then in an application and protocol agnostic manner. Some have argued that the Comcast solution is not less intrusive, as it throttles so called time-sensitive traffic along with everything else. However, it does so for less than 0.1% of customers, and rarely for more than 15 minutes at a time. Additionally, as mentioned above, time-sensitivity is very subjective and not something any ISP can predict for any customer at any time. Further, current ISP practices also capture content they classify as 'time sensitive', as they throttle the BitTorrent protocol. The solution to issues of time sensitivity is to develop and implement methods for customers to prioritize their own traffic. Such technologies are not out of reach. The IETF also has a number of possible solutions that are not discriminatory and do not target specific applications and so do not raise the same concerns for innovation and privacy.¹⁵

[12] In addition, CDM is confident that once the Commission puts in place this framework ISPs will develop and adopt a number of new innovative methods of addressing congestion. It is

¹¹ BitTorrent, *Reply to Telecom Public Notice 2008-19 Hearing*, July 28, 2009, at para. 21; CDM, *Telecom Part VII Application: Review and Vary of Telecom Decision 2008-108*, June 22, 2009, at para. 15.

¹² BitTorrent, *Reply to Telecom Public Notice 2008-19 Hearing*, July 28, 2009, at para. 23.

¹³ *Ibid.* at para. 24.

¹⁴ CDM, *Reply to Telecom Public Notice 2008-19*, April 30, 2009, at paras. 71-76

¹⁵ CDM, *Reply to Telecom Public Notice 2008-19*, April 30, 2009, at paras. 67-70. See additionally, BitTorrent, *Reply to Telecom Public Notice 2008-19 Hearing*, July 28, 2009, at paras. 25-33.

unlikely, however, that any application or protocol specific approach will meet this criteria. This is because, as mentioned above, applications do not cause congestion, but rather users cause congestion and the unnecessary harm to innovation and the threat to privacy that results from any application-specific approach will generally outweigh any benefits gained from such an approach.

Part II: Assessing the Framework:

[13] CDM has suggested an assessment framework designed to provide ISPs with the guidance they need to develop solutions that take into account the legal requirements of the Telecommunications Act. There is broad consensus among many of the parties on the main structure of the CDM test.¹⁶ However, some concerns have been raised as well, and modifications or alternatives to our test have been suggested. These concerns arise out of a misunderstanding of the CDM test, and will be clarified below.

[14] The concerns raised against the CDM framework can be summarized as follows:

- (1) the proposed framework is too restrictive and will require all ISPs to adapt the same solution;
- (2) the test lacks objectivity and will essentially substitute the Commission's 'opinion' for that of an ISP's; and,
- (3) the composition of the test itself has been attacked.

We address each of these points below.

(1) One Size Fits All

[15] ISPs have claimed that any application of the proposed framework will lead to one solution alone.¹⁷ The concern here is that the CDM's approach would hinder both innovation and competition at the network level since the requirement to adopt minimally intrusive traffic management solutions would allegedly eliminate ISPs' ability to develop creative ways to differentiate themselves from one another. This premise is faulty for a number of reasons.

[16] First, with respect to the objective of congestion management, historically, all ISPs have responded in the same manner: through provisioning.¹⁸ ISPs have also proven able to differentiate themselves from one another through pricing, service offerings, and through better provisioning within their systems and developing innovative ways to improve the speed of their networks for *all* users.¹⁹ CDM maintains that provisioning remains the primary method

¹⁶ See *supra* note 5.

¹⁷ Telus, *Transcripts: Testimony to CRTC: Telecom Public Notice 2008-19*, July 10, 2009, at line 4090, for example.

¹⁸ CDM, *Submissions to Telecom Public Notice*, February 29, 2009, at paras. 211-214; OIC, *Comments to Telecom Public Notice 2008-19*, February 23, 2009, at para. 18.

¹⁹ Telus, *Transcripts: Testimony to CRTC: Telecom Public Notice 2008-19*, July 10, 2009.

by which ISPs should continue to innovate and differentiate themselves from one another and, indeed, this solution is most in line with the policy objectives of the Act.²⁰

[17] Second, even in the context of s.1 Charter jurisprudence, the minimal impairment requirement rarely leads to “one solution”. Courts have described the minimal impairment requirement as such:

The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement...On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.²¹

There is no one size fits all component to the minimal impairment requirement in the Charter context. Far from being a check on the ‘ultimate monopoly’, the minimal impairment branch of the test is a vehicle for courts to inform the government on the requirements of the law and to defer to its legitimate interests while insuring the law is not unduly ignored.²² This does not lead to one solution alone, but rather a multitude of possibilities.

[18] The proposed framework will leave ISPs with ample room to innovate, while providing them with incentives to do so in a manner that is targeted to the requirements of the Act.

(2) Subjectivity of the Proposed Framework

[19] ISPs have also signalled their concern that the CDM test is overly “subjective” in that it essentially requires the Commission to substitute its opinion for that of the ISPs. This concern is related to the first but different in kind as it alleges that the criteria by which one solution or purpose is judged relative to another will be subjective and so it cannot be said decisively that one is better than another.²³ The focus of this criticism is on the legitimate purpose and minimal impairment branches of the CDM test, and again, it misapprehends the nature of the proposed framework.

[20] Judgment both in setting legitimate interests and in defining minimal impairment is informed by the law, and not by subjective preferences of the Commission. In many cases, as in this proceeding, it will be largely defined by the ISPs themselves. So, for example, in this Public Notice, congestion is the main issue. A number of ISPs have stated that their primary response to congestion is provisioning, and that they have only chosen to adopt application-specific ITMPs in order to address congestion that they feel cannot be met through

²⁰ See *supra* note 18.

²¹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (S.C.C.) per McLachlin, J., (as she was then) at para. 160.

²² P.W. Hogg and A.A. Bushell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, (1997) 35(1) Osgoode Hall L.J. 75, at p. 85.

²³ Bell, *Transcripts: Testimony to CRTC: Telecom Public Notice 2008-19*, July 14, 2009, at line 6341.

reasonable provisioning alone.²⁴ That purpose is subjective to the extent that ISPs have selected it themselves. It is legitimate in the sense that it also aligns with s.7 of the Act by placing provisioning foremost among congestion management practices.²⁵ Other legitimate purposes would probably include reducing malicious activity such as spam or malware, or perhaps facilitating a system of high-priority emergency alerts.²⁶ While the analytical framework for such purposes would be the same, the analysis itself would be different.

[21] Subjectivity has been raised more strenuously with respect to the minimal impairment branch of the test.²⁷ The test is not about the Commission's subjective views of a given ITMP, but rather about defining the parameters of the legal requirements of the Act. When deciding whether a given ITMP is appropriately tailored to safeguarding innovation platforms or avoiding discrimination, for example, the CRTC will be defining legal standards and addressing how certain practices interact with them. This is not a subjective process, but a legal one.

[22] The Commission here will provide the legal definition of discrimination, of controlling the content of a telecommunication, of privacy, and of innovation. It is then a matter of judging the technical impact of adopted practices in relation to these values and in relation to available alternatives and those within easy reach. These are all factual and legal determinations and the Commission has the expertise, the legitimacy and the legal mandate to define their boundaries and ensure ISPs respect them when developing ways to achieve their legitimate purposes.

(3) Content of the Test

[23] No substitutes to the CDM test should be adopted. Some have suggested that aspects of the test be replaced by a "reasonableness" standard.²⁸ Others have proposed that the Commission issue guidelines as to what is "reasonable" under the Act.²⁹ Still others have argued that the final cost/benefit leg of the CDM's proposed test should be dropped altogether. All of these will be addressed in turn.

i) The "Reasonableness" Standard

[24] First, Telus has asked to replace the minimal impairment branch of the test with a "reasonableness" criteria and a requirement that the practice be narrowly tailored to its

²⁴ See *supra* note 6.

²⁵ See *supra* note 18.

²⁶ Telus, *Testimony to Telecom Public Notice 2008-19*, July 10, 2009, at line 4363.

²⁷ Bell, *Testimony to Telecom Public Notice 2008-19*, July 14, 2009, at line 6341; Telus, *Testimony to Telecom Public Notice 2008-19*, July 10, 2009.

²⁸ Telus, *Testimony to Telecom Public Notice 2008-19 Hearing*, July 10, 2009, at line 4107.

²⁹ Bell, *Written Submissions to Telecom Public Notice 2008-19 Hearing*, July 14, 2009.

legitimate purpose. This is problematic. Telus employs the term "narrowly tailored" in the abstract, ironically opening the test up to a greater degree of subjectivity. The CDM test requires that the ITMP be narrowly tailored to its objective in a manner that minimally impairs the legal requirements of the Act – a much clearer and more objective criterion and one more in line with the Commission's mandate of enforcing the Act. The justification criteria suggested by CDM is, and has been, an analytical framework for assessing what is or is not reasonable. A broad reasonableness standard will provide ISPs with neither guidance nor incentives to develop ITMPs that respect the policy objectives, that are not discriminatory and that do not egregiously infringe s.36. Indeed, it could be argued that ISPs *have* been acting reasonably to date (many ISPs have argued such), yet the result has been ITMPs that are not tailored to the Act at all.³⁰

[25] Illustrative of the problem here is the BitTorrent example. Here, ISPs, and particularly some cablecos, have said that throttling upstream P2P traffic is reasonable because their consumers do not care about uploading but only about downloading. The common refrain is 'why should we invest to support people who are not our customers'.³¹ In this scenario, upload P2P capacity is an externality. While P2P users in general care about uploading, the benefit to them from such practices are less immediate and so the incentive on each individual consumer to respond to such practices, and hence on the ISP itself, is lower. The resulting impact on BitTorrent, and on innovation more broadly, is extreme. BitTorrent has stated that its ability to diffuse its uploads in Canada is the worst of any major network in the world – almost 1/3 the average.³² In addition, this has had a palpable impact on its viability as a product in Canada.³³

[26] Yet ISPs claim that this approach would pass a 'reasonableness' standard. While ISPs care about innovation without permission, the benefits of such innovation are very broad, and the interest of any individual ISP to cut costs will generally outweigh such considerations. This is a rational response, but not a reasonable one. Yet it may well fall within the broad sweep that ISPs suggest for 'reasonableness'. The CDM framework will provide a greater degree of guidance to ISPs on how to develop their practices in a manner that does not ignore the Act.

ii) Dropping the CDM Test in Favour of "Reasonableness" Guidelines

[27] Bell's proposed guidelines amount to statements that an ISP will abide by the law and applies a "reasonableness" test to ISP traffic management practices.

³⁰ CDM, *Reply Submissions to Telecom Public Notice 2008-19*, April 30, 2009.

³¹ Rogers, *Testimony to Telecom Public Notice 2008-19 Hearing*, July 13, 2009, at line 4915.

³² BitTorrent, *Reply to Telecom Public Notice 2008-19 Hearing*, July 28, 2009, at para. 24.

³³ *Ibid* at para. 23.

- [28] First, With respect to privacy and undue preference, respectively, the guidelines do little more than restate the requirements of PIPEDA and of s.27(2).
- [29] Second, Beyond this restatement of existing laws, Bell's guidelines amount to little more than substituting CDM's test with 'reasonableness' and as such raise similar problems as those noted above. While Bell's 'reasonableness' standard requires reasonable attempts to limit negative impacts on users, services, protocols or applications, this again is insufficient. Bell asks the Commission to adopt a hands-off approach that only intervenes when and if an adopted practice produces fully unreasonable negative impacts.³⁴ But as above, this fully unreasonable standard will not safeguard the policy objectives of the Act. Under these guidelines, ISPs that can *still* develop ITMPs that essentially ignore the majority of the policy objectives, that are far more discriminatory than they need to be to achieve their purpose, and that control content or influence the meaning of a telecommunication in a manner that egregiously departs from Internet common carrier norms such as the IETF standards.
- [30] Third, the only practical guidance these guidelines offer is that ISPs can consider time sensitivity in making their decisions. However, as noted above, time sensitivity merely substitutes an ISP's opinion of which application should pass before another for that of the consumer. This is an inherently subjective exercise that properly rests with the consumer.
- [31] Overall, Bell's guidelines in *no way* address the legal provisions of the Act, except to limit them. Bell's approach merely requires "reasonable efforts" to avoid negative impacts on users, services, protocols or applications, only indirectly addressing aspects of the Act.

iii) The Benefits of Cost/Benefit Analysis

- [32] Finally, some parties have suggested that the final leg of the CDM test be dropped. This leg balances the salutary benefits of a given ITMP against its deleterious impact on the policy objectives and on discrimination. While in the vast majority of cases, this step will be synonymous with the minimal impairment branch of the test, there could be instances where a legitimate interest is sufficiently tailored to its objective and minimally impairing of the Act, but still egregiously violates a policy objective in a manner that far outweighs its benefits. This chapter of the test, rarely decisive in Canadian *Charter* jurisprudence, works no mischief and is still a valuable safeguard that should be retained.

Part III: Future Enforcement of Framework

- [33] Moving forward, CDM envisions a limited role for the Commission in monitoring future ITMPs. This proceeding will provide ISPs with clear guidance in the form of a framework against

³⁴ Bell, *Testimony to Telecom Public Notice 2008-19 Hearing*, July 14, 2009, at line 6371.

which to assess future practices. If, for example, the Commission finds, as CDM urges it to, that there is currently no demand that cannot be met through supply alone, ISPs will know not to implement new invasive solutions. If and when that occurs, ISPs will likely develop a number of practices, and these will need to be assessed.

- [34] Practices that violate s.36 prima facie will need prior approval from the Commission, however this process need not be onerous. The Commission can provide expedited processes by which ISPs can gain approval for their practices. These expedited processes will serve more as disclosure mechanisms where the ISP in question provides the Commission and the public with information on its traffic management plans – information it will have to disclose in any case if it wishes to avoid deceiving its consumers. After this hearing provides ISPs with some guidance, they are likely to develop targeted practices capable of justification, as did Comcast. Disclosure of these practices is not likely to illicit public complaint, and will in most cases gain s.36 approval through this expedited process.
- [35] The Commission or consumers may challenge ISPs that decide not to target their solutions. Any application-specific management is likely to trigger an expanded process where the ISP will have to justify their choice by the suggested framework.
- [36] In addition, other internet management contexts may lead to different analyses. For example, some have claimed that wireless congestion raises distinct issues and the Commission has in its assumptions created a dichotomy between ‘private’ and ‘public’ Internet services. CDM submits that the potential issues raised by these contexts should be analyzed distinctly once their use has developed further.
- [37] The Commission can address discriminatory practices on a case-by-case complaint basis to assess unjustness. Robust disclosure requirements must be in place to ensure consumers are aware of ISP practices so that they will be able to complain if excessively discriminatory processes are adopted. Disclosure has the additional benefits of allowing consumers to make informed choices, and providing application developers with the information they need to create applications. ISPs must tell consumers what traffic they are managing, to what extent (including specific speeds), how often this occurs, and whether any personal information is collected at any point. Additional transparency is required around average speeds.

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