

**Review and Variance application by Bell  
Canada and Bell Aliant Regional  
Communications, Limited Partnership of  
Telecom Decision CRTC 2013-72,  
*Canadian Network Operators  
Consortium Inc. – Application requesting  
relief to address implementation of the  
capacity model approved in Telecom  
Regulatory Policy 2011-703 and CRTC  
2013-73, Canadian Network Operators  
Consortium Inc. – Application to review  
and vary Telecom Regulatory Policies  
2011-703 and 2011-704***

---

**Intervention of the Public Interest Advocacy  
Centre**

---

April 29, 2013

John Lawford  
Counsel  
Public Interest Advocacy Centre  
One Nicholas Street, Suite 1204  
Ottawa, Ontario K1N 7B7  
(613) 562-4002 x.25  
[lawford@piac.ca](mailto:lawford@piac.ca)

## Table of Contents

Introduction and Nature of the Application .....	3
Why we are participating in this proceeding .....	3
Criteria for review and variance advanced by the Applicants .....	4
The Application is ill-founded .....	5
Misrepresentation regarding directions found in OiC 2009-2007 .....	5
The Applicants have also ignored important policy considerations identified by the Commission .....	6
The Applicants incorrectly interpret the Commission’s determinations in Decision 2013-73 .....	7
The Applicants ignore a central consideration in Decision 2013-73: the actual costs incurred to provide service.....	9
Inconsistency of the Application with the objectives of Canada’s telecommunications policy .....	10
Consistency of Decision 2013-73 with the Policy Direction.....	12
Conclusion .....	14

## **Introduction and Nature of the Application**

1. The Public Interest Advocacy Centre (PIAC) on its own behalf is pleased to provide intervener comments regarding the above referenced review and variance application (the Application) submitted by Bell Canada and Bell Aliant Regional Communications, Limited Partnership (collectively, the Bell companies or the Applicants).
2. In their Application the Bell companies are seeking significant changes to the manner in which wholesale Internet access services are rated. Our comments focus upon the Bell companies' request in Decision 2013-73:

...that the mark-up applied to the Companies' wholesale business HSA services provided over FTTN infrastructure be raised from 40% to 50% in order to properly maintain the Companies' incentives to invest at the level they were under the previously approved mark-ups, contrary to the Commission's conclusions in Part II of Decision 2013-73 that effectively set a common mark-up of 40% on all such FTTN-HAS...

### ***Why we are participating in this proceeding***

3. While the subject matter of Decision 2013-73 is wholesale and not retail services, we are submitting comments in this proceeding because of the potentially significant impacts on consumer rates and on the availability of competitive alternatives to the incumbent Internet service providers that the determinations reached by the Commission in response to the Application could have.
4. In this respect, we note that the Applicants have stated that in this proceeding they are not seeking increases to rates for wholesale services used to provide retail residential services. When they make this statement they also ominously go on to state, however, that they "are not seeking at this time to review and vary the rates established by the Commission for residential FTTN-HSA services in Decision 2013-73, though they reserve the right to seek a residential increase at a later time." Given that the Applicants rely upon the contention that mark-ups approved by the Commission impact their "incentives to invest", we would expect that if the Commission granted the Applicants the relief they are seeking in this proceeding, the Bell companies could soon be at the Commission's doorstep seeking higher wholesale mark-

ups for other services used by competitors to deliver retail data services on the same basis.

5. We are also concerned by the Applicants' insistence on "incentives to invest" as grounds upon which to seek a review and variance of Commission determinations in relation to wholesale services used by competitors whose share of the retail residential Internet services marketplace, at last count, stood at significantly less than 10%. While the focus of the relief sought by the Applicants is upon wholesale business services, we expect that regulatory measures which raise competitors' costs – whether in the business or residential retail marketplaces – are likely to harm these competitors' overall ability to compete. The Applicants' focus in this proceeding on business (and not residential) wholesale services overlooks the fact that many of the incumbents' competitors are much smaller firms than the incumbents.
6. Moreover, as we discuss later in this submission, the Bell companies in their Application have become advocates of value of service pricing – a notion which has no place in the determination of rates for wholesale services competitors depend on to compete. Granting the relief sought by the Applicants in relation to Decision 2013-73 would harm competition and ultimately Canadian Internet access service end users.

### ***Criteria for review and variance advanced by the Applicants***

7. As the Applicants note in paragraph 3 of the Application, the guidelines the Commission follows in relation to applications seeking a review and variation of its determinations are set out in Telecom Public Notice CRTC 98-6, *Guidelines for Review and Vary Applications* (PN 98-6) and Information Bulletin 2011-214. Of the four criteria set out by the Commission, the Bell companies rely principally on the first one, namely, that the Commission allegedly committed errors of law or fact which have raised a substantial doubt about the correctness of the decisions being challenged and warrant the relief the Applicants are seeking.
8. The Bell companies' contention that the Commission committed errors of fact or law (the Applicants claim principally that the Commission committed errors of law) is based principally upon the claim that the wholesale rates set by the Commission as a result of Decisions 2013-73 were established "...without any reference at all to the impact this change would necessarily have on the ILECs' incentives to invest."<sup>1</sup> The Applicants argue that in doing this, the Commission failed to comply with a direction issued by the Governor-in-

---

<sup>1</sup> Application, paragraph 17.

Council in Order-in-Council P.C. 2009-2007 (the Order-in-Council or OiC 2009-2007).<sup>2</sup>

9. By way of general comment, we also note that the Applicants' case in this proceeding appears to be almost exclusively based on assertions made without supporting evidence. The Applicants focus upon the assertion that the Commission has removed incentives to invest, yet they have provided no evidence that is what has effectively happened. Their case appears to be based entirely on argument, not evidence.

### ***The Application is ill-founded***

#### **Misrepresentation regarding directions found in OiC 2009-2007**

10. The Applicants argue that "the Commission ... has erred in law by ignoring a clear direction from the Governor-in-Council to consider incentives to invest in broadband infrastructure." The Applicants state that the "clear direction" they refer to is found in OiC 2009-2007.
11. There are several problems with this contention.
12. First, the Applicants misrepresent the Order-in-Council by selectively emphasizing only some portions of OiC 2009-2007 while ignoring other portions of the findings reached by the Governor-in-Council.
13. In OiC 2009-2007, the Governor-in-Council observed that "it is critical that the regulatory regime provide a cohesive, forward looking framework that provides the proper incentives for continued investment in broadband infrastructure, encourages competition and innovation and leads to consumer choice."<sup>3</sup> The Governor-in-Council acknowledged that the Commission was then conducting a proceeding into wholesale Internet services (namely, the proceeding initiated by TNC 2009-261) and directed the Commission to ensure that it included in this proceeding consideration of the adequacy of incentives to invest in new network infrastructure, the maintenance of competition sufficient to protect the interests of users, the maintenance of equity in wholesale obligations and the impact of policies on the ability of incumbents to offer new converged services. We interpret "a cohesive, forward looking framework" as one which balances the entire range of

---

<sup>2</sup> See [http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-pc2009-2007.pdf/\\$FILE/crtc-2008-117-pc2009-2007.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-pc2009-2007.pdf/$FILE/crtc-2008-117-pc2009-2007.pdf).

<sup>3</sup> Order-in-Council, page 2.

objectives set out by the Governor-in-Council and not, as the Applicants appear to be arguing, one which focuses solely on one such objective.

14. The Applicants, second, have also misrepresented the scope of the Governor-in-Council's directions to the Commission in OiC 2009-2007. The Governor-in-Council in OiC 2009-2007 issued no directions regarding future Commission proceedings or decisions. Nor did the Governor-in-Council order any changes to any existing Commission decisions or policies. The Governor-in-Council's directions in OiC 2009-2007 were specific in their focus and they related to the proceeding already initiated by the Commission in TNC 2009-261. OiC 2009-2007 was not a general policy direction to the Commission.
15. The Governor-in-Council in OiC 2009-2007 found that the regulatory regime should maintain "a cohesive, forward looking framework that provides the proper incentives for continued investment in broadband infrastructure encourages competition and innovation and leads to consumer choice". In Decisions 2013-72 and 73, the Commission did just that. This becomes even clearer when one considers the Commission's findings in TRP 2013-70 in which the Commission provided an introduction to Decisions 2013-72 and 73 and detailed explanations of its determinations in these decisions. As discussed earlier, contrary to the assertions made by the Applicants, in Decision 2013-73 the Commission balanced a range of objectives including incentives for continued investment in broadband infrastructure, as well as encouragement for competition and innovation and the maintenance of consumer choice. The Applicants have ignored the range of regulatory objectives identified by the Governor-in-Council and, incorrectly, have focused on just one objective.

### **The Applicants have also ignored important policy considerations identified by the Commission**

16. Decision 2013-73 was issued as part of a long list of decisions rendered by the Commission following the filing of applications seeking a range of changes to Telecom Regulatory Policies 2011-703 and 704 by several parties, including incumbents and entrants. In Telecom Regulatory Policy 2013-70<sup>4</sup> the Commission provided a detailed discussion setting out the context in which decisions such as Decision 2013-73 were issued. The Commission explained that it had conducted a detailed review of its

---

<sup>4</sup> Disposition of review and vary applications with respect to wholesale high-speed access services:  
Introductory statement

determinations in TRP 2011-703 and 704 and it explained the changes it was making to these decisions.

17. The Bell companies in their Application have almost completely ignored the Commission's findings in TRP 2013-70. They have not sought a review and variance of TRP 2013-70. The Applicants focus almost solely on incentives for the construction by the ILECs of fibre optic facilities in their Application. Their decision to ignore the complexity of the issues balanced by the Commission when it established rates for residential and business wholesale fibre-based Internet services, as it explained in TRP 2013-70, should doom their Application to failure.

### **The Applicants incorrectly interpret the Commission's determinations in Decision 2013-73**

18. The Applicants have also misrepresented (or ignored altogether) important elements of Decision 2013-73. In a succession of policies and decisions, including Decision 2013-73, the Commission has taken specific steps to address the Bell companies' (and the other ILECs') arguments regarding the maintenance of incentives for investment in next-generation network facilities.

19. In TRP 2010-632, the Commission specifically recognized that:

...if it were to conclude that speed matching for the ILECs' aggregated ADSL access services should be required, it is reasonable that tariffed rates for new higher speed aggregated ADSL access service options (speed-matching rates) should recognize a higher cost of capital than would otherwise be the case. The Commission notes that the ILECs' costs of capital that would otherwise be used to establish these speed-matching rates are significantly lower than the cable carriers' costs of capital used to establish TPIA service rates.

The Commission has paid considerable attention to Bell Canada's investment studies and considers that it would be appropriate for the ILECs to use a higher cost of capital, which would be comparable to the hurdle rate Bell Canada used in its internal FTTN investment studies, in the Phase II cost studies of the ILECs for speed-matching rates. The Commission considers that for tariff purposes, the simplest approach for recognizing this higher cost of capital would be to increase the markup applied to Phase II costs when establishing rates for the new higher speed aggregated ADSL service options. In the Commission's view, an additional markup of

10 percent for each ILEC on the Phase II costs used to establish these speed-matching rates would be appropriate.<sup>5</sup>

20. In TRP 2010-632, the Commission did not make a distinction between costs associated with the provision residential and business wholesale Internet access.<sup>6</sup>

21. In the proceeding which culminated in TRP 2010-632, the Commission fully considered the issue of granting incentives to the ILECs to construct next generation fibre infrastructure. It set the principle that the rates for such services should reflect an additional markup (of 10%). The Commission then approved rates for wholesale business Internet access services in TRP 2011-704. These rates featured exceptionally high markups – substantially beyond other mandated wholesale service markups. In Decision 2013-73 the Commission has simply removed the greater markups on business services proposed by the Applicants (and other ILECs) and granted in TRP 2011-704. In TRP 2013-70, the Commission explained why it did this.

22. At no point did the Commission alter its initial finding (in TRP 2010-632) regarding the appropriateness of an additional markup for fibre-based wholesale Internet access. The rates approved by the Commission in Decision 2013-73 have continued to include an additional mark-up consistent with the findings in TRP 2010-632. There is no basis for the contention put forward by the Applicants that as a result of Decision 2013-73 the ILECs are inadequately compensated for the construction of infrastructure in relation to either residential or business Internet services.<sup>7</sup>

---

<sup>5</sup> TRP 2010-632, paragraphs 44 and 45.

<sup>6</sup> See Commission comments at paragraph 43.

<sup>7</sup> We further add that in the proceeding initiated by TNC 2009-261 we argued – and continue to believe – that the ILECs do not require regulatory concessions such as additional special wholesale markups in order to have sufficient incentives to build fibre facilities. If, as the ILECs have consistently argued for many years, market forces are sufficient in the retail marketplaces for Internet and advanced fibre reliant services such as high speed Internet access and IP TV to warrant forbearance of retail rates, terms and conditions, these same ILECs do not need regulatory concessions in order to invest. They do so because they need to in order to remain in business. There is no basis to the Applicants' claims that markups for mandated services they consider inadequate create a disincentive for them to deploy fibre optic facilities in their networks.

In a dynamic competitive marketplace, market forces should determine markups a supplier can enjoy. Market forces should drive rates towards costs. In the marketplace for mandated wholesale services, there are no (or insufficient) market forces at play. In the regulation of these services, the Commission's rating decisions provide a substitute for market forces. The Commission, as a matter of policy, however, should seek to set rates in a manner which approximates the operation of market forces in a dynamic competitive marketplace. We do not have access to information regarding incumbent service providers' costs but we are skeptical regarding the premise underlying the relief sought by the Applicants that they enjoy an entitlement to markups of 50% above their Phase II costs and that the markups for wholesale business services should be greater than those for residential services. In a marketplace in which market forces



## **The Applicants ignore a central consideration in Decision 2013-73: the actual costs incurred to provide service**

23. Another way in which the Applicants have misunderstood the Commission's determinations in Decision 2013-73 is reflected in their failure to address an important finding in that Decision. The Applicants never address the Commission's determination in Decision 2013-73 that "...business and residential wholesale HSA services provide essentially the same functionality use essentially the same network components, and typically have the same costs."<sup>8</sup>
24. In our view, in light of the manner in which the Commission, for many years, has rated mandated wholesale services, a request by the Applicants to alter rates for the services at issue in this proceeding should be doomed unless the Bell companies could provide compelling arguments, supported by evidence, to demonstrate that the Commission has incorrectly assessed their costs. In the proceeding leading to Decision 2013-73, the Bell companies implied that their costs may be different on the basis of unspecified differences in the support provided to customers for the services in question. Other parties put forward conflicting evidence. The Bell companies' claims then were vague and do not appear to have been supported with evidence. In this proceeding, the Applicants have made no greater effort to substantiate cost differences.
25. Instead, the Bell companies have become advocates of mandated wholesale services rating based on value of service:
- The Companies disagree with the principle that residential and business FTTN-HSA services should have the same mark-up. As was indicated during the proceeding leading to Decision 2013-73, there are important differences between the residential and business HSA services that justify different rates, such as the level of support provided to the types of HSA services customers and the value given the services by end-users.<sup>9</sup>
26. Value of service pricing has no place in mandated wholesale telecommunications services rate setting. It was rejected by the Commission in TRP 2011-704 and again in Decision 2013-73. The Applicants have not sought a review and variance of this Commission determination.

---

operate, we question the likelihood of achieving, let alone maintaining such markups or of being able to maintain different markups between market segments. Yet this is precisely what the Applicants are attempting to achieve in their Application.

<sup>8</sup> Decision 2013-73, paragraph 29.

<sup>9</sup> Application, paragraph 14.

27. Moreover, the wholesale telecommunications services marketplace in Canada is characterized by suppliers (i.e. the incumbents) who appear to have little or, indeed, no interest in promoting the commercial well-being of their wholesale customers. The Commission correctly rejected value of service pricing in relation to wholesale Internet services in TRP 2011-704<sup>10</sup> and in Decision 2013-73 and the Applicants have put forward no valid reason why the Commission should reconsider its determination.

28. We note in this respect that the Commission, consistent with Parliament's directions in section 47 of the *Telecommunications Act*, is required to meet the objectives of Canada's telecommunications policy. The Policy Direction also requires that the Commission implement the policy objectives set out in section 7 of the Act.

### **Inconsistency of the Application with the objectives of Canada's telecommunications policy**

29. Just as they have misinterpreted OiC 2009-2007, TRP 2010-632, TRP 2011-704, TRP 2013-70 and Decision 2013-73, the Applicants have also overlooked several key policy objectives which the Commission is required to take into consideration when it renders decisions and which it considered when it rendered Decision 2013-73.

30. We note in this respect that the Commission, consistent with Parliament's directions in section 47 of the *Telecommunications Act*, is required to meet the objectives of Canada's telecommunications policy. The Policy Direction also requires that the Commission implement the policy objectives set out in section 7 of the Act.

31. The policy objectives set out in section 7 include the following:

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

---

<sup>10</sup> See TRP 2011-704, paragraph 25.

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and

(h) to respond to the economic and social requirements of users of telecommunications services.

32. The objectives of Canada's telecommunications policy refer to competitiveness in the marketplace (section 7(c)), reliance on market forces (section 7(f)), the efficiency and effectiveness of regulation (section 7(f)), responsiveness to the requirements of telecommunications service users (section 7(h)) and, in particular, the pursuit of reliability and affordability of telecommunications forces (section 7(b)). All of these objectives require an adequately competitive marketplace.
33. The Commission has already recognized the importance, if an adequately competitive Canadian retail Internet access services marketplace is to operate, of non-incumbent competitors. As the Commission noted in TRP 2010-632, the presence in the retail Internet services marketplace of a range of service providers which includes smaller firms dependent on incumbents for facilities "...bring[s] pricing discipline, innovation, and consumer choice to these retail Internet service markets."<sup>11</sup>
34. The Commission's annual CRTC Communications Monitoring Report (the Monitoring Report) continues to show that incumbent cable and telephone companies dominate the retail Internet access services marketplace. In its latest (2012) Monitoring Report the Commission noted that the 5 biggest broadband Internet service providers (Bell, TELUS, Rogers, Shaw and Quebecor) accounted for 76% of retail Internet access revenues.<sup>12</sup> While competitors who are not affiliated with incumbents have experienced greater success in the retail Internet access business marketplace than in the retail residential marketplace, these competitors remain vulnerable and dependant on incumbent provided facilities.<sup>13</sup>
35. The Commission's rating determinations in Decisions 2013-73 were consistent with the maintenance of a retail Internet services marketplace that is served by competitors other than the incumbent cable and telephone companies (and their respective affiliates). The Bell companies in their

---

<sup>11</sup> Telecom Regulatory Policy CRTC 2010-632 *Wholesale high-speed access services proceeding*, paragraph 50. Similarly, see Telecom Regulatory Policy CRTC 2011-703, *Billing practices for wholesale residential high-speed access services*, paragraph 3.

<sup>12</sup> 2012 *CRTC Communications Monitoring Report*, section 5.3, table titled *Internet sector and broadband availability at a glance*.

<sup>13</sup> TRP 2010-632, paragraph 54.

Application have completely ignored this aspect. Increasing already generous wholesale Internet services markups for the Bell companies would not be consistent with the promotion of a marketplace served by service providers who are not incumbent cable or telephone companies (or their affiliates).

## **Consistency of Decision 2013-73 with the Policy Direction**

36. We note, finally, that in Decision 2013-73 the Commission explained how its determinations were consistent with the Policy Direction. More specifically, the Commission noted that it:

...considers that the rates approved in this decision were established with a view to ensuring that competitors pay rates constituting Phase II costs plus a reasonable markup, while the incumbent providers legitimately recover the costs that are incurred. The Commission therefore considers that in accordance with subparagraphs 1(a)(ii) and 1(b)(ii) of the Policy Direction, the rates for these services (a) are efficient and proportionate to their purpose and interfere with competitive market forces to the minimum extent necessary to meet the policy objectives noted above, and (b) neither deter economically efficient competitive entry into the market nor promote economically inefficient entry.

37. The Applicants have not addressed the Policy Direction. Yet the Policy Direction provides guidance in relation to the objectives the Commission was required to –and did–address in Decision 2013-73.

38. In addition to the considerations identified by the Commission in the passage cited above, we note that the Policy Direction sets out a number of specific expectations with which Decision 2013-73 is entirely consistent.

39. In sub-paragraph 1 (b)(iv) of the Policy Direction<sup>14</sup>, for example, the Commission was directed, in relation to interconnection arrangements or regimes for access to networks, to “ensure the technological and competitive

---

<sup>14</sup> Sub paragraph 1 (b)(iv) provides that:

(b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that

...

(iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers;

neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers”. Wholesale high speed Internet access services are a key input needed by competitors to make new technologies available to end-users. As discussed earlier, the Commission ensured that incumbent telephone companies are fully compensated for the incremental costs they incur to provide the services at issue, thus ensuring that the rates for the wholesale services in question do not artificially favour Canadian carriers or resellers. The Commission compensated the Bell companies based on costs they were able to demonstrate they incur, not on value of service.

40. We also draw the Commission’s attention to sub-paragraph 1(c)(ii)<sup>15</sup> in which the Governor-in-Council directed the Commission to conduct a review of its regulatory framework “with a view to increasing incentives for innovation and investment in and construction of *competing* telecommunications network facilities” (our emphasis). Even more specifically, the Commission was directed to conduct a review to “determine the appropriate pricing of mandated services wholesale services”,

... which review should take into account the principles of technological and competitive neutrality, the potential for incumbents to exercise market power in the wholesale and retail markets for the service in the absence of mandated access to wholesale services, and the impediments faced by new and existing carriers seeking to develop competing network facilities

41. Decision 2013-73 was one of the outcomes of this review. The rates approved in this Decision are entirely consistent with the objectives set by the Governor-in-Council in sub-paragraph 1(c)(ii).

---

<sup>15</sup> Sub-paragraph 1( c)(ii) provides that:

(c) the Commission, to enable it to act in a more efficient, informed and timely manner, should adopt the following practices, namely,

(ii) with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities, to complete a review of its regulatory framework regarding mandated access to wholesale services, to determine the extent to which mandated access to wholesale services that are not essential services should be phased out and to determine the appropriate pricing of mandated services, which review should take into account the principles of technological and competitive neutrality, the potential for incumbents to exercise market power in the wholesale and retail markets for the service in the absence of mandated access to wholesale services, and the impediments faced by new and existing carriers seeking to develop competing network facilities...

## Conclusion

42. In light of the above, the Commission should reject the Bell companies' Application. The Bell companies have failed to show that the Commission made any errors of law or fact in Decision 2013-73. The Applicants have centered their arguments upon an alleged loss of incentives to construct infrastructure attributable to Decisions 2013-73. Yet, they have provided no evidence to support their position.
43. Wholesale rates at issue in this proceeding have nothing to do with any absence of incentives to build infrastructure to support next generation services the Bell companies may claim to be facing. In a competitive and dynamic retail marketplace, market forces, and in particular, competitors' retail Internet, digital television and other powerful data services should provide sufficient incentives without the creation by the Commission of additional (and in our view excessive and anti-competitive) wholesale markups. The Bell companies do not require incentives in the form of higher wholesale mark-ups to build infrastructure.
44. The Commission's determinations regarding high speed wholesale Internet access were consistent with existing Commission policies and with the Commission's obligations under the Telecommunications Act, the Policy Direction and Order-in-Council 2009-2007.

**\*\*\* End of Document \*\*\***