



Telecom Order CRTC 2016-201

PDF version

Ottawa, 26 May 2016

File numbers: Eastlink Tariff Notices 35 and 35A, and Persona Tariff Notice 7

Bragg Communications Incorporated and Persona Communications Inc., both operating as Eastlink – Introduction of third-party Internet access services and destandardization of certain third-party Internet access service speeds

The Commission approves, with changes and on an interim basis, the rates for Eastlink's proposed third-party Internet access (TPIA) service speeds, effective the date of this order. The Commission will consider Eastlink's final TPIA service rates once Eastlink files supporting cost studies, as per the Commission's determinations set out in Telecom Decision 2016-117. The Commission also approves Persona's request to destandardize its TPIA service speeds in its Ontario serving territory. The introduction of the new TPIA service speeds, including those in Persona's serving territory, will increase both consumer choice and competition in the wholesale high-speed access services market.

Applications

1. The Commission received Tariff Notice 7, dated 4 September 2015, from Persona Communications Inc. (Persona), a wholly-owned subsidiary of Bragg Communications Incorporated (Bragg), operating as Eastlink (Eastlink), in which Persona proposed to grandfather its existing third-party Internet access (TPIA) service speeds offered in its Ontario serving territory.¹
2. The Commission also received Tariff Notice 35, dated 15 September 2015, from Persona and Bragg, both operating as Eastlink, in which Eastlink proposed to introduce TPIA services in its serving territories in Nova Scotia, Ontario, and Prince Edward Island.²
3. On 14 January 2016, Eastlink filed an amendment to Tariff Notice 35 to include the rates and terms and conditions for second-level modem testing.³

¹ These three TPIA service speeds are (i) 256 kilobits per second (Kbps) download and 128 Kbps upload, (ii) 1 megabit per second (Mbps) download and 284 Kbps upload, and (iii) 6 Mbps download and 640 Kbps upload. Persona currently offers these TPIA service speeds in Kapuskasing, New Liskeard, Sudbury, and Timmins (Ontario).

² These services are set out in the Appendix to this order.

³ Second-level modem testing involves specific network tests conducted to discover the compatibility of a modem with a telecommunications service provider's network.

4. The Commission received interventions regarding the above-mentioned applications from the Canadian Network Operators Consortium Inc. (CNOC), ISN Internet Incorporated (ISN), and Navnet Communications Inc. (Navnet). The public record of this proceeding, which closed on 17 September 2015 for Persona Tariff Notice 7 and on 22 February 2016 for Eastlink Tariff Notices 35 and 35A, is available on the Commission's website at www.crtc.gc.ca or by using the file numbers provided above.⁴

Issues

5. The Commission will address the following issues regarding Eastlink's request to introduce new TPIA services in its serving territories in Nova Scotia, Ontario, and Prince Edward Island:
 - What should be the appropriate rates for Eastlink's proposed TPIA service speeds?
 - Should Eastlink and Persona be required to file separate tariffs?
 - Should Eastlink be required to change the location for its proposed point of interconnection for Nova Scotia?
 - Should Eastlink be required to amend its proposed TPIA service agreement?
 - Should Eastlink be required to amend its proposed TPIA tariff to refer to the bank whose rate it will use to calculate interest?
6. The Commission will also address Persona's request to destandardize its TPIA service speeds.

What should be the appropriate rates for Eastlink's proposed TPIA service speeds?

Positions of parties

7. Eastlink submitted that the Commission should treat it as a small cable carrier, as determined in paragraph 9 of Order 2000-317. Eastlink stated that, consistent with this determination and Commission practice, the Commission should set the company's TPIA service rates based on proxies rather than requiring Eastlink to file

⁴ Eastlink initially filed Tariff Notice 6, dated 26 June 2015, in which it sought to (i) introduce TPIA services in its Nova Scotia and Prince Edward Island serving territories and new TPIA service speeds in its Ontario serving territory, and (ii) destandardize its existing TPIA service speeds in its Ontario serving territory. In response to a Commission staff letter, Eastlink withdrew its Tariff Notice 6 on 14 September 2015 and re-filed its requests to introduce new TPIA services and destandardize existing TPIA service speeds as separate tariff notices, Tariff Notices 1 and 7 respectively. On that same date, Tariff Notice 1 was withdrawn because of a numbering issue and re-filed as Tariff Notice 35. The Commission incorporated the record of Eastlink Tariff Notice 6 into the company's Tariff Notices 35 and 35A.

supporting cost studies. Eastlink indicated that it would not be efficient or cost effective for the company to file supporting cost studies at this time for its TPIA services since it would eventually be required to provide disaggregated wholesale high-speed access (HSA) services, given the Commission's determinations set out in Telecom Regulatory Policy 2015-326. Eastlink submitted that if the Commission were to require the company to file cost studies, it would be appropriate to set the company's TPIA service rates based on proxies as an interim measure.

8. Eastlink argued that it would be appropriate to use Shaw Communications Inc.'s (Shaw) rates as a proxy since Eastlink is proposing to use a flat rate billing model, and Shaw is the only other cable carrier that applies this model.
9. CNOC and ISN requested that the Commission direct Eastlink to file cost studies in support of its proposed rates, arguing that Eastlink has sufficient resources to conduct cost studies. CNOC argued that Eastlink should now be considered a large cable carrier, because it has grown substantially since the publication of Order 2000-317.
10. CNOC also submitted that it would not be appropriate for Eastlink to adopt Shaw's TPIA service rates since (i) the characteristics of the services offered by the two companies are different; and (ii) the two companies' serving territories are located at opposite ends of the country, and the companies operate in vastly different environments.
11. CNOC and Navnet submitted that Eastlink's proposed wholesale rate for its 100 Mbps TPIA service speed is marginally lower than its current retail rate for the same service speed. In reply, Eastlink proposed a revised, lower rate for this service, although it did not include the revised rate in subsequent filings.

Commission's analysis and determinations

12. The Commission has adopted the practice that in cases where a company does not file a cost study to support proposed rates for new wholesale HSA service speeds, the Commission will generally set interim monthly rates based on the nearest lower-speed service rates that are currently approved.⁵
13. The Commission identified Eastlink as being subject to wholesale service obligations for the purpose of the wholesale services framework set out in Telecom Regulatory Policy 2015-326. As such, that framework applies to Eastlink. In Telecom Decision 2016-117, which sets out the Commission's determinations on costing inputs for wholesale HSA services, the Commission required all wholesale HSA service providers (including Eastlink) to file new cost studies to reflect the Commission's determinations set out in that decision.

⁵ For example, see Telecom Order 2012-706, in which the Commission set interim rates based on the existing nearest lower-speed services.

14. No wholesale TPIA services are currently being provided in Eastlink's Atlantic serving territory, and Persona's current TPIA service speeds in its Ontario serving territory are significantly lower than those that Persona is proposing to introduce under the Eastlink brand name. It is therefore in the public interest that the proposed new TPIA service speeds be implemented as soon as possible. Given the time required for Eastlink's cost studies to be filed and analyzed, prompt introduction of these services necessitates the setting of rates on an interim basis using proxies.
15. Eastlink does not offer comparable, existing wholesale services on which interim rates could be based. As argued by Eastlink, Shaw provides service speeds that are generally comparable to those that Eastlink has proposed to introduce, and Shaw is the only other cable carrier that does so on a flat rate billing basis.
16. In these circumstances, it is appropriate for Eastlink to use Shaw's nearest lower-speed approved TPIA service rates as proxies for its proposed new TPIA service speeds on an interim basis. However, since Eastlink filed its applications, the Commission has approved applications by Shaw to destandardize certain TPIA service speeds, as set out in Telecom Orders 2015-378 and 2014-610. Consistent with the Commission's practice, it would not be appropriate to use the rates for these service speeds, which are no longer offered to Shaw's new customers, as proxies for Eastlink's proposed service speeds, which would be available to new customers.⁶
17. Accordingly, the Commission **approves on an interim basis** the rates for Eastlink's proposed TPIA services using either Shaw's rates for the same service speed, or in the absence of such service speeds, Shaw's rates for the nearest lower-speed, non-destandardized service, as outlined in the Appendix to this order.
18. The Commission will consider final rates for the proposed TPIA service speeds once Eastlink files its supporting cost studies pursuant to Telecom Decision 2016-117.

Should Eastlink and Persona be required to file separate tariffs?

Positions of parties

19. ISN raised concerns about the filing of a single tariff under the brand name of Eastlink, instead of separate tariffs under the Persona brand name in Ontario, and the Bragg brand name in Nova Scotia and Prince Edward Island. ISN questioned whether the use of a single tariff bearing Eastlink's brand name caused confusion regarding the entity providing services to competitors in a given serving territory. ISN added that Persona was a separate entity from Bragg, and that Bragg did not provide services in Nova Scotia and Prince Edward Island.

⁶ For example, also in Telecom Order 2012-706, the Commission did not adopt the applicant's proposal to base certain of its proposed interim TPIA service rates on those of the nearest existing lower-speed services that the company no longer offers.

20. Eastlink replied that it purchased Persona from Persona Systems in 2007. Persona is now a wholly-owned subsidiary of Bragg, and although Eastlink has maintained Persona as a separate corporate entity, this entity relies on Bragg's staff, billing systems, and other systems. Both Bragg and Persona operate under the Eastlink registered business name.
21. Eastlink indicated that it currently provides TPIA services in Ontario pursuant to a TPIA tariff initially approved under the Persona brand name; however, Eastlink indicated that it intends to make its TPIA services available under the same terms and conditions and at the same rates across its serving territories where it offers TPIA services. Eastlink argued that as such, it would not be logical or cost-efficient for the company to file two separate tariffs for services provided by, in effect, one business.

Commission's analysis and determinations

22. During the proceeding, Eastlink inserted the following clarification in its proposed TPIA tariff, at item 100:

This tariff governs the provision of third-party Internet access services offered by Bragg Communications Incorporated, on its own behalf and on behalf of its affiliates, all operating as "Eastlink" in all applicable serving areas.

23. This clause clarifies that while Eastlink is a business name, the services in question are provided by either Bragg or its wholly-owned subsidiary, Persona. Accordingly, the Commission **approves** item 100 as amended by Eastlink, and does not require Eastlink to file two separate tariffs for each of Persona and Bragg.

Should Eastlink be required to change the location for its proposed point of interconnection for Nova Scotia?

Positions of parties

24. Eastlink proposed to implement its point of interconnection (POI) for Nova Scotia in its data centre in Pennant Point, which is part of the Halifax Regional Municipality but located approximately 30 kilometres away from downtown Halifax.
25. CNOC and ISN requested that the Commission direct Eastlink to place its POI in downtown Halifax where Eastlink already has a cable modem termination system (CMTS). CNOC submitted that Eastlink's proposed POI location (i) was remote, (ii) would force competitors to bear unnecessary transport costs, and (iii) would disrupt the existing downtown Halifax co-location arrangements of some potential TPIA service competitors, particularly City Wide Communications Inc. CNOC argued that the ultimate result of Eastlink's proposed POI location would be to harm competition and to confer an undue preference on Eastlink, contrary to subsection 27(2) of the *Telecommunications Act* (the Act).⁷

⁷ Subsection 27(2) of the Act states that 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.

26. Eastlink replied that the Pennant Point POI location is consistent with the Commission's determinations set out in Telecom Regulatory Policy 2010-632, namely the requirement that the aggregation of competitor traffic at POIs be at least at the same level as cable carriers' aggregation of traffic for their own retail Internet service customers. Eastlink added that the proposed POI is located at an aggregation point for Eastlink's own retail Internet service network, and that this would enable competitors to access all of Eastlink's CMTSs across Nova Scotia. Eastlink further submitted that its proposed POI location (i) is served by a competitive supply of transport facilities, and (ii) can accommodate co-location, while the alternative location proposed by CNOC cannot, though competitors would not be required to co-locate at the proposed POI site.
27. Eastlink argued that the Commission has never mandated specific POI locations in the past, and that TPIA service providers should be permitted to choose POI locations based on business rationale and not on where a particular potential competitor may or may not be co-located. Eastlink added that Commission intervention could, in fact, confer an undue preference on a competitor in this case.

Commission's analysis and determinations

28. The Commission assesses allegations regarding contraventions of subsection 27(2) of the Act on a case-by-case basis, taking into account the circumstances of each case. The Commission must first determine whether there is a preference. If it determines that there is one, it must then decide whether the preference is undue or unreasonable.
29. The party alleging the preference must demonstrate the existence of such a preference. If the existence of a preference is established, pursuant to subsection 27(4) of the Act, the carrier against whom the preference is alleged must demonstrate that any such preference is not unjust or undue.
30. Although the Commission has never mandated a specific location for a carrier's POI with respect to wholesale HSA services, wholesale HSA service providers must respect the prohibition against undue preference and unjust discrimination set out in the Act in all aspects of the service they provide to competitors.
31. CNOC has demonstrated that Eastlink's proposed POI location may constitute a disadvantage for one of its members. However, this disadvantage is largely based on that member's pre-existing co-location arrangement, rather than on any action taken by Eastlink. As well, Eastlink is proposing a single POI for the province of Nova Scotia, located within the boundaries of the Halifax Regional Municipality, which would enable TPIA service competitors to serve all areas in Eastlink's serving territory in Nova Scotia. Finally, Eastlink's proposed Pennant Point POI site is a major Eastlink data centre served by competitive transport facilities, and the site could accommodate competitor co-location, although this is not mandatory for TPIA services.

32. Accordingly, while there may be a disadvantage to a competitor and a corresponding preference in favour of Eastlink under subsection 27(2) of the Act, based on the information provided, any such disadvantage or preference would not be undue or unreasonable.
33. In light of the above, the Commission **denies** CNOC's request to require Eastlink to locate its POI in downtown Halifax.

Should Eastlink be required to amend its proposed TPIA service agreement?

Positions of parties

34. CNOC submitted that certain clauses of Eastlink's proposed TPIA service agreement regarding intellectual property, misleading or abusive marketing practices (clauses 13.1 and 13.2), and *force majeure* (clause 19.1) should be removed since they either restrain free speech or are anti-competitive. CNOC added that Schedule B of Eastlink's service agreement should be amended to include two additional methods whereby a competitor can record evidence of an end-user's consent to transfer to that competitor's service.⁸
35. In reply, Eastlink stated that clauses 13.1, 13.2, and 19.1 either mirror previously approved service agreements submitted by other TPIA service providers, or represent reasonable commercial business practices, or both. However, Eastlink agreed to the addition of the two additional methods of recording consent proposed by CNOC, or in the alternative, proposed the addition of the following clarifying statement: "ISPs [Internet service providers] shall comply with all applicable Commission rulings, as may be amended from time to time, regarding customer order confirmation."

Commission's analysis and determinations

36. In Telecom Decision 2012-636, the Commission did not require that a contested service agreement clause pertaining to intellectual property be removed, finding that such clauses are, in essence, contractual matters and not matters that the Commission would enforce. The contested clauses in the present case are principally commercial matters to which the same reasoning applies. The Commission would not be the most suitable forum for resolving any disputes that may arise regarding the contested clauses. Accordingly, it would not be appropriate for the Commission to intervene in the circumstances.

⁸ These two additional methods are (i) oral confirmation, in which a recording is retained, and (ii) any other method, in which an objective record is created by the customer or a third party.

37. The inclusion of the additional methods of recording consent to a customer transfer proposed by CNOC is consistent with existing Commission policies regarding the customer transfer process.⁹ Given this, as well as Eastlink's agreement to include references to these methods, the Commission **directs** Eastlink to modify Schedule B, sections 2(b) and 2(c)(iv) of its proposed TPIA service agreement to include these references.

Should Eastlink be required to amend its proposed TPIA tariff to refer to the bank whose rate it will use to calculate interest?

Positions of parties

38. CNOC submitted that Eastlink did not indicate in its tariff pages which bank's prime rate will be used for the purpose of calculating interest.

39. Eastlink replied that it intended to use the rate of TD Bank.

Commission's analysis and determinations

40. The Commission **directs** Eastlink to amend item 102 of its proposed TPIA tariff to include a reference to TD Bank as the bank whose prime rate will be used for the purpose of calculating interest.

Request to destandardize Persona's TPIA service speeds

Positions of parties

41. Persona proposed to destandardize its legacy TPIA service speeds in its Ontario serving territory concurrent with the introduction of higher TPIA service speeds by Eastlink. The proposed destandardized service speeds are no longer offered at the retail level.

Commission's analysis and determinations

42. Given that the Commission received no interventions regarding Persona's application, that the speeds in question are being replaced with higher speeds, and that there is no obligation on service providers to continue providing competitors with services that they do not provide to their own retail customers, the Commission accepts Persona's destandardization request.

Conclusions

43. In light of all the above, the Commission **approves on an interim basis, subject to the changes set out in this decision**, Eastlink's Tariff Notices 35 and 35A, and **approves** Persona's Tariff Notice 7, effective the date of this order.

⁹ See for example Telecom Decision 2005-15 and Broadcasting and Telecom Regulatory Policy 2011-191.

44. The Commission reminds Eastlink and Persona that they must issue revised tariff pages¹⁰ reflecting the determinations set out in this order within **10 days** of the date of this order.

Secretary General

Related documents

- *Review of costing inputs and the application process for wholesale high-speed access services*, Telecom Decision CRTC 2016-117, 31 March 2016
- *Shaw Cablesystems G.P. - Destandardization of four third-party Internet access services*, Telecom Order CRTC 2015-378, 17 August 2015
- *Shaw Cablesystems G.P. – Application to review and vary Telecom Order 2015-73 regarding interim rates for third-party Internet access service speeds*, Telecom Decision CRTC 2015-338, 27 July 2015
- *Shaw Cablesystems G.P. – Introduction of a new third-party Internet access service speed*, Telecom Order CRTC 2015-328, 22 July 2015
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015
- *Shaw Cablesystems G.P. – Introduction of five new third-party Internet access service speeds*, Telecom Order CRTC 2015-73, 2 March 2015
- Telecom Order CRTC 2014-610, 25 November 2014
- *Rogers Communications Partnership – Introduction of four new wholesale Third Party Internet Access service speeds*, Telecom Order CRTC 2012-706, 21 December 2012
- *Wholesale residential high-speed access services – Capacity-based billing model service charge rates and related matters*, Telecom Decision CRTC 2012-636, 21 November 2012
- *The customer transfer process and related competitive issues*, Broadcasting and Telecom Regulatory Policy CRTC 2011-191, 18 March 2011
- *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010

¹⁰ Revised tariff pages can be submitted to the Commission without a description page or a request for approval; a tariff application is not required.

- *Part VII application to revise Article 11 of the Terms of Service, Telecom Decision CRTC 2005-15, 17 March 2005*
- *Definitions of larger cable carrier and the creation of confidentiality agreements, Order CRTC 2000-317, 18 April 2000*

Appendix to Telecom Order CRTC 2016-201

Rate adjustments for Eastlink's TPIA services

Eastlink's proposed service speeds (Tariff Notice 35)	Shaw's equivalent service speeds as submitted by Eastlink (Tariff Notice 35)	Eastlink's proposed rates (and Shaw's approved rates as submitted by Eastlink)	Shaw's nearest lower-speed, non-destandardized services ^{***}	Shaw's approved rates	Commission's approved rates
20 Mbps download, 2 Mbps upload	20 Mbps download, 1.5 Mbps upload	\$29.83	20 Mbps download, 1.5 Mbps upload	\$29.83	\$29.83
50 Mbps download, 5 Mbps upload	50 Mbps download, 3 Mbps upload*	\$54.24	30 Mbps download, 2.5 Mbps upload	\$29.83	\$29.83
100 Mbps download, 10 Mbps upload	100 Mbps download, 5 Mbps upload*	\$91.25	60 Mbps download, 3 Mbps upload	\$54.24	\$54.24
150 Mbps download, 10 Mbps upload	100 Mbps download, 5 Mbps upload*	\$91.25	120 Mbps download, 6 Mbps upload	\$98.55	\$98.55
200 Mbps download, 10 Mbps upload	250 Mbps download, 15 Mbps upload**	\$114.75	120 Mbps download, 6 Mbps upload	\$98.55	\$98.55
400 Mbps download, 10 Mbps upload	250 Mbps download, 15 Mbps upload**	\$114.75	120 Mbps download, 6 Mbps upload	\$98.55	\$98.55

* These services were destandardized in Telecom Order 2015-378.

** These services were destandardized in Telecom Order 2014-610.

*** The Commission approved the rates for these services on an interim basis in Telecom Decision 2015-338, and Telecom Orders 2015-328 and 2015-73.