



## Telecom Decision CRTC 2017-105

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Reference: Telecom Notice of Consultation 2016-192

Ottawa, 20 April 2017

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### **Complaints against Quebecor Media Inc., Videotron Ltd., and Videotron G.P. alleging undue and unreasonable preference and disadvantage regarding the Unlimited Music program**

*The Commission finds that Quebecor Media Inc., Videotron Ltd., and Videotron G.P. (collectively, Videotron) are acting in violation of subsection 27(2) of the Telecommunications Act by exempting the Unlimited Music program from data charges. Subsection 27(2) prohibits Canadian carriers from giving an undue or unreasonable preference to themselves or any other person, or subjecting any person to an undue or unreasonable disadvantage. Videotron is giving an undue preference to subscribers who access the Unlimited Music program and to the providers whose services are included in that program, and is subjecting providers and consumers of other content and services to a corresponding undue disadvantage.*

*Unlimited Music enables some of Videotron's mobile wireless customers to access certain music streaming services without the data associated with those services counting toward the data caps included in those customers' mobile wireless plans.*

*The Commission **directs** Videotron to bring itself into compliance with subsection 27(2) of the Act with respect to data charges for the Unlimited Music program by no later than **19 July 2017**, and to report to the Commission when and how it has come into compliance.*

*This decision promotes the freedom of consumers to access the online content of their choice and supports the ability of all content providers to innovate. It also encourages Internet service providers to compete and innovate based on the capabilities of their networks, as well as to offer a range of speed- and volume-based data packages to provide better choices to Canadian consumers.*

#### **Application**

1. On 1 September 2015, the Commission received a Part 1 application from the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of B.C., and the Public Interest Advocacy Centre (collectively, CAC-COSCO-PIAC) regarding the Unlimited Music program offered by Quebecor Media Inc. and its wholly owned subsidiaries Videotron Ltd. and Videotron G.P. (collectively,

Videotron). On 4 September 2015, the Commission received a Part 1 application from Vaxination Informatique (Vaxination) on the same subject.

2. The applicants objected to Videotron's practice of exempting its Unlimited Music program from the standard monthly data caps<sup>1</sup> and data charges generally applicable to its wireless services. They requested that the Commission prohibit Videotron from applying this exemption, submitting that Videotron's billing practices regarding its Unlimited Music program are unjustly discriminatory and are therefore in violation of subsection 27(2) of the *Telecommunications Act* (the Act). The applicants also submitted that these practices violate the framework regarding Internet traffic management practices (ITMPs) established in Telecom Regulatory Policy 2009-657.

## Background

3. The Unlimited Music program, launched on 27 August 2015, enables Videotron's mobile wireless customers to access certain music streaming services<sup>2</sup> without incurring data transmission charges, as long as they subscribe to certain plans, such as a plan with a data cap of 2 gigabytes (GB) or more, and have a long-term evolution (LTE) smartphone that uses Videotron's LTE network. In other words, the data consumed by these music streaming services does not count toward the data caps included in those customers' mobile wireless plans. Videotron's mobile wireless customers who satisfy the above-noted criteria have automatic access to the Unlimited Music program – that is, they do not have to specifically subscribe to it. However, no rebate or alternative offer is provided to eligible subscribers who do not use Unlimited Music.
4. Eligible Videotron customers cannot take advantage of the Unlimited Music program while using a virtual private network (VPN)<sup>3</sup> or while in Internet tethering mode.<sup>4</sup> In addition, a customer's data consumption when using Unlimited Music while roaming

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<sup>1</sup> A data cap, also known as a bandwidth cap or a data allowance, is the amount of data transfer allowed during a specified period of time (usually a month) as part of a retail Internet access service. Once the data cap is surpassed, customers typically incur a surcharge, are subject to throttling, or are invited to subscribe to a plan with higher capacity or to buy an additional block of allowable data consumption.

<sup>2</sup> Videotron indicated that as of 14 November 2016, Unlimited Music included 14 music streaming applications: 8tracks, Analekta, Apple Music, Bandcamp, Deezer, Google Music, Groove, Jango, Jazz Radio / Digitally Imported / Rock Radio / RadioTunes, Rhapsody, Slacker, Spotify, Stingray Musique, and Tidal.

<sup>3</sup> A VPN is a private network that extends across a shared or public network (Internet) and enables users to send and receive data as if their devices were directly connected to the private network. VPNs can provide functionality, security, and/or network management benefits to the user.

<sup>4</sup> Tethering, or phone-as-modem, is the sharing of a mobile device's Internet connection with other devices. Connection of a mobile phone or tablet computer with other devices can be done over a wireless local area network (Wi-Fi), over Bluetooth, or by physical connection using a cable. Tethering can be used, for example, to connect a cellphone that has Internet access to a laptop that does not, so that the laptop can access the Internet.

is subject to the roaming limitations of that customer's particular wireless data plan. Unlimited Music applies to music streaming only and excludes the downloading of songs and other non-music content (such as videos) via the music streaming service provider's applications. Unlimited Music allows a maximum data flow of 128 kilobits per second (Kbps) to be exempt from the usual data charges.

5. Any eligible music streaming service provider<sup>5</sup> that wishes to participate in the Unlimited Music program must sign a letter of agreement with Videotron. Videotron indicated that no money changes hands between it and the participating providers.

## **Proceeding**

6. In response to the above-mentioned applications, the Commission received comments from: l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ); Bragg Communications Inc., carrying on business as Eastlink (Eastlink); the Canadian Internet Policy and Public Interest Clinic (CIPPIC); the Canadian Network Operators Consortium Inc. (CNOG); Benjamin Klass; Fenwick McKelvey; Marc Nanni; Newcap Inc., Rogers Media Inc., Corus Entertainment Inc., the Jim Pattison Broadcast Group, Vista Radio Ltd., and Golden West Broadcasting Inc. (collectively, Newcap et al.); OpenMedia; Rogers Communications Inc. (Rogers); Sandvine Incorporated (Sandvine); TELUS Communications Company (TCC); and Videotron.
7. Several parties expressed general concerns regarding billing practices that exempt the data consumed by some services from the data caps included in the customer's service plan (zero-rating practices). Among other things, these parties argued that zero-rating practices undermine the principle of net neutrality, which according to them involves Internet service providers (ISPs) treating all Internet traffic equally. Certain parties requested that the Commission initiate a public proceeding to examine these practices. Some parties raised other issues, including section 36 of the Act, which states that Canadian carriers must not control the content or influence the meaning or purpose of the telecommunications they carry, and expressed concerns about confidentiality and security of information and access to exclusive content.
8. In light of this proceeding and the proceeding that led to Broadcasting and Telecom Decision 2015-26 concerning Bell Mobility Inc.'s and Videotron's mobile TV services (the Mobile TV decision), it became clear to the Commission that zero-rating and other differential pricing practices<sup>6</sup> are likely to become increasingly common in

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<sup>5</sup> Videotron has indicated that, to be eligible, a music streaming service provider must meet Videotron's technical requirements. Specifically, Videotron must be able to identify each supplier's URL to distinguish its audio stream from other data streams to which Videotron subscribers could have access. Furthermore, the Unlimited Music program excludes radio stations and any video content.

<sup>6</sup> Differential pricing practices, in general terms, involve the same or a similar product or service being sold to customers at different prices. Zero-rating is an example of differential pricing. In the context of Internet access services, zero-rating can happen when an ISP does not count data traffic related to a particular application or set of applications against the limits of a monthly data plan, which is often sold to consumers at a fixed price per month.

Canada. Instead of making decisions on a case-by-case basis, the Commission decided to undertake a thorough analysis of the issues surrounding differential pricing practices and provide answers to the questions raised by these practices. Therefore, in Telecom Notice of Consultation 2016-192, the Commission initiated a public proceeding with the goal of providing a clear framework for the industry on how it generally intends to address differential pricing practices, particularly in relation to unjust discrimination and undue or unreasonable preference or disadvantage (subsection 27(2) of the Act). The Commission's intention in launching the public proceeding was to create more certainty in the market and to ensure that ISPs and consumers benefit from a clear, transparent framework regarding differential pricing practices.

9. As such, the record of the Part 1 proceeding regarding the Unlimited Music program was placed on the record of the proceeding initiated by Telecom Notice of Consultation 2016-192, and the Commission's ruling in this decision is based on that broader record. The public record of the combined proceeding is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the file numbers provided above.
10. Concurrently with this decision, the Commission is issuing Telecom Regulatory Policy 2017-104, in which it sets out its determinations on the issues raised in the proceeding initiated by Telecom Notice of Consultation 2016-192 and establishes a regulatory framework to govern the use of differential pricing practices.

### **Issue**

11. After examining the complete public record of this proceeding, the Commission has determined that the issue it must address in this decision is whether Videotron is acting in violation of subsection 27(2) of the Act when operating as a Canadian carrier providing telecommunications services for the transport of its Unlimited Music program to subscribers' mobile devices.

### **Is Videotron acting in violation of subsection 27(2) of the Act?**

12. In Telecom Decision 96-14 and subsequent decisions, the Commission forbore from regulating mobile wireless data services, which can be used to provide Internet access to mobile wireless service subscribers. In Telecom Decision 2010-445, the Commission amended the forbearance framework for those services by making the offering and provision of data services by Canadian carriers subject to its powers and duties under section 24 and subsections 27(2), 27(3), and 27(4) of the Act. In that decision, it considered that those amendments were appropriate and would enable it to address, among other things, unjust discrimination and undue preference issues with respect to the provision of mobile wireless data services by Canadian carriers.

13. In light of the telecommunications policy objectives set out in section 7 of the Act,<sup>7</sup> the Commission will address the complaints it received regarding Videotron's Unlimited Music program by applying the following subsections of the Act:

27(2) 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.

27(4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

### **Summary of positions of parties**

14. Several parties, including CAC-COSCO-PIAC, CIPPIC, CNOC, Mr. Klass, Mr. McKelvey, Newcap et al., Rogers, and Vaxination, alleged that Videotron, with its Unlimited Music program, discriminates against one or more of the following services or persons:

- eligible Videotron customers who wish to use any Internet service or application that is not included in the Unlimited Music program;
- any Internet service or application that is not included in the Unlimited Music program; and
- Videotron's mobile wireless service customers who are not eligible for the Unlimited Music program.

15. CAC-COSCO-PIAC, CNOC, Eastlink, Mr. Klass, Mr. McKelvey, Newcap et al., Rogers, and Vaxination argued that Unlimited Music is being offered in violation of subsection 27(2) of the Act. A number of parties submitted that this offer could have negative consequences for the development of new online services, as it would make it more difficult for the providers of new services to break into the market. Further, many argued that in selecting certain online music streaming services for

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<sup>7</sup> The policy objectives are as follows: 7(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; (d) to promote the ownership and control of Canadian carriers by Canadians; (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada; (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; (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services; (h) to respond to the economic and social requirements of users of telecommunications services; and (i) to contribute to the protection of the privacy of persons.

zero-rating, Videotron is acting as a gatekeeper that is able to pick winners and losers among Internet content services, in violation of the principles of net neutrality.

16. Newcap et al. submitted that all Canadian radio stations that stream their signals online are subjected to an undue and unreasonable disadvantage by Videotron in the context of Unlimited Music, because customers would incur data charges to stream these stations on Videotron's wireless network. Newcap et al. added that with increasing competition from new digital sources of audio programming, most of which are not licensed, it becomes increasingly important for radio broadcasters to have access to a level playing field on Internet and mobile platforms.
17. Some parties submitted that zero-rated music streaming services are discriminatory against individuals with hearing problems.
18. Videotron stated that it did not contest the fact that its Unlimited Music program gives an advantage to its eligible customers who use the program and to certain music streaming service providers.<sup>8</sup> However, Videotron denied that this advantage is undue, submitting that wireless service providers like itself must adopt new strategies to improve and differentiate their services in order to attract new customers.
19. Videotron submitted that Unlimited Music is a democratic program that allows participation by any music streaming service provider that meets the program's technical criteria. The company explained that its decision to focus the Unlimited Music program on music streaming services rather than on radio stations that stream their content over the Internet was based on trends among 14- to 34-year-olds, who listen to radio much less than other age groups do. In addition, Videotron cited administrative and technical challenges related to including Canada's approximately 700 radio stations in the Unlimited Music program.
20. Videotron also submitted that the technical parameters for qualification for the Unlimited Music program, including the 128 Kbps speed, are reasonable restrictions to ensure that the service does not generate the congestion-related problems referenced in the Mobile TV decision.
21. Videotron submitted that its business objectives in offering the Unlimited Music program are to provide a segment of its clientele with a benefit they will appreciate and to attract new customers. Videotron, as well as Sandvine and TCC, submitted that Unlimited Music is an innovative program that enables it to improve its service and differentiate itself from other wireless service providers in order to attract and retain customers. According to these parties, such activities reflect healthy competition in the marketplace and their cumulative effects result in increased choice and added value for consumers.

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<sup>8</sup> See, for example, Videotron's submission dated 21 September 2016.

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

22. The Commission's consideration of an allegation of undue or unreasonable preference or disadvantage under subsection 27(2) of the Act is conducted in two phases. First, the Commission must determine whether the conduct in question constitutes a preference or subjects a person to a disadvantage. If it so determines, it must then decide whether the preference or disadvantage is undue or unreasonable.

### **Determination of preference or disadvantage**

23. The Commission agrees with Videotron that its Unlimited Music program gives an advantage to (a) its wireless subscribers who listen to streamed music and who are eligible for the program, and (b) music streaming service providers whose services are included in the program. The members of the former group get access to data over and above the limits of their plans, and the latter group gets an opportunity to expand its customer base.
24. In addition, the Commission considers that eligible Videotron subscribers who choose to access services that are not part of the Unlimited Music program are subject to a disadvantage. Since their data use for excluded services is not exempt from data charges as it is for services included in the Unlimited Music program, they must access the services they select at a potentially significantly higher cost.<sup>9</sup> Further, Videotron subscribers who are not eligible to receive the Unlimited Music program are subject to a disadvantage, as they are unable to access the services included in the program without incurring data charges.<sup>10</sup> Finally, content providers that are not eligible to be part of the Unlimited Music program, whether because they are not online streaming services or for other reasons, are subject to a disadvantage: not only do they lack the opportunity available to participating providers to expand their customer base, but they can be expected to lose customers if eligible subscribers choose to access the included services rather than their services in order to avoid using data.
25. The Commission considers that music services that primarily play music but are excluded from the Unlimited Music program, such as Canadian radio stations that stream their content over the Internet, are comparable (substantially the same) to the music streaming services included in the program, as they offer similar functionality and often target the same consumers.
26. When consumers subscribe to a wireless data plan, they do so not just to access music services, but to gain access to all content available on the Internet. The functions performed by Videotron to establish data connectivity and provide transport over its network are the same regardless of whether the content being transported is part of Unlimited Music, other musical content, or any other content.

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<sup>9</sup> Additional data charges will be incurred only if the data cap is exceeded. However, many customers refrain from using data for fear of incurring such charges, even if they have not reached their cap.

<sup>10</sup> See footnote 9.

27. Nevertheless, the data that an eligible subscriber uses when accessing Unlimited Music content does not count toward the data cap of that subscriber's wireless plan, while the data associated with other content-based services (even those requiring bit rates similar to or lower than those required for Unlimited Music) does count toward the cap. As a result, the cost to the consumer of accessing, by means of the wireless network, the content included in Unlimited Music can be significantly different from the cost of accessing other Internet content.
28. In light of the above, the Commission finds that, in providing access to certain music streaming services at different rates, Videotron is
- giving a preference to its subscribers who are eligible to access the Unlimited Music program and do so,
  - giving a preference to the providers of the content included in the program,
  - subjecting to a disadvantage its subscribers who are not eligible for the program or who consume other content and services, and
  - subjecting to a disadvantage the providers of content and services not included in the program.

**Undue or unreasonable nature of the preference or disadvantage**

29. A preference or a disadvantage is not in itself contrary to the Act, unless the Commission determines that it is undue or unreasonable. In this case, pursuant to subsection 27(4) of the Act, the burden of establishing before the Commission that any preference or disadvantage is not undue or unreasonable is on Videotron.
30. In addition, pursuant to section 28 of the Act, the Commission must have regard to the broadcasting policy set out in the *Broadcasting Act* in determining whether any preference or disadvantage is undue or unreasonable in relation to the transmission of programs.
31. Videotron argued that it is not picking and choosing partners with its Unlimited Music program; the program is open to all music streaming service providers, and participation in the program is determined by the individual provider. However, based on the record, Videotron has proactively approached well-known providers to inform them of the Unlimited Music program and to invite them to participate.<sup>11</sup> It is unclear how smaller, less established providers are supposed to find out about the program.

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<sup>11</sup> Videotron submitted in confidence, on 14 November 2016, the details of which providers it had approached.

32. The number of services that have been included in the Unlimited Music program during the 20 months since its launch represents a small fraction of all the similar music services that exist on the Internet. Further, the record of this proceeding indicates that the inclusion of these services in the program has required negotiations averaging 5.5 months between Videotron and the content providers, and that there are ongoing negotiations to include other services as well.<sup>12</sup> The length of time required to add services to the program illustrates the challenge of offering an inclusive package, even when a carrier is motivated to do so. Such time frames, in an environment that moves as quickly as the Internet, could have a major impact on the services that are excluded from Unlimited Music, whether because the providers of those services have been unable to reach an agreement with Videotron or because they are unaware of the program.
33. Given that access to the Unlimited Music program is exempt from the standard data charges for eligible subscribers, the charge to those subscribers to access content excluded from the program on their mobile devices can be significantly higher than the charge to access Unlimited Music content. Videotron's eligible subscribers therefore have an economic incentive to access the content included in Unlimited Music as distinct from other content. Consequently, providers of excluded content, such as online streaming radio stations and other music streaming services, are being subject to a disadvantage because subscribers can be expected to opt for the use of the free content included in the program rather than excluded content.
34. Videotron argued that it had technical and administrative reasons for excluding Internet radio stations from its Unlimited Music program, including the fact that there are many of them operating. However, since Internet radio stations that principally play music are substantially similar to online music streaming services, the Commission finds that Videotron's reasons for excluding such stations are not sufficiently persuasive to justify the disadvantage to which Videotron has subjected them.
35. In light of the foregoing, the Commission finds that Videotron's practice of zero-rating certain content is generally harmful to consumers and content providers, as it favours particular content or applications over others. Over time, this type of practice could discourage the development of other applications and services, to the detriment of Canadians. Further, the Commission considers that the inception and offering of content-specific data programs that are priced differently from other similar programs would put ISPs in a position where they are picking winners and losers. In the Commission's view, this is a clear example of an ISP exercising a gatekeeping power and is inconsistent with the policy objectives set out in the Act, particularly those in paragraphs 7(a), (c), (g), and (h).

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<sup>12</sup> See Videotron's submission dated 16 November 2016.

36. With regard to Videotron's argument that Unlimited Music is an attempt to differentiate its service and attract new customers, the Commission notes that ISPs have a variety of options for differentiating their telecommunications services (e.g. prices and speeds) and that competition among retail wireless Internet services should be based on the quality of the services themselves, not on preferred content selected by an ISP. ISPs provide access to Internet content; offering unlimited access only to selected content would result in the ISP having undue influence over the choice of content that its subscribers access, which could in turn have a significant impact on the development of content itself. This is not an appropriate role for an ISP, as it is inconsistent with the policy objectives set out in paragraphs 7(a), (b), (c), and especially (g) of the Act.
37. Videotron submitted that it considers Unlimited Music as a bonus that gives added value to its subscribers. Based on the usage forecasts provided by Videotron on the record of this proceeding, users of services included in Unlimited Music could consume a substantial amount of extra data, over and above their monthly data cap. However, it is only subscribers with the highest data allotments and the fastest services who have access to this additional data, to the exclusion of other subscribers.
38. Further, Videotron's subscribers who are eligible for the Unlimited Music program but are not interested in it, or who are unable to benefit from it (for instance, because of a hearing disability), do not receive a monetary discount or added data allotment for other services. As such, Unlimited Music may exacerbate existing inequalities, as customers who already have access to higher levels of data are able to use even more data (and thus pay less per byte), contrary to customers who do not consume music services. The Commission finds that this result is inconsistent with the policy objectives set out in paragraphs 7(a), (b), and (h) of the Act.

#### **Broadcasting objectives**

39. While some parties suggested that a differential pricing practice such as the Unlimited Music program could be used to promote content made by Canadians, Videotron submitted that any effort it could have made as part of the program to isolate and give special treatment to Canadian music services would have been contrary to the principle of non-discrimination in subsection 27(2) of the Act.
40. As Newcap et al., Rogers, and Vaxination submitted, some Canadian radio stations are taking greater advantage of the digital economy. By providing a significant incentive for its eligible customers to choose only certain music streaming services instead of Canadian radio stations that stream their signals online, Videotron is not privileging Canadian programming in any specific way. Videotron's practices therefore do not promote the Canadian broadcasting policy objectives set out in subsection 3(1) of the *Broadcasting Act*, including in particular those related to safeguarding, enriching, and strengthening the cultural, political, social, and economic fabric of Canada and encouraging the development of Canadian expression.

41. In light of the above, the Commission finds that the preference or disadvantage involved in the Unlimited Music program cannot be justified under the broadcasting policy set out in the *Broadcasting Act*.

## Conclusion

42. In light of all the foregoing, the Commission finds that Videotron has failed to establish that

- the preference given to its eligible customers who access the music streaming services included in Unlimited Music, and to the providers of those services, is not undue or unreasonable;
- the disadvantage to ineligible customers, and to eligible customers who use or want to access content not included in the Unlimited Music program, is not undue or unreasonable; and
- the disadvantage to providers whose content or services are not included in Unlimited Music but are substantially similar to those that are included, such as Internet radio stations that primarily play music, is not undue or unreasonable.

43. Further, given the concerns outlined above with regard to the exclusion of radio services, as well as the limited number of services that are actually part of the Unlimited Music program and the influence that this program has on consumers' decisions as to which content they access, the Commission finds that the preferences and the disadvantages cited above are in fact undue and unreasonable.

44. Therefore, the Commission finds that, in providing certain of its retail Internet access service customers with access to some content through Unlimited Music without charging those customers for the data involved (contrary to content that is not included in Unlimited Music, which is subject to data charges), Videotron has conferred upon its eligible subscribers who access the Unlimited Music program, and upon the providers of the services included in that program, an undue and unreasonable preference, in violation of subsection 27(2) of the Act. In addition, Videotron has subjected to an undue and unreasonable disadvantage: (a) its ineligible subscribers; (b) its eligible subscribers who do not access the services in question; (c) providers whose content or services are not included in Unlimited Music but are substantially similar to those that are included, such as Internet radio stations that primarily play music; and (d) other excluded content providers.

45. The Commission **directs** Videotron to bring itself into compliance with subsection 27(2) of the Act with respect to the data charges for its Unlimited Music program, and to inform its customers appropriately, by no later than **19 July 2017**. The Commission also **directs** Videotron to report to the Commission when and how it has come into compliance.

46. The Commission notes that the applicants and certain parties raised concerns about whether Videotron, in regard to its billing practices for the Unlimited Music program, contravened the ITMP framework and section 36 of the Act. However, as it has already found the program to be in violation of subsection 27(2) of the Act and directed Videotron to comply with that provision with respect to Unlimited Music, the Commission does not consider it necessary to make a finding under section 36 or the ITMP framework.
47. With regard to the concerns about confidentiality and security of information that some parties raised during the proceeding, the Commission notes that in various decisions, including Telecom Regulatory Policies 2009-657 and 2009-723, it has established regulatory measures to safeguard customer information and to protect the privacy of consumers. In the current case, the evidence on the record does not demonstrate that personal or confidential information about Videotron's customers has been disclosed, in violation of the rules established by the Commission, to Videotron's partners who provide music streaming services in the context of Unlimited Music.

#### **Analysis under Telecom Regulatory Policy 2017-104's evaluation criteria**

48. The Commission has already determined that Videotron is in violation of subsection 27(2) of the Act with regard to its Unlimited Music program. However, since that determination was based on the entire record of the proceeding, which led to Telecom Regulatory Policy 2017-104 as well as to this decision, the Commission has also assessed the Part 1 applications from CAC-COSCO-PIAC and Vaxination based on the four evaluation criteria set out in Telecom Regulatory Policy 2017-104, namely:
- the agnostic treatment of data;
  - the exclusiveness of the offering;
  - the impact on Internet openness and innovation; and
  - whether there is financial compensation involved.

#### **Agnostic treatment of data**

49. In Telecom Regulatory Policy 2017-104, the Commission found that ISPs, in providing a content-specific differential pricing practice as part of a retail Internet access service, would generally raise concerns of undue or unreasonable preference or disadvantage under subsection 27(2) of the Act.
50. The Unlimited Music program gives certain subscribers unlimited access to selected music streaming services, whereas all other data used is accounted and charged according to subscribers' data plans.
51. Accordingly, Unlimited Music does not meet this criterion.

### **Exclusiveness of the offering**

52. In Telecom Regulatory Policy 2017-104, the Commission considered that if an ISP makes a differential pricing practice exclusive to subscribers to a particular data plan, that practice is likely to raise concerns under subsection 27(2) of the Act.
53. The information provided on the record indicates that the Unlimited Music program is available only to high-tier customers who subscribe either to plans with more than 2 GB of data or to a combination of a 1 GB data plan and home Internet access service. Further, only a limited number of music streaming services are included in the program, to the exclusion of all other content.
54. Accordingly, Unlimited Music does not meet this criterion.

### **Impact on Internet openness and innovation**

55. Because Unlimited Music favours some music services over others and excludes many types of online music services, most notably streaming Canadian radio stations, the Commission considers that it could have a negative impact on Internet openness and consumer choice. For example, while it may seem that certain Canadians are getting access to more data through this program, ISPs rather than Canadians are choosing what content is zero-rated, and this favouring of certain content over other content could have an impact on the amount and choice of content for Canadians. In addition, by making certain content attractive to consumers for its lower price rather than its intrinsic interest and creating barriers to entry for excluded content providers, Unlimited Music makes it more difficult for content providers to launch their services and gain access to customers. Further, a program such as Unlimited Music tends to favour large, established content providers to the detriment of smaller providers and new entrants, including Canadian radio stations streaming over the Internet.
56. Accordingly, Unlimited Music does not meet this criterion.

### **Financial compensation**

57. Information on the record indicates that there is no financial compensation involved between Videotron and the music streaming service providers participating in the Unlimited Music program, beyond the use of application names for marketing purposes.
58. Accordingly, Unlimited Music meets this criterion.

### **Exceptional circumstances**

59. Based on the record of the proceeding, the Commission considers that there are no other mitigating factors or extenuating circumstances associated with the Unlimited Music program that would impact its analysis and conclusions in this case.

## Conclusion

60. In light of the above, the Commission finds that, on balance, the Unlimited Music program is not consistent with the evaluation criteria of Telecom Regulatory Policy 2017-104 and that Videotron, in its offering of the program,

- gives an undue preference to its customers eligible for the Unlimited Music program who use the music streaming services that are included, and therefore subjects to an unreasonable disadvantage ineligible customers and eligible customers who use or want to access other content, and
- gives an undue preference to the music streaming service providers that are included in the Unlimited Music program, and therefore subjects to an unreasonable disadvantage providers of other services, including substantially similar services, such as Internet radio stations that primarily play music.

Secretary General

## Related documents

- *Framework for assessing the differential pricing practices of Internet service providers*, Telecom Regulatory Policy CRTC 2017-104, 20 April 2017
- *Examination of differential pricing practices related to Internet data plans*, Telecom Notice of Consultation CRTC 2016-192, 18 May 2016, as amended by Telecom Notices of Consultation CRTC 2016-192-1, 3 June 2016; and 2016-192-2, 19 September 2016
- *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*, Broadcasting and Telecom Decision CRTC 2015-26, 29 January 2015
- *Modifications to the forbearance framework for mobile wireless data services*, Telecom Decision CRTC 2010-445, 30 June 2010
- *Regulatory measures associated with confidentiality provisions and privacy services*, Telecom Regulatory Policy CRTC 2009-723, 25 November 2009
- *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 2009
- *Regulation of mobile wireless telecommunications services*, Telecom Decision CRTC 96-14, 23 December 1996