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15 April 2008

By epass

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

Subject: Application requesting certain orders directing Bell Canada to
cease and desist from “throttling” its wholesale ADSL Access
Services

1. Primus Telecommunications Inc. (“Primus”) has obtained a copy of the above-noted Part VII Application, dated 3 April 2008, by the Canadian Association of Internet Providers (“CAIP”) requesting that the Commission issue certain orders directing Bell Canada to cease and desist from “throttling” wholesale ADSL services and in particular, the wholesale service known as Gateway Access Service (“GAS”). Primus has also obtained a copy of a letter, dated 4 April 2008, from Vaxination Informatique supporting CAIP’s application.

2. On 8 April 2008, Commission staff issued a letter splitting CAIP’s application into two separate processes, establishing 15 April 2008 as the deadline for submissions on CAIP’s request for interim relief. Pursuant to

section 60.(1) of the *CRTC Telecommunications Rules of Procedure*, Primus hereby submits its intervention on that portion of CAIP's application. Primus intends to submit a further intervention supporting and dealing with the substance of CAIP's application and why it agrees that Bell Canada is in violation of its GAS tariff, once the deadlines in that further process are established by the Commission

3. As noted by the Staff letter:

... CAIP made a request for interim relief on an expedited basis. Specifically, CAIP requested that the Commission issue an order directing Bell Canada to immediately cease and desist from "throttling" GAS.

4. Primus submits that the Commission should grant CAIP's request for an interim order directing Bell Canada to stop "throttling" its GAS service. The order should remain in effect until the Commission issues a decision with regard to the remainder of CAIP's application.

5. Of extraordinary significance to this application is the fact that CAIP has not just relied on its suspicion or hearsay evidence of Bell Canada's "throttling" activity. It has provided concrete and undeniable proof of the fact that Bell Canada has taken the "throttling" measures described in its application. In fact, media reports in the days after Bell Canada's enactment of these restrictions contained statements by senior Bell Canada employees defending the decision. CAIP has included a letter from Bell Canada to that effect and for its part, Primus can confirm that it has met with Bell Canada to discuss this issue and received other information from Bell Canada

confirming its “throttling” activity. No one can deny that “this horse is out of the barn.”

6. At the outset, however, Primus rejects any assertion by Bell Canada that traffic volumes associated with its wholesale GAS customers have necessitated this measure. Based on the capacity of the connections between Primus’ network and the GAS network at the Aggregated High Speed Service Provider Interface (AHSSPI)¹, and based on certain assumptions about the capacity of other ISPs’ connections, Primus does not believe that such traffic management measures are required. Bell Canada’s actions have dramatically changed GAS service levels and subsequently the levels of service Primus is able to offer its retail customers. For this reason, and the set out in the balance of this intervention, Primus submits that the Commission should grant CAIP’s request for interim relief.

7. CAIP’s application raises significant issues for Commission deliberation. It raises questions of whether Bell Canada is in compliance with its tariffs (section 25 of the *Telecommunications Act*) and questions of undue and unreasonable preference and disadvantage (section 27 of the *Act*). Both of these allegations relate to a service which the Commission has just recently re-affirmed as a service upon which competitors rely on a significant scale to provide competitive alternatives in the high-speed Internet access market. In *Revised Regulatory Framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008 (“Decision 08-17”) the Commission categorized GAS as a

¹ The AHSSPI provides for the aggregation of end-user traffic associated with a single service provider, from every ADSL enabled wire centre in either Bell Canada’s or Bell Aliant’s operating territory.

“conditional mandated non-essential” service. Decision 08-17 had this to say about aggregated ADSL access services (i.e. GAS):

In order for competitors to offer retail high-speed Internet access service, in most instances they have no option other than to buy the wholesale aggregated ADSL access [service]... To withdraw mandated access to aggregated ADSL access service – that is access and transport – at this time would likely result in a substantial lessening or prevention of competition in retail high-speed Internet access services. (emphasis added)²

8. Any actions impacting such a critical service that violate sections 25 or 27 of the *Act* in the manner alleged by CAIP would threaten the short and long-term competitiveness of the market and thwart the Policy Objectives contained in the *Act*, namely:

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

and

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

9. Moreover, CAIP has alleged that the actions of Bell Canada interfere with the content of messages in violation of section 36 of the *Act*. This too is a serious issue that cannot be taken lightly by the Commission.

10. The seriousness of the potential legal implications of Bell Canada's decision to "throttle" wholesale Internet traffic vis-à-vis three different sections of the *Act*, the undeniable impacts of that decision as they are already being felt by the ISP industry in Ontario and Quebec and the possibility that the Commission will find in CAIP's favour and direct Bell Canada to stop "throttling" GAS traffic permanently speak to the need for an expedited interim order directing Bell Canada to stop for the interim.

11. Primus also submits that the requested interim order would be in keeping with the government's Policy Direction to the CRTC. The Direction states that the Commission is to implement the *Act's* Policy Objectives by "[relying] on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives" and "when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives."

12. Consistent with the rationale behind Commission's categorization of GAS service in Decision 98-17³, Bell Canada's unilateral decision to throttle GAS service and stand by that decision in the face of industry protest demonstrates its market power in the wholesale high-speed Internet

² Decision 08-17, paragraph 85.

³ See paragraph 7 of this submission.

access market. Clearly, then, the Commission cannot rely on market forces alone to address the competitive impacts and alleged violations of the *Act* by Bell Canada.

13. Primus submits that an interim order directing Bell Canada to stop throttling GAS would be an effective and proportionate measure and would not interfere with competitive market forces. Such an order would effectively re-set the industry playing field back to the week of 17 March 2008, until the Commission issues its final orders on CAIP's application. To permit Bell Canada to continue would sustain the significant impact on GAS service (a critical competitor service). However, to take additional steps at this point would be to act without due process, as indicated by the Commission's decision to split CAIP's application.

14. For all of these reasons, Primus submits that the Commission should grant CAIP's request for interim order directing Bell Canada to immediately cease and desist from "throttling" GAS.

Yours truly,

A handwritten signature in black ink that reads "Jonathan L. Holmes". The signature is written in a cursive style with a horizontal line above the first name.

Jonathan L. Holmes

Cc: CAIP
Bell Canada
T. Vilmansen - CRTC

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