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The CRTC's Matching Speed Decision: What's Good for the Gander May be Toxic for the Goose

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UPDATED BELOW

In a Decision released on August 30th, the CRTC has confirmed that Canada's major telephone companies must make their existing wholesale high-speed internet access services available to competitors under a "speed-matching" requirement. "Speed Matching" is a regulatory requirement that applies to phone companies (referred to by the CRTC as “incumbent local exchange carriers”, or “ILECs”) who offer broadband internet access to residential customers. The CRTC applies similar rules to cable companies when they act as “cable carriers” in offering high speed internet access via their cable facilities. Under the speed matching rules, the ILECs and cable carriers must ensure that internet speeds provided to smaller companies that rent portions of the ILEC and cable carrier networks (known as “wholesale” services) match the speed that the ILECs and cable carriers offer to their own retail customers.

The ILECs (the major ILECs are Bell Canada, Telus and MTS/Allstream) provide retail high speed internet service using aggregated asymmetric digital subscriber (ADSL) technology for use with their copper or hybrid copper-fibre facilities. On the cable side, cable carriers including Rogers, Shaw and Videotron provide high speed third-party Internet access (TPIA) service using its DOCSIS technology alongside hybrid fibre-coaxial facilities.

CRTC Chairman Konrad von Finckenstein has referred to retail broadband access as “a key foundation for the digital economy”. The CRTC believes that requiring facilities-based operators to provide access to their networks on fair and equitable terms (including matching speeds) will lead to more opportunities for competition in retail internet services which will better serve consumers.

The CRTC’s August 30th Decision confirms the regime that the CRTC had previously established to apply speed matching requirements to both cable carriers’ TPIA services and to ILECs’ aggregated ADSL services. After the CRTC initially established the rules in 2008, the major ILECs petitioned the federal cabinet to reverse these rules, following which the Government issued an Order in Council in December 2009 requiring the CRTC to reconsider the ILEC rules. The CRTC conducted a proceeding earlier this year to address the Government’s Order.

In its Decision, the CRTC was careful to underscore the need to balance the goals of competitive broadband access at the retail level while at the same time ensuring that the ILECs continue to have the necessary incentives to innovate and invest in broadband facilities. The CRTC stated the importance of building out fibre networks closer to Canadian homes and businesses, which allows for faster internet connections.

To effect this balance among competing concerns, the CRTC approved wholesale tariff rates to ILEC competitors that reflect an additional markup of 10 per cent on its incremental costs. The purpose of the mark-up was to recognize the higher cost of capital for the ILECs needed to construct “fibre-to-the-node” (FTTN) facilities on a widespread basis. According to the CRTC, the new mark-up gave sufficient comfort to preclude any “undue disincentive” for ILECs to continue to invest in FTTN facilities. The ILECs have criticized the CRTC’s Decision as ignoring the significant risks and costs associated with investing in high speed facilities. The ILECs argue that, by mandating access to the ILECs network without putting any risk capital in the ground, the CRTC has effectively permitted competitors to “free ride” off ILEC investments in their transmission facilities.

Some commentators have also raised the concern that the speed matching Decision could have unintended consequences in other markets that depend on access to the ILEC and cable carrier pipe. An example of competing uses of the broadband platform is Bell Canada’s recent announcement of the launch of its new Internet based TV service, known as IPTV. Bell's IPTV offering is an integrated broadband service which will offer a full TV menu of signals to customers. Bell’s IPTV service offers digital television signals over fibre and last-mile DSL phone lines. Bell is also using this same platform to offer “Fibe”, a premium higher-speed Internet service to customers.

With competing demands on bandwidth for uses such as full TV service, high speed Internet service and now speed-matching for wholesale access to competitors, something had to give. In July, Rogers, one of the cable carriers, announced that it would impose more restrictive usage limits on its “Extreme” and “Lite” services. The new limits will effectively mean that it will take a smaller number of streamed videos before a Rogers’ customer reaches his or her monthly bandwidth cap.

It is interesting to note that some have attributed Rogers’ decision to lower the usage limits on its services to the anticipated entry of services such as Netflix and GoogleTV into Canada. The lower usage limits would make a service such as Netflix arguably less attractive due to the effective economic limits on streaming video over a broadband connection. At the same time, it appears that Rogers has been careful to structure its revised usage limits in accordance with the CRTC’s 2009 Internet traffic management regime, also known as the Canadian “net neutrality” rules. Usage limits that vary according to set prices would be permissible as “economic ITMPs” under the CRTC’s rules.

But back to speed matching: in contrast to providers such as Rogers, competitors who obtain wholesale access to ILEC or cable carrier platforms in many cases do not employ download caps. For example, one such competitor, *TekSavvy*, offers usage plans for lower fees on an unlimited basis. As a result of these disparate internet traffic management practices between resellers of high speed access and the cable carriers and ILECs, some are speculating that the speed matching Decision could induce a substitution effect, in which customers migrate to high speed Internet services provided by smaller ISPs who can stream high-quality video in huge volumes. This development could boost the success of “over-the-top” internet content-streaming services such as AppleTV and Netflix, to the extent that resellers will be able to obtain wholesale bandwidth at matching speeds and offer access without any bandwidth caps. The proponents of this argument also note that such a substitution effect would also thwart the take-up of the ILECs’ new IPTV offerings.

Whether this purported “zero-sum game” between “over-the-top” internet content-streaming services such as AppleTV and Netflix and the potential success of IPTV can be laid on the shoulders of the speed-matching rules, is debatable. But as increasing demands are made for access to the high speed platform, you can count on seeing more disputes, much of which will be played out along the fault line demarcating CRTC-regulated services such as IPTV and cable television from unregulated uses of the broadband plant by “over-the-top” providers such as Netflix, AppleTV and GoogleTV.

And the debate is far from over: the ILECs have already announced that they will appeal the CRTC’s August 30th Decision to the federal cabinet.*

*UPDATED September 14, 2010: Technically, the ILECs have no further appeal to Cabinet becuse the current CRTC proceeding was the result of the Cabinet ordering the CRTC to reconsider its 2009 determinations. Under the Telecommunications Act, the Cabinet now has 90 days to vary or rescind the CRTC's August 30th Decision.
