

**THE COMPETITION TRIBUNAL**

**IN THE MATTER** of the *Competition Act*, R.S.C. 1985, c. C-34 as amended;

**AND IN THE MATTER** of a Consent Agreement pursuant to section 74.12 of the *Competition Act* with respect to certain deceptive marketing practices of the Respondent under subsection 74.01(1) of the *Competition Act*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE REGISTERED / ENREGISTRÉ FILED / PRODUIT  CT-2016-014 September 13, 2016  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 2

Applicant

- and -

**COMWAVE NETWORKS INC.**

Respondent

**CONSENT AGREEMENT**

**WHEREAS** the Commissioner of Competition (the “**Commissioner**”) is responsible for the administration and enforcement of the *Competition Act* (the “**Act**”);

**AND WHEREAS** the Respondent, Comwave Networks Inc., is an independent communications company with its Head Office in Toronto, Ontario, that provides a range of communications services to consumers, including internet and home phone services;

**AND WHEREAS** the Commissioner commenced an examination into certain marketing practices of the Respondent under Part VII.1 of the *Act*;

**AND WHEREAS** the Respondent made representations to the public about the prices at which consumers could obtain various telecommunications services (the “**Price Representations**”);

**AND WHEREAS** the Respondent charged consumers Non-Optional Fees disclosed in fine print disclaimers, in addition to the prices advertised in the Price Representations;

**AND WHEREAS** as part of its telephone sales intake process, the Respondent’s staff was instructed to provide consumers with an itemized breakdown of charges, including Non-Optional Fees, for the services prior to the completion of the sale and installation of the services;

**AND WHEREAS** the Commissioner has concluded that the disclaimers and Comwave telephone intake process were insufficient to alter the general impression created by the Price

Representations;

**AND WHEREAS** the Commissioner has concluded that notwithstanding the disclaimers and telephone intake process, the Respondent's Price Representations created the general impression that consumers could obtain communications services from the Respondent at prices that were not in fact attainable, because consumers were required to pay these additional Non-Optional Fees;

**AND WHEREAS** the Respondent also made representations to the public offering unlimited local calling (the "**Unlimited Calling Representations**") for home phone service, such as "*The lowest priced Home Phone line with unlimited local calling*";

**AND WHEREAS** the Commissioner has concluded that disclaimers contained terms and conditions that limited residential phone service to 3000 minutes per month, and that the disclaimers were insufficient to alter the general impression created by the "Unlimited Calling Representations";

**AND WHEREAS** the Respondent has recently removed the 3000 minute/month cap on residential phone service, so that there are no fixed usage-based caps on unlimited residential phone service;

**AND WHEREAS** the Respondent also made representations to the public that they could receive special price offerings, such as "6 months free home phone service" (the "**Special Price Offerings Representations**");

**AND WHEREAS** as part of its telephone sales intake process, the Respondent's staff was instructed to inform some consumers of the terms and conditions that apply to the Special Price Offering prior to the completion of the sale and installation of the services;

**AND WHEREAS** the Commissioner has concluded that the disclaimer and telephone sales intake process explaining the terms and conditions that apply to the Special Price Offerings was insufficient to alter the general impression created by the representation which is that consumers could receive free phone service for a specified period of time;

**AND WHEREAS** the Respondent also made representations to the public offering unlimited Internet services (the "**Unlimited Internet Representations**"), including but not limited to representations such as "*Unlimited*", "*No Caps on Downloads*", "*limit free*", "*enjoy everything the web has to offer without ever worrying about your data limit*", and "*Now watch all the movies you want*";

**AND WHEREAS** the Commissioner has concluded that disclaimers contained terms and conditions that effectively limited internet usage for consumers, by significantly slowing download speeds when consumers reached a certain amount of data per month;

**AND WHEREAS** the Commissioner has concluded that the Unlimited Internet Representations created the general impression that consumers could receive internet services that were not limited by caps on downloads, when in fact the internet services were effectively limited by caps on downloads, and that the disclaimer and the Respondent's telephone sales intake process were insufficient to alter the general impression created by the Unlimited Internet Representations;

**AND WHEREAS** the Respondent has recently changed the terms and conditions of its contracts, including contracts with existing customers, so that there are no fixed usage-based caps on unlimited usage internet plans and consequently will not slow down customer internet speeds when a customer reaches a certain amount of data usage per month;

**AND WHEREAS** the Respondent made the said Representations to consumers through various communications channels, including television, the internet, print, and out-of-home advertisements since about 2011;

**AND WHEREAS** the Respondent has advised the Commissioner that it believed that it had adequately informed consumers of the terms and conditions that apply to its Representations over the telephone at some point during the customer acquisition process;

**AND WHEREAS** the Commissioner concluded that such subsequent disclosures would not be sufficient to alter the general impression conveyed by the Representations;

**AND WHEREAS** the Commissioner has therefore concluded that the Representations made by the Respondent to consumers were false or misleading in a material respect and therefore reviewable conduct, contrary to subsection 74.01(1) of the *Act*;

**AND WHEREAS** the Commissioner has been advised by the Respondent that it has modified or will modify, within the time envisaged by this Agreement, all Representations that gave rise to the reviewable conduct described above, and that it has ceased all such conduct;

**AND WHEREAS** the Respondent does not admit to the Commissioner's conclusions, but for the purposes of this Agreement only, including execution, registration, enforcement, variation and rescission, does not contest the Commissioner's conclusions, and nothing in this Consent Agreement (the "Agreement") shall be taken as an admission or acceptance by the Respondent thereof of any facts, wrong-doing, submissions, legal argument or conclusions for any other purpose, nor shall it derogate from any rights or defences of the Respondent against third parties including any defences available under the *Competition Act*;

**AND WHEREAS** the Parties are satisfied that this matter can be resolved with the registration of this Agreement which, upon registration, shall have the same force and effect as an order of the Competition Tribunal (the "Tribunal");

**AND WHEREAS** the Commissioner has agreed to more favorable terms in this Agreement than would otherwise be the case because of the Respondent's full and timely cooperation with the Commissioner's inquiry;

**NOW THEREFORE** in order to resolve the Commissioner's concerns, the Parties hereby agree as follows:

**I. INTERPRETATION**

1. For the purpose of the Agreement, the following definitions shall apply:

- a. "Act" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

- b. “**Affiliate**” means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the *Act*;
- c. “**Agreement**” means this Consent Agreement entered into by the Parties pursuant to section 74.12 of the *Act*, including the recitals and Appendix “A” hereto;
- d. “**Commissioner**” means the Commissioner of Competition appointed pursuant to Section 7 of the *Act*, and his authorized representatives;
- e. “**Compliance Program**” has the meaning set out in paragraph 8 of this Agreement;
- f. “**Comwave Networks Inc.**” means the company Comwave Networks Inc., a company headquartered in Toronto, Ontario, its directors, officers, employees, agents, representatives, successors and assigns, and all joint ventures, subsidiaries, divisions and Affiliates controlled by Comwave Networks Inc. within the meaning of subsection 2(4) of the *Act*, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;
- g. “**Days**” means calendar days;
- h. “**Effective Date**” means the date on which this Agreement is recorded by the Tribunal as having been registered pursuant to section 74.12 of the *Act*;
- i. “**Execution Date**” means the date on which this Agreement has been signed by the Parties;
- j. “**Non-Optional Fees**” means any charges, surcharges, fees or other amounts, excluding applicable provincial and federal sales taxes, that are charged in addition to any Price Representations that consumers are required to pay to obtain communications services from the Respondent;
- k. “**Parties**” means the Commissioner and the Respondent collectively, and “**Party**” means any one of them;
- l. “**Person**” means any individual, corporation, partnership, firm, association, trust, unincorporated organization or other entity;
- m. “**Price Representations**” has the meaning set forth in the recitals to this Agreement;
- n. “**Product**” means an article and a service within the meaning of subsection 2(1) of the *Act*;
- o. “**Representations**” include collectively, the Price Representations, the Special Price Offerings Representations, the Unlimited Calling Representations and the Unlimited Internet Representations;
- p. “**Respondent**” means Comwave Networks Inc.;
- q. “**Senior Management**” includes the Chief Executive Officer (CEO), Chief

Financial officer (CFO) and the Chief Operations Officer (COO), or any equivalent;

- r. “**Special Price Offerings Representations**” has the meaning set forth in the recitals to this Agreement;
- s. “**Tribunal**” means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended;
- t. “**Unlimited Calling Representations**” has the meaning set forth in the recitals to this Agreement; and
- u. “**Unlimited Internet Representations**” has the meaning set forth in the recitals to this Agreement.

## **II. COMPLIANCE WITH SUBSECTION 74.01(1) OF THE ACT**

- 2. The Respondent shall comply with subsection 74.01(1) of the *Act*, for any Product supplied by the Respondent in Canada and advertised via print, within thirty (30) Days after the Effective Date of the Agreement; advertised via its website, within sixty (60) Days after the Effective Date of the Agreement and advertised via television, within ninety (90) Days after the Effective Date of the Agreement.
- 3. Without limiting the generality of the foregoing, after the timeframes noted in paragraph 2 above, the Respondent shall not make, cause to be made, or permit to be made on its behalf, any representation to the public that creates a materially false or misleading general impression that:
  - a. consumers can obtain communications services from the Respondent at prices that are not attainable in light of the existence of non-Optional Fees; or
  - b. consumers can obtain unlimited communications services where the services are in fact limited.

## **III. PAYMENTS**

### **ADMINISTRATIVE MONETARY PENALTY**

- 4. The Respondent shall pay an administrative monetary penalty in the total amount of \$300,000.00, and such amount shall be paid in the manner provided as follows:
  - a. the sum of \$100,000.00, payable as soon as possible, but no later than the Execution Date of this Agreement;
  - b. the sum of \$80,000.00, payable on the one year anniversary date of the Execution Date of this Agreement;
  - c. the sum of \$80,000.00, payable on the two year anniversary date of the Execution Date of this Agreement; and

- d. the sum of \$40,000.00, payable on the third year anniversary date of the Execution Date of this Agreement.

#### IV. **COSTS**

5. The Respondent shall pay a total of \$60,000 for costs incurred by the Commissioner during the course of its investigation of this matter, and such costs shall be paid in the manner provided as follows:
  - a. the sum of \$20,000.00, payable on the one year anniversary date of the Execution Date of this Agreement;
  - b. the sum of \$20,000.00, payable on the two year anniversary date of the Execution Date of this Agreement; and
  - c. the sum of \$20,000.00, payable on the third year anniversary date of the Execution Date of this Agreement.

#### V. **FORM OF PAYMENT**

6. The payments referred to in paragraphs 4 and 5 shall be made as soon as possible, but no later than the respective due dates, by certified cheque or wire transfer payable to the Receiver General for Canada.

#### VI. **CORRECTIVE NOTICE**

7. Within ninety (90) Days after the Effective Date of the Agreement, the Respondent shall prominently publish a corrective notice on its customer portal for a period of three months from the Effective Date of this Agreement. Comwave customers shall be directed to the corrective notice by email. The corrective notice shall be published by displaying an underlined header entitled, "Settlement reached with Competition Bureau" in a prominent font. The header shall hyperlink to a corrective notice that states the following:

##### **"Settlement Reached With the Competition Bureau"**

The Commissioner of Competition (the "Commissioner") has informed Comwave Networks Inc. ("Comwave") that certain representations in our advertisements raised concerns under section 74.01 of the *Competition Act*. These included:

- (i) representations that created the general impression that consumers could obtain telecommunication services at prices that were not attainable, because of the addition of non-optional fees;
- (ii) representations offering "unlimited" residential telephone services, when in fact the services were capped each month; and
- (iii) representations offering "unlimited" internet services when, in fact

the services were effectively limited by caps on downloads.

Comwave does not admit to any conduct contrary to the *Competition Act*. However, in recognition of both the concerns of the Commissioner and the importance of providing accurate information to consumers, Comwave and the Commissioner have entered into a Consent Agreement which addresses the Commissioner's concerns. This notice has been published pursuant to the Consent Agreement between the Commissioner and Comwave, copies of which can be found at the Competition Tribunal's website ([www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)”).

8. The Respondent shall within ninety (90) Days after the Effective Date of the Agreement notify its existing customers by email of the changes to the terms and conditions of its contracts and outlining its revised Fair Usage Policy. Pursuant to this notification, the Respondent shall provide the Commissioner with a copy of the letter the Respondent sent to its customers.

## **VII. CORPORATE COMPLIANCE PROGRAM**

9. Within sixty (60) Days of the Effective Date of this Agreement, the Respondent shall, establish, and thereafter maintain a Corporate Compliance Program (the “Compliance Program”), the goal of which will be to promote the compliance of the Respondent with the *Act* generally, and subsection 74.01(1) specifically. The Compliance Program shall be framed and implemented in a manner consistent with the Commissioner's Information Bulletin titled “Corporate Compliance Programs”, as published (as of the Execution Date of this Agreement) on the Competition Bureau's website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03942.html>.
10. The Respondent's Senior Management shall fully support and enforce the Compliance Program and shall take an active and visible role in its establishment and maintenance.
11. Within 21 (twenty-one) Days after the establishment of the Compliance Program, each member of Respondent's Senior Management shall acknowledge his or her receipt of the Agreement and commitment to the Compliance Program by signing and delivering to the Commissioner a commitment letter in the form set out in Appendix “A” of this Agreement. Any individual that becomes a member of the Respondent's Senior Management, during the term of this Agreement, shall sign and deliver to the Commissioner a commitment letter in the form set out in Appendix “A” of this Agreement, within 21 days of becoming a member of Respondent's Senior Management.

## **VIII. COMPLIANCE REPORTING AND MONITORING**

12. The Respondent shall provide to the Commissioner or his authorized representative, within 30 (thirty) Days following receipt of a written request from the Commissioner, such information as the Commissioner may require, including without limitation copies of any representations or other records, in such form as the Commissioner requests, solely for the purposes of monitoring compliance with this Agreement.

13. No later than one hundred and twenty (120) Days after the Execution Date of this Agreement, the Respondent shall provide to the Commissioner a statement under oath or solemn affirmation of the Chief Executive Officer, Yuval Barzakay, that the Compliance Program required by Part VII of this Agreement has been implemented.

**IX. GENERAL**

14. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail, facsimile transmission or email to the Parties at the following addresses:

**a. The Commissioner**

Commissioner of Competition  
Competition Bureau Canada  
Place du Portage, 21st Floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9

Attention: Senior Deputy Commissioner of Competition,  
Cartels and Deceptive Marketing Practices Branch

Email: [as applicable]  
Facsimile: (819) 953-4792

**With a copy to:**

Executive Director and Senior General Counsel  
Competition Bureau Legal Services  
Department of Justice  
Place du Portage, 22nd Floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9

Email: [as applicable]  
Facsimile: (819) 953-9267

**b. The Respondent**

Comwave Networks Inc.  
61 Wildcat Rd.  
Toronto, ON, M3J 2P5

Attention: Yuval Barzakay

Email: ybarzakay@comwave.net  
Facsimile: 1 (866) 288-5779



**With a copy to:**

Michael Koch  
Goodmans LLP  
333 Bay Street, Suite 3400  
Toronto, ON, M5H 2S7

Email: mkoch@goodmans.ca  
Facsimile: (416) 979-1234

15. This Agreement shall be binding upon the Respondent as defined herein for a period of 10 years following the Effective Date.
16. The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 74.12 of the *Act*. The Respondent hereby consents to such registration.
17. The Respondent shall not make any public statements that create the general impression that it contests the Commissioner's conclusions regarding this Agreement.
18. The Commissioner may, in his sole discretion and after informing the Respondent in writing, extend any of the time frames in Parts VII and VIII of this Agreement.
19. Nothing in this Agreement precludes the Respondent or the Commissioner from bringing an application under section 74.13 of the *Act*. The Respondent will not, for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions as stated herein.
20. This Agreement constitutes the entire agreement between the Commissioner and the Respondent and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof, unless they are incorporated by reference herein. There are no terms, covenants, representations, statements or conditions binding on the Parties other than those contained herein.
21. The Respondent attorns to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement for variation or rescission.
22. In the event of a dispute as to the interpretation, implementation or application of this Agreement, any of the Parties shall be at liberty to apply to the Tribunal for an order or directions. The Parties agree that the Tribunal has jurisdiction to make such order as is required to give effect to this Agreement.
23. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.
24. The computation of time periods contemplated by this Agreement shall be in accordance

with the *Interpretation Act*, R.S.C. 1985, c. 1-21. For the purpose of this Agreement, the definition of “holiday” in the *Interpretation Act* shall include Saturday. For the purposes of determining time periods, the date of this Agreement is the last date on which it is executed by a Party.

25. This Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein, without applying any otherwise applicable conflict of laws rules.

The undersigned hereby agree to the filing of this Agreement with the Tribunal for registration.

**DATED** at Toronto, in the Province of Ontario, this 9<sup>th</sup> day of September, 2016.

**for: Comwave Networks Inc.**

*“Yuval Barzakay”*

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Yuval Barzakay  
President and Chief Executive Officer  
I have authority to bind the corporation.

**DATED** at Gatineau, in the Province of Quebec, this 12th day of September 2016.

*“Matthew Boswell”*

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**for: John Pecman**  
Commissioner of Competition

**Appendix “A”- Acknowledgement by Senior Management**

[Corporate Company Letterhead] [date], 2016

**CONFIDENTIAL**

Commissioner of Competition  
Competition Bureau  
Place du Portage, Phase 1  
50 Victoria Street, 21st Floor  
Gatineau (QC) K1A 0C9

**RE: Commitment to Establishment and Maintenance of Compliance Program (the “Compliance Program”)**

I have received a copy of the Consent Agreement between the Commissioner of Competition (the “Commissioner”) and Comwave Networks Inc., dated \_\_\_\_\_, 2016. Further to paragraph [] of the Consent Agreement, I hereby commit to the successful implementation of the Compliance Program described therein. I confirm that the Respondent’s Senior Management and other senior leaders at Comwave Networks Inc. will take an active and visible role in the establishment and maintenance of the Compliance Program.

Sincerely,

(Name and title)

- c. Senior Deputy Commissioner of Competition, Cartels and Deceptive Marketing Practices Branch  
Executive Director and Senior General Counsel, Competition Bureau Legal Services