



11 November 2018

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Via GC Key

Dear Secretary General,

Re: *Call for comments – Proceeding to establish a mandatory code for Internet services, Telecom Notice of Consultation CRTC 2018-422, (Ottawa, 9 November 2018), Procedural Request of the Public Interest Advocacy Centre to change timelines – FRPC’s comments*

1 The Forum for Research and Policy in Communications (FRPC) is writing to support the procedural request submitted yesterday by the Public Interest Advocacy Centre (PIAC) in the proceeding announced the day before that. Our reasons follow.

I. This proceeding is important, and should not be rushed

2 The current deadlines in the TNoC CRTC 2018-422 proceeding will limit Canadians’ ability to participate even though their participation matters because, as the CRTC itself established two years ago, the Internet is vital to the people of Canada, and to Canada itself:

While the Commission set out to examine all telecommunications services that Canadians require to participate in the digital economy, fixed and mobile wireless broadband Internet access services became the focus of the proceeding. During the second week of the hearing, the Panel acknowledged that today, broadband Internet access services are vital to Canada’s economic, social, democratic, and cultural fabric. There is general agreement by all parties on the importance of broadband Internet access services for Canadians to participate in the digital economy.¹

3 Earlier this year the CRTC’s Harnessing Change report re-affirmed that “[i]n the future, Canadians will increasingly rely on the Internet to discover and consume music, entertainment, news and information.”

¹ *Modern telecommunications services – The path forward for Canada’s digital economy*, Telecom Regulatory Policy 206-496 (Ottawa, 21 December 2016), at para. 21, <https://crtc.gc.ca/eng/archive/2016/2016-496.htm>.

- 4 Even if the Internet Code already drafted by the Commission builds on *Codes* it has already approved for wireless and programming distribution services, Canadians may well wish that an Internet Code achieve more than the CRTC now proposes. Extending the TNoC CRTC 2018-422 deadlines will provide interested parties with the time they need to canvass such views.
- II. Extending TNoC CRTC 2018-422's deadlines limits impact of overlap with major Parliamentary and government proceedings
- 5 As PIAC has already noted, the TNoC CRTC 2018-422 proceeding overlaps with a number of other proceedings, some involving the Commission, but – unusually – two others that are undertaking an overarching, and critical review of the entire legislative framework for Canada's communications system.
- 6 This past June the Senate of Canada approved a study by Standing Committee on Transport and Communications of the modernization of Canada's broadcasting and telecommunications legislation,² and the CRTC's Chair and several senior staff have already testified in the Committee's hearings.³ The Committee currently plans to complete its study by 28 June 2019.⁴ The Forum – and likely many others – is following the course of the Committee's proceedings very carefully – a process that requires time.
- 7 The Broadcasting and Telecommunications Legislative Review panel, established 5 June 2018 by the Ministers of Innovation, Science and Economic Development, and Canadian Heritage,⁵ has also specifically asked Canadians for detailed comments on a number of questions and themes.⁶ The detailed and evidence-based submissions it considers also require time to research and write: so much time will be required for this work that, in response to comments from several parties the Broadcasting and Telecommunications

² The Senate approved Motion 361 by the Honourable Senator Tkachuk on 20 June 2018: see https://sencanada.ca/en/content/sen/chamber/421/journals/224jr_2018-06-20-e.

³ CRTC, "Ian Scott to the Senate Standing Committee on Transport and Communications", Speech (Ottawa, 30 October 2018), <https://www.canada.ca/en/radio-television-telecommunications/news/2018/10/ian-scott-to-the-senate-standing-committee-on-transport-and-communications.html>.

⁴ *Supra*, note 1.

⁵ Department of Canadian Heritage, "Government of Canada launches review of Telecommunications and Broadcasting Acts", News release (Ottawa, 5 June 2018), <https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html>.

⁶ Broadcasting and Telecommunications Legislative Review, "Review of the Canadian Communications Legislative Framework" (Ottawa, 24 September 2018), <https://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html>:

The Panel is committed to providing relevant, practical and implementable recommendations to government. To this end, those submissions that offer not just perspective and insight but detailed suggestions, are evidence-based and include relevant legal or policy research, and measures or models adopted in other jurisdictions would be valuable. Specific areas of proposed amendments to the Telecommunications Act, Radiocommunication Act, and Broadcasting Act would also be helpful.

See also Broadcasting and Telecommunications Legislative Review, "Broadcasting and Telecommunications Panel launches consultations", News release (Ottawa, 25 September 2018), <http://www.ic.gc.ca/eic/site/110.nsf/eng/00004.html>.

Legislative Review panel recently decided to extend its deadline for comments on new communications legislation from 30 November 2018 to 11 January 2019.⁷

- 8 The current TNoC CRTC 2018-422 process is now set to consume 40 days between 9 November and 19 December 2018. Sixty-three calendar days remain between 9 November 2018 and the revised Broadcasting and Telecommunications Legislative Review deadline of 11 January 2019.
- 9 The TNoC CRTC 2018-422 process would therefore be superimposed on 40 of the 63 days now provided to participate in the Broadcasting and Telecommunications Legislative Review process. The Forum lacks the resources to participate in the Senate, Broadcasting and Telecommunications Legislative Review and CRTC processes, and an extension of the TNoC CRTC 2018-422 deadlines as PIAC has proposed, would mitigate this problem.
- III. Extending TNoC CRTC 2018-422 deadlines will help to provide a record with the “detailed comments”, “detailed evidence”, and “rationale” CRTC seeks
- 10 The TNoC CRTC 2018-422 proceeding is complex. Its complexity is demonstrated not merely by the 11-page length of the proposed *Internet Code* for which the CRTC is seeking comments, or by the 19 questions and 45 sub-questions posed by the CRTC in Appendix 2 of TNoC CRTC 2018-422, but also by the fact the CRTC itself sets out – not two, or three, or four – but twelve separate “preliminary views” on its proposed *Code*.⁸
- 11 In fact, the CRTC’s introduction to TNoC CRTC 2018-422 states specifically that it “*is seeking detailed comments, with supporting rationale, on the need*”⁹ for an *Internet Code*. The CRTC notes at paragraph 2 of the notice that it wishes “to develop a record” to address “growing consumer concerns about Internet services generally”. Question 8 (of Appendix 2) asks for “detailed comments, with supporting rationale, on the Working Document and any other specific provision” that should be included.¹⁰ TNoC CRTC 2018-422 also requires large, facilities-based ISPs to “provide detailed evidence and rationale” to explain why they cannot implement specific portions of an *Internet Code*¹¹ – implying in turn that public-interest organizations may well have to respond to such arguments with ‘detailed evidence and rationale’ of their own.
- 12 Even if the Senate of Canada and the government of Canada had not launched major reviews of Canada’s communications statutes, the 40 calendar – or 28 working days (ie, excluding weekends) would be insufficient to respond effectively to the requirements set out by TNoC CRTC 2018-422. The extension of deadline proposed by PIAC will largely remedy this issue.

⁷ Broadcasting and Telecommunications Legislative Review, “The Consultation Process”, <http://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html#cp>: “In response to comments from several parties, the Broadcasting and Telecommunications Legislative Review Panel has decided to extend the deadline for submissions to its Call for Comments until January 11, 2019.”

⁸ TNoC CRTC 2018-422, at para. 3.

⁹ Italics in the original text.

¹⁰ TNoC CRTC 2018-422, Appendix 2, at Q8 (“Content of the *Code*”).

¹¹ TNoC CRTC 2018-422, at para. 9.

IV. Extending the TNoC CRTC 2018-422 deadlines permits public-interest groups to undertake empirical survey research

- 13 Even if the current TNoC CRTC 2018-422 deadlines would have allowed the Forum to participate (and they do not), the deadlines preclude interested non-telco parties from undertaking empirical research. Complex proceedings such as TNoC CRTC 2018-422 require that research, for two reasons: to provide the CRTC with objective information, and to enable public-interest participants to apply to the CRTC for the costs of their participation.¹²
- 14 The submission of objective evidence such as survey research by public interest organizations provides the CRTC with a balanced and more detailed record on which it may rely to make its deliberations. The absence of such evidence would place the CRTC in an awkward position: it would either have to ignore public-interest issues except to the extent that they arose through comments from the general public (which, while interested is not necessarily expert in this area), or it would itself have to act through its proceedings on behalf of the public. While many doubtless assume that the Commission's determinations will be made in the public interest,¹³ the CRTC instead describes itself "an administrative tribunal with quasi-judicial functions",¹⁴ implying a level of impartiality towards the public interest, rather than any distinct, pro-interest partiality. Indeed, under the current *Telecommunications Act* the public interest is merely one of several interests that the CRTC may serve.¹⁵
- 15 The challenge for public interest organizations is that expert research takes time. Surveys of the general population, for example, require a minimum of several weeks to draft, refine and finalize questionnaires, launch the questionnaires in the field, obtain data and analyze the results. We understand that surveys of specific populations such as the Deaf and Hard of Hearing require far more time, as the general-survey approach of calling people's telephones self-evidently cannot be used. Extending the TNoC CRTC 2018-422 deadlines will enable a range of public-interest organizations to gather evidence to strengthen the proceeding's record with respect to public-interest points of view.
- 16 The Forum also wishes to point out that TNoC CRTC 2018-422's current deadlines (and many of the CRTC's telecommunications deadlines in general) also provide too little

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¹³ This specific duty is not stated in any of its three enabling statutes: the *Broadcasting Act*, the *Telecommunications Act* and the *Canadian Radio-television and Telecommunications Act*.

¹⁴ CRTC, Review of the Implementation of Section 41 of the Official Languages Act 2015-2016, (Ottawa, 2016), Appendix A, response to question 1, https://crtc.gc.ca/eng/5000/lo_ol/olc16-loc16.htm:

Because the Commission is an administrative tribunal with quasi-judicial functions, public proceedings are the primary vehicles by which the communities can voice their concerns. While all CRTC proceedings are publicly disclosed, OLMCs are expressly made aware of those proceedings that could have a greater impact on them via the CTRC-OLMC discussion group. In such cases, it is imperative that any section 41 arguments submitted by any party be addressed in the staff analysis.

¹⁵ See e.g. *Federation of Canadian Municipalities v. AT & T Canada Corp.*, [2003] 3 FC 379, 2002 FCA 500 (CanLII), <<http://canlii.ca/t/4hk9>>, at para 28, in which a majority the Federal Court of Appeal commented with respect to the installation of telecommunications transmission lines that "the CRTC has to strike a delicate balance between public, private and municipal interests."

time for public-interest organizations to gather the objective evidence required to support their costs applications to the CRTC.

- 17 The CRTC first established a costs-awards process in 1978, explaining that its proceedings were often complex and required expertise:

The Commission has concluded that if the objective of informed participation in public hearings is to be met, some form of financial assistance must be made available to responsible interveners, both active and potential, who do not have sufficient funds to properly prosecute their cases, particularly where such interveners represent the interests of a substantial number or class of subscribers. The complexity and importance of the issues which come before the Commission often demand that expert resources be available for their adequate treatment. Such resources are employed by the regulated companies. In the Commission's view, it is critical to, and part of the necessary cost of, the regulatory process that such resources also be available to responsible representative interveners.¹⁶

- 18 Parliament agreed with the CRTC's view on the critical importance of responsible public interest organizations, including a specific provision allowing the CRTC to issue costs orders when the *Telecommunications Act* was enacted in 1993.¹⁷ As described by a research note of the Forum in November 2017¹⁸ the CRTC last modified its costs-application process in 2010,¹⁹ and has since then amended its costs process through bulletins and cost-order decisions.
- 19 In 2017, a CRTC information bulletin announced that parties purporting to represent the public interest but which lack a large membership must prove that they represent telecommunications subscribers through research.²⁰ In the Forum's case, the bulletin means that it must undertake surveys, or have its submissions written free of charge.²¹

¹⁶ *CRTC Procedures and Practices in Telecommunications Regulation*, Telecom Decision CRTC 78-4, (Ottawa, May 1978).

¹⁷ *Telecommunications Act*, s. 56:

Award of costs

56 (1) The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.

Marginal note: Payment of costs

(2) The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.

¹⁸ FRPC, *The CRTC's cost orders process in telecommunications*, Research note (November 2017), <http://frpc.net/wp-content/uploads/2017/11/CRTC-cost-orders-Nov-2017-Final-1.pdf>.

¹⁹ Revision of CRTC costs award practices and procedures, Telecommunications Regulatory Policy 2010-963 (Ottawa, 23 December 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-963.htm>.

²⁰ *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188 (Ottawa, 17 May 2016), at para. 16, <https://crtc.gc.ca/eng/archive/2016/2016-188.htm>:

In the event that a costs applicant did not canvass or consult members of the group or class of subscribers it purports to represent, the costs applicant should nonetheless address and explain how its positions reflect the interests of that group or class of subscribers. For instance, the costs applicant may provide evidence of research it has conducted or commissioned.

²¹ See, for example, the Forum's January 2018 [submission](#) with respect to the application by the City of Calgary regarding telecommunications carriers' access to municipal roads.

- 20 Extending the TNoC CRTC 2018-422 deadlines will enable public-interest organizations to canvass their members and/or to conduct research that will strengthen the public record, and will enable public-interest parties to participate on a more equitable ‘playing field’ with telecommunications companies.

V. Conclusion

- 21 The Forum joins with PIAC in its procedural request, and respectfully requests that the Commission amend the TNoC CRTC 2018-422 as PIAC has suggested. Specifically, we support its proposal of a public hearing; this will help to ensure that the CRTC’s record is complete regarding the Internet (being “vital” to Canadians and Canada, as the CRTC has said). We also support its proposal to extend TNoC CRTC 2018-422’s deadlines, for the reasons set out above: to ensure that the process to implement a new *Internet Code* is not rushed, and thereby potentially flawed; to limit overlap with other important proceedings by Parliament and the government and provide the time required for thoughtful participation; to enable parties to provide the level of detail sought by the Commission; and to permit public-interest groups to undertake empirical research.
- 22 In concluding, we take the liberty of recalling the comments by CRTC Chair Scott, a year ago, when he pointed out the importance of public participation:
- ... businesses are but one group of stakeholders. They alone cannot control the market. This is why contributions from individual Canadians and consumer-advocate groups are also critical to informing our decisions. We must hear how proposed changes will affect the lives and livelihoods of everyday people across the country—now, more so than ever, given the prevalence and significance of broadband technology. Anything less would be irresponsible. It would be to exclude the public from the public interest.²²
- 23 The Forum respectfully submits that granting PIAC’s procedural request would ensure that public is not excluded from the TNoC CRTC 2018-422 proceeding and the development of a new *Internet Code*.

Sincerely yours,



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²² Ian Scott, Chairperson and CEO, Canadian Radio-television and Telecommunications Commission, *Remarks to the IIC Canada Communications Law and Policy Conference* (Ottawa, 14 November 2017), <https://www.canada.ca/en/radio-television-telecommunications/news/2017/11/ian-scott-to-theiiccanadacomunicationslawandpolicyconference.html>.