

**BEFORE THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**



TELUS COMMUNICATIONS INC.

**Telecom Notice of Consultation CRTC 2018-422
Proceeding to establish a mandatory code for Internet services**

Intervention of TELUS

ABRIDGED

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1.0 Introduction and Executive Summary

1. TELUS Communications Inc. files this intervention in accordance with the procedures set out in Telecom Notice of Consultation CRTC 2018-422.¹ In this proceeding, the Commission seeks comments on a draft Internet code (the “Internet Code” or the “Code”) to address consumer contracts and related issues for fixed retail Internet access services.
2. The market for Internet services in Canada is very competitive. Accordingly, TELUS has invested billions of dollars over the past decade in building fibre networks and bringing new, innovative services to market. Internet services enable participation in the digital economy for Canadian consumers and are a critical input for Canadian industry. These infrastructure investments, along with customer service investments, are a competitive differentiator for TELUS borne of rigorous competition. To the extent the Commission determines to regulate the Internet sales process, it must do so as narrowly and carefully as possible so as not to regulate away the benefits of competition and innovation. Regulating to the minimum extent necessary to address perceived consumer concerns is also consistent with the Policy Direction.
3. In this respect, there are a number of changes the Commission should make to the proposal set out in the Notice of Consultation, including the following:
 - a) First, the Commission should ensure that any Internet Code applies to all ISPs. The Commission’s proposal for the Internet Code to apply, at least at first, exclusively to large facilities-based ISPs will deny protections to customers of small ISPs, when all customers are equally deserving of protections. This decision is without any evidentiary foundation. Indeed, the evidence before the Commission shows that the smaller ISPs in Canada are the subject of a disproportionately large number of complaints with respect to high-speed Internet access (“HSIA”) service.
 - b) Second, the Commission should apply any new Internet Code exclusively to consumers, and not to businesses. While the Wireless Code applies to small

¹ Telecom Notice of Consultation CRTC 2018-422, *Proceeding to establish a mandatory code for Internet services*, 9 November 2018 (the “Notice of Consultation” or “TNC 2018-422”).

businesses, the Television Service Provider Code (the “TV Code”) does not. The provision of HSIA to small businesses is much more individualized and particularized than the provision of wireless access to small businesses. While small business sales of wireless service more closely reflect the mass market nature of consumer sales, the opposite is true for small business sales of HSIA.

- c) Third, the Commission should apply any new Internet Code exclusively on a prospective basis. Applying the Code retrospectively would unilaterally amend the bargains entered into by ISPs and their customers. To the extent that ISPs are no longer able to cover their costs in contracts with existing customers, the result will be that ISPs raise prices to new customers—in effect forcing new customers subsidize the inefficient bargains imposed by the new Code.
- d) Fourth, the Commission’s proposal to cap early cancellation fees (“ECF”s) at \$50 or 10% of the minimum monthly charge of the remaining months of a term contract indicates a lack of understanding of the cost of providing HSIA, as well as the value of sales inducements that ISPs provide. Installing HSIA requires TELUS to send a truck and technician to the customer’s premises, at a significant cost. HSIA—especially for small businesses—often requires the installation of expensive equipment, not all of which can be readily be repurposed. Finally, given the vigorous competition in the industry, ISPs often offer large discounts or gifts with the purchase of HSIA grossly in excess of \$50. Any ECF cap must reflect these realities.
- e) Fifth, while TELUS supports clarity at the pre-sale offer stage, and indeed is already rolling out the ability to provide pre-sale quotations across all sales channels, the Commission’s proposal for a prescriptive pre-sale critical information summary (“CIS”) should be rejected in favour of rules that set out what an ISP must tell customers, but not how. Unduly narrow prescriptions on how information must be disclosed limit the flexibility and dynamism necessary for ISPs to respond in real-time to a rapidly changing market, and are disproportionate to any perceived harm.

- f) Sixth, while TELUS already offers most of its customers a cooling-off period, to the extent the Commission mandates a 30 day cooling-off period, it must ensure that ISPs are provided sufficient flexibility to deny the use of the cooling-off period to customers who seek to abuse the rule by churning monthly between providers in order to never have to pay an Internet bill.
 - g) Seventh, to the extent the Commission imposes the obligation to provide a CIS, the Commission should not require ISPs to guarantee a set price throughout the contract, provided that the ISP makes the quantum of any discount clear. For example, a CIS could state unambiguously that the customer would be entitled to a discount of \$20 month off of the regular price, but would not need to guarantee a fixed regular price. This flexibility will permit ISPs to offer time-limited discounts while continuing to have the flexibility to respond to changes in the market.
4. In addition to these seven changes, the Commission should also declare that any new code will be the sole governing standard for protection of Internet service customers. This would mean that the Internet Code would be exclusively federal and would leave no room for provincial encroachment. Such a statement is necessary to ensure that consumer protections are consistent between provinces and industry players, that duplicative and potentially contradictory regimes do not threaten national application of federal rules, and that the Commission's intentions are not thwarted by provincial regulators who may desire to implement a different regulatory regime.
5. The Commission should also take care to ensure that the Internet Code is not simply a repurposed version of the Wireless Code. HSIA and wireless service are marketed, sold, and delivered very differently, and any code of conduct must reflect the differing nature of the two services. The marketing, sale and provision of HSIA service is far more similar to that of television service. Unlike wireless service, both television and HSIA services (i) require equipment to be installed on the customer premise by a technician; (ii) are primarily consumed in a fixed location; (iii) are used by multiple users in the same location; (iv) are often marketed and sold together as a bundle; and (v) are offered on contracts with varying lengths and incentives that are not tied to the ownership of a subsidized device. The offering

and provision of television service is already regulated by the TV Code.² Given the structural similarities between Internet and TV services, the policy considerations that underpin the TV Code should also underpin the Internet Code. To the extent that the Commission drafts an Internet Code that reflects different policy choices from those it made with respect to the TV Code, the Commission must explain what has changed, and why.

6. Finally, depending on the ultimate content of the Code, TELUS estimates it would take approximately eighteen months to implement, and cost approximately # #.

2.0 Disproportionate and unnecessary regulation will suppress innovation and competition

7. To the extent the Commission determines that an Internet Code is necessary, it should be very careful to avoid the unintended effects of overregulation and regulate only in a manner that is proportionate to the harm the Commission seeks to remedy. As set out in the objectives of the *Telecommunications Act*, regulatory action, where required, should be efficient and effective.³ The principle of proportionate regulation is also set out in the Policy Direction, which orders the Commission “when relying on regulation, use measures that are efficient and proportionate to their purpose...”⁴
8. Proportionate regulation is important not just because the Commission is required to do so by law, but also because it is good public policy. The Canadian telecommunications industry is high-performing and competitive. Despite Canada’s very low population density, Canadian fixed-wire broadband prices are relatively low. Internet services are offered at significant competitive discounts and one recent major study places Canada first in terms of broadband affordability among 75 countries studied.⁵ Another recent study

² Broadcasting Regulatory Policy CRTC 2016-1, *The Television Service Provider Code*, 7 January 2016 (“BRP 2016-1”).

³ *Telecommunications Act*, SC 1993, c 38, s 7(f) (“*Telecommunications Act*”).

⁴ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, s. 1(a)(ii), (the “Policy Direction”).

⁵ The Economist Intelligence Unit, *The Inclusive Internet Index: Bridging Internet Divides*, 2017. TELUS asked Dr. Robert Crandall to prepare an expert report in response to the Competition Bureau’s Market Study Notice on Competition in Broadband Services. TELUS submitted the resulting report with its submission to

shows that Canadians benefit from lower prices per megabit-per-second than the U.S. and the weighted average of western European countries.⁶

9. These strong results are a function of the Commission's successful policy of encouraging facilities-based investment. Earlier this year, as part of the Competition Bureau's market study of competition in broadband service, TELUS commissioned a study from Dr. Robert Crandall, an economist specializing in industrial organization, regulation, and competition policy, who was for almost four decades Senior Fellow in Economic Studies at the Brookings Institution in Washington, DC. Dr. Crandall concluded that "since 2006, Canada's capital spending has continued to be very strong compared with both the United States and the EU-14. Canada has relied principally on competition between telecommunications platforms, as has the United States. The EU, on the other hand, has relied on service competition. The result of these very different policies has been quite predictable – greater access to higher and higher speeds for Canadian consumers."⁷
10. TELUS has spent billions of dollars deploying fibre networks across Canada to enable Internet access. These networks are the primary platform for social and economic innovation in our economy. At the end of December 2016, 84% of Canadian households had access to a fixed broadband Internet access service with a downstream rate of at least 50 Mbps and an upstream rate of at least 10 Mbps.⁸ As of the end of Q3/2018, TELUS' high-speed broadband footprint covered approximately 3.1 million households and businesses in Canada.⁹ These networks are the foundation for the delivery of next generation services, including:
 - Internet-enabled home services that allow customers to connect to the people and digital technologies that matter most to them, including

the Bureau dated August 31, 2018. TELUS attaches Dr. Crandall's report to this intervention as Appendix A (the "Crandall Report"). This research was cited on p 14 of the Crandall Report.

⁶ Federal Communications Commission, Fourth International Broadband Report, February 4, 2015, Table 5, as referenced on p 13 of the Crandall Report.

⁷ The Crandall Report p 16.

⁸ CRTC Communications Monitoring Report 2017, p 254, available at <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr.htm>.

⁹ TELUS Q3 2018 Management Discussion and Analysis, p 14, available at https://assets.ctfassets.net/rz9m1rynx8pv/5I3cOCxKcEQcEqvogYOS00/13121be6b18e24056b8d330051568500/TELUS_Q3_2018_Quarterly_Report.pdf

- streaming video, TV and other content; security services and other smart home solutions;
- Digital health and wellness solutions for patients, physicians, pharmacies, extended healthcare providers, insurers and health authorities and
 - Access to managed data solutions for small businesses to increase productivity and efficiency.
11. The performance of the Canadian Internet market, both in absolute and comparative terms, demonstrates that additional regulation is not justified. Many of the proposals set out in the draft Code are disproportionate to the perceived harm the Commission seeks to remedy. Insisting on imposing prescriptive, *ex ante* regulation will lead to several counter-intuitive outcomes. First, having forborne from rate regulation, the Commission should not now impose regulations that are equally restrictive of competition. Doing so would lead to the absurd result of a forborne service subject to more competitive restrictions than many services with limited competition.
12. Second, disproportionate regulation of the Internet market will establish Canada as an outlier among peer economies and particularly among the most successful broadband economies. This can have a profound effect on Canada's goal to be a world leader in science, technology and innovation, and to be recognized as one of the most innovative and competitive economies in the world. The 2018 Global Innovation Index ranks Canada 17th out of 47 high-income countries for innovation.¹⁰ The Internet remains the innovation platform for the entire economy and countries seeking to become innovation leaders need to maintain and improve competition and market flexibility – not eliminate it.
13. Disproportionate regulation removes the incentive for ISPs to compete amongst each other and inhibits the proliferation of next-generation data-intensive services that depend upon the ability of ISPs to recoup their investment costs and stimulate market demand. Politically motivated proceedings such as this one help neither consumers nor industry, and benefit only the short term electoral goals of politicians. Disproportionate regulation of the

¹⁰ The Global Innovation Index 2018: Energizing the World with Innovation, Online: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2018-profile7.pdf. The GII Index is a collaborative publication by Cornell University, INSEAD, and the World Intellectual Property Organization.

Internet will stall innovation and put Canada behind other developed countries that are not hamstrung by inefficient and counterproductive policymaking.

3.0 Internet Code should apply to all Internet service providers

14. The Commission has proposed that the Internet Code apply exclusively to large facilities-based ISPs.¹¹ There is no principled basis for exempting the customers of smaller providers from these protections. To the extent that these new measures are justified, all customers are equally deserving of protection. There is likewise no factual basis for such an exemption: the facts demonstrate that customers of smaller ISPs have a disproportionately higher rate of complaints compared to those of the large facilities-based ISPs.
15. The Commission states that it is aware of “growing consumer concerns about Internet services generally and is concerned about the absence of a code of conduct for fixed Internet services in an environment where such codes exist for the mobile wireless and television markets.”¹² To the extent that such concerns exist, there is no evidence before the Commission that they relate exclusively or predominantly to service provided by large facilities-based ISPs. To the contrary, the Commission stated that it has become aware of growing concerns about Internet services *generally*.¹³
16. In fact, the Commission’s own evidence shows this is not the case. According to the most recent statistics, large facilities-based ISPs account for 87% of Internet service

¹¹ The Commission has identified “large facilities-based ISPs” as being Bell Canada (including Bell MTS Inc.; NorthernTel, Limited Partnership; and Télébec, Société en commandite); Cogeco Connexion Inc. (Cogeco); Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); Northwestel Inc.; Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); Shaw Telecom Inc. (Shaw); TELUS Communications Inc. (TCI); Videotron Ltd. (Videotron); and Xplornet Communications Inc. (Xplornet).

¹² TNC 2018-422, para. 2.

¹³ *Ibid.* [emphasis added].

subscribers¹⁴ but only 73% of complaints.¹⁵ This shows that large facilities-based ISPs account for proportionately fewer CCTS complaints and the providers that the Commission proposes to exempt from a new code account for proportionately more complaints. To the extent that a new code should be targeted at any group, it is precisely the *smaller*, not the larger, ISPs.

17. This concern can also be seen in the latest CCTS annual report. For example, TekSavvy, a reseller ISP that the Commission proposes to exempt from the new Internet Code, saw its CCTS complaint numbers increase by 293% last year alone and it now sees the same number of complaints as TELUS while serving a far smaller customer base. Comwave and Primus, also proposed to be exempt, are in the top 10 list by number of complaints.¹⁶ In fact, Comwave has more complaints to the CCTS than TELUS about its Internet services while serving significantly fewer customers. To the extent that there is any correlation between complaints and the size of an ISP, the data show that the smaller ISPs are the problem.
18. The Commission's proposal also violates the Policy Direction. The Policy Direction requires the Commission to use measures that are implemented in a symmetrical and competitively neutral manner.¹⁷ Applying the Internet Code to some but not all ISPs is not symmetrical and not competitively neutral. To the extent that the Commission intends to implement an Internet Code, the Policy Direction requires that it apply to all ISPs.
19. The Commission's own precedent with mandatory codes also militates in favour of applying the Internet Code to all ISPs. The Wireless Code applies to all wireless service providers¹⁸ and the TV Service Provider Code applies to all licenced TV Service Providers

¹⁴ TNC 2018-422, paras. 3c, 10. TELUS disagrees with the initial characterization of the market shares of various ISPs by the Competition Bureau: see TELUS' Intervention in Competition Bureau's Market Study, paras. 48-60, online: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Submissions_to_Competition_Bureau_Abridged.pdf/\\$file/Submissions_to_Competition_Bureau_Abridged.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Submissions_to_Competition_Bureau_Abridged.pdf/$file/Submissions_to_Competition_Bureau_Abridged.pdf).

¹⁵ TNC 2018-422, para. 14.

¹⁶ CCTS 2017-2018 Annual Report, p. 15.

¹⁷ The Policy Direction, s. 1(b)(iii).

¹⁸ Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, 3 June 2013, para 30 ("TRP 2013-271").

and related exempt undertakings.¹⁹ This broad application ensures that all customers are protected and that all service providers compete on the same basis.

20. Finally, there is no evidence that providers other than large facilities-based ISPs would face a heavier regulatory burden²⁰ in implementing the Internet Code. In any event, the existence of a “heavy burden” is no answer to why smaller ISPs should not be bound. To the extent an ISP cannot operate unless it deprives consumers of protections deemed in the public interest, it would be negligent for the Commission to permit that ISP to continue operating—let alone condone it.

4.0 The Internet Code should apply only to consumer sales, not small business sales

21. The Commission proposes that the Internet Code apply both to consumer and small business sales, as does the Wireless Code. However, to the extent there is an evidentiary basis for a consumer code—and, as noted above, there is not—there is even less of a basis for applying the code to small businesses. The 2017-2018 CCTS annual report shows that the number of Internet complaints from small businesses decreased by 35.6% year over year, and the total number of CCTS complaints from small businesses dropped 41% over the same time period.²¹ Small business complaints constituted only 3.7% of all concluded CCTS complaints in 2017-2018.²² If the Commission is going to apply an Internet Code to small business services, it must justify how this is a necessary and proportionate measure given the small number of complaints by small businesses and the fact that the number of complaints is decreasing significantly.
22. There are also significant structural differences in the provision, sale and marketing of HSIA to small businesses compared to consumers. Presently, wireless services are sold to small business for the most part as a mass market “off-the-shelf” offering. For this reason,

¹⁹ BRP 2016-1 at para 5.

²⁰ TRP 2018-422, para. 3c.

²¹ See CCTS 2017-2018 Annual Report, p. 45 and CCTS 2016-2017 Annual Report, p 46. This figure was determined by calculating the year over year decline between: i) the 2016-2017 number of small business complaints related to Internet (31.2% of 841 total complaints) and ii) the 2017-2018 number of small business complaints related to Internet (34.2% of 494 total complaints).

²² CCTS 2017-2018 Annual Report, p. 45.

it makes sense for the Wireless Code to cover the sales process for both consumer and small business wireless products and services. However, this is not the case with respect to HSIA. HSIA products and services provided to small businesses often include customized service offerings that require expensive additional equipment, specialized installation, customized offers and contracts. For example, small business customers often bundle together solutions such as network management services, managed security solutions, remote maintenance or voice over IP with their Internet services. TELUS' sales representatives work directly with the small business customer to put together a solution, often encompassing products far more specialized than consumer HSIA that is tailored for the customer on this specialized basis.

23. These products and services may require construction work, the placement of equipment in the customer's telecom room, the installation and maintenance of inside wiring, the installation of multiple pieces of equipment and a more complex configuration of the network. Business contracts may also involve work at multiple customer sites. In many small businesses, ISPs also install equipment that is far more expensive than consumer equipment, and often difficult to reclaim and refurbish upon cancellation. In this environment, the Commission's proposals with respect to the ECF and the trial period are not readily applicable.
24. In the alternative, should the Commission nevertheless insist on applying an Internet Code to small business customers despite the differences noted above, the Commission should amend the definition of "small business". The proposed Internet Code defines a small business as one whose average monthly telecommunications bill is under \$2,500. This definition may be theoretically appealing but it is nearly impossible to operationalize. It is rare for a business to engage only one service provider for its entire telecommunications spending, and no single telecommunications service provider can know how much its customers spend with other providers. As a result, no ISP can know with any degree of reliability whether its customers qualify as small businesses for the purposes of the Internet Code.

25. While no definition of small business is perfect, there are better metrics to use than monthly telecommunications spending. Some alternatives for the Commission to consider include a customer's average monthly HSIA bill with a given provider (as opposed to overall telecommunications service bill); the number of Internet subscriptions a customer has with a given ISP; and the number of employees a customer has, as reported to the provider from time to time. Any of these metrics would be easier to operationalize if the Commission determines that the Internet Code should apply to small businesses.

5.0 The Internet Code should apply exclusively on a prospective basis

26. The Commission sets out four options with respect to the retrospective or prospective application of the Internet Code. The options are whether the Code should apply to (1) new contracts and contracts that are amended on or after the Code comes into effect; (2) new, amended and existing contracts; (3) new and amended contracts and only certain sections will apply to existing contracts or (4) new contracts and contracts that are amended on or after the Code comes into effect and all contracts, no matter when they were entered into, by no later than "date Y" (*i.e.* a specific date).
27. Of these options, only Option (1) provides for exclusively prospective application. The Commission should choose this option. Any of the options giving retrospective effect would cause significant market distortions and be disproportionate to any potential harm, as it would require reopening every term Internet contract in Canada based on a comparatively small number of complaints. On the other hand, Option 1 would respect the bargains entered into by ISPs and their customers. At present, when customers enter into a term contract with TELUS, they generally receive a substantial incentive, such as a discount or a gift with purchase, in consideration for agreeing to a term. TELUS enters into these bargains on the basis that they would be governed by existing law. If the Commission retrospectively and unilaterally renegotiates the terms of these bargains, the result would be higher prices elsewhere as ISPs recover these amounts. *New* customers could be charged higher rates in order to subsidize existing customers, whose contracts retrospectively become priced at below-market rates.

28. In addition to causing every Internet contract to be re-written unilaterally, retrospective application could also cause significant customer confusion, as many customers would be left with contracts that no longer reflect their rights vis-à-vis their ISP. ISPs can of course explain the reason for this to their customers, but this, too, can be a cumbersome and confusing process for customers. The prospective approach set out in Option 1, on the other hand, will respect the bargains entered into by ISPs and their customers and will provide a smooth and transparent transition that will minimize customer confusion. The Commission should therefore adopt this proposal and reject any proposal that calls for retrospective application.
29. In the alternative, to the extent the Commission insists on giving a new Code retrospective effect, it should adopt Option 3 and limit retrospective effect to provisions that mandate the provision of certain information (for example, a CIS), rather than provisions that reopen the bargain struck between ISPs and their customers. Under no circumstances should the Commission adopt Options 2 or 4.
- 6.0 The Commission's proposed cap on ECFs ignores the cost to ISPs and will lead to higher prices for consumers**
30. In Section G of the draft Internet Code, the Commission proposes to cap early cancellation fees at the lesser of \$50 or 10 percent of the minimum monthly charge for the remaining months of the contract up to a maximum of 24 months. This language is copied directly from the early cancellation fee cap set out in the Wireless Code where a customer does not receive a subsidized device.
31. The Commission should not adopt this proposal because it demonstrates a fundamental misunderstanding of how HSIA services are offered for sale in the real world. While the Wireless Code, in recognition of the upfront cost borne by wireless service providers, provides for higher ECFs where the customer receives a subsidized device, the proposed Internet Code ECF makes no provision for the fact that ISPs often bear very high upfront costs when providing HSIA service.

32. There are at least three such costs. First, many of TELUS' HSIA customers on term contracts received a gift in consideration for entering into the contract, either for standalone HSIA services or a bundle of HSIA and Optik TV service. These gifts are often worth far in excess of \$50, and have included flat screen televisions, laptops, Apple TVs, and prepaid Visa gift cards worth hundreds of dollars. At present, where a customer cancels his or her contract early, TELUS will recoup a portion of the gift provided at purchase. Set out below are examples of recent TELUS gift with purchase promotions.



Watch the World Juniors in stunning 4K.

Catch all the action on your free 55" LG 4K HDR Smart TV when you sign up for 2 years of Optik TV® and TELUS Internet.

[See details](#)

Get Apple TV 4K on us when you sign up for TELUS Internet

Sign up for TELUS Internet for 2 years and enjoy an Apple TV 4K with 32GB of storage on us.⁴

[View this deal](#)



Only need TELUS Internet?

Sign up on a 2-year term and get a FREE \$200 TELUS Visa Prepaid Card.⁵ Plus, for a limited time also get a \$100 bill credit when you order online.¹

[Internet only >](#)



33. Second, unlike wireless services, which are portable, HSIA service requires the installation of a fixed gateway (and an optical network terminal for fibre customers) on the customer's premises to enable the service. TELUS typically makes the gateway available to the

customer as rental equipment and the cost of such rental equipment is either discounted or included free of charge for customers, often in exchange for entering into a term contract. This is an appealing offer for customers as it provides them with the latest technology for an optimal Internet experience and also helps defray the customer's cost of the equipment and installation.

34. Third, the cost of installing HSIA service is often far greater than the cost of activating a wireless phone. Before TELUS can activate an HSIA customer it must send a technician to the customer's home or business and a technician must spend time on-site installing equipment. The technician ensures the availability of the fibre or copper into the home or business, installs or upgrades the connection if required, installs and configures the gateway and any associated networking devices, conducts testing to ensure the customer's Internet service is working, ensures Wi-Fi is enabled (should the customer require a Wi-Fi network) and may perform inside wiring work in the customer's home or office, as required to optimize Wi-Fi coverage. In some cases, where terrain is difficult and customers are situated in remote locations, the cost can run into the thousands of dollars. For this reason, at present TELUS ordinarily charges an installation fee of between \$150 and \$300, depending on the services purchased, but often waives this fee as a customer incentive.
35. The Commission's proposed cap on ECF ignores both the significant inducements that customers receive in consideration for entering into a term contract, as well as the often very high costs of providing HSIA service. The proposed cap has no basis in evidence or policy and should be rejected. Instead, to the extent the Commission determines to impose a cap on ECFs, the value of any such promotions (including waived or credited installation costs and equipment costs) should be set out in the contract and the ISP should be entitled to charge an ECF up to the stated value of all inducements noted in the contract.
36. Additionally, there is no evidence before the Commission at present to justify a maximum 24 month period over which an ECF must decline to zero. There is no evidence of difficulty switching between HSIA providers and an imposition of a 24 month period is arbitrary. It is also inconsistent with the absence of an ECF cap in the TV Code. Under the TV Code, television service providers must clearly set out any ECF, including the formula for

calculating the early cancellation fee and the date on which a customer is no longer subject to the early cancellation fee, but there is no prescribed maximum ECF. When developing the TV Code, the Commission considered whether it was appropriate to align with the Wireless Code.²³ In the case of ECFs, the Commission clearly considered that the language of the Wireless Code was not appropriate for the provision of television service.²⁴ The same holds true for HSIA service.

37. In the end, the result of the Commission’s proposed ECF restriction for Internet will almost certainly be an increase in cost for customers who presently choose to enter into term contracts. If ISPs cannot recoup the value of inducements and the significant costs of waived installation and equipment fees, or if the recovery period of those inducements is limited to 24 months, the result will be fewer contracts, higher rates, and lower inducements.

7.0 The Commission should not mandate a pre-sale CIS

7.1 Only Option 1 is a proportionate response to consumer protection concerns

38. In Section A.5 of the draft Code, the Commission provides two options for regulation with respect to clarity of offers. Option 1 sets out certain information that service providers must ensure is “clearly explained in all communications with consumers.” Option 2 introduces a requirement that a service provider furnish a pre-sale CIS within 24 hours of making a “specific” offer to a consumer.²⁵
39. The Commission should adopt Option 1. There is no evidence before the Commission that there is a need for a pre-sale CIS. The Commission prescribes that a CIS must include “a complete description of all key contract terms and conditions.”²⁶ However, at the offer

²³ BRP 2016-1 at para 17.

²⁴ In its TV Code decision, the Commission noted several instances where it deliberately considered whether to model the TV Code language after the Wireless Code, including format of the permanent copy of the customer agreement (BRP 2016-1 at paras 56-62), trial periods (BRP 2016-1 at paras 74-81), notification of changes to programming options (BRP 2016-1 at paras 76-103), notification in advance of agreement expiring (BRP 2016-1 at para 106), etc.

²⁵ The Commission does not define “specific.” To the extent the Commission adopts this proposal it must explain what features make an offer “specific.”

²⁶ Section C.1(iii)(a) of the proposed Internet Code.

stage, the parties have yet to reach agreement on the terms of a bargain. A written pre-sale CIS risks confusing customers in the event the contract ultimately executed by a customer does not exactly reflect the terms contained in the “pre-contractual” CIS.

40. Option 1 has the advantage of protecting consumers by ensuring they are provided with clear and accurate information while avoiding overly prescriptive regulations on ISPs that will limit their flexibility. Under Option 1, for example, if an offer is communicated on the website, the prescribed details can be set out on the website. If the offer is communicated via a telephone conversation, the details can be communicated via that interactive telephone conversation.
41. Option 1 is also consistent with the “Clarity of Offers” provision set out in the TV Code.²⁷ TV services and Internet services are often sold as a bundle and ISPs may offer promotions that are linked to both services. For example, TELUS currently offers a free TV to customers who sign up for Optik TV and Internet services on a term contract. For both customers and ISPs, alignment on the clarity of offer rules for both TV and HSIA would allow the offer to be clarified in its entirety at one time to facilitate ease of understanding. If ISPs were forced to outline the details of a single offer using two different methods (one for each service), it would create customer confusion, cause additional overhead costs and negatively impact the overall customer experience.
42. Finally, as TELUS explained in testimony before the Commission at the public hearing pursuant to Telecom and Broadcasting Notice of Consultation CRTC 2018-246, TELUS is currently completing a multi-million dollar initiative to roll out the ability to provide pre-sale quotations:

We have multiple ways to provide customers with pricing information. The market is competitive and dynamic and pricing can change daily. For that reason we do have printable collateral that our customers can take away with them. In addition to that, existing TELUS customers can leverage our digital property, such as TELUS.com, or the TELUS my account to access personalised

²⁷ Television Service Provider Code, Section II “Clarity of offers” as set out in the Appendix to BRP 2016-1.

preloaded offers for them that they can access. And finally, TELUS has actually undertaken a multi-million dollar capital initiative to develop the ability to enable email quoting, which begins rolled out next quarter.²⁸

43. TELUS undertook this initiative because it is consistent with its Customers First approach.²⁹ Requiring TELUS to undo this work and re-create a new and different Commission-mandated pre-sale disclosure system would result in millions of dollars in costs thrown away to create a new system that will not be demonstrably any better. This will also send a message to ISPs that they should not bother investing in strategies to improve customer service, because there is a significant risk the Commission will squander their work and investment through after-the-fact regulatory intervention. TELUS also explained the danger of this approach in its testimony before the Commission:

[O]ne of the recommendations that's come up ... was the pre-sales quote as an example. And we talked about how we've proactively entered into a multi-million dollar capital project, for example, to roll something like that out. And so what concerns us operationally and from a business standpoint when we're talking about incremental codes or incremental regulation is that when we have already taken the steps to proactively do what we think is best practice for a customer and implement these processes, we are concerned that some of those investments may lie fallow or that we have to go back and redo, you know, systemic upgrades that we had already planned. In the process of that, we would have part of our channels rolled out in one context or another.³⁰

44. The Commission should encourage ISPs to engage in proactive and pro-consumer measures like this. Without any evidence that a pre-sale CIS is necessary, mandating its

²⁸ Testimony of Jamie McNicol, Telecom and Broadcasting Notice of Consultation CRTC 2018-246, *Report regarding the retail sales practices of Canada's large telecommunications carriers*, 24 October 2018, Transcript vol. 4 at 5127.

²⁹ The Customers First program has a singular focus on the customer with the goal of raising the likelihood of a customer recommending TELUS to others.

³⁰ Testimony of Zainul Mawji, Telecom and Broadcasting Notice of Consultation CRTC 2018-246, *Report regarding the retail sales practices of Canada's large telecommunications carriers*, 24 October 2018, Transcript vol. 4 at 5231.

creation would waste money and send a message to ISPs that they should not proactively invest in customer service initiatives.

7.2 The phrase “duration of offer” should be interpreted as “duration of discount”

45. Within Option 1, one of the elements that the Commission proposes that ISPs be required to disclose is “the duration of the offer.” This phrase requires some clarity. To the extent this phrase implies that the ISP must clearly explain to a prospective customer the duration during which a given discount will apply, TELUS supports this clarity. Thus, if the proposal to a customer offered HSIA at a \$20 discount for six months, followed by HSIA at the regular price for the remainder of the contract, then the ISP would be under a duty to clearly communicate that the duration of the offer was six months.
46. However, to the extent the phrase is intended to require ISPs to set out at the time of making the offer the amount of time that an offer is *open for acceptance* (for example, “this offer is open for acceptance for 2 days”), then this proposed requirement should be rejected for four reasons. First, requiring ISPs to determine *ex ante* how long they will keep an offer in market is unduly restrictive and would interfere greatly with market dynamics. TELUS responds as quickly as possible to changing market dynamics in order to attract and retain customers. This means an offer available one day might not be available the next. Requiring ISPs to put a fixed timeline for acceptance of an offer will only have the effect of *shortening* the duration that offers are available for acceptance so that ISPs can retain their ability to respond to market developments.
47. Second, such a measure would be redundant if the Commission imposes a cooling-off period: to the extent a customer accepted a time-limited offer, that customer would also have a right to rescission within the cooling-off period.
48. Third, mandating a fixed window for offer acceptance can make it difficult to manage inventory and again potentially restrict the offers available to customers. For example, if an ISP offers a free laptop to customers who sign up for HSIA and television services for a 2 year term, the ISP typically procures a set amount of laptops for the promotion. Once the laptops are all assigned to customers who signed up for the promotion, the ISP needs

to cancel or change the offer (perhaps to provide a different gift with purchase or a completely different offer). There is simply no practical way to communicate this change to all customers who received a pre-sales offer.

49. Fourth, this requirement forces ISPs to provide valuable information about their promotional strategy to competitors. ISPs do not currently communicate end periods for offer availability as offers change rapidly in response to competitive market conditions. Under the proposed asymmetrical application of the Internet Code, forcing certain ISPs to communicate offer availability end dates while others have complete flexibility to change plans at any time creates an artificial competitive advantage for those providers who are not subject to the Internet Code.

8.0 The Internet Code should contain a 30 day cooling-off period but allow ISPs to prohibit abusive use and recover incentives offered with purchase

50. The Wireless Code provides for a cooling-off period designed to allow customers to determine if the wireless coverage in their area is sufficient for their needs and to ensure their wireless device is suitable. In the TV Code proceeding, the Commission noted that there is no need for a cooling-off period for TV customers as there are “typically no issues with coverage, service reliability or service constraints for the services provided by TVSPs”.³¹ Similarly, for Internet customers, there is no need for a trial period as it is unlikely that an Internet customer would have an issue with coverage, and the customer does not purchase a handset. Nevertheless, customer satisfaction is a top priority at TELUS, and for most products and services, TELUS already offers a cooling-off period during which customers can cancel services they feel they do not need.
51. To the extent the Commission imposes a mandatory cooling off period, TELUS supports a 30 day period, as this will allow all customers to receive their first bill. This support is subject to three caveats. First, ISPs should be permitted to recover any gifts with purchase and/or promotional or installation credits that customers may have received in consideration for agreeing to a term contract. Otherwise, a customer could receive a large

³¹ BRP 2016-1 at para 81.

gift with purchase—for example, a television—and upon delivery of the television immediately cancel his or her contract and keep the gift.

52. Second, customers should also be required to return any rental equipment in good condition.
53. Third, ISPs should be afforded the discretion to refuse to honour a cooling-off period where it is being abused. In the case of a 30 day cooling-off period, an unscrupulous subscriber could sign up with TELUS and cancel after 29 days, then move to a competitor and cancel after 29 days, and then move back to TELUS. That customer could repeat this cycle indefinitely and, at the limit, never pay for Internet access at all. While cooling-off periods are in general customer-friendly initiatives, any regulatory requirement to offer them must be subject to sufficient discretion to avoid abuse.

9.0 The Commission should not require ISPs to guarantee a minimum monthly price for the duration of a contract

54. In section B.4 of the draft Code, the Commission proposes that the “minimum monthly charge for services included in the contract” be a “key contract term” and that ISPs be prohibited from unilaterally amending key contract terms during the contract period, except where the amendment would reduce the rate for a single service or increase the customer’s usage allowance or speed for a single service.
55. The Commission should not include a fixed price as a key term because doing so will result in higher prices for customers. In the current competitive marketplace, ISPs provide a number of incentives to customers in consideration for entering into term agreements. TELUS offers various incentives such as waived installation fees, gift with purchase, free equipment rental, reduced monthly service charges and other incentives. It is financially viable for TELUS to offer these lucrative inducements because the current contractual structure permits TELUS the flexibility to respond to changes in the market. If TELUS were forced to guarantee a rate for the length of the contract period, the result would be that the rate would be *higher* than present contracted rates, or that the discount or inducement would be less valuable.

56. In any event, options for guaranteed rates are already available in the marketplace. While TELUS has chosen to offer discounts or gifts with purchase in consideration for a customer agreeing to a term contract, other ISPs have chosen different marketing strategies and offer bundled discounts or guaranteed pricing for the length of the contract term instead of offering a gift such as a TV or laptop. If a customer would prefer rate certainty over the other inducements, that customer is of course free to contract with the ISP offering the guaranteed rates. Mandating price certainty during the length of a contract would artificially eliminate market differentiators and regulate away competition—which is directly counter to both the telecommunications policy objectives in the *Telecommunications Act*³² and the Policy Direction.³³ It would also reduce consumer choice. In short, given the level of competition at present, it would result in negative outcomes for customers.

10.0 Comments on additional proposals in the draft Internet Code

10.1 Notification of Overage Charges (Section E.3)

57. The Commission presents two options for customer notification of data overage charges. The Commission should adopt Option 1, as follows:

A service provider must notify a customer who has incurred overage charges of where they can find information about (i) the account management tools the service provider offers, (ii) the data usage associated with common online activities, and (iii) alternative plans that may better suit the customer's needs. Customers may opt out of these notifications at any time. Such notifications must be provided each month in which a customer incurs data overage charges, unless the customer opts out of receiving such notifications.

58. As the Commission notes, this requirement is the same as was imposed by the Commission in Telecom Regulatory Policy CRTC 2016-496 less than two years ago after a lengthy proceeding including a multi-week public hearing.³⁴ ISPs expended considerable time and money to comply with these requirements, and there is no evidence before the Commission

³² *Telecommunications Act*, s 7.

³³ The Policy Direction, s. 1(a)(i).

³⁴ Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy*, 21 December 2016 at para 239.

that they are not fulfilling their intended purpose. Unless there is evidence to show that these measures have not been effective, the Commission should not now force ISPs to invest in new notification systems less than two years after they were last required to do so.

59. While the requirement from TRP 2016-496 put in place a minimum level of protection, it also provided ISPs with the latitude to go above and beyond those requirements to differentiate themselves. Presently, TELUS contacts Internet customers by e-mail when they reach 75%, 90% and 100% of their Internet plan data usage limit. The e-mail includes suggestions of potential causes of usage and information about TELUS plans that have higher usage limits. The email also provides a link to the TELUS website which sets out data usage associated with common online activities. TELUS also provides data usage monitoring tools available through the “My TELUS” website that allow customers to monitor their data usage and also compare current usage with past monthly usage. Option 1 is already in place, provides opportunities for ISPs to differentiate themselves and should be the preferred option.

10.2 Critical Information Summary (Section C.1(i))

60. The Commission asks whether the CIS should be provided to a customer either (1) when the customer is provided with a permanent copy of the contract or (2) when the consumer is provided an offer of service. TELUS supports Option 1 for the reasons set out in section 7.1 above: there is no evidence that a pre-sale CIS is necessary to improve sales transparency; providing a contract summary *before a contract has been executed* risks significant customer confusion; and such a requirement would be inconsistent with the determinations made recently in the proceeding that led to the TV Code.

11.0 Internet Code should establish consistent nationwide rules

61. The Commission should clearly articulate that any new Internet Code will be the sole governing standard for protection of Internet service customers. This is consistent with the state of constitutional jurisdiction in Canada as determined repeatedly by courts throughout

the country, including the Supreme Court of Canada.³⁵ Specifically, subsection 92(10) of the *Constitution Act, 1867* grants Parliament exclusive jurisdiction over the regulation of telecommunications and radiocommunication undertakings. By using consumer protection legislation to regulate telecommunications undertakings, some provinces have adopted regulatory regimes that are (1) constitutionally invalid because the pith and substance of the legislation is about a matter that is within the exclusive jurisdiction of Parliament; (2) inapplicable by way of the doctrine of interjurisdictional immunity, and (3) inoperative as a result of the federal paramountcy doctrine.

62. Unconstitutional provincial regulation of telecommunications has a real social cost. It weakens the Commission's authority, leads to an overly complex regime, and creates confusion for consumers of telecommunications services because it ultimately leaves them with a patchwork of standards rather than one clear national code. This complexity also leads to increased compliance costs for ISPs and thus needlessly increases costs to consumers.
63. Comments by consumer groups in the recently concluded review of sales practices proceeding clearly illustrate the problem of having multiple competing standards and regulations. A number of intervenors in that proceeding have pointed out that the lack of clarity around applicable regulations frustrates and confuses consumers. One consumer advocacy group described the regulatory state as "a bewildering maze of federal and

³⁵ *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, par. 42; *Alberta Government Telephones v. CRTC*, [1989] 2 S.C.R. 225, *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304; *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141 at 160-161; *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Québec (Procureur général) c. Québec (Régie des télécommunications)*, 1992 CanLII 3743 (QC CA), conf. by [1994] 1 S.C.R. 878; *Association canadienne des télécommunications sans fil c. Procureure générale du Québec*, 2018 QCCS 3159; *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749; *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] S.C.R. 767; *Saskatchewan Power Corporation et al. v. TransCanada Pipelines Ltd.*, [1979] 1 S.C.R. 297 at 306ff. See also M. Ryan, "Telecommunications and the Constitution: Re-Setting the Bounds of Federal Authority" (2010), 89 *R. du B. can.* 695, p. 726.

provincial rules and institutions”³⁶ that needs to be navigated by consumers who have a complaint about their provider.

64. Commission decisions have contributed to the consumer and constitutional confusion by refusing to displace provincial regulations and by establishing a framework in the *Wireless Code* that is intended to be expressly concurrent with provincial regulations unless there is a “direct conflict.”³⁷ The Commission reiterated four years later that the *Wireless Code* takes precedence “if direct conflict with provincial legislation should arise.”³⁸ These statements are incorrect articulations of Canadian constitutional law and they create consumer confusion as to governing rules and means of redress.
65. To avoid these problems and create better outcomes for consumers, the Commission should state that the new Internet Code will be the sole governing standard for protection of Internet service customers. This would mean that the Internet Code would be exclusively federal and would leave no room for provincial encroachment. Such a statement is necessary to ensure that consumer protections are consistent between provinces and industry players, that duplicative and potentially contradictory regimes do not threaten national application of federal rules, and that the Commission’s intentions are not thwarted by provincial regulators who may desire to implement a different regulatory regime.

12.0 HSIA is closely aligned with television service, and the Commission should justify deviations from the TV Code on the basis of evidence before it

66. In some respects, the Commission appears to have modeled the draft Internet Code on the existing *Wireless Code*. This is problematic in certain areas as the nature of wireline HSIA service differs materially from wireless services. The marketing, sale and provision of HSIA access is much more similar to the marketing, sale and provision of television service. Given that the Commission recently implemented the TV Code on the basis of an

³⁶ Intervention of the Manitoba Coalition in response to Telecom and Broadcasting Notice of Consultation CRTC 2018-246, *Report regarding the retail sales practices of Canada’s large telecommunications carriers*, 16 July 2018, para. 44 (“TNC 2018-246”). See also Intervention of Consumers Council of Canada in response to TNC 2018-246, paras. 39, 43-44.

³⁷ TRP 2013-271 at para. 26

³⁸ Telecom Regulatory Policy CRTC 2017-200, *Review of the Wireless Code*, para. 60 (“TRP 2017-200”).

extensive consultation, and given the similarities between HSIA service and TV service, to the extent the Commission intends to model the Internet Code in any respect on the Wireless Code rather than the TV Code, the Commission should justify its decision to do so on the basis of policy evidence before it.

67. The Commission acknowledges certain differences between HSIA and mobile wireless access in the Notice of Consultation:

However, there are some important differences between the two contract types. For example, while most mobile wireless service contracts include an end-user device (e.g. a smartphone), most Internet service contracts do not, although they may include equipment (e.g. a modem). Other examples include: (i) mobile wireless services enable customers to roam on other networks, while Internet services do not, and (ii) Internet services may require installation and service calls, while mobile wireless services generally do not.³⁹

68. This statement of differences between the services is accurate, but incomplete. There are many other differences. The chart below summarizes key differences between mobile wireless and HSIA service, as well as the similarities between HSIA service and television service.

³⁹ TNC 2018-422 at para 8.

	HSIA	TV	Mobile Wireless
Nature of equipment	Standardized equipment such as a fixed gateway or modem and PVR		Customized personal mobile phone
Installation and servicing	Technician visits premises to install equipment and provision the service		No on-site technician needed. Phone can be activated by customer or in-store
Where the services are consumed	Consumed in a single location; no roaming fees		Consumed across multiple locations, possibly incurring roaming fees
Marketing and bundling of services	HSIA frequently bundled with TV; discounts typically offered for bundled services		Not typically bundled with other services
Ownership of Equipment	Typically rented from the service provider. The service provider may choose to upgrade the customer's equipment from time to time to the latest model		Typically owned; often purchased with subsidy from service provider
Structure of the contract	Many customers on both month-to-month and term contracts. One Internet or TV subscription can be used to serve many individuals at the same location.		Most wireless contracts are designed to accommodate subsidized devices. Wireless customers often choose to subsidize their mobile phone by paying a reduced price as part of a term contract. Because each customer requires a phone and a distinct phone number, each customer has a plan and enters into a contract.
Incentives	Many different inducements, including gifts with purchase, promotional pricing, additional data, credits for installation, and free equipment rental		Typically handset subsidies, price reductions or additional data or voice minutes

69. HSIA service is marketed, sold and delivered in a similar manner to TV service. The TV Code is structured in such a way as to accommodate and encourage investment and competition, while ensuring that consumers are protected. Given the similarity in services, the Internet Code should generally reflect the policy decisions made in the TV Code proceeding. To the extent that they do not, the Commission should explain what evidence before it justifies a different approach.
70. Internet use is a key consideration underlying the deployment of faster networks and larger pipes via multi-billion dollar fibre deployments. The rollout of fibre facilitates a better Internet experience and greater participation in the digital economy by reaching more Canadians with faster speeds. This all contributes to the fulfillment of social policy objectives set out in section 7 of the *Telecommunications Act*, including the deployment of high quality services accessible to Canadians in both urban and rural areas in all regions of

Canada, the strengthening of the social and economic fabric of Canada, the encouraging of innovation and responding to social requirements of users of telecom services.⁴⁰

13.0 The Commission should not deviate from accepted rules of contractual interpretation and statutory construction

71. In the draft Code, the Commission proposes that “if any part of the Code or a contract for Internet services is ambiguous, or if it is unclear how the terms of the Code or the contract are to be applied, then the Code and the contract must be interpreted in a manner that is favourable to the customer.” This proposal runs contrary to the common law rules of statutory and contractual interpretation, and is inconsistent with the *Telecommunications Act*. It should be dismissed accordingly.

13.1 Portions of contracts approved or prescribed by the Commission should not be interpreted contra proferentem

72. The Commission’s proposal that any ambiguity in a contract for Internet services “be interpreted in a manner that is favourable to the customer” should not apply to portions of a contract that have been approved or prescribed by the Commission.

73. At common law, in certain circumstances as a last resort after other tools of contractual interpretation have failed, courts will interpret an ambiguous clause in a contract of adhesion *contra proferentem*: ambiguity or uncertainty can be resolved against the party that drafted the provision where the counterparty had “no opportunity to modify its wording.”⁴¹ The principle applies “on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.”⁴² This principle also finds some statutory recognition in provincial consumer protection legislation.⁴³

⁴⁰ *Telecommunications Act*, s 7(a), (b), (g) and (h).

⁴¹ *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at para. 17.

⁴² *McClelland & Stewart Ltd. v. Mutual Life*, [1981] 2 S.C.R. 6 at 15 per Estey J., dissenting on other grounds.

⁴³ See for example *Consumer Protection Act, 2002*, S.O. 2002, Sched. A, s.11: “Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.”

74. However, by definition, a contract can only be interpreted *contra proferentem* where there exists a *proferens*—a party that drafts the contract of adhesion. With respect to telecommunications law, “[w]here the provision in question has been prescribed by the legislature or by a regulatory authority acting pursuant to statutory authority, the carrier is not a *proferens* and, if logic is to govern, the rule should have no application.”⁴⁴ Thus, the Supreme Court of Canada refused to construe railway bills of lading strictly against a carrier because the bills of lading “were promulgated by the Board of Railway Commissioners under the authority of the law and should be construed according to the spirit of fairness which the board intended to establish in the relations between the shipper and the carrier.”⁴⁵ Similarly, the Supreme Court of Canada has stated that while insurance contracts are frequently interpreted *contra proferentem*, that will not be the case where the clause in question is required to be included in the contract pursuant to statute, because the insurer obviously “is not to be held responsible for the manner in which it is expressed.”⁴⁶ Accordingly, where the Commission prescribes the nature of the contracts between a provider and customers, there is no basis for those provisions to be constructed *contra proferentem*.

75. Furthermore, even where the contract in question is a contract of adhesion, courts will only resolve ambiguity against the drafter where “all other rules of construction fail.”⁴⁷ The doctrine cannot be used to create an ambiguity. Merely because the application of the policy to particular fact situations might be difficult does not mean that there is “ambiguity” in the wording of the contract. The Supreme Court of Canada has held that other rules of construction must be applied first, including, for example, the reasonable expectations of the parties, before courts can interpret a provision *contra proferentem*.⁴⁸ Including the Commission’s proposed language could therefore give consumers a false sense of security: if they are confused by the language, they may believe it will automatically work to their

⁴⁴ Michael H. Ryan, *Canadian Telecommunications Law and Regulation*, (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2018, release 3), ch. 4 at 4-26.

⁴⁵ *Premier Lumber Company v. Grand Trunk Pacific Railway Co.*, [1923] S.C.R. 84 at 102.

⁴⁶ *Madill v. Chu*, [1977] 2 S.C.R. 400 at 410.

⁴⁷ *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66 at para. 3.

⁴⁸ *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 50-51.

advantage when, in fact, the clause can be interpreted without resorting to the *contra proferentem* rule. In other words, consumers may take comfort and avoid reading the contract carefully, not understanding that it is only a rule of last resort.

76. In the case of contracts for the provision of HSIA, a hybrid approach to contract construction is required. Where a provision—for example, a Critical Information Summary—is included pursuant to a Commission requirement, then there is no rationale for any ambiguity in that provision to be interpreted in favour of the customer, since the Commission will have already taken the customer’s interest into account in requiring the inclusion of the clause in question. However, where the clause in question is included at the discretion and insistence of the service provider, and only where other tools of contract construction have failed, then consistent with the common law, it would be appropriate for any residual ambiguity to be resolved in favour of the customer.

13.2 The common law rules of statutory interpretation should apply to the Internet Code

77. The Commission’s proposal to interpret the Code (as opposed to contracts made pursuant to the Code) in a manner favourable to the customer in case of ambiguity is also inconsistent with the common law of statutory interpretation. The Supreme Court of Canada and nearly every court in the country has held repeatedly that statutes “are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁴⁹ The *Interpretation Act* also applies, which provides that “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”⁵⁰

⁴⁹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para 21, citing Elmer Driedger, *Construction of Statutes* (2nd ed. 1983) at p.87.

⁵⁰ *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12. The *Interpretation Act* applies to every federal “enactment,” defined at subsection 2(1) as “an Act or regulation or any portion of an Act or regulation. The term “regulation” is in turn defined to include “an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (a) in the execution of a power conferred by or under the authority of an Act, or (b) by or under the authority of the Governor in Council.”

78. It is according to this principle and decades of case law that the *Telecommunications Act* has repeatedly been interpreted both by courts and the Commission itself.⁵¹ There is no principled reason why a code of conduct developed pursuant to the Commission's statutory authority under the *Telecommunications Act* should be interpreted differently. The Commission should take care to draft a code that removes as much ambiguity as possible. Where any ambiguity remains, the Code should be interpreted according to the principles set down by the Supreme Court of Canada and subject to the *Interpretation Act*.

14.0 Timeline and cost for introduction of the Internet Code

79. Without knowing the final text of any Internet Code, it is impossible for TELUS to estimate with a significant degree of accuracy the amount of time or money it would take to implement an Internet Code. Nevertheless, on a very approximate basis, and based on TELUS' experiences implementing the Wireless Code and the TV Code, TELUS estimates it will require eighteen months following the date of the decision in this proceeding to implement, and would cost # #. This timeframe is also consistent with the implementation period set out with the introduction of the TV Code. Additionally, #

#

15.0 Promotion of the Code

80. The Commission asks how the Internet Code should be effectively promoted among consumers and how sales representatives will be made aware of the Internet Code. TELUS proposes that the CCTS Annual Report can be used to promote the mandatory Internet

⁵¹ See, for example, *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476; *Telus Communications Co. v. Northwestel Inc.*, 2013 FCA 44. For an example of the Commission resorting to this approach, see Telecom Decision CRTC 2018-384, *Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites*, 2 October 2018 at para. 56.

Code, in addition to reporting on its effectiveness. ISPs can also include a prominent link to the Internet Code on their websites, just as they do today for the Wireless Code. An overview of the Internet Code in American Sign Language and Langue des signes du Québec should also be made available on carrier websites for the deaf, deaf-blind, and hard of hearing.

81. Internally, TELUS proposes to follow a training regime similar to that used for the Wireless Code for its customer facing representatives to ensure awareness of the Internet Code. For new employees, Internet Code training would be integrated throughout the new hire curriculums. For existing customer-facing employees, TELUS would create a mandatory e.learning course that provides background on the Internet Code, explains the major Internet Code requirements, the recourse options available for customers and how ISPs must comply with the Internet Code. Going forward, any changes to the Internet Code would be delivered using a variety of communication tools, including: high-visibility news stories on internal websites, “desk drop” employee bulletins and digital newsletters. Links will be included to the applicable internal help pages which contain additional information specific to the Internet Code.

16.0 Time period for review of the Internet Code

82. An Internet Code should be subject to review through a written consultation five years from the date of its implementation. Five years is sufficient time for systems and processes to be optimized and normalized. Reviewing the Internet Code within a shorter time frame could cause unnecessary disruption to systems and processes and generate additional costs. Five years also allows time for the Commission and the CCTS to gather data about the effectiveness of the Internet Code. Should a party feel a review of the Internet Code is required prior to the five year time interval, it can bring an application for such a review. This approach ensures efficient use of scarce regulatory resources for both industry and

public stakeholders. A five year review period is also consistent with the review periods ultimately selected for both the Wireless Code⁵² and the TV Code.⁵³

17.0 Conclusion

83. In creating any Internet Code, and indeed in any regulation of a forborne service, the Commission must be mindful that disproportionate regulation will dampen competition, and ultimately hurt innovation and digital adoption. The Commission should therefore regulate only where it determines that there is insufficient competition to protect customers, and only to the extent required to protect customers.
84. The Commission should also ensure—consistent with the Policy Direction—that regulation applies in a competitively neutral manner. In this case, this means that all ISPs should be bound by an Internet Code. To bind only some ISPs is to protect only some customers. As recent data show, it is precisely the customers of the smaller ISPs that the Commission proposes to exclude who are most in need of protection. To the extent there is a heavier regulatory burden on smaller ISPs in complying with an Internet Code—and there is no evidence to that effect—that is not a sufficient reason to exclude them from the application of a Code. If an ISP cannot provide service without violating consumer protection standards, then it should not be permitted to provide service. There is no principled justification to the contrary.
85. The Commission should also restrict the application of any Internet Code to consumers, rather than small businesses. As set out above, while there is considerable overlap in the way wireless services are marketed and sold to consumers and small businesses – that is not the case with respect to HSIA. The proposals in the Commission’s draft Code would be difficult to operationalize in the small business context and most importantly would make it exceedingly difficult for ISPs to offer small businesses the customized Internet services they currently enjoy.

⁵² TRP 2017-200, para 463.

⁵³ BRP 2016-1 at para 150.

86. The Commission should also apply any Internet Code exclusively on a prospective basis in order to respect the bargains entered into by ISPs and their customers. Granting retrospective effect will simply lead to new customers subsidizing below market rates for existing customers under contract, a manifestly unjust result.
87. A number of additional elements in the Commission's draft Code also require modification. As set out above, the Commission's proposed ECF does not reflect the much higher cost of providing HSIA compared to wireless service, and does not take into account significant discounts and gifts offered to customers in consideration for entry into term contracts. The Commission's proposal to mandate a pre-sale CIS is also unnecessary and difficult to operationalize, and threatens to cause significant customer confusion.
88. Many of these difficulties in the Commission's draft Code stem from a problematic attempt to transpose language from the Wireless Code to the HSIA context. However, HSIA services are marketed and sold in a manner much more similar to television services than wireless services. Accordingly, the Commission should justify any deviation from the model of the TV Code in favour of the Wireless Code.
89. Finally, the Commission should state unequivocally that the Internet Code constitutes the exclusive governing standard for Internet services. The Commission should also respect the common law principles of statutory and contractual interpretation by refraining from imposing a separate interpretation regime that is not justified on the basis of the evidence before it.
90. Precisely because there remains more competition than ever for HSIA customers across the country, TELUS has already adopted a suite of customer friendly practices as part of its Customers First approach. To the extent the Commission nevertheless deems it necessary to mandate an Internet Code, it must be mindful of the state of competition in the industry and the differences in the sale and marketing of HSIA and wireless services.

* * * End of Document * * *

Appendix A – Expert Report of Dr. Robert Crandall

As submitted by TELUS in its Initial Submission on August 31, 2018 to the Competition Bureau of Canada in the Market Study Notice: Competition in Broadband Services

See separate attachment titled “Appendix A – Expert Report of Dr. Robert W. Crandall”.

Appendix B – TELUS responses to the Commission’s Questions for discussion

Q7. Need for the Code

The Commission is of the preliminary view that the creation of the Internet Code is necessary to respond to consumer concerns about Internet services. Comment on this preliminary view, providing an explanation for your position and supporting rationale.

ANSWER

TELUS sets out its response to Question 7 at paras. 7-13 of its Intervention.

Q8. Content of the Code

To facilitate the discussion on the possible content of the Code, please review the Internet Code Working Document in Appendix 1, which is intended to provide parties with a possible model and to stimulate discussion and debate. Comments on the Working Document will further inform the Commission's views on the content and structure of the Internet Code being developed. The Working Document is intended to be written in plain and easy-to-understand language. Options for proposed wording have been provided for some issues.

Adjustments to Internet Code Working Document

- a. Provide detailed comments, with supporting rationale, on the Working Document and any other specific provisions that would enable consumers to better understand their rights with respect to Internet services. Where you consider that changes are necessary, provide an explanation, alternative wording, and supporting rationale. This includes addressing any sections that you consider should be added or removed from the content of the Code. With respect to proposed wording, note that, to the extent possible, the Internet Code Working Document has been designed to be consistent with the language in the Wireless Code, the Television Service Provider Code, and the Deposit and Disconnection Code.

ANSWER

TELUS sets out its response to Question 8a. throughout its Intervention.

Key provisions

- b. Identify the provisions that you consider to be the most significant in responding to consumer concerns about Internet services, taking into consideration complaint data to the CCTS about the leading complaint issues for Internet services.

ANSWER

TELUS has no comment at this time in response to Question 8b. but reserves the right to comment at later stages of this proceeding.

Bundles

- c. In your response, identify the issues that you consider to be particularly relevant and/or unique to customers who purchase Internet services as part of a bundle of other communications services. Do you consider that any additional rules are necessary to specifically address the needs of such customers, especially with respect to clarity of contracts and ease of switching providers?

ANSWER

TELUS partially addresses the topic of bundles at paragraph 41 of its Intervention. TELUS reserves the right to comment further at later stages of this proceeding.

Cost to implement proposed provisions in Internet Code Working Document

- d. For service providers, provide an estimate of the proposed costs (and estimated time required) to implement the provisions set out in the Internet Code Working Document.
- e. Estimates relating to provisions in the Internet Code Working Document that were previously set out as expectations in Telecom Regulatory Policy [2016-496](#) or as requirements in other policies (e.g. 30-day cancellation policy) should reflect the fact that these expectations and requirements should already be in place.
- f. For Internet service providers (ISPs) that also offer mobile wireless and/or broadcasting distribution undertaking services that are subject to the Wireless Code and the Television Service Provider Code respectively, estimates should address the extent to which costs to implement the Internet Code would be incremental, building on the tools and processes in place for customers subscribing to wireless and television services.

ANSWER

TELUS sets out its response Question 8 subsections d. through f. at para. 79 of its Intervention.

Q9. Application of the Code to ISPs

Since 87% of Canadians with Internet services purchase their retail Internet subscriptions from a traditional telephone or cable company, the Commission is of the preliminary view that limiting the initial application of the Code to large facilities-based ISPs at this time would strike an appropriate balance between addressing consumer concerns and not placing a heavy regulatory burden on smaller carriers or resellers.

The Commission notes that this approach would be generally consistent with the model used for participation in the CCTS, which originally limited the application of the participation requirement to large providers and expanded it, as appropriate, in subsequent policy proceedings. The Commission determined in Telecom Decision [2007-130](#) that such an approach was consistent with the Policy Direction.

The Commission notes that 73% of consumer complaints to the CCTS in the last year related to five large facilities-based ISPs.

In light of the above, the Commission is of the preliminary view that the initial application of the Internet Code should be limited to the following providers, including all their brands and affiliates that provide services governed by the Code: Bell Canada (including Bell MTS Inc.; NorthernTel, Limited Partnership; and Télébec, Société en commandite); Cogeco Connexion Inc.; Bragg Communications Incorporated, carrying on business as Eastlink; Northwestel Inc. (Northwestel); Rogers Communications Canada Inc.; Saskatchewan Telecommunications; Shaw Telecom Inc.; TELUS Communications Inc.; Videotron Ltd.; and Xplornet Communications Inc.

Comment on this preliminary view, including which ISPs you think the Code should apply to at this time. Where you consider that changes are necessary, provide an explanation, alternative wording, and supporting rationale.

ANSWER

TELUS sets out its response to Question 9 at paras. 14-20 of its Intervention.

Q10. Application of the Code to contracts

The Commission is of the preliminary view that the Code should ensure that consumers can benefit from the protections to be set out therein, regardless of

- what region of Canada they live in;
- how they signed up for their Internet service (in person, over the phone, online, etc.);
- what underlying network technology is used to provide their Internet service; and
- whether they purchased the service on a stand-alone basis or as part of a bundle with other communications services.

Thus, the Commission is of the preliminary view that the Internet Code would apply to all retail fixed Internet services provided to individuals and small businesses by large facilities-based ISPs in all regions of Canada, regardless of underlying technology or the business models of the ISP.

Comment on this preliminary view. Where you consider that changes are necessary, provide an explanation, alternative wording, and supporting rationale.

ANSWER

Any Internet Code that results from this proceeding should apply to all retail fixed Internet services provided to individuals by all ISPs in all regions of Canada, regardless of underlying technology or the business models of the ISP. See paragraphs 14 through 25 of TELUS' intervention for additional information to supplement this response.

Q11. Application of the Code – Avoiding duplication with Wireless Code

The Commission is of the preliminary view that since the Wireless Code already applies to mobile wireless data services, including mobile Internet services, it is not necessary for the Internet Code to also apply to such services. In other words, as a result of this proceeding, individuals and small business customers could have their complaints about fixed Internet services resolved according to the Internet Code and continue to have their complaints about mobile wireless data and Internet services resolved according to the Wireless Code.

Comment on this preliminary view. Where you consider that changes are necessary, provide an explanation and supporting rationale.

ANSWER

Services covered by the Wireless Code should not be covered by the Internet Code and vice versa.

Q12. Application of Code principles to Northwestel's rate regulated services

The Commission is of the preliminary view that it may also be appropriate for the principles set out in the Internet Code to apply to customers of Northwestel's rate regulated Internet services, which may require adjusting Northwestel's tariff at a later date.

Comment on this preliminary view. Where you consider that changes are necessary, provide an explanation and supporting rationale.

ANSWER

TELUS has no comment at this time in response to Question 12 but reserves the right to comment at later stages of this proceeding.

Q13. Implementation – Extension requests related to unique barriers

The Commission is of the preliminary view that if any ISP considers that it may face unique barriers that would make implementing a specific provision in the Code technically impossible or financially unreasonable for itself, it should be able to submit a Part 1 application prior to the coming into effect of the Code, seeking an extension to implement those provisions. The ISP should be required to provide detailed evidence and rationale to show that its circumstances are unique and that the burden it faces is exceptional and unreasonable.

Comment on this preliminary view. Where you consider that changes are necessary, provide an explanation, alternative wording, and supporting rationale.

ANSWER

TELUS has no comment at this time in response to Question 13 but reserves the right to comment at later stages of this proceeding.

Q14. Implementation of the Code – Implementation date

The Commission is of the preliminary view that the Code should be implemented as soon as reasonably possible, to benefit consumers.

Provide your view on when it would be reasonable to have the Code come into effect. Comment on whether you consider that all provisions in the Code should come into effect at the same time or if certain provisions (list which ones) should come into effect at a later date and why.

ANSWER

TELUS sets out its response to Question 14 at para. 79 of its Intervention.

Q15. Implementation of the Code – Application to new, amended, and/or existing contracts

The Commission is of the preliminary view that when the Code comes into effect, it will apply to new contracts, which include contracts that are signed, changed, or renewed on or after the Code's implementation date.

The Commission is seeking comments on whether the Code should also apply to existing contracts, and if so, when and how. See the Internet Code Working Document for options to comment on.

ANSWER

TELUS sets out its response to Question 15 at paras. 26-29 of its Intervention.

Q16. Implementation of the Code – Implementation reports

The Commission is of the preliminary view that ISPs offering services governed by the Code should be required to report to the Commission to demonstrate that they have implemented the Code effectively and on time.

Comment on this preliminary view. Where you consider that changes are necessary, provide an explanation, alternative wording, and supporting rationale.

ANSWER

TELUS has no comment at this time in response to Question 16 but reserves the right to comment at later stages of this proceeding.

Q17. Administration and enforcement of the Code

The Commission is of the preliminary view that the Internet Code would be administered by the CCTS and enforced by the Commission.

Comment on this preliminary view. Where you consider that changes are necessary, provide an explanation, alternative wording, and supporting rationale.

ANSWER

TELUS agrees that any Internet Code that results from the current proceeding should be administered by the CCTS and enforced by the Commission.

Q18. Promotion of the Code

The Commission is of the preliminary view that it will be necessary to effectively promote the Internet Code to ensure that consumers and ISPs are aware of their rights and responsibilities.

Comment on what mechanisms should be used to effectively promote the Internet Code among consumers.

Provide supporting rationale.

For service providers, provide a summary of your proposed approach to ensuring that sales representatives are knowledgeable about both service providers' and customers' rights and responsibilities regarding the Code.

For all parties, comment on whether specific additional mechanisms are necessary to ensure that customers with disabilities can access information about the Code and have the tools they need to be informed about their rights and responsibilities related to the Code. If so, describe the proposed measures.

ANSWER

TELUS sets out its response to Question 18 at paras. 80-81 of its Intervention.

Q19. Measuring effectiveness and review of the Code

The Commission is of the preliminary view that it will be necessary to review the Internet Code in the future to ensure that it continues to be effective in meeting its objectives as the market evolves.

- (i) Comment on whether the Commission should plan to review the Internet Code in three or five years and why, providing supporting rationale.

ANSWER

TELUS sets out its response to Question 19 part (i) at para. 78 of its Intervention.

- (ii) Comment on how the Code's effectiveness should be measured.

ANSWER

TELUS has no comment at this time in response to Question 19 part (ii) but reserves the right to comment at later stages of this proceeding.