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

Reply Comments of TELUS

ABRIDGED

January 28, 2019

Table of Contents

1.0 Executive Summary

1. TELUS Communications Inc. ("TELUS") files this Reply in accordance with the procedures set out in Telecom Notice of Consultation CRTC 2018-422, *Proceeding to establish a mandatory code for Internet services*.[1]

2. Canada's market for broadband Internet access services is competitive, high performing, and produces excellent outcomes for Canadians in terms of affordability, availability, and capital investment.[2] When comparing average broadband prices with countries with similar demographics, Canada had lower average wireline broadband prices per actual Mbps delivered in 2013 than the EU-15 and the United States.[3] Canada is also ranked highest among 86 countries sampled by the Economist Intelligence Unit's recent 2018 Inclusive Internet Index report in terms of affordability of broadband.[4] Canada also fares well compared to its European counterparts in terms of access to higher broadband speeds: 83 percent of Canadians have access to wireline speeds of 100 Mbps or more, while only 34 percent of French households, 19 percent of Italian households, and 24 percent of UK households have access to such speeds.[5] Canada's high broadband network speeds are the result of significant capital investment in Canadian networks by facilities-based carriers. Capital spending in the Canadian telecommunications sector between 1997 and 2015 outpaced that of both the US and the EU-14.[6]

3. Given the strong state of the Canadian broadband Internet access market, the rationale for regulatory intervention is very weak. If the Commission decides to intervene, despite evidence of Canada's strong absolute and relative performance, it must be mindful of the character and extent of the intervention. The tools of monopoly regulation (such as *ex ante* prescription of rates, terms and conditions) are ill-suited and counterproductive to a dynamically evolving competitive broadband Internet access market. Excessive regulation

---

1 Telecom Notice of Consultation CRTC 2018-422, *Proceeding to establish a mandatory code for Internet services*, 9 November 2018 (the "Notice" or "TNC 2018-422").
2 See Intervention of TELUS, paras 8-10.
3 Report of Dr. Robert Crandall, p 13, submitted as Appendix A to the December 19, 2018 Intervention of TELUS in the current proceeding (the "Crandall Report").
4 "Economist Intelligence Unit, The Inclusive Internet Index: Measuring Success," online: <https://theinclusiveinternet.eiu.com/explore/countries/performance?category=affordability>.
5 The Crandall Report, p 21.
6 The Crandall Report, p 17.

is also contrary to the Policy Direction. The Commission should reject calls for disproportionate and unnecessary regulation in favour of an approach that seeks to foster innovation and investment through continued reliance on market forces and competition. This can be accomplished by maximizing business flexibility, encouraging evolution of services and platforms, and limiting regulation to circumstances of market failure. Where a market failure is clearly identified, the minimum set of rules compatible with remedying the underlying concern should be deployed to address it.

4. There were in excess of 140 Interventions filed by various parties, including private individuals, facilities-based Internet service providers, resellers, industry groups representing various telecommunications providers, the Commission for Complaints for Telecom-Television service (the "CCTS"), two provincial governments, consumer advocacy groups, a group of joint interveners including the Canadian Association of the Deaf-Association des Sourds du Canada ("CAD-ASC")[7] and the Competition Bureau.

5. As set out in the Notice, the purpose of the Internet Code is to address specific perceived issues for Internet customers, including clarity of contracts and promotional offers, bill shock and barriers to switching service providers.[8] The Commission enumerates items that are outside the scope of this proceeding at paragraph 45 of the Notice. Despite this, several parties have attempted to broaden the scope of this proceeding by including various topics in their Interventions, such as:

- Speed, quality of service and performance[9]
- Regulation of advertising[10]

---

7 The joint interveners included: Canadian Association of the Deaf-Association des Sourds du Canada, Deaf Wireless Canada Consultative Committee-Comité pour les Services Sans fil des Sourds du Canada, Canadian National Society of the Deaf-Blind, and Deafness Advocacy Association Nova Scotia.

8 The Notice, para 3.

9 See for example Intervention of Union des consommateurs, para 40; Intervention of CCTS, para 51; Intervention of Le Conseil provincial du secteur des communications, paras 25-27.

10 See for example Intervention of the Competition Bureau, paras 50-52, 59; Intervention of Union des consommateurs, para 34.

- Regulation of data overage rates[11]
- Net neutrality and traffic management[12] and
- Penalties for non-compliance.[13]

6. Having expressly set out the scope of this proceeding, the Commission must restrict its focus to considering the contents of the draft Internet Code as articulated in the Notice and disregard topics that are out of scope. Should the Commission decide it wishes to address any of the out-of-scope items, it must provide sufficient notice to all parties in order to ensure a fair process. TELUS does not comment further on out-of-scope topics and failure to reply to any specific topic should not be taken as agreement with other parties' submissions on that topic.

7. This submission is organized as follows. In Section 2, TELUS reiterates why the Internet Code must apply to all ISPs: asymmetrical application of the Code ultimately hurts consumers. In Section 3, TELUS responds to arguments that the Code should apply to small businesses: the evidence on the record does not disclose any need for the Code to apply to small businesses. Furthermore, Internet solutions for this market segment are typically much more complex, customized, have a different cost structure, and are ill-suited to the regulatory measures set out in the proposed Code. In Section 4, TELUS responds to proposals that would require ISPs to commit to a guaranteed price for the duration of a contract term and explains why pricing flexibility within the contract term is important and beneficial for consumers. In Section 5, TELUS responds to proposals to require a standard form pre-sale critical information summary. These proposals are a disproportionate regulatory measure and ignore the fact that the Commission has previously found that mandating a pre-sale CIS creates a significant and unnecessary financial and resource burden on service providers. They also ignore the fact that several ISPs already have, or are in the process of rolling out, the ability to provide pre-sale quotations. In Section 6, TELUS replies to proposals that would place restrictive and unfeasible conditions on early

11 Intervention of Union des consommateurs, para 105.
12 Intervention of Union des consommateurs, para 39
13 Intervention of Union des consommateurs, para 29.

cancellation fees and trial periods. In Section 7, TELUS responds to proposals that seek to abandon Commission requirements regarding data use notifications that were put in place less than three years ago. Section 8 contains TELUS' comments on various other proposals and in Section 9 TELUS responds to arguments that incorrectly assert provincial jurisdiction over the offer and provision of telecommunications services.

2.0 Internet Code should apply to all Internet service providers

8. As TELUS noted in its Intervention,[14] there is no principled basis for denying the protections of the Code to the customers of smaller Internet providers and resellers. To the extent that the measures set out in the Code are justified, all customers are deserving of protection, regardless of the ISP from which they receive services. The Commission itself appears to agree that all customers, including customers of smaller reseller ISPs, are deserving of protection. As the Commission noted in its submission to the Legislative Review Panel earlier this month, "[r]esellers are a growing part of the Canadian telecommunications market, and their customers **expect to receive the same levels of service and protection** (e.g., public safety, net neutrality) as customers of Canadian carriers"[15] (emphasis added). This no doubt applies to the proposed Internet Code.

9. Almost all parties participating in this proceeding have taken a strong stand against limiting the application of the Code exclusively to large ISPs.[16] While the Competition Bureau – which normally advocates for competitively neutral regulation – did not take a strong stand that the Code should apply to all ISPs, the Bureau equally did not support uneven application of the Code. The only parties who support the proposed limitation are the ISPs that would be in a position to deny their customers the protections of the Code, including CANWISP, CCSA, ITPA, CNOC and SaskTel. These parties are making a transparent

14 Intervention of TELUS, paras. 14-20.
15 CRTC written public submission to the Legislative Review Panel, 10 Jan 2019, p. 7.
16 The parties who support universal application of the Code include ISPs (Bell, Rogers, Vidéotron, Cogeco, Xplornet, TELUS, Eastlink and Shaw), advocacy groups (CPSC, Union des consommateurs and CAD-ASC) and the CCTS.

attempt to relieve the burden of regulation as it concerns them, while seeking to impose it on their competitors. Their self-serving submissions should be rejected.

10. There is also no factual basis for the arguments of the small ISPs. For example, CNOC states that "the vast majority of complaints to the Commission for Complaints for Telecom-television Services ("CCTS") are not caused by smaller providers" and goes on to say that "[s]maller providers are by necessity more responsive to consumer needs."[17] CNOC then concludes that applying the Code to smaller ISPs "would not translate into a meaningful contribution towards relieving the leading causes of consumer complaints."[18]

11. These statements are directly contradicted by the fact that other ISPs, including members of CNOC, account for a disproportionate number of CCTS complaints. CCTS' Intervention shows that reseller ISPs including TekSavvy, Primus, Comwave and Distributel are on the list of the top 20 ISPs with complaints to the CCTS. Comwave alone accounts for more Internet issues than Shaw, Cogeco and Eastlink despite serving significantly fewer customers.[19] There is also evidence of disproportionate increases in the number of complaints regarding smaller ISPs. For example, TekSavvy, which would be exempt from the Code under the Commission's proposal, saw its CCTS complaint numbers regarding Internet service delivery increase by 293% last year alone.[20]

12. As noted by the CCTS and others, applying the Code to some ISPs but not others will create two tiers of customers and will cause consumer confusion and administrative difficulty.[21] On the other hand, applying the Code to all ISPs will ensure that all customers are protected, all service providers compete on the same basis and the CCTS does not have to apply different standards to different providers while explaining that differentiation to aggrieved and confused consumers.

---

17 Intervention of CNOC, para. 4.
18 *Ibid*, para. 5.
19 Intervention of CCTS, p. 11-12.
20 CCTS 2017-2018 Annual Report, p. 17.
21 Intervention of CCTS, para. 60.

13. In response to CNOC and other smaller ISPs' arguments about the regulatory burden of the Code,[22] it is no excuse to say that certain players in the market are too small to comply with consumer protection regulation that they themselves concede to be necessary.[23] If an ISP cannot meet that burden, it must be true that the only way that ISP can succeed in the market is by acting in a way that threatens consumers. This is the very thing the Code is aimed at addressing and if an ISP cannot comply with it, it should not be allowed to offer services to the public. If the Code creates unique barriers for a given ISP, the Commission can address those on the evidence in a separate Part 1 proceeding. As it stands, there is no reason to create an *ex-ante* exemption from the Code for a class of ISPs and no evidence on which such an exemption could be based.

14. Inconsistent application of the Code would also violate the Policy Direction, which requires the Commission to use measures that are implemented in a symmetrical and competitively neutral manner.[24] Applying the Internet Code to some but not all ISPs is not symmetrical and not competitively neutral. The current proposal by the Commission would give a potential competitive advantage to ISPs that already do not invest in building their own networks, and now will not be required to invest in protecting their customers.

3.0 The Internet Code should not apply to small business sales

15. As TELUS explained in its Intervention,[25] the Internet Code should not apply to small business sales. The cost, complexity, configuration and deployment of Internet solutions for small business customers differs greatly from deployment for the consumer mass market. Unlike wireless services, Internet services for businesses typically require specialized installation, customized offers and contracts. Certain Internet Code contractual requirements are therefore unworkable for the small business market. For example, a $50 cap on early cancellation fees (as per section G(1)(i)(a) of the proposed Code) does not reflect the higher cost of provisioning and installing services for small businesses. Imposing such a cap would mean that ISPs may need to raise their overall rates or impose

---

22 See, for example, Intervention of CNOC, para. 21 and Intervention of TekSavvy, paras. 5-8.
23 Intervention of CNOC, para. 9.
24 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, s. 1(b)(iii), (the "Policy Direction").
25 Intervention of TELUS, paras 21-23.

specific charges to mitigate the cost of deploying and installing equipment to provide Internet service for a short amount of time. Many other interveners were in agreement that the Internet Code should not apply to small business customers, including Bell, Cogeco, Eastlink, Vidéotron, Shaw and Rogers.[26] Applicability of the Internet Code to only the consumer market is also consistent with the Television Service Provider Code.[27]

16. While the CCTS states that small businesses had a higher proportion of Internet-related complaint issues compared to consumers (34% versus 29%),[28] these numbers are misleading without additional context. Small business complaints comprise only 3.7% of all concluded complaints,[29] and small business Internet issues constituted only 1.4% of all issues raised with the CCTS in 2017-2018.[30] Further, the number of small business complaints related to Internet service is decreasing year over year.[31] Since small business complaints represent only a small proportion of overall complaints, and are *decreasing in volume absent regulatory intervention*, there is no justification for Commission regulation at this point. This disproportionate approach is also inconsistent with section 1(a)(ii) of the Policy Direction.[32]

17. Finally, while the Internet Code should not apply to small businesses, this does not mean that small business customers would be excluded from the purview of the CCTS when it comes to Internet services. On the contrary, small business customers would still be able to submit complaints to the CCTS, including about Internet services, just as they do today in the absence of an Internet Code. By excluding small businesses from the scope of the Internet Code, the Commission removes the many practical challenges of applying the

---

26 See Interventions of Bell, paras 13-16; Cogeco, paras 96-98; Eastlink, para 52; Québecor Média, paras 27-38; Shaw, para 10; Rogers, paras 9 and 42-44.

27 Broadcasting Regulatory Policy CRTC 2016-1, *The Television Service Provider Code*, 7 January 2016 ("BRP 2016-1") (the "TV Code").

28 Figures are from the 2017-2018 CCTS Annual Report, pp 45 and 15 respectively.

29 CCTS 2017-2018 Annual Report, p 45.

30 A complaint can contain more than one issue. See "Summary of leading complaint issues" data file on the CCTS website at https://www.ccts-cprst.ca/report/annual-report-2017-2018/. By filtering the issues by (i) "Internet access service" line of business and (ii) "small business" complainants, the spreadsheet shows a total of 427 complaint issues from small businesses that were related to Internet. This is out of a total of 8,987 Internet issues (or 4.8%) and 30,374 total issues raised (or 1.39%) (see 2017-2018 CCTS Annual Report, p8 for total number of issues).

31 See Intervention of TELUS, para 21 and footnote 21.

32 The Policy Direction, s. 1(a)(ii).

Code to this market segment, while retaining the right for small business customers to seek redress with the CCTS.

4.0 The Internet Code should allow for pricing flexibility during the term

18. Some interveners make proposals that would have the effect of fixing a price for the term of the contract and not allowing that price to change until the term expires. However, these types of requirements will likely only lead to higher prices or reduced value in promotional items made available to consumers who opt for term contracts. When customers enter into a contract term with TELUS, they do so in consideration for gifts with purchase, free equipment rental, waived installation fees, a reduction off the current market price and/or other incentives. In return, TELUS gains the certainty of a customer's business for a set period of time. If ISPs are forced to guarantee a rate for the length of the contract period, the result may be that rates for services provided under contract increase and that discounts or inducements would be less valuable, as ISPs will lose the benefit of rate flexibility for those customers.[33]

19. Critically, the competitive market already provides for rate certainty for customers that seek it. While TELUS offers the incentives listed above in exchange for a term contract, other ISPs offer guaranteed rates for the duration of the contract. This is in fact a point of competitive differentiation. Mandating that every provider must guarantee rates during the life of a contract would regulate away the benefits of competition.

20. Union des consommateurs proposes to include a paragraph in subsection A.5 of the draft Code requiring ISPs to inform consumers of "*iii. le prix mensuel complet qu'un consommateur devra débourser pour obtenir le service*"[34] at the time of offer. Le Réseau FADOQ ("FADOQ") makes a substantively similar proposal – to set out the maximum amount of a customer's bill in the contract – with their proposed language in B.4(b).[35] For reasons set out above, this will reduce ISPs' pricing flexibility and will lead to higher prices

---

33 Other ISPs intervened support to the view that pricing flexibility should be retained for customers on term contracts. For example, CNOC notes that "service providers may have important reasons for making a change to agreements during a commitment period", see Intervention of CNOC, para. 17. See also Intervention of Xplornet, para 5.

34 Intervention of Union des consommateurs, para. 66.

35 Intervention of FADOQ, p. 11.

for consumers. The requirement to provide the price that the consumer will pay each month at the time of offer is also highly impractical as many plans in the market have data limits and exceeding those limits results in additional costs. ISPs cannot know ahead of time how much extra charges each customer will incur. FADOQ and Union des consommateurs' proposals, if adopted, could require ISPs to offer only unlimited plans, thereby reducing competition between ISPs and reducing consumer choice.

21. Union des consommateurs also proposes to include a paragraph in subsection A.2 of the draft Code with the words "*ii. Il est interdit au fournisseur d'imposer quelques frais dont le montant n'est pas prévu au contrat.*"[36] To the extent that this language would require ISPs to set out all the *quantum* of fees – including rates for optional services – at the time of contract formation without the flexibility to change those rates during the term of the contract, TELUS disagrees with the wording for reasons set out above. In addition, this wording would require an ISP to send a customer a new contract every time a small or temporary change is made to the customer's account. This is administratively burdensome, confusing for consumers and serves no purpose.

22. FADOQ also proposes that ISPs set out minimum and maximum charges that can be incurred as a result of a service call.[37] TELUS does not oppose a requirement to set out a *minimum* fee, but requiring that an ISP inform the customer of the *maximum* fee is not feasible. When TELUS receives a call from a customer with a request that requires a visit by a technician, the agent receiving the call has no way of knowing the work needed to fulfil the customer's request. The maximum amount incurred as a result of a service call will depend on the work that the technician will need to perform at the customer's premises. Once the technician is on site, he or she will be able to diagnose the cause of the request and inform the customer of what fees, if any, will be incurred in connection with the work. This approach is consistent with other home services that require a diagnostic analysis, including plumbing and electrical work. FADOQ's proposal to require ISPs to inform customers of the maximum amount for a service call is unworkable and should be rejected.

---

36 Intervention of Union des consommateurs, paras. 52-53.
37 Intervention of FADOQ, p. 13.

5.0 Mandating a pre-sale CIS is inefficient for consumers and ISPs and acts as a disincentive for ISPs to invest in innovative solutions

23. The Commission sets out two options at section A5 of the draft Internet Code in respect of clarity of offers. Option #1 requires the ISP clearly communicate the duration of the offer, the price of the service at the end of any limited time discount and any consumer obligations if they accept the offer. It provides flexibility in the way ISPs interact with customers while still prescribing the type of information that must be communicated. Option #2 requires the ISP provide a consumer with a written pre-sale CIS within 24 hours of making an offer to a consumer. The pre-sale CIS must contain specific information set out in section (C)(1)(iii) of the draft Internet Code.

24. The Competition Bureau wrongly perceives some need for a pre-sale CIS in its Intervention. While initially noting that the Commission should rely on market forces to the maximum extent,[38] the Bureau then recommends that the Commission require a standardized pre-sale quote. The Bureau goes so far as to prescribe a template for a standardized quote that is to be part of the CIS referred to in Option #2.[39]

25. The Bureau's proposal is contradictory: mandating a standardized pre-sale quoting system is inconsistent with relying on market forces to the maximum extent possible. As noted in their Interventions, several ISPs including Rogers, Vidéotron and TELUS are either developing or have already deployed pre-sale quoting systems to provide customers with detailed information to facilitate decision-making. TELUS is currently in the process of implementing a quoting system for customers and anticipates, by the time the system is fully implemented, to have spent a total of # # on this project. Mandating a pre-sale CIS would destroy significant investments made by ISPs to develop these systems. It would also disincentivize ISPs from developing future marketing and sales solutions to differentiate themselves out of fear that the Commission may mandate something different. In the *Review of the Wireless Code* proceeding, when considering whether to mandate a pre-sale CIS, the Commission acknowledged that "the

38 Intervention of the Competition Bureau, para 2.
39 Intervention of the Competition Bureau, para 36.

way in which a WSP chooses to promote its services can be considered a point of competitive differentiation."[40] There is also no evidence that the Bureau's prescribed CIS quote template would be better than the quoting systems that Rogers, Vidéotron and TELUS have already announced.

26. Further, the Competition Bureau is currently in the middle of conducting a market study on consumer habits in purchasing Internet services, with the goal of better understanding the competitive dynamics within the Canadian broadband sector.[41] It is premature for the Bureau to draw conclusions and provide advice on consumer behaviour in the Internet market before completing its research.

27. The CCTS suggests that the customer must have a pre-sale CIS before the customer can consent to ordering the service.[42] This is not a consumer friendly proposal. For example, if a customer were to call an ISP to purchase an Internet service plan that she saw advertised, the CCTS proposal would require the ISP to *refuse* the customer's request, send the customer a pre-sale CIS for review, and then have the customer call back upon receipt of the pre-sale CIS to order the service. It is not in the best interest of consumers to require every customer to wait for a CIS to buy a product or service if she knows what she wants to purchase.

28. The CCTS proposal also threatens to create an indefinite chain of mandatory pre-sale CIS disclosures for customers who change their minds. Consider the scenario in which a customer received a pre-sale CIS, and then changes her mind and wants to purchase a service that differs slightly from that set out in the pre-sale CIS. Under the CCTS proposal, the customer would once again be required to wait to receive a fresh CIS and then call the ISP back. This causes a cumbersome process that would irritate customers.

---

40 Telecom Regulatory Policy CRTC 2017-200, *Review of the Wireless Code*, 15 June 2017 at para 188 ("*Review of the Wireless Code*").

41 Market Study Notice: Competition in Broadband Services, 10 May 2018. Online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04360.html.

42 Intervention of the CCTS, Appendix A, p 5.

29. Finally, Union des consommateurs suggests that both Option #1 and Option #2 should be mandated in the "Clarity of Offers" section of the Internet Code.[43] This is duplicative. If Option #2 is provided, then the information set out in Option #1 is encompassed in Option #2. Union des consommateurs also proposes that any written offer be kept open for a prescribed number of days.[44] As TELUS noted in its Intervention,[45] the market for Internet services changes rapidly and it is sometimes not feasible to predict *ex ante* how long an offer will stay in market.

30. In the current regulatory proceeding, the measure that would rely on market forces to the maximum extent feasible would be to wait and see the effect of the ISP's quoting systems on improving clarity of information. This is compliant with the Policy Direction and is consistent with Option #1. Many interveners agreed that Option #1 is the preferred option.[46] If required, the Commission can examine the impact of these systems on offer clarity when it reviews the Internet Code in five years.

31. Option #1 is also consistent with the requirements contained in the TV Code, an important consideration as Internet and TV services are often sold together and consistency in the go-to-market process would minimize customer confusion and administrative burden. The Commission also previously considered the issue of a pre-sale CIS in the original and subsequent Wireless Code decisions, and found that the resulting financial and resource burden was not justified.[47]

---

43 Intervention of Union des consommateurs, para 58.

44 Intervention of Union des consommateurs, para 65.

45 Intervention of TELUS, paras 46-49.

46 See Intervention of Eastlink, paras 22-28; Intervention of Xplornet paras 30-34; Intervention of CNOC p 13; Intervention of Cogeco paras 22-26 and 33; Intervention of Shaw paras 46-58; Intervention of Vidéotron paras 39-50; Intervention of SaskTel para 29-33; Intervention of Rogers paras 14 and 19-20; and Intervention of Bell paras 19-22

47 "*The proposal to require WSPs to provide the Summary before a contract has been entered into would involve a significant burden, from both a financial and a resource perspective, and the Commission considers that it is not necessary to require this*." Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, 3 June 2013 at para 71. "*The Commission considers that parties in this proceeding have not provided evidence that circumstances have changed sufficiently since the Code came into effect such that the benefit of providing consumers with a CIS during the pre-purchasing stage would outweigh the burden on WSPs*." *Review of the Wireless Code*, at para 188.

6.0 Early Cancellation Fees and Trial Periods Must Take Into Account Inducements and Installation Costs

32. TELUS argued in its Intervention that the Commission should not adopt a proposal to cap early cancellation fees at $50.[48] The proposed language of the Internet Code with respect to early cancellation fees makes no provision for the fact that ISPs often bear very high upfront costs when acquiring and onboarding a customer. Many customers receive a gift worth far in excess of $50, ISPs bear the costs of installation (including dispatching a technician), and ISPs often provide discounted or free rental of equipment that is required to use the service. Some ISPs also guarantee prices for the term of the contract in exchange for a commitment by a customer to take services for that term. Putting a cap on early cancellation fees risks removing the incentive for ISPs to offer those inducements and guarantees,[49] ultimately leading to higher costs for consumers. Most ISPs participating in this proceeding note that capping early cancellation fees will lead to negative outcomes.[50]

33. In respect of trial periods, Union des consommateurs[51] and FADOQ[52] propose amendments to section G of the Code that would have the effect of depriving ISPs of the ability to recover waived installation fees if the customer decides to cancel his or her services. TELUS often waives installation fee for customers who choose to enter into a term contract. If ISPs are prohibited from recovering waived installation fees where a customer cancels within a trial period, the resulting risk of having to absorb expensive installation

48 Intervention of TELUS, paras. 30-37.

49 Intervention of Eastlink, para. 48.

50 Eastlink, Distributel, Xplornet, Bell, Cogeco, Shaw, TELUS, Vidéotron, SaskTel, Rogers and CNOC all provided reasons for which this proposal should not be implemented.

51 Intervention of Union des consommateurs, pp. 46-48. Union des consommateurs proposes the following language: "v. Au cours de ou à la fin de la période d'essai, le client peut annuler son contrat sans payer de pénalité, de frais d'installation et/ou d'activation ou de résiliation anticipée …"

52 Intervention of FADOQ, pp. 13-14. FADOQ proposes the following language: "i. Lorsqu'un nouveau client conclut un contrat assujetti à des frais de résiliation anticipée, le fournisseur de services doit offrir au client une période d'essai d'au moins (modification : 30) jours civils afin de permettre au client de déterminer si le service répond à ses besoins. De plus, lorsqu'un client existant accepte un nouveau forfait ou un forfait modifié assujetti à des frais de résiliation anticipée ou d'autres pénalités pour résilier un contrat de manière hâtive, le fournisseur de services doit offrir au client une période d'essai d'au moins (modification : 30) jours civils afin de permettre au client de déterminer si le service répond à ses besoins. Le client existant doit avoir l'option de retourner à son forfait antérieur (ajout : sans aucune pénalité) à la fin de la période d'essai. […] v. Au cours de la période d'essai, le client peut annuler son contrat sans payer de pénalité, (ajout : de frais de désinstallation) ou de résiliation anticipée, à condition: […]"

costs for a customer who cancels soon after may mean that ISPs choose not to waive installation fees. This would be a negative development for the many customers who choose to enter into a contract in exchange for a fee waiver. Therefore, the changes proposed by Union des consommateurs and FADOQ to section G of the Code should be rejected.

34. Union des consommateurs also seeks to extend the trial period significantly by making the period run from the *latter of* receipt of (1) the permanent copy of the contract *or* (2) the first bill.[53] This proposal should be rejected. The primary justifications for a trial period are to ensure that the service works and the customer is satisfied with it, and that the customer is indeed receiving the service for which he or she contracted.[54] A 30 day period is sufficient for a customer to ensure that he or she is receiving what is set out in the contract and that the services in question work to the customer's satisfaction. Some parties justify an additional 30 day period on the basis that a customer needs more time to review his or her bill. This argument does not withstand scrutiny, for two reasons. First, a customer billed on a monthly basis will always receive his or her first bill within 30 days of activation or installation. There is no need for a *further* 30 days to review the bill. Second, in the event that there is an error on a customer's bill or that the bill does not reflect what is set out in the customer's contract, the appropriate remedy is to make the customer whole by *fixing the bill*, rather than permitting complete rescission.

7.0 The Commission should not introduce new data usage notification requirements

35. In section E3 of the draft Internet Code, the Commission proposes two options for notification of data overage charges. Option #1 reflects the notification requirements that the Commission introduced in TRP 2016-496:[55] ISPs are required to set out certain plain language information in contracts, provide account management tools for data usage monitoring and provide customers with information on tools, data usage and alternative plans. Option #2 requires notification at specific dollar thresholds of data overage, together

53 Intervention of Union des consommateurs, para. 72.
54 *The Wireless Code*, Telecom Regulatory Policy CRTC 2013-271, para. 247.
55 Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy*, 21 December 2016 at paras 231-241 ("TRP 2016-496").

with the ability to suspend additional data for the billing cycle. The CCTS advocates for the adoption of both Option #1 and Option #2 as part of the Internet Code.[56] Union des consommateurs proposes augmenting Option #2 with data usage notifications of 75%, then 100% of monthly data, and a further notification when a customer reaches $25 in data overage charges.[57]

36. The Commission issued TRP 2016-496 pursuant to one of the most detailed and involved proceedings in recent years. TELUS then expended considerable resources to implement systems changes and meet the requirements that the Commission set out. There is no evidence before the Commission that the current usage notification regime is inadequate. On the contrary, the evidence is clear that there is no need for additional changes. Given that unlimited Internet plans are now widely available,[58] there is a decreased risk of bill shock related to data overage for Internet services. According to the Commission's Communications Monitoring Report, less than 5% of Canadian Internet subscribers incurred data overage charges in 2017, and the amount of data overage charges decreased by 6% between 2016 and 2017.[59]

37. Having canvassed this issue less than three years ago, the Commission should not now change course and create a new notification regime, laying waste to the resources that ISPs expended to comply with TRP 2016-496. There is no evidence that the TRP 2016-496 solutions (Option #1) are ineffective. Implementing Option #2 would be cost-prohibitive and unnecessary.[60]

---

56 Intervention of the CCTS, Appendix A, p 13.

57 Intervention of Union des consommateurs, paras. 90 and 107.

58 See for example: TELUS (https://www.telus.com/en/bc/shop/home/internet/plans?refinements[Term%20Length]=24,0); SaskTel (https://www.sasktel.com/store/browse/Personal/Internet/Internet-plans/_/N-satbeg); Rogers (https://www.rogers.com/consumer/internet); Shaw (https://www.shaw.ca/store/internet/internetPackageCompare.jsp?catId=cat280009); Bell (https://www.bell.ca/Bell_Internet/Internet_access). All websites accessed as of January 23, 2019.

59 CRTC Communications Monitoring Report 2018, p 8, available at https://crtc.gc.ca/eng/publications/reports/policymonitoring/2018/cmr2018-internet.pdf.

60 Many parties agree that option #2 should not be implemented. See Intervention of Bell paras 23-25; Intervention of CNOC pp 18-19; Intervention of Eastlink paras 40-43; Intervention of Cogeco paras 41-44; Intervention of Rogers paras 23-24; and Intervention of Vidéotron paras 51-63. In particular, implementing a system that allows customers to suspend data overage during the billing cycle would require significant and

8.0 TELUS reply to various other proposals

8.1 *Internet Code should apply only to new and amended contracts*

38. As noted in TELUS' Intervention,[61] the Code should only apply prospectively – that is, the Commission should select Option #1 with respect to application. Option #1 respects the bargains entered into by ISPs and their customers, whereas the other options require reopening every term contract for Internet services in Canada. If the Commission retrospectively and unilaterally renegotiates the terms of the bargains between ISPs and their customers, *new* customers could be charged higher rates in order to subsidize existing customers, whose contracts would retrospectively become priced at below-market rates. 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.

39. The CCTS advocates for Option #3, namely the Code will apply to new and amended contracts and only certain sections will apply to existing contracts:

> CCTS believes that Option 3 is the best combination of broadest consumer protection and easiest and simplest administration and comprehension. For example, there seems to be no policy reason why protections about contract changes, bill shock, service calls, contract extension, returning security deposits, and disconnection notices should not be available to existing customers as of the date the Code comes into effect.[62]

40. It is unclear which sections of the Code the CCTS proposes to apply on a retrospective basis. In particular, the words "contract changes" as used by the CCTS are very broad and can encompass price changes that were contemplated at the time that the bargain between the customer and the ISP was made. This requires clarification, and if the CCTS intended to advocate for disallowing pricing flexibility during the term of the contract, this should be rejected for the reasons explained above.

---

expensive system changes that may or may not be compatible with the systems put in place to address the requirements under TRP 2016-496.

61 Intervention of TELUS, paras 26-28.

62 Intervention of CCTS, Appendix A, p. 3.

8.2 ***Prohibition on appeals of CCTS decisions must be rejected***

41. The CCTS proposes amending the Code in a way that would eliminate appeals of its decisions.[63] This proposal is contrary to administrative law principles, the *Federal Courts Act* and the *Telecommunications Act*, is bad public policy and is inconsistent with other Commission codes. It should be rejected.

42. It is a fundamental principle of administrative and constitutional law that no decision of a public body is immune from judicial review, even in the face of a privative clause:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.[64]

43. A complete privative clause violates section 96 of the *Constitution Act, 1867*, as when a legislature attempts to "insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional…"[65] Decisions of administrative bodies such as the CCTS are subject to judicial review, at a minimum, "when they involve questions about the rule of law and the limits of an administrative decision maker's exercise of power."[66]

44. This constitutional and administrative law principle is also reflected in the *Federal Courts Act*, which provides:

> 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

---

63 Intervention of CCTS, Appendix A, p. 4.

64 *Roncarelli v. Duplessis,* [1959] SCR 121 at 140. See also *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at paras. 29-31, 52. There are very narrow exceptions to this broad principle, such as Parliamentary privilege, which do not apply here.

65 *Crevier v A.G. (Québec) et al.*, [1981] 2 SCR 220 at p 234.

66 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 20.

> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.[67]

45. The words "federal board, commission or other tribunal" are defined in the statute as:

> any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.[68]

46. The CCTS is included in this definition as it is a body approved by the Commission under an order of the Governor-in-Council.[69] The Federal Court (or the Federal Court of Appeal)[70] therefore has jurisdiction to hear an application for judicial review from a CCTS decision, regardless of whether language in the Internet Code purports to bar appeals.

47. The CCTS' proposal also fails to recognize that the CCTS, although a corporation, in effect acts pursuant to the subdelegation of the Commission's authority. In the Commission's decisions on the structure and mandate of the CCTS, the Commission determined that

---

67 *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 18(1) ("*Federal Courts Act*").

68 *Federal Courts Act*, s. 2(1).

69 *Order Requiring the Canadian Radio-television and Telecommunications Commission to report to the Governor in Council on Consumer Complaints*, P.C. 2007-533.

70 Under section 28 of the *Federal Courts Act* and section 64 of the *Telecommunications Act*, appeals from Commission decisions are taken, with leave, directly to the Federal Court of Appeal. As set out herein, CCTS' authority to adjudicate disputes is properly considered a subdelegation of the Commission's power to do so, and as such, judicial reviews of CCTS decisions are properly brought pursuant to these sections. However, to the extent a CCTS decision is considered an independent exercise of public authority, then section 18 of the *Federal Courts Act* would apply and a judicial review would be taken to the Federal Court.

certain entities must become participants in the CCTS as a condition of offering or providing telecommunication services. If the Commission has the power to compel service providers to participate in the CCTS and to approve the CCTS' structure and mandate,[71] it must be that the powers exercised by the CCTS derive from those of the Commission.

48. A delegate (CCTS) cannot have greater powers than the delegating authority (the Commission).[72] It is therefore also the case that the decisions of the delegate are reviewable on the same grounds as if they had been made by the delegating authority.[73] The Commission therefore cannot insulate a decision of the CCTS from the provisions of the *Telecommunications Act* any more than it could insulate its own decision from such review. Any provision in a Code that purports to deny this right would be unenforceable.

49. Accordingly, parties to a decision of the CCTS, acting as the Commission's delegate, have recourse to the review and vary provisions in section 62 of the *Telecommunications Act*.[74] This provision is very broad and empowers the Commission to "make any order in review which it might have made were such matter *res integra*."[75] The Commission also has discretion to undertake reviews of its decisions at any time.[76]

50. Additionally, section 64 of the *Telecommunications Act* creates a right of appeal, with leave, to the Federal Court of Appeal. This similarly applies to delegated decisions of the Commission, including CCTS decisions.

51. In addition to the legal reasons, CCTS' proposal should be rejected because it is bad public policy. In proposing to insulate its decisions from review, the CCTS neglects important

---

71 Telecom Decision CRTC 2007-130, *Establishment of an independent telecommunications consumer agency*, paras 2 and 25.

72 *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2017) (loose-leaf updated December 2018) at §13:2100.

73 *Butler Metal Products Company Limited v. Canada*, [1983] 1 F.C. 790 (F.C.A.). See also Donald J.M. Brown and The Hon. John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2017) (loose-leaf updated December 2018) at §13:2100.

74 "The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision."

75 *Canadian Pacific Railway Co. v. Toronto Transportation Commission*, [1930] S.C.R. 94 at 99, interpreting the equivalent power given to the Board of Railway Commissioners under the *Railway Act*, R.S.C., 1927, c. 170.

76 Michael Ryan, *Canadian Telecommunications Law and Regulation*, (Toronto: Carswell, 2017) (loose-leaf updated 2018) at §901.

public interest concerns. As noted above, an attempt to bar any form of review of CCTS decisions would be ineffective at common law and under the *Federal Courts Act*, leading to parties having to proceed by way of judicial review. An appeal to the CRTC is preferable to judicial review for three reasons:

52. The Commission has greater expertise in the issues addressed by the CCTS than courts. The Commission's expertise in telecommunications contracts and the telecommunications market generally makes it a preferable forum for review rather than a Court.

53. The time and expense required to pursue a claim in court is significantly higher than it is before the Commission, which is particularly harmful for consumers; and

54. The Commission could retain the ability to conduct appeals informally, in a manner tailored for the nature of the appeal and the capacity of the parties to participate in a proceeding.

55. Finally, an express provision taking away the possibility of appeal of Internet Code decisions is inconsistent with the *Wireless Code* and *Television Service Provider Code*. The CCTS has not given any reason behind this inconsistency. It would be administratively burdensome and confusing for consumers if decisions related to some services but not others were subject to appeal to the Commission. This is another reason why this proposal should be rejected.

8.3 *Proposals related to security deposits and disconnection ignore the fundamental reason for a security deposit and must be rejected*

56. FADOQ and Union des consommateurs make several proposals that would have the effect of curtailing ISPs' flexibility when it comes to requiring security deposits and disconnecting service for non-payment. These proposals should be rejected as they are ultimately anti-consumer. If ISPs are not permitted to mitigate their risk of providing services to customers who have no credit history or bad credit, the business reality is that it will be more difficult or even impossible for these customers to obtain Internet service. Allowing ISPs to determine an appropriate security deposit enables them to offer access to Internet services for customers with little or no credit.

57. Currently, TELUS analyzes the credit risk posed by each new customer account and where necessary take steps to protect itself by requiring a security deposit. If the ability to ask for security deposits were limited, ISPs might take on fewer clients who represent a credit risk. This would lead to difficulties for some Canadians in obtaining HSIA services. This would have a particularly negative impact on new businesses, new Canadians and young Canadians. These categories of customers typically have limited or no credit history and establish credit in part by signing up for services that require a security deposit. A proposal to limit security deposits may lead to more difficulty for these types of customers in signing up for Internet services.

58. Similarly, if there were additional limits on when services could be disconnected and how much money an ISP would have to lose before that can happen, ISPs would decline to provide Internet to some Canadians. This could lead to some people or new businesses being unable to obtain HSIA services. While TELUS does not oppose measures proposed by the Commission, including notification before a disconnection and giving customers the ability to dispute the reason for a disconnection, the Commission should carefully consider the negative impacts of adopting measures proposed by FADOQ and Union des consommateurs.

59. Union des consommateurs proposes to limit the amount of a security deposit to two months of service charges, claiming that this is consistent with the Deposit and Disconnection Code.[77] While this is practical for telephone services where there is often one rate package, it may be confusing and administratively challenging for Internet services where there are different levels of service and customers may change their packages. If the amount of the security deposit were tied to cost of services, every time a customer switches their HSIA plan, they would either need to top up their security deposit or receive a partial refund. This would be frustrating to consumers and administratively difficult for ISPs.

60. Union des consommateurs also proposes a requirement to review the security deposit at any time a customer signals a change in circumstance.[78] This is administratively

[77] Intervention of Union des consommateurs, para. 135.
[78] *Ibid*, para. 136.

unworkable and some limit on the number of reviews is required. In an extreme case, a customer who was deemed to need a security deposit could request a review of his or her circumstances several times per day. The Commission's proposed requirement to review the need for a security deposit at least once per year[79] is sufficient to protect consumers and will not cause excessive administrative burden to ISPs. There is no evidence before the Commission that reviewing the need for a deposit once a year is insufficient to protect consumers.

61. Next, Union des consommateurs proposes to allow disconnection only if an account has been in arrears for more than two months *and* the amount to be paid is at least $100. There is no need for both of these criteria to be satisfied. At the high end, two months' worth of TELUS' HSIA service could equate to approximately $300 (for Gigabit Internet that includes a terabyte of data). If a customer incurs charges for usage above the contours of their rate plan, that amount goes even higher. There is no reason to compel ISPs to be exposed to a credit risk of that magnitude before being able to disconnect service. The Commission's proposal of requiring non-payment for two months *or* outstanding balance of $50 before disconnection[80] strikes the right balance between protecting consumers from disconnection resulting from non-payment of small amounts and protecting ISPs from providing services without compensation. For the same reasons, the Commission should reject FADOQ's proposal to eliminate the monetary threshold entirely and not allow disconnection before two full months of non-payment.[81]

62. Finally, FADOQ proposes that ISPs should not be able to apply the security deposit to recover overdue amounts and states that this proposal is based on its understanding that the purpose of the security deposit is to cover rented equipment.[82] FADOQ is mistaken in its understanding of the purpose of security deposits: these deposits are used as security for payment of future bills, as well as to cover rented equipment. A security deposit is typically only required by TELUS from customers who, based on their credit histories, pose a risk of non-payment of monthly bills. As such, the very purpose of the security deposit is to

79 Section H.1(i)(d) of the proposed Code as set out in TNC 2018-422.
80 Section I.1(i)(a) of the proposed Code as set out in TNC 2018-422.
81 Intervention of FADOQ, p. 15.
82 Intervention of FADOQ, p. 15.

potentially apply it to recover overdue amounts. FADOQ's proposal should be rejected as it ignores a fundamental purpose of the security deposit.

8.4 *Proposed consumer consent requirements will effectively make every term a "key contract term"*

63. Union des consommateurs proposes to add the following language to section D.2 of the Code: "iii. Si la modification proposée par le fournisseur affecte les obligations d'une ou l'autre des parties, le client peut mettre fin au contrat sans frais ou pénalités."[83] As all terms of a contract affect obligations of the parties, this proposal would allow customers to terminate the contract at their discretion without any fees or penalties when any term in the contract changes. This has the effect of making every term in a contract with an ISP a "key contract term".

64. Paragraph B.4(i)(m) of the draft Code as set out in TNC 2018-422 lists terms that are *not* key contract terms. This list includes indicating where customers can find information about items such as the equipment manufacturer's warranty, location of tools to manage bills and usage, rates for optional services and how to contact an ISP's customer service agent. Under Union des consommateurs' proposal, for example, a change to the address of a website listing warranty information (which could be changed by a manufacturer beyond the control of the ISP) would produce the absurd result of the consumer being permitted to terminate the contract without any fees or penalties. Similarly, if the prices for optional services change, the consumer could theoretically cancel the entire contract without penalty under the Union des consommateurs proposal. However, there is no reason to permit rescission of the entire contract in those circumstances when the customer could instead simply remove or stop using those optional services without penalty. To the extent the Union des consommateurs believes there are additional terms that should fall under the "key contract term" section, it is open to them to make such a proposal, but their proposal in its current form should be rejected.

---

83 Intervention of Union des consommateurs, pp. 31-32.

8.5 *Proposal to make information available in ASL and LSQ should be organized as a common effort directed by the Commission*

65. CAD-ASC makes a number of recommendations regarding the provision of information about the Code in ASL and LSQ, including videos summarizing the Internet Code, common Internet services contract terminology and information about data management tools.[84] If the Commission orders these recommendations to be implemented, it would be a duplication of effort and resources to compel each ISP to produce its own accessible content on common issues (for example, common contract terminology). It could also create a problem with consistency in that the videos might differ in terms of content. Therefore, to the extent the Commission makes such an order, it should permit ISPs to collaborate and prepare one common set of ASL and LSQ materials under the guidance of the Commission and in collaboration with accessibility stakeholders.

9.0 Provincial regulation of the offer and provision of telecommunications services is unconstitutional

66. In its Intervention, TELUS requested that the Commission clearly and unambiguously state that the new Internet Code will be the sole governing standard for protection of Internet service customers.[85] This would make clear that the Internet Code is 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.

67. The Union des consommateurs repeatedly references provincial legislation and argues that ISPs cannot require consumers to waive their rights under provincial consumer protection laws.[86] This argument ignores the fact that as a matter of constitutional law, provincial legislation that regulates the offer and provision of telecommunications services is unconstitutional.

---

84 Intervention of CAD-ASC, p. 11.
85 Intervention of TELUS, paras 61-65.
86 Intervention of Union des consommateurs, paras. 43-44.

68. The Government of Québec, represented by the Ministère de la culture et des communications and Office de la protection du consommateur, goes much further. It suggests, without any basis in constitutional jurisprudence, that the CRTC is encroaching on the exclusive legislative jurisdiction of the Québec provincial government.[87] This submission is wrong and runs counter to established jurisprudence from all levels of Canadian courts.

69. Regulation of the offering and provision of a telecommunications service is *ultra vires* a provincial legislature. Subsection 92(10) of the *Constitution Act, 1867* grants Parliament exclusive jurisdiction over the regulation of telecommunications and radiocommunication undertakings.[88] By using consumer protection legislation to regulate telecommunications undertakings, provinces such as Québec 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.

70. The Québec government's argument that a province has the exclusive power to regulate the provision of a telecommunications service by virtue of its power to legislate on matters of property and civil rights under the *Constitution Act, 1867* is particularly insidious and is contrary to nearly a century of jurisprudence on the matter from Canada's highest courts. In fact, the primary manner through which Parliament exercises its power over communications is by regulating the contractual relationship between service providers and their customers. Thus, section 25 of the *Telecommunications Act* provides that "no Canadian carrier shall provide a telecommunications service except in accordance with a

---

87 Intervention of Ministère de la culture et des communications and Office de la protection du consommateur, paras. 110-113.

88 *Constitution Act, 1867*¸s. 92(10)(a). This has been addressed repeatedly in courts throughout the country. See, for example, *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225 at para. 66; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, par. 42 ["*Châteauguay*"]; *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, 160-161; *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; and *Québec (Procureur général) c. Québec (Régie des télécommunications)*, 1992 CanLII 3743 (QC CA), conf. by [1994] 1 S.C.R.. 878.

tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service." To be clear: a tariff is a contract between a carrier and its customers, prescribed by regulation. Where the Commission has forborne from the exercise of its section 25 power, it has generally retained its powers under section 24, which provides that "[t]he offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission." The Commission also generally retains its powers under section 27, which requires that rates be "just and reasonable" and non-discriminatory. The Supreme Court of Canada has in turn held that "[…] the power to regulate rates and the availability and quality of services such as telephone services or railway services…fall within the exclusive classes of subject represented by such federal undertakings."[89]

71. Thus, even if provincial legislation that directly regulates the manner in which a telecommunications provider offers telecommunications services were validly enacted, it would remain inapplicable by virtue of the doctrine of interjurisdictional immunity, because the contractual relationship between a telecommunications provider and its customers is at the core of federal authority over telecommunications, and any such legislation would necessarily impair that core.[90]

72. Given that the Québec government, TELUS and other interveners have put the constitutionality of provincial regulation squarely in play, the Commission must address the issue and state that jurisdiction over telecommunications, including the Internet Code, is a matter of exclusive federal jurisdiction; that it intends its rules to be binding, exclusive

---

89 *Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 749 at 839-40 ["*Bell 1988*"] (emphasis added). See also *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] S.C.R. 767 at 772 ["*Bell 1966*"]: "[i]t was not disputed in argument that the regulation of the rates to be paid by the respondent's customers is a matter for federal legislation."

90 *Bell 1988* at 839-40; *Bell 1966* at 772; *Châteauguay* at para. 68; *Téléphone Guèvremont Inc.* v. *Québec (Régie des télécommunications)*, [1994] 1 S.C.R. 878 and *Québec (Procureur général) v. Québec (Régie des télécommunications)*, 1992 CanLII 3743 (QC CA)); *Alberta Government Telephones v. Canada (CRTC)*, [1989] 2 S.C.R. 225; *Saskatchewan Power Corporation et al* c. *TransCanada Pipelines Ltd*., [1979] 1 S.C.R. 297, pp. 306-307; *Re Public Utilities Commission and Victoria Cablevision Ltd*., (1965) 1965 CanLII 498 (BC CA); *Vidéotron* v. *Gatineau (City)*, 2017 QCCS 3571, para. 179. See also M. Ryan, "Telecommunications and the Constitution: Re-Setting the Bounds of Federal Authority" (2010), 89 *R. du B. can.* 695, p. 726.

(meaning its rule will operate to the exclusion of provincial regulation), and national in scope; and that the Internet Code will operate to the exclusion of provincial regulation.

10.0 Conclusion

73. Canada's market for market for broadband Internet access services is competitive, high performing, and produces excellent outcomes for Canadians. The Commission must exercise caution when regulating to ensure that its regulations do not hurt competition, innovation, and the overall strong performance of the market in Canada. The Commission should regulate only when there is evidence of market failure and then only to the minimum amount required to meet the particular objective.

74. The Commission should not enact any regulation that would have a negative effect on customers and on competition between ISPs. To that end, the Commission should ensure that the Internet Code is applied in a competitively neutral manner and that residential high-speed Internet subscribers in Canada have the benefit of the Code, regardless of their choice of ISP.

75. The Commission should restrict the application of any Internet Code to consumers, rather than small businesses. There is no reason to include small businesses in the ambit of the Internet Code as small business complaints constitute a very small percentage of total complaints about HSIA services. Small business Internet services also typically require specialized installation, customized offers and contracts. Including small businesses as part of the Code would be difficult to operationalize and most importantly would make it exceedingly difficult for ISPs to offer small businesses the customized Internet services they currently enjoy.

76. The Commission should also be extremely cautious about adopting proposals that would have the effect of regulating away competition and raising prices. Such proposals include limiting pricing flexibility during the term of a contract, enacting overly restrictive trial periods and punitively low caps on early cancellation fees, and restricting security deposits. Enacting any of these proposals will ultimately result in higher prices as ISPs scale back

incentives, discounts and gifts that are offered to consumers in consideration of entering into a term contract.

77. Lastly, given the issues raised by the Government of Québec and other interveners, the Commission needs to make a clear statement that that the new Internet Code will be the will be the sole governing standard for protection of Internet service customers, exclusively federal and will leave no room for provincial encroachment. Such a statement would ensure a consistent set of rules throughout the country and is consistent with nearly a century of constitutional jurisprudence from all levels of Canadian courts.

* * * End of Document * * *