Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2021-125

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Large facilities-based Internet service providers – Application to review and vary Telecom Regulatory Policy 2019-269 regarding the application of the Internet Code

*The Commission **denies** the application by certain large facilities-based Internet service providers (ISP) to review and vary Telecom Regulatory Policy 2019-269. The applicants submitted that the Commission erred in its determination to apply the Internet Code to only the 10 largest facilities-based ISPs at this time; however, the Commission finds that the applicants have failed to demonstrate that there is substantial doubt as to the correctness of that determination.*

As stated in Telecom Regulatory Policy 2019-269, the Commission expects that all Internet service providers will behave in a manner consistent with the principles set out in the Internet Code. The Commission also intends to initiate a formal review of the Internet Code within three years of it taking effect. As part of that review, the Commission will have the opportunity to expand the Internet Code's application to other ISPs if deemed appropriate.

Background

1. The Internet Code, set out in Telecom Regulatory Policy 2019-269 (the Internet Code Policy), is a mandatory code of conduct for providers of retail fixed Internet access services (Internet services) for individual customers. It came into effect on 31 January 2020. The Internet Code aims to make it easier for Canadians to understand their Internet service contracts, prevent bill shock from overage fees and price increases, and make it easier for Canadians to switch Internet service providers (ISPs). Among other things, the Internet Code ensures that customers will benefit from increased clarity in their interactions with ISPs; clearer prices, including for bundles, promotions, and time-limited discounts; and increased clarity around service calls, outages, security deposits, and disconnections.

2. In the Internet Code Policy, the Commission noted that the large facilities-based ISPs appeared more likely than other ISPs to offer bundles and fixed-term contracts; impose early cancellation fees, higher installation fees, and higher overage fees; and offer time-limited promotional offers, gifts with purchases, or other discounts.

3. The Commission found that the record of the proceeding that led to the Internet Code Policy (hereafter, the Internet Code proceeding) was not sufficient to assess the

impact of compliance with the Internet Code on either non-facilities based larger ISPs or on the small ISPs. With respect to non-facilities-based ISPs, the Commission noted that they would face unique challenges in meeting customer protections, and that the Commission would first need to examine wholesale tariffs and wholesale-retail relationships before the Internet Code could reasonably be applied to them. In regard to the small ISPs, the Commission noted that these ISPs are diverse and include community-run and non-profit providers, and that they might not all have the required resources to fully understand and implement the Internet Code.

4. Accordingly, the Commission determined that the Internet Code would apply to the 10 largest facilities-based ISPs: Bell Canada (including Bell MTS; NorthernTel, Limited Partnership; and Télébec, Société en commandite); Bragg Communications Incorporated, carrying on business as Eastlink; Cogeco Communications inc.; Northwestel Inc.; Rogers Communications Canada Inc.; Saskatchewan Telecommunications; Shaw Communications Inc.; TELUS Communications Inc.; Videotron Ltd.; and Xplornet Communications Inc. (Xplornet).

5. However, because customer protection is an important issue for the Commission and in light of the fact that the Commission exempted other ISPs from the Internet Code's application at that time (referred to hereafter as the exempt ISPs) for the reasons cited above, it explicitly set out an expectation that all ISPs behave in a manner consistent with all the principles set out in the Internet Code. Those principles include using clear communication, providing bill management tools, and having consumer-friendly business practices.

6. The Commission stated that it intends to initiate a formal review of the Internet Code within three years of it taking effect. It noted that as part of that review, the Commission will have the opportunity to expand the Internet Code's application to other ISPs, if deemed appropriate, based on information that will be submitted on the record of that proceeding.

Application

7. The Commission received an application dated 29 October 2019 from all but one of the large facilities-based ISPs (the applicants),[1] in which the applicants requested that the Commission review and vary the Internet Code Policy on the basis that the Commission had erred in its determination to apply the Internet Code to only the 10 largest facilities-based ISPs.

[1] Xplornet was not one of the applicants; however, it submitted an intervention in full support of the application.

8. Specifically, the applicants argued that there is substantial doubt as to the correctness of the Commission's application of the Internet Code due to

    - an error in law, in fact, or in mixed law and fact because the Commission indicated that the Internet Code's application reflects the initial model used for participation in the Commission for Complaints for Telecom-television Services Inc. (CCTS) and then failing to introduce a clear financial threshold for inclusion in the Internet Code's application;

    - an error in fact because the Commission applied the Internet Code only to the large facilities-based ISPs; and

    - an error in law or in mixed law and fact because the Commission concluded that the Internet Code's application is compliant with the 2006 Policy Direction[2] and with the stated policy objectives of the *Telecommunications Act* (the Act).

9. The applicants requested that the Commission vary its determination in the Internet Code Policy and expand the application of the Internet Code to all ISPs, with limited exceptions based on ISP size (measured by revenue), ISP business model (for-profit/not-for-profit), and carrier status (facilities-based/non-facilities-based). They also submitted a proposal for how the Internet Code's application should be varied if the Commission were to determine that it had erred in this regard.

10. The Commission received an intervention from Xplornet in support of the application. It also received an intervention from the Public Interest Advocacy Centre (PIAC) in partial support of the application; and four interventions opposed to the application from the Canadian Communication Systems Alliance (CCSA) jointly with the Independent Telecommunications Providers Association (ITPA) [collectively, CCSA/ITPA], which represent the majority of small facilities-based ISPs; the Canadian Network Operators Consortium Inc. (now Competitive Network Operators of Canada) [CNOC]; Distributel Communications Limited (Distributel); and TekSavvy Solutions Inc. (TekSavvy).

Review and vary criteria

11. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that in order for it to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision,

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[2] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, 14 December 2006

(iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

Issues

12. The Commission has identified the following issues to be addressed in this decision:

    Issue A Did the Commission err in law or in fact by indicating that the Internet Code's application reflects the initial model used for participation in the CCTS and then failing to introduce a clear financial threshold?

    Issue B Did the Commission err in fact by applying the Internet Code only to the large facilities-based ISPs at that time?

    Issue C Did the Commission err in law or in fact by concluding that its application of the Internet Code is compliant with the 2006 Policy Direction and with the stated policy objectives of the Act?

Issue A – Did the Commission err in law or in fact by indicating that the Internet Code's application reflects the initial model used for participation in the CCTS and then failing to introduce a clear financial threshold?

Positions of parties

13. The applicants argued that the Commission erred in law, in fact, or in mixed law and fact by determining that the Internet Code's application reflects the initial model used for participation in the CCTS and then failing to introduce a clear financial threshold.

14. The applicants submitted that the Commission arbitrarily limited the Internet Code's application to the large facilities-based ISPs. They further submitted that despite the Commission's suggestion that the current approach of limiting the application of the Internet Code to the 10 largest facilities-based ISPs is "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,"[3] the current application of the Internet Code is in fact not consistent with that model.

15. The applicants further submitted that the Commission failed to conduct a principled analysis of (i) the financial threshold below which exempt ISPs might suffer an undue cost burden in implementing the Internet Code, or (ii) which provisions of the Internet Code would be burdensome for exempt ISPs to meet.

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[3] See Telecom Notice of Consultation 2018-422, Appendix 2, Q9.

16. The applicants reviewed the history and evolution of the criteria for membership in the CCTS, and submitted that those criteria would provide a useful model for application of the Internet Code.

17. Regarding the applicants' argument that the Commission's application of the Internet Code to ISPs was arbitrary, Distributel submitted that the Commission (i) explained the considerations it took into account in the Internet Code Policy, and (ii) listed the factors that would have to be assessed before applying the Internet Code to all ISPs, including the underlying wholesale-retail relationships.

18. Distributel argued that while the Commission stated that the Internet Code's application would be "generally" consistent with the model used for participation in the CCTS, the Commission was not required to follow the same approach it adopted for membership in the CCTS or to establish a financial threshold.

19. Distributel further submitted that the applicants erred by conflating "is consistent" with "is generally consistent," and supported the Commission in seeking input from parties before making a decision on an appropriate application model for the Internet Code.

Commission's analysis and determinations

20. In the notice of consultation that initiated the Internet Code proceeding, Telecom Notice of Consultation 2018-422 (the Notice), the Commission put forth a preliminary view in regard to limiting the application of the Internet Code to a small number of ISPs. The Commission addressed and analyzed this issue in detail in the Internet Code Policy, based on the record of the Internet Code proceeding. The Commission stated in the Notice's Appendix that its proposed approach of limiting the application of the Internet Code to the large facilities-based ISPs at this time would be "generally consistent" with the model used for participation in the CCTS.

21. In the decision that created the CCTS (Telecom Decision 2007-130), the Commission required telecommunications service providers with annual Canadian telecommunications service revenues above $10 million to be members of the CCTS.

22. The applicants stated that the Commission determined that the Internet Code's application reflected the initial model used for participation in the CCTS and then failed to introduce a clear financial threshold. They argued that this raised substantial doubt as to the correctness of the Commission's decision. The Commission considers that the applicants mischaracterised the Commission's statements.

23. The applicants' arguments imply that when the Commission stated its preliminary view that the application of the Internet Code would be "generally consistent with the model used for participation in the CCTS," this created a positive obligation for the Commission to base the application of the Internet Code on a similar financial threshold.

24. In stating that one approach would be "generally consistent" with another, the Commission does not bind itself to a specific approach, methodology, or outcome. The Notice clearly indicates that the Commission did not consider annual revenues to be the only criterion for consideration in the application of the Internet Code. The Commission articulated at the outset in the Notice the fact that 87% of Canadians with Internet services purchase their retail Internet subscriptions from a traditional telephone or cable company (i.e. large facilities-based ISPs) and that this was a factor underpinning its preliminary view. As a result, it is apparent that the Commission had considerations other than a financial threshold in mind when examining the application of the Internet Code.

25. It was ultimately within the Commission's discretion to base the application of the Internet Code on considerations borne out by the record of that proceeding, and more appropriate for it to do so. The Commission was not bound by the preliminary view stated in the Notice, which was much broader than framed by the applicants.

26. In light of the above, the Commission finds that the applicants have not demonstrated that there is substantial doubt as to the correctness of the Commission's determinations in the Internet Code Policy due to an error in law or in fact.

Issue B – Did the Commission err in fact by applying the Internet Code only to the large facilities-based ISPs at that time?

Issue B.1 – Did the Commission err in fact in its assessment that application of the Internet Code to only the large facilities-based ISPs at that time would further the Internet Code's objectives?

Positions of parties

27. The applicants argued that the Commission erred in fact by determining that the Internet Code should apply only to the large facilities-based ISPs and by not taking a more tailored approach. Specifically, they argued that this error in fact means that the Internet Code does not meet its stated objectives to

    (i) make it easier for individual customers to obtain and understand the information in their Internet service contracts;

    (ii) establish consumer-friendly business practices for the Internet service industry where necessary;

    (iii) contribute to a dynamic Internet service market; and

    (iv) further the policy objectives set out in paragraphs 7(a), (b), (f), and (h) of the Act.[4]

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[4] The cited policy objectives of the Act are 7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; (b) to render reliable and affordable telecommunications services of high quality

Objectives (i) and (ii) – Contracts and business practices

28. The applicants, supported by Xplornet, submitted that the Internet Code does not meet these objectives because, among other things, there is a large number of Canadian consumers who are excluded from its protections.

29. The applicants referred to the record of the Internet Code proceeding, in which the CCTS submitted that "if the proposed Internet Code applies only to large facilities-based service providers, CCTS data shows that 21% (i.e. 1,923 out of 8,987) of Internet service issues in complaints to the CCTS in 2017-18 would not have the code protections available."

30. The applicants further argued that the Commission's expectation that all ISPs behave in a manner consistent with the Internet Code is not sufficient to meet objectives (i) and (ii). The applicants added that voluntary behaviour is not the same as mandatory compliance backed by regulatory consequences.

31. PIAC submitted that the Internet Code does not and can never achieve its goals when such a large number of customers are excluded from its protections.

32. The CCSA/ITPA, CNOC, Distributel, and TekSavvy argued that the Internet Code's current application fulfills objectives (i) and (ii).

33. With respect to ensuring contract clarity and establishing consumer-friendly business practices, TekSavvy submitted that the Commission carefully considered whether to apply the Internet Code to all ISPs, especially to non-facilities-based ISPs. TekSavvy submitted that the Commission found that the applicants have more complex service offerings than those offered by exempt ISPs, and that those complex offerings are more likely to include bundles, time-limited offers, promotional prices, and multiple package options subject to a fixed term with an early cancellation fee.

34. Further, the CCSA/ITPA and CNOC disagreed with the applicants' argument that the Commission's expectation that exempt ISPs will comply with the Internet Code is not sufficient.

35. Specifically, CNOC submitted that by including an expectation in the Internet Code Policy that all ISPs behave in a manner that is consistent with the principles established in the Internet Code, the Commission ensured consumer protection even for customers of exempt ISPs. CNOC added that in accordance with Telecom Regulatory Policy 2017-11, non-facilities-based ISPs are required to abide by all

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accessible to Canadians in both urban and rural areas in all regions of Canada; (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and (h) to respond to the economic and social requirements of users of telecommunications services.

applicable consumer safeguard obligations as a condition of offering and providing telecommunications services.

36. The CCSA/ITPA submitted that they emphasize to their members (small ISPs) the importance of conducting their businesses in accordance with the spirit of the Commission's expectations.

37. Regarding the applicants' arguments concerning CCTS data, CNOC stated that the CCTS's data do not account for the proportion of complaints that are directly attributable to issues caused by the wholesale service provider. CNOC argued that those complaints illustrate what must be assessed in the context of the Commission's examination of whether new policies should be created to address the underlying wholesale-retail relationships before applying the Internet Code to exempt ISPs.

38. TekSavvy stated that based on the CCTS's Annual Report 2018-2019, most Internet service complaints concerned the applicants, and the number of Internet service issues complained about by the applicants' customers has increased since last year.

39. CNOC noted the Commission's finding in the Internet Code Policy that "it would be inappropriate to use the volume of complaints submitted to the CCTS as a parameter upon which to base the application of the Internet Code."

Objective (iii) – Dynamic market

40. With respect to how the Internet Code's application affects the market, the applicants argued that a blanket limitation of the Internet Code to only 10 ISPs and their affiliates distorts the Internet services market.

41. They added that some non-facilities-based ISPs may have Internet service revenues and subscriber numbers that are comparable to those of the large facilities-based ISPs. Such larger non-facilities-based ISPs benefit from unfair advantages: (i) they are relieved of certain compliance costs that are imposed on their competitors, (ii) they can offer deep discounts under fixed-term contracts, and (iii) they can charge substantial early cancellation fees to discourage their customers from switching providers. These are in addition to the cost advantage the non-facilities-based ISPs currently have due to their lack of investment in the networks themselves.

42. The applicants also submitted that the Internet Code's application is static since it includes certain named ISPs and excludes others. Such application is not responsive to changes in the Internet services market and will become outdated as the market shifts and certain ISPs grow.

43. CNOC argued that the applicants' claims are unsubstantiated, incorrect, and demonstrate a fundamental misunderstanding of the Commission's determinations. CNOC submitted that the applicants' claim that the Commission's determinations do not meet the stated objectives of the Internet Code assumes that the Commission had access to a sufficiently robust record to determine which of the Internet Code's obligations, if any, should apply to smaller ISPs. As well, the Commission expressed

the preliminary view that small ISPs should be exempt from the Internet Code due to the regulatory burden of compliance.

44. CNOC further submitted that the Commission issued requests for information to all ISPs in which it sought estimates of the costs and time required for them to implement specific provisions of its proposed Internet Code. These steps confirm that the Commission collected and considered evidence relating to the regulatory burden that the Internet Code would impose on non-facilities-based ISPs.

45. The CCSA/ITPA submitted that large ISPs have significant market share, and any actions they take will force others to adopt their best practices to remain competitive.

46. TekSavvy submitted that the applicants are working to undermine regulation that facilitates greater competition. They are dominant players in the Internet services market, and as a result, they enjoy significant, deeply entrenched competitive advantages over TekSavvy and other smaller ISPs.

47. CNOC and Distributel disagreed with the applicants' argument that the Internet Code's application is static, since the Commission will review the Internet Code within three years of its implementation.

Objective (iv) – Furthering the policy objectives

48. This matter is addressed as part of Issue C below.

Commission's analysis and determinations

Objectives (i) and (ii)

49. The evidence on the record of the Internet Code proceeding included a detailed assessment of ISP contracts and consumer complaint data, as well as evidence submitted in parties' interventions. Based on that evidence, the Commission found that many of the contract and business practice harms that the Internet Code's rules were designed to address (e.g. bill shock and high cancellation fees) were significantly more prevalent in contracts provided by the large facilities-based ISPs. As a result, customers of exempt ISPs are less likely to encounter those harms than customers of the large facilities-based ISPs.

50. With respect to the applicants' arguments related to CCTS data, the Commission indicated in the Internet Code Policy that while complaints to the CCTS are useful in establishing overall trends in customer complaints about retail fixed Internet access services, they do not reflect all complaints. Therefore, the Commission concluded that it would be inappropriate to use the volume of complaints submitted to the CCTS to assess the application of the Internet Code. Further, the Commission recognized in the Internet Code Policy that "as noted by non-facilities-based ISPs, wholesale services are the origin of certain complaints such as those related to service interruptions, or issues related to installation, repairs, disconnection, and reconnection."

51. As well, in the Internet Code Policy the Commission specifically set the expectation that all ISPs behave in a manner that is consistent with all the principles set out in the Internet Code, such as using clear communication, providing bill management tools, and having consumer-friendly business practices. The CCSA/ITPA stated that they emphasize these principles to their members. While the applicants disagreed that this expectation is sufficient, their disagreement is insufficient to demonstrate an error in fact.

52. As part of its compliance approach, the Commission will continue to monitor trends in complaints, including those reported annually by the CCTS related to Internet services and to exempt ISPs. The Commission can also initiate a future proceeding to modify an expectation into a regulatory requirement if it finds that the expectation was not sufficient to meet its objectives.

53. The applicants' argument that the Internet Code will not meet certain stated objectives is a matter of opinion and does not translate to an error in fact.

Objective (iii)

54. The Commission notes that there are over 1,000 ISPs of varying sizes, business models, and carrier status in the market, and that it must consider various factors based on a robust record before imposing obligations in order to obtain the desired balance between efficient regulation, competition in the market, and consumer protection.

55. The large facilities-based ISPs are the dominant providers in the retail Internet services market, with over 87% of all consumer contracts. Accordingly, ISPs that are currently exempt from the Internet Code are necessarily required to provide compelling offers and competitive services in order to win or maintain customers. Although expectations are not regulatory requirements, they do establish the path forward for future policy intervention as necessary.

56. The Commission stated in the Internet Code Policy that it intends to initiate a formal review of the Internet Code within three years of it taking effect. By stating the need for a review, the Commission indicated its position that the Internet Code's application should not be fixed and that the market may change over time. Consistent with the Commission's previous code reviews, the purpose of the upcoming review will be to revisit the Internet Code, including its application, in order to respond to changes in the market. In the interim, the Commission continues to monitor the extent to which its expectations for the exempt ISPs are being met and can take action earlier to address specific issues or concerns with particular providers, should the need arise.

57. The Commission considers that its determination to impose the Internet Code on only the large facilities-based ISPs at that time and to evaluate the appropriateness of extending the Internet Code's obligations to exempt ISPs at a later date, after evaluating the effects on the market and other factors, is appropriate and supported by the evidence submitted on the record of the Internet Code proceeding.

58. The Commission considers that the competitive pressures, the expectation set out in the Internet Code, and the data submitted as part of the Internet Code proceeding that show that exempt ISPs are less likely to have customers with term contracts, all indicate that the limited application of the Internet Code, at this time, will not prevent the Internet Code from achieving its objective of contributing to a dynamic Internet service market. The Commission considers that the applicants' position is based on opinion rather than on any identifiable error in fact.

59. In light of all of the above, the Commission considers that the applicants have failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determinations in the Internet Code Policy due to an error in fact in its assessment that application of the Internet Code to only the large facilities-based ISPs would further the Internet Code's objectives.

Issue B.2 – Did the Commission err in fact in its assessment of the burden of imposing the Internet Code on exempt ISPs?

Positions of parties

60. The applicants argued that the Commission erred in fact by finding that imposing all of the Internet Code's obligations would be an unreasonable burden on the exempt ISPs.

61. The applicants generally submitted that the Commission should have imposed the Internet Code on all ISPs, with certain limited exceptions. The applicants submitted that the results from a future wholesale-retail proceeding are not required to implement their proposed application of the Internet Code.

62. The applicants submitted that the Commission did not have sufficient evidence before it in the Internet Code proceeding to make a determination to apply a blanket exemption to the Internet Code for certain ISPs. The applicants added that many ISPs did not raise a significant number of concerns regarding compliance with the Internet Code on the record of the Internet Code proceeding, and that many of the concerns raised related to obligations that were not ultimately included in the Internet Code.

63. Xplornet supported the applicants and argued that smaller ISPs should not be exempt from regulatory measures to protect consumers by virtue of not having a large customer base or operating a resale business model. Xplornet added that in the case of smaller ISPs, the processes used to service a smaller customer base are generally less complex and may be more easily modified to adopt new practices.

64. The CCSA/ITPA submitted that in the Internet Code Policy, the Commission arrived at reasonable findings of fact in the context of the factual record before it. For example, the Commission recognized that equal application of the Internet Code to all ISPs would produce an unequal effect – that is, a disproportionate negative impact on smaller ISPs.

65. Distributel argued that the applicants' claim that the Commission erred in fact is based on incorrect assumptions, such as that the Internet Code would not be effective unless it is applied to all ISPs. Distributel submitted that if an ISP fails to provide protections similar to those in the Internet Code, it runs the risk of losing its customers to an ISP that has implemented those protections. Distributel further submitted that the applicants' claim also ignores the fact that many of the Internet Code's protections are either already provided or are in the process of being provided by non-facilities-based ISPs.

66. According to Distributel, the Commission took all relevant evidence into account, balanced the many factors involved, and reached a decision that was appropriate in the circumstances. Similarly, TekSavvy stated that the Commission carefully considered whether to apply the Internet Code to all ISPs, especially to wholesale-based ISPs.

67. The applicants replied that the opposing interventions in this review and vary proceeding do not point to any specific example of the applicants' proposed application of the Internet Code that is beyond the control of non-facilities-based ISPs, except Distributel's claim that the requirement to provide a critical information summary would impose a significant burden on non-facilities-based ISPs as a result of the monetary and staff resources required.

Commission's analysis and determinations

68. In the Internet Code Policy, the Commission found that there was not sufficient information on the record of the Internet Code proceeding to determine the impact of imposing the Internet Code on certain ISPs. The Commission further noted that some issues that needed to be assessed involved wholesale-retail relationships, which it found could not be completed since an examination of these issues was outside the scope of the Internet Code proceeding. Accordingly, the Commission considers that (i) it established the Internet Code's application based on the evidence on the record of the Internet Code proceeding, and (ii) the Internet Code's application may be expanded as the Commission deems appropriate once it has conducted certain assessments, monitored the effects of the Internet Code on the Internet services market, or obtained other data.

69. The Commission notes that the current application of the Internet Code is not static; as stated in the Internet Code Policy, the Commission intends to initiate a formal review of the Internet Code within three years of it taking effect.

70. The assessment of whether it is appropriate to impose new regulatory requirements on ISPs is complex and requires consideration of multiple factors, including those set out in the 2006 Policy Direction. The Commission considers that it assessed all of the factors that were known at the time of the Internet Code proceeding, but that this assessment could not be completed without further analysis of other factors. The Commission also considers that the Internet Code's application reflects the Commission's obligations to assess burden and impose regulatory measures where

necessary, based on the evidence on the record of the Internet Code proceeding. It does not amount to an error in fact for the Commission to have determined that further analysis is required before imposing the Internet Code on other ISPs.

71. The Commission considers that the applicants did not establish substantial doubt as to the correctness of its determinations in the Internet Code Policy with respect to the Commission's assessment of the burden of imposing the Internet Code on the exempt ISPs. Instead, the heart of the applicants' arguments appears to be that there was not sufficient evidence on the record of the Internet Code proceeding to demonstrate that there would be a significant burden in imposing the Internet Code on exempt ISPs. This is simply the converse of the Commission's determinations and does not demonstrate substantial doubt in those determinations.

72. In light of the above, the Commission finds that the applicants have not demonstrated that the Commission erred in fact in its assessment of the burden of imposing the Internet Code on the exempt ISPs, and therefore have not demonstrated that there is substantial doubt as to the correctness of the Commission's determinations in the Internet Code Policy due to an error in fact.

Issue C – Did the Commission err in law or in fact by concluding that its application of the Internet Code is compliant with the 2006 Policy Direction and with the stated policy objectives of the Act?

Background

73. The Commission is required to exercise its powers and perform its duties under the Act and must implement the Canadian telecommunications policy objectives set out in section 7 of the Act in accordance with the 2006 Policy Direction.[5] The 2006 Policy Direction states that the Commission should rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives. In addition, the 2006 Policy Direction requires that when relying on regulatory measures, the Commission should use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives. When the Commission implements non-economic regulatory measures, such as industry codes of conduct, the 2006 Policy Direction requires the Commission to implement these measures in as symmetrical and competitively neutral a manner as possible.

[5] The Internet Code Policy was not subject to the 2019 Policy Direction issued under the Act. Nonetheless, in reaching its determinations in the Internet Code Policy and in establishing the Internet Code, the Commission took into consideration the principles set out in the 2019 Policy Direction, which include promoting competition, affordability, consumer interests, and innovation.

Positions of parties

74. The applicants submitted that the Commission erred in law or in mixed law and fact by concluding that the application of the Internet Code is compliant with the 2006 Policy Direction and with the stated policy objectives of the Act. Specifically, the applicants alleged that the Internet Code's application is not compliant with the 2006 Policy Direction for several reasons.

75. First, by excluding potentially millions of Canadians from the Internet Code's protections, the Internet Code fails to further the policy objectives set out in paragraphs 7(a), (b), (f), and (h) of the Act.

76. In addition, the blanket exclusion of all but the large facilities-based ISPs from all of the Internet Code's obligations is not efficient or proportionate to its purpose, interferes with competitive market forces to more than the minimum extent necessary, and is not symmetrical or competitively neutral to the greatest extent possible. Such exclusion creates two tiers of ISPs, and of consumers based only on their choice of ISP.

77. Finally, the exclusion of larger non-facilities-based ISPs from the Internet Code's application is particularly asymmetrical, not competitively neutral, and interferes with market forces, since many of these ISPs have comparable subscriber bases to some of the ISPs included in the Internet Code's application. For instance, in terms of total Internet service subscribers, certain facilities-based ISPs are comparable in size to certain non-facilities-based ISPs, yet non-facilities-based ISPs are excluded from the Internet Code's application. Further, the access costs for resellers have dropped dramatically since 2011, providing them with another market advantage.

78. PIAC agreed with the applicants that by excluding potentially millions of Canadians from the Internet Code's protections, the Internet Code is asymmetrical, not competitively neutral, and fails to further the policy objectives set out in paragraphs 7(a), (b), (f), and (h) of the Act.

79. Xplornet submitted that extending adherence to the Internet Code to only the large facilities-based ISPs is not proportionate to the Internet Code's purpose. Xplornet argued that there was significant evidence on the record of the Internet Code proceeding based on CCTS complaint data that demonstrates that the customers of smaller ISPs and non-facilities-based ISPs would benefit from the Internet Code's protections.

80. Xplornet also argued that there is substantial doubt as to the correctness of the Commission's determination that application of the Internet Code to only the large facilities-based ISPs interferes with market forces to the minimum extent necessary. Xplornet submitted that in the majority of the regions it serves, it is generally not competing with any of the other large providers that would also be subject to the Internet Code, but rather with the hundreds of smaller providers that operate in Canada's rural and remote regions. Consequently, application of the Internet Code to

Xplornet and not to its competitors could distort competitive dynamics, disadvantage it, and ultimately harm rural consumers.

81. Xplornet submitted that there is also substantial doubt as to the correctness of the Commission's determination that application of the Internet Code to only the large facilities-based ISPs represents non-economic regulation that is symmetrical and competitively neutral. According to Xplornet, it is inappropriate for the Commission to consider the symmetrical application of regulation among only a subset of ISPs. By applying the Internet Code to only Xplornet in the regions the company serves, the Commission has introduced highly asymmetrical regulation into the marketplace. Xplornet stated that consequently, a broadened application of the Internet Code to smaller ISPs and non-facilities-based ISPs would ensure that Canadians are able to benefit to the greatest extent possible from the application of the Internet Code in a manner consistent with the 2006 Policy Direction.

82. CNOC argued that the applicants failed to account for the 2006 Policy Direction requirement that the Commission use regulatory measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

83. CNOC noted that the Commission expressed in the Internet Code Policy that the record of the Internet Code proceeding did not enable it to make determinations on the Internet Code's application to smaller ISPs until a wholesale-retail proceeding is held; as such, imposing any Internet Code requirements on non-facilities-based ISPs would be arbitrary.

84. CNOC added that the Internet Code successfully furthers the listed policy objectives and, as the Commission concluded in paragraphs 128 to 130 and 482 to 486 of the Internet Code Policy, the Internet Code is consistent with the 2006 Policy Direction.

85. The CCSA/ITPA argued that the Commission's determination that application of the Internet Code to the large facilities-based ISPs would represent implementation in "a symmetrical and competitively neutral manner to the greatest extent possible" was a reasonable conclusion made by an expert tribunal on the basis of the complete, extensive, and detailed record of a proceeding before it, and after careful consideration of the competing positions of both the large facilities-based ISPs and all exempt ISPs. As such, that determination amounts to neither an error in law nor an error in fact. The CCSA/ITPA submitted that the Commission's determination is in fact consistent with the 2006 Policy Direction in that the Commission implemented non-economic measures "to the extent possible."

86. Distributel submitted that where the Commission determines that regulation need not be applied, it should not be applied; where the Commission determines that a less burdensome form of regulation is sufficient, it should adopt that form. Consequently, the Commission's determination not to apply the Internet Code to non-facilities-based ISPs was both efficient and proportionate to its purpose.

87. Distributel argued that by imposing the Internet Code only where necessary, the Commission took an approach that relied on market forces to the maximum extent possible and used measures that interfered with the operation of competitive market forces to the minimum extent necessary.

88. Distributel added that the question of the parties on which to impose the Internet Code is not one of regulatory symmetry or competitive neutrality; rather, it is a question of what mechanism is required to ensure that the Commission's policy objectives are accomplished. In the case of the large facilities-based ISPs, the Commission must apply the Internet Code to ensure proper behaviour, while in the case of the non-facilities-based ISPs, it does not have to do so. There is no question of regulatory symmetry or competitive neutrality because the Commission had two different types of entities before it that needed to be regulated differently.

Commission's analysis and determinations

Allegations that the current application of the Internet Code fails to meet the policy objectives and is not efficient and proportionate to its purpose

89. As part of the Internet Code proceeding, the Commission considered whether it would be best for consumers if all ISPs were subject to the Internet Code immediately. However, the Commission found that further assessments would be required for it to make this determination. The Commission considers that its determination about the Internet Code's application addresses paragraphs 7(a) and (b) of the Act.

90. The Commission stated in the Internet Code Policy that the regulatory requirements it established therein were necessary because market forces alone have not ensured that customers benefit from the associated protections, which will foster customers' effective participation in the retail fixed Internet access services market. In determining each requirement in the Internet Code, the Commission explicitly considered the burden that would be imposed on ISPs and the effect of such burdens on their business models. Accordingly, the Commission considers that its determination about the Internet Code's application addresses paragraph 7(f) of the Act.

91. The Commission concluded in the Internet Code Policy that there are significant differences between the contracts and business practices of the large facilities-based ISPs and those of the exempt ISPs. These differences put customers of the large facilities-based ISPs more at risk of the specific consumer harms that the Internet Code seeks to address. Specifically, the Commission found that facilities-based ISPs are more likely to offer bundles of services and fixed-term contracts, and to impose early cancellation fees, higher installation fees, and higher overage fees. These findings underpin the Commission's determinations regarding the ISPs to which the Internet Code applies at this time. The Commission therefore imposed the Internet Code as a regulatory requirement on those ISPs that are most likely to have contracts and business practices that are inconsistent with the Internet Code's objectives, and as an expectation on the other ISPs. The applicants did not take issue with the Commission's findings regarding the above-mentioned

differences. Accordingly, the Commission considers that its determination about the Internet Code's application addresses paragraph 7(h) of the Act.

92. The Commission stated in the Internet Code Policy that limiting the initial application of the Internet Code would be efficient and proportionate to its purpose by ensuring that the majority of customers benefit from the Internet Code, without imposing an undue regulatory burden on other ISPs. Although the applicants disagreed with this determination, the Commission considers that they have not established that it constitutes an error in law or in fact.

Allegations that the application of the Internet Code interferes with competitive market forces to more than the minimum extent necessary and is not symmetrical or competitively neutral

93. The 2006 Policy Direction does not require the Commission to impose non-economic measures on all ISPs in the same manner at the same time. Instead, it requires the Commission to ensure that such measures are imposed on ISPs in a symmetrical and competitively neutral manner to the greatest extent possible.

94. The Commission addressed the issue of the Internet Code's application at length in the Internet Code Policy and provided detailed reasoning in paragraphs 106 to 130 as to why it would not have been appropriate to impose the Internet Code on all ISPs in the same way at that time. These reasons included that (i) non-facilities-based ISPs would face unique challenges in meeting customer protections, (ii) the Commission would first need to examine wholesale tariffs and wholesale-retail relationships, and (iii) small ISPs may not have had the required resources to meet the obligations of the Internet Code at that time.

95. Specifically, the Commission stated in the Internet Code Policy that "[t]he Internet Code would be implemented in a symmetrical and competitively neutral manner to the greatest extent possible by being applied equally to all the large facilities-based ISPs, regardless of where they operate or their business models."

96. As noted above, there are over 1,000 ISPs of varying sizes, business models, and carrier status in the market, and the Commission must consider various factors based on a robust record before imposing regulations in order to obtain the desired balance between efficient regulation, competition in the market, and consumer protection. The Commission remains of the view that the record of the Internet Code proceeding was not sufficient to justify imposing the Internet Code as a regulatory requirement on non-facilities-based or smaller ISPs at that time and without further process. Consequently, the Commission imposed the Internet Code symmetrically and in a competitively neutral manner on all the ISPs to which it applies.

97. The applicants did not dispute the Commission's determination that issues related to the wholesale market were out of the scope of the Internet Code proceeding, but did dispute whether such information is necessary to establish the Internet Code's application. However, the applicants did not demonstrate that this information is not necessary to assess the impact of imposing the Internet Code on non-facilities-based

ISPs, nor are they in a position to do so since they do not reflect that category of ISPs. Since the Commission indicated in the Internet Code Policy that such issues would need to be examined before it could expand the Internet Code's application, the Commission considers that it met the above-mentioned policy objectives and did not err as argued by the applicants.

98. In light of the above, the Commission considers that it gave due consideration to and properly applied the 2006 Policy Direction. Furthermore, the Commission considers that the applicants have not demonstrated that there is substantial doubt as to the correctness of the Commission's determinations in the Internet Code Policy due to an error by the Commission in law or in fact.

Conclusion regarding the review and vary application

99. In light of all the above, the Commission finds that the applicants have not established substantial doubt as to the correctness of the Commission's determinations in the Internet Code Policy stemming from errors in law or in fact. The Commission therefore **denies** the applicants' request to review and vary the Internet Code Policy.

Policy Directions

100. The 2006 Policy Direction requires, among other things, that the Commission rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives set out in the Act. It also requires the Commission to regulate, where there is a need to do so, in a manner that interferes with market forces to the minimum extent necessary to meet the policy objectives.

101. The Commission's determination to deny the review and vary application is consistent with the 2006 Policy Direction in that the determination maintains the current application of the Internet Code and does not introduce any new regulatory measures.

102. The 2019 Policy Direction[6] provides that the Commission should consider how its decisions can promote competition, affordability, consumer interests, and innovation when exercising its powers and performing its duties under the Act. Moreover, in its decisions the Commission should demonstrate its compliance with the 2019 Policy Direction and specify how those decisions can, as applicable, promote competition, affordability, consumer interests, and innovation.

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[6] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, 17 June 2019

103. The Commission finds that its denial of the applicants' review and vary application is consistent with subparagraphs 1(a)(i), (iii), and (v) of the 2019 Policy Direction, which state that the Commission should consider the extent to which its decisions

    (i) encourage all forms of competition and investment;

    (iii) ensure that affordable access to high-quality telecommunications services is available in all regions of Canada, including rural areas; and

    (v) reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers.

104. The Commission considers that its determinations in this decision also address the policy objectives set out in paragraphs 7(a), (b), and (f) of the Act, which respectively relate to the safeguarding, enrichment, and strengthening of the country's social and economic fabric; rendering reliable and affordable telecommunications services of high quality; and fostering increased reliance on market forces while ensuring that regulation, where required, is efficient and effective. Specifically, the Commission's determinations uphold the Internet Code's application and provide consumer protections grounded in the evidence that was before the Commission in the Internet Code proceeding.

Secretary General

Related documents

- *The Internet Code*, Telecom Regulatory Policy CRTC 2019-269, 31 July 2019; as amended by Telecom Regulatory Policy CRTC 2019-269-1, 9 August 2019

- *Call for comments – Proceeding to establish a mandatory code for Internet services*, Telecom Notice of Consultation CRTC 2018-422, 9 November 2018; as amended by Telecom Notices of Consultation CRTC 2018-422-1, 21 February 2019; and 2018-422-2, 18 March 2019

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011

- *Establishment of an independent telecommunications consumer agency*, Telecom Decision CRTC 2007-130, 20 December 2007