December 6, 2019

VIA Intervention Comment Form

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet,

Subject: Part 1 Application to Review and Vary Telecom Regulatory Policy CRTC 2019-269, The Internet Code

1. The Canadian Communication Systems Alliance ("CCSA") and the Independent Telecommunications Providers Association ("ITPA") hereby submit their joint response to the Part 1 Application by Bell, Cogeco, Eastlink, Quebecor Media, SaskTel, Shaw and TELUS (collectively, "the Applicants" or "the large, facilities-based ISPs") for a Commission review and variance of TRP CRTC 2019-269, "The Internet Code".

2. In making this joint response, CCSA and ITPA speak for their combined memberships. While some CCSA/ITPA members offer non-facilities-based service outside their home networks, all such members who offer Internet service to the public are small, facilities-based ISPs.

Executive Summary

3. The decisions in Telecommunications Regulatory Policy CRTC 2019-269 were based on the Commission's consideration of an extensive body of evidence gathered in the course of a full public process.

4. That evidence included representations from "over 2,300 individuals, including more than 65 current or past employees of the Service Providers or of third parties offering the Service Providers' services for sale; the CCTS; consumer and public advocacy groups; researchers; unions representing employees; government agencies and departments; and the 12 Service Providers [the Commission] identified". That evidence also included the results of an extensive public survey conducted by Ipsos Public Affairs.

5. Most notably, that evidence included representations by the Applicants as described by the Commission below:

> Most large facilities-based ISPs, including Cogeco, Eastlink, SaskTel, Shaw, RCCI, TCI, Videotron, and Xplornet, submitted that the Code should apply equally to all ISPs, including large facilities-based ISPs, to ensure that all customers benefit from the Code and to avoid asymmetric regulation. RCCI and TCI argued that inconsistent application of the Code would violate the 2006 Policy Direction, which requires that non-economic measures be implemented symmetrically to the extent possible.

6. That is, the Commission considered the very arguments that the Applicants put forward in their present application as a justification for review and variance of TRP 2019-269.

7. The Applicants' reasons for their allegation that a "blanket all-or nothing exclusion of all the Excluded ISPs from all obligations of the Code is not efficient or proportionate to its purpose, interferes with market forces to more than the minimum extent necessary and is not symmetrical or competitively neutral" depend on the Applicants' view of the facts.

8. For instance, an answer to the question of whether application of the Code is "efficient or proportionate to its purpose" depends entirely on the findings of fact made on the basis of the evidentiary record.

9. In conducting proceedings such as the one which produced TRP 2019-269, the Commission is responsible for balancing many competing views and interests to achieve a result which is in the public interest and which is consistent with the health of Canada's telecommunications system.

10. In its review of the factual record before it, the Commission considered real and profound differences in the relative complexity to consumers of the retail offerings of the large and small ISPs.

11. It found that, unlike the simpler packages sold by small ISPs, the large ISPs' retail offers:

> . . . include bundles, time-limited offers, promotional prices, and multiple package options; and (ii) have a fixed term. Customers are also more likely to be subject to an early cancellation fee with a large facilities-based ISP, and such fees, where imposed, are higher through a large facilities-based ISP.

12. It found that:

> . . . smaller ISPs represent a diverse range of ISPs, including not-for-profits and cooperatives run by members of the community. They may not have the resources to fully understand and implement the Code at this time and, in many instances, they offer a limited range of plans with no discounts or promotional prices, lessening the potential risks to customers.

13. On the strength of those factual findings, the Commission properly considered that imposition of the Internet Code on small ISPs would impose an administrative burden on

those small ISPs which was undue given the greatly reduced risk to consumers of the small ISPs' contracting practices, as compared to those of the Applicants.

14. In so doing, the Commission recognized that equal application of the Code to all ISPs would produce an unequal effect: that is, it would impose a disproportionate negative impact on smaller ISPs, to the detriment of the telecommunications system and the Canadians it serves.

15. As such, the Commission legitimately applied its regulation symmetrically "to the extent possible" in the context of the factual record of the proceeding.

16. The reasonableness of the Commission's conclusions is underlined by the experience of the CCTS with customer complaints.

17. CCSA/ITPA members, who represent the majority of small, facilities-based ISPs, generated 110 of 14,272 (0.77%) complaints accepted by the CCTS in 2017-18 and 151 of 19,287 (0.78%) accepted complaints in 2018-19. Application of the Internet Code to those ISPs would be a poor solution to a problem which does not exist.

18. The Applicants' arguments in the present application are simply a re-hash of the same arguments which the Commission considered and did not accept in the extensive public proceeding which resulted in TRP 2019-269.

19. What is new in that application is a proposal to partially impose elements of the Internet Code on different classes of small ISPs according to those ISPs' varying sizes and natures. The Applicants suggest that such application would mitigate any undue administrative burden on the small ISPs.

20. However, that is not true. Such application would still require the small ISPs to understand the Code and integrate elements of it into their business practices as a matter of regulatory compliance.

21. That result would be consistent neither with the Commission's finding that smaller ISPs: "may not have the resources to fully understand and implement the Code at this time" nor with its finding that, in many instances, those ISPs and "offer a limited range of plans with no discounts or promotional prices, lessening the potential risks to customers".

22. That result would also complicate the CCTS' administration of compliance with the Code.

23. CCSA/ITPA submits that the Commission got it right in TRP 2019-269. The Commission arrived at reasonable findings of fact and resulting conclusions regarding application of the ISP Code in the context of the extensive factual record before it.

24. The question of whether the Commission made errors of law in this matter rests entirely upon one's view of the Commission's findings of fact in TRP 2019-269.

25. That the Applicants take a different view of the facts is not justification for a conclusion that the Commission made errors of fact and resulting errors of law. Rather, the Commission, acting in its capacity as an expert tribunal, made reasonable findings and conclusions on the basis of the extensive record before it.

26. CCSA/ITPA requests the Commission to deny the present application in its entirety.

27. CCSA/ITPA thanks the Commission for the opportunity to make these comments.

Sincerely,

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Before the Canadian Radio-television and Telecommunications Commission

In the matter of the Part 1 Application of Bell, Cogeco, Eastlink, Quebecor Media, SaskTel, Shaw and TELUS

To Review and Vary Telecom Regulatory Policy

CRTC 2019-269, *The Internet Code*

Joint Response of

Canadian Communication Systems Alliance

("CCSA")

and

Independent Telecommunications Providers Association ("ITPA")

December 6, 2019

Contents

Introduction

1. The Canadian Communication Systems Alliance ("CCSA") and the Independent Telecommunications Providers Association ("ITPA") hereby submit their joint response to the Part 1 Application of the "large, facilities-based ISPs" for a Commission review and variance of Telecommunications Regulatory Policy CRTC 2019-269, "The Internet Code".[1]

2. In making this joint response, CCSA and ITPA speak for their combined memberships.

3. All CCSA/ITPA members who offer Internet service to the public are small, facilities-based ISPs. While some CCSA/ITPA members offer non-facilities-based service outside their home networks, all such members who offer Internet service to the public are small, facilities-based ISPs.

The Evidentiary Base

4. The Applicants allege that the Commission has made numerous errors of fact in making its determinations in TRP 2019-269. In that respect, it is important to remember the breadth and scope of the factual inquiry upon which the Commission made those determinations.

5. Specifically, in its TNC 2018-422 proceeding, the Commission included, in its evidentiary base, the following elements:

[1] In the matter of the Part 1 Application of Bell, Cogeco, Eastlink, Quebecor Media, SaskTel, Shaw and TELUS To Review and Vary Telecom Regulatory Policy CRTC 2019-269, *The Internet Code*, 29 October 2019 [hereinafter, *Part 1 Application*].

a. Comments from "over 2,300 individuals, including more than 65 current or past employees of the Service Providers or of third parties offering the Service Providers' services for sale; the CCTS; consumer and public advocacy groups; researchers; unions representing employees; government agencies and departments; and the 12 Service Providers it identified";[2]

b. An Ipsos Public Affairs survey report entitled "Consultation on Canada's large telecommunications carriers' sales practices". The public opinion research methods used to generate that report "included a survey with a representative panel of over 1,600 Canadians; a voluntary public survey that reached over 7,000 Canadians; 10 in-depth interviews with individuals with a disability; and 10 focus groups with seniors, residents of rural communities, Canadians who use a language other than French or English at home, and residents of official language minority communities";[3]

c. Representations from a large number of knowledgeable industry participants including interventions from Ageing + Communication + Technologies (ACT); Bell Canada; Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); the Canadian Communication Systems Alliance (CCSA) (including submissions from CCSA members Cochrane Telecom Services [CochraneTel], Coopérative de Câblodistribution de Sainte-Hedwidge [Coop Sainte-Hedwidge], Diffusion Fermont, DERYtelecom Inc. [DERYtelecom], and Seaside Communications Inc. [Seaside]); the Canadian Network Operators Consortium Inc. (CNOC); the Canadian Association of Wireless Internet Service Providers (Canwisp); Cogeco Communications Inc. (Cogeco); the CCTS; the Competition Bureau; the Conseil provincial du secteur des communications du

[2] CRTC "Report on Misleading or Aggressive Communications Retail Sales Practices" sourced online at https://crtc.gc.ca/eng/publications/reports/2018_246/index.htm on November 25, 2019, under the heading "The Proceeding".
[3] Ipsos Public Affairs, "Consultation on Canada's large telecommunications carriers' sales practices", ISSN: BC92-101/2018E-PDF, September 27th 2018.

Syndicat canadien de la fonction publique (CPSC); the Consumers Council of Canada; Distributel Communications Limited (Distributel); the Forum for Research in Policy in Communications; the Government of Yukon; the Independent Telecommunications Providers Association (ITPA); the Internet Society Canada Chapter; the Manitoba Branch of the Consumers' Association of Canada; the Ministère de la Culture et des Communications du Québec and l'Office de la protection du consommateur du Québec; Primus Management ULC, Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); le Réseau Fédération de l'Âge d'Or du Québec (FADOQ); Rogers Communications Canada Inc. (RCCI); Rothschild & Co. (Rothschild); Saskatchewan Telecommunications (SaskTel); Shaw Communications Inc. (Shaw); TekSavvy Solutions Inc. (TekSavvy); TELUS Communications Inc. (TCI); l'Union des consommateurs (l'Union); and Xplornet Communications Inc. (Xplornet).[4]

6. CCSA/ITPA submit that the Commission, as an expert tribunal acting on the basis of an extensive, detailed and comprehensive evidentiary record, had reasonable grounds for its findings of fact in TRP CRTC 2019-269.

7. CCSA/ITPA submits, further, that the Applicants' allegations of errors of law rest on an incorrect presumption that the Commission made certain errors of fact in making its determinations in TRP CRTC 2019-269.

8. For example, the Applicants characterize the Commission's conclusion that the Code complies with the 2006 Policy Direction as "an error of law and/or mixed fact and law".[5]

[4] TRP CRTC 2019-269 at para. 24.
[5] *Part 1 Application* at para. 25.

9. However, the reasons given for that allegation – that a "blanket all-or nothing exclusion of all the Excluded ISPs from all obligations of the Code is not efficient or proportionate to its purpose, interferes with market forces to more than the minimum extent necessary and is not symmetrical or competitively neutral"[6] – depend entirely on the Applicants' view of the facts.

10. For instance, an answer to the question of whether application of the Code is "efficient or proportionate to its purpose" depends entirely on the findings of fact made on the basis of the evidentiary record.

11. On its face, restriction of a mandatory Code's application to those large ISPs who serve 87% of the market appears to be a simple, highly efficient and proportionate response to the identified regulatory problem.

12. On the other hand, application of the Code to a small subset of the ISPs who serve the remaining 13% of the market would amount, as CCSA has said before, to "a poor solution to a problem which does not exist".[7]

13. That the Applicants' view of the facts differs from the Commission's findings of fact is no basis for any allegation of errors in fact or in law.

14. Rather, as the Commission noted:

> The record of the proceeding demonstrates that there are differences in the typical Internet service contracts offered by the large facilities-based ISPs

[6] *Part 1 Application* at para. 30.
[7] CCSA, "Telecom Notice of Consultation CRTC 2018-422: Call for comments – Proceeding to establish a mandatory code for Internet services, CCSA final Written Comment", April 23, 2019.

> on the one hand, and other ISPs on the other hand. The large facilities-based ISPs appear to be more likely to (i) offer bundles of services, (ii) offer fixed-term contracts, and (iii) impose early cancellation fees, higher installation fees, and higher overage fees. The large facilities-based ISPs are also less likely to have customers subscribe to unlimited services.[8]

15. The Commission found further that:

> The large facilities-based ISPs are also more likely to offer time-limited promotional offers, gifts with purchase, or other discounts than other ISPs. In this regard, many smaller ISPs indicated that they have very simple plans and pricing, with no promotional offers at any time.[9]

16. The Commission found as fact that:

> . . . large facilities-based ISPs have more complex service offerings than those offered by other ISPs. In particular, the large facilities-based ISPs are more likely to (i) include bundles, time-limited offers, promotional prices, and multiple package options; and (ii) have a fixed term. Customers are also more likely to be subject to an early cancellation fee with a large facilities-based ISP, and such fees, where imposed, are higher through a large facilities-based ISP. The complexity of these service offerings, which are often set out through a verbal agreement, renders these contracts particularly difficult to navigate for customers. This is reflected in the many complaints submitted on the record of this proceeding and to the CCTS regarding a broad range of Internet Service issues that relate to the large facilities-based ISPs.[10]

[8] TRP 2019-269 at para. 107.
[9] TRP 2019-269 at para. 108.
[10] TRP 2019-269 at para. 110.

17. The Commission concluded, on the basis of those findings of fact that:

> Given that the large facilities-based ISPs account for 87% of all Internet services received by Canadians, and that these service offerings are complex and oftentimes offered as part of a bundle, the Commission considers that the Internet Code should apply to large facilities-based ISPs at this time. The Commission considers that imposing the Code on the largest national and regional ISPs strikes an appropriate balance between benefiting the largest possible customer base and minimizing the burden of compliance with the Code.[11]

18. CCSA/ITPA submits that the Commission properly concluded that there was a strong, fact-based rationale for applying the Code only to the large, facilities-based ISPs whose commercial arrangements gave rise to the vast bulk of problems and consumer complaints regarding retail Internet service.

19. Also worth noting is the Commission's statement, in TRP 2019-269, that:

> Most large facilities-based ISPs, including Cogeco, Eastlink, SaskTel, Shaw, RCCI, TCI, Videotron, and Xplornet, submitted that the Code should apply equally to all ISPs, including large facilities-based ISPs, to ensure that all customers benefit from the Code and to avoid asymmetric regulation. RCCI and TCI argued that inconsistent application of the Code would violate the 2006 Policy Direction, which requires that non-economic measures be implemented symmetrically to the extent possible.[12]

[11] TRP 2019-269 at para. 112.
[12] TRP 2019-269 at para. 100.

20. That statement is a strong indication that the Commission considered and rejected the large, facilities-based ISPs' arguments for application of the Code to all ISPs. Those are the very same arguments made by the Applicants in the present application.

21. That is, rather than containing "errors of fact and law", TRP 2019-269 simply arrived, on the basis of the Commission's findings of fact, at conclusions the large, facilities-based ISPs do not like.

Small ISPs Do Not Generate Complaints to the CCTS

22. ITPA, in its Reply Comments in the TNC 2018-422 proceeding, stated that:

> Appendix A – Complaints by Service Provider to the CCTS' 2017-2018 Annual report demonstrates that of the ITPA member companies listed, two had no complaints, five have a single complaint, three had two complaints, one had three complaints and one member company had just 13. A cursory review of Appendix A tells the same story for other small independent service providers. Imposing a new regulatory measure such as an Internet code on small services providers is not a proportionate response to the numbers of complaints generated by their customers nor is it a proportionate response given the additional workload associated with these codes.[13]

23. ITPA and CCSA's combined membership currently amounts to 117 members. According to the same Appendix, those members generated a total of 110 complaints in 2017-18.[14] That amounts to 0.77 percent of the 14,272 complaints accepted by the CCTS.

[13] ITPA, "Call for comments – Proceeding to establish a mandatory code for Internet services – Telecom Notice of Consultation CRTC 2018-422 – Public Record: 1011-NOC2018-0422 – ITPA Reply Comments", 28 January, 2019 at para. 10.
[14] Of that number, 83 concerned CCSA members.

24. According to the just released CCTS 2018-19 Annual Report, CCSA/ITPA members were responsible for a total of 151 accepted complaints of a total of 19,287.[15] That is 0.78 percent and is consistent with the 2017-18 percentage noted above.

25. CCSA and ITPA count most of the small, facilities-based ISPs among their membership. Based on the percentage of complaints noted above, it is clear that the small, facilities-based ISPs generate a miniscule proportion of the complaints accepted by the CCTS.

26. That fact supports a conclusion that application of the Code to small, facilities-based ISPs would be stunningly out of proportion with the costs of the regulatory burden that such application would impose on such ISPs.

Small ISPs Serve a Low Percentage of Retail Consumers

27. The small, facilities-based ISPs that CCSA and ITPA represent account for only a subset of the 13% of the Canadian market that is served by ISPs other than the named large, facilities-based ISPs.

28. In a marketplace of more than a million Internet subscribers served by smaller competitive ISPs[16], CCSA and ITPA's membership serves well under half of that total. It follows that the small, facilities-based ISPs that CCSA and ITPA represent serve fewer than seven percent of the total Internet customers served by both facilities-based and non-facilities-based competitors.

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[15] Canadian Commission for Telecom-Television Complaints, *Annual Report 2018-19*, "Data Files: Complaints by Service Provider 2018-19", accessed at https://www.ccts-cprst.ca/report/annual-report-2018-2019/ on 29 November 2019.

[16] Competition Bureau, "Delivering Choice: A Study of Competition in Canada's Broadband Industry", at Executive Summary, p. 6, says: ". . . when it comes to buying internet services, the Bureau's research has found that more than 1,000,000 Canadian households rely on smaller competitive providers to obtain internet services".

29. Moreover, with a couple of exceptions, those small, facilities-based ISPs do not serve the major urban centres in which the Applicants contend, "a significant portion of Canadians (as high as 18% in some markets)"[17] would be without protection of the Code.

30. In TRP 2019-269, the Commission observed that:

> . . . smaller ISPs represent a diverse range of ISPs, including not-for-profits and cooperatives run by members of the community. They may not have the resources to fully understand and implement the Code at this time and, in many instances, they offer a limited range of plans with no discounts or promotional prices, lessening the potential risks to customers.[18]

31. Accordingly, the Commission decided that, "that the Internet Code will not apply to smaller ISPs at this time".

32. In this respect, the Commission's finding of fact is entirely consistent with the submissions and RFI responses of CCSA and ITPA who, between the two organizations, represent a large percentage of Canada's many small, facilities-based ISPs.

33. As CCSA and ITPA members' RFI responses indicate, most of those small ISPs are, indeed, very small and deliver a simple, straightforward retail offering which generally does not include elements such as discounts, promotional prices or usage caps/overage charges. Generally, those arrangements are not for fixed terms and do not involve early cancellation fees.

[17] *Part 1 Application* at para. 6.
[18] TRP 2019-269 at para. 125.

34. Most of those arrangements may be purchased from the small ISPs' websites without the need for a written contract and, typically, they run month-to-month, with the result that it is easy for a dissatisfied customer to change providers relatively quickly.

35. On the other side of the same coin, CCSA members' RFI responses, in particular, demonstrate the truth of the Commission's observation that many small ISPs "may not have the resources to fully understand and implement the Code at this time."

36. That is true regardless of whether the full Code or, as the Applicants propose, limited aspects of the Code are applied to the small ISPs.

37. For example, even additional record-keeping requirements such as those at ss. A.5.iii and H.1.i.b of the Code would represent a new and disproportionate administrative burden for which many smaller ISPs are almost certainly unprepared.

38. Perhaps more importantly, application of any aspect of the Code, as a matter of mandatory policy, would require such ISPs to understand, interpret and apply the Code to their businesses; something that, as the Commission has noted, many simply lack the resources to do.

39. We note, as well, the Applicants' contention that: "If the Code creates unique barriers for a given ISP, the Commission can address those on the evidence in a separate Part 1 proceeding."[19]

[19] *Part 1 Application* at para. 8.

40. For many small, facilities-based ISPs, formulation of a Part 1 application and participation in a dedicated Part 1 proceeding is simply beyond their capabilities and would represent a demand on their resources which they cannot afford.

41. For those reasons, CCSA/ITPA disputes the Applicants' blanket assertion that "some of the Code's obligations cannot be said to be an unreasonable regulatory burden on most of the exempted ISPs".[20]

42. It should also be borne in mind that, while the Commission has not imposed the Code directly on such small ISPs at this time, it has stated that it:

> . . . expects all ISPs to 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.

and, further that it:

> . . . considers that this expectation is in keeping with the fulfilment of the policy objectives of the Act.[21]

43. As with the other industry codes introduced over the past few years, CCSA and ITPA have made a point of emphasizing to their members both the Commission's expectation and the importance of conducting their businesses in accordance with the spirit of that expectation and the best practices that inform it.

[20] *Part 1 Application* at para. 23.
[21] TRP CRTC 2019-269 at para. 127.

Small ISPs Are Motivated and Able to Respond to Customer Complaints

44. Almost all of the combined membership of the CCSA and ITPA share two key characteristics:

    1) they are very small with only a minority serving more than a few thousand customers; and

    2) they are highly localized with the vast majority providing service in and to the communities in which their facilities are based.

45. For most, it is perhaps too colloquial but nonetheless true to say that a dissatisfied customer can bring her complaint directly to top management at the company's main office or, for that matter, the local Tim Hortons.

46. It is also true that the small, facilities-based ISPs have a strong motivation to do everything they can to retain customers and, therefore, quickly and painlessly resolve customer complaints.

47. In its Reply Comments in the TNC 2018-422 proceeding, ITPA noted that:

> Applying any new Internet code on the largest service providers that collectively have 87% of Internet customers will have impacts throughout the retail Internet services market without the need for the imposition of this regulatory measure across on all service providers. Smaller independent ISPs that are competing against the largest service providers – and often for their customers – will be required to match these service standards in order to satisfy customer expectations. Just as the largest service providers

> generally set customer expectations with regard to price and speed offerings, having the largest service providers comply with a mandatory code will also set customer expectations in the market. Small service providers will ignore these expectations at their peril.[22]

48. One ITPA member puts it more simply, saying: "Large ISPs have market share, and any actions they take will force others to adopt their 'best practices' to remain competitive. Therefore by regulating the large player, you're automatically regulating everyone".[23]

49. That ITPA member continues:

> Economies of scale versus a lean business model is an important distinction when looking at the impact of regulatory burden. Spending a few hours on a report for a large ISP who spreads the cost over a hundred thousand customers, versus the same few hours of labour spread across one thousand customers is very different. The smaller ISP would need to recover the costs, which ultimately is borne by the smaller consumer base. Historically smaller ISPs have been forcing the industry's retail pricing down, this trend would end;

and, further, that:

> With only the large ISPs regulated, the customer has the choice to change to the provider that best matches their needs . . . . Therefore because the customer has this choice the smaller ISP must either match the regulatory

[22] Independent telecommunications Providers association, "Call for comments – Proceeding to establish a mandatory code for Internet services – Telecom Notice of Consultation CRTC 2018-422 – Public Record: 1011-NOC2018-0422 – ITPA Reply Comments" 28 January, 2019 at para. 8.
[23] Ken Naylor email to ITPA Regulatory Committee, "RE: Large ISP R&V Re: Application of Internet Code", 11 November 2019.

requirements or be innovative and provide perks and benefits that the consumers want. Either way the customer benefits.[24]

50. Many of the RFI responses CCSA received from its members in the TNC 2018-422 proceeding also underscore those points. We reproduce two of them here:

    a. "We are a small internet provider so much of this does not apply to us. Our clients are not under any contracts. We want customers to like and want our services, instead of having them in a contract. All business we do is on a monthly basis."

    b. "This [disputes] is not an occurrence we are familiar with. In the event such a thing might happen in future, and we couldn't find a mutually agreeable resolution to the situation, we would simply release the customer from further obligations."[25]

51. As can be seen from those comments, customer care is paramount to smaller ISPs who operate and serve customers – customers with whom they tend to have close relationships – in their local communities. The retail relationship is as informal and practical as it can be and, because that model reduces the provider's costs, customers benefit from that approach.

52. Such customers are highly unlikely to benefit from new requirements placed on their local service providers to offer services and promotions using written contractual vehicles and administrative tools designed to comply with the proposed Code's provisions.

[24] *Ibid*.
[25] Canadian Communication Systems Alliance Inc., "Telecom Notice of Consultation CRTC 2018-422: Call for comments – Proceeding to establish a mandatory code for Internet services, CCSA final Written Comment", 23 April, 2019 at para. 12.

53. Rather, such a requirement is likely to introduce new cost and complexity to both the smaller ISPs and their customers.

The Commission's Policy is Consistent with the 2006 Policy Direction

54. As noted above, TRP 2019-269 records the fact that: "RCCI and TCI argued that inconsistent application of the Code would violate the 2006 Policy Direction, which requires that non-economic measures be implemented symmetrically to the extent possible."[26]

55. However, also as noted above, the Commission determined that: ". . . imposing the Code on the largest national and regional ISPs strikes an appropriate balance between benefiting the largest possible customer base and minimizing the burden of compliance with the Code."[27]

56. In this respect, CCSA/ITPA note the basic legal principle that equal application of a law to persons who are not similarly situated may, itself, result in an undesirable inequality.[28]

57. As it applied to the TNC CRTC 2018-422 proceeding, CNOC described operation of that principle as follows:

> More importantly in assessing the application of these principles, the focus must be on the effect of regulatory requirements and not merely on their existence. If the same regulatory requirement imposed on two classes of services providers results in an outcome that is much more onerous for one class than another when the requirement is not justified by other relevant

[26] TRP CRTC 2019-269 at para. 100.
[27] TRP CRTC 2019-269 at para. 112.
[28] *See*, e.g. in the context of an allegation of discrimination under the Canadian Charter of Rights, the Supreme Court of Canada decision in *Andrews* v. *Law Society of British Columbia* [1989] 1 SCR 143.

> regulatory considerations, it cannot be said that the requirement results in regulation that is either symmetrical or competitively neutral.[29]

58. CNOC's brief continued:

> In the present circumstances, symmetrical and neutral application of the Internet Code is inappropriate given that there exists two classes of providers (i.e., large facilities-based ISPs and competitive service providers) who: (1) do not contribute equally to the need for the protections that the Internet Code would provide; and (2) have radically different capacities to implement and comply with the requirements of the Internet Code. These considerations warrant different regulatory treatment for each of the two classes of providers in question.[30]

59. In TRP 2019-269, the Commission indicated that it had considered the positions of both the large, facilities-based ISPs and other ISPs in making its determination as to application of the Code. Specifically, the Commission said:

> Large facilities-based ISPs and other ISPs both argued that their respective opposing perspectives were consistent with the 2006 Policy Direction. The large facilities-based ISPs emphasized the importance of symmetrical and competitively neutral regulation. In contrast, the other ISPs emphasized the importance of such regulation "to the greatest extent possible," which they argued required consideration of the burden of imposing the Internet Code on ISPs that are not large and/or not facilities-based.[31]

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[29] CNOC, "Telecom Notice Of Consultation CRTC 2018-422, Call for Comments – Proceeding to Establish a Mandatory Code for Internet Services, Reply Of Canadian Network Operators Consortium Inc.", 28 January 2019 at para. 47.
[30] *Ibid*. at para. 48.
[31] TRP 2019-269 at para. 129.

60. Based on the full record of the proceeding and its findings of fact derived from that record, the Commission concluded that it:

> . . . considers that limiting the initial application of the Internet Code would (i) further the policy objectives set out in paragraphs 7(a), (b), (f), and (h) of the Act; and (ii) be efficient and proportionate to its purpose by ensuring that the majority of customers benefit from the Code, without imposing an undue regulatory burden on other ISPs. The 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.[32]

61. CCSA/ITPA submits that the Commission's conclusion that application of the 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 both the complete, extensive and detailed record of a proceeding before it and careful consideration of the competing positions of both the large facilities-based ISPs and all other ISPs.

62. The Commission's decision also complies with the 2006 Policy Direction's requirement that regulatory measures be efficient and proportionate to their purpose and that it should rely on market forces to the maximum extent feasible.

63. As such, that determination amounts to neither an error of fact nor an error of law.

[32] TRP 2019-269 at para. 130.

Conclusion

64. The Commission, acting as an expert tribunal acting on the basis of an extensive, detailed and comprehensive evidentiary record, had reasonable grounds for its findings of fact in TRP CRTC 2019-269

65. In particular, the Commissioned expressly considered and chose not to act upon the Applicants' submissions that:

> . . . the Code should apply equally to all ISPs, including large facilities-based ISPs, to ensure that all customers benefit from the Code and to avoid asymmetric regulation. RCCI and TCI argued that inconsistent application of the Code would violate the 2006 Policy Direction, which requires that non-economic measures be implemented symmetrically to the extent possible.[33]

66. In so doing, the Commission reasonably gave weight to its factual findings that the simpler retail offerings and contracting practices of the smaller ISPs produced a relatively low level of risk to consumers and that equal application of the Internet Code to all ISPs would impose an undue regulatory burden on smaller ISPs.

67. The Commission's determinations regarding application of the Code are borne out by subsequent experience: the small ISPs represented by CCSA and ITPA are responsible for a paltry 0.78 percent of all complaints accepted by the CCTS.

68. The Applicants' allegations of errors of law depend entirely on a presumption that the Commission made errors of fact in its decision to impose the Code only on the Applicants.

[33] *Supra*, Footnote 12.

69. CCSA/ITPA submits that, to the contrary, the Commission's findings of fact in that respect were reasonable in view of the evidentiary record and, therefore, the alleged errors of law could not flow from such findings.

70. In context of the factual record, the Commission's determinations are consistent with the 2006 Policy Direction in that they implement non-economic measures "to the extent possible".

71. The present application is a re-hash of arguments which were made and not accepted in the public proceeding which resulted in TRP 2019-269.

72. What is new in the application is a proposal to apply the Code in a more limited fashion to various classes of small ISPs.

73. Such application would still impose an undue regulatory burden on ISPs which the Commission found, as a matter of fact, "may not have the resources to fully understand and implement the Code at this time". Such application would also complicate the CCTS' administration of compliance with the Code.

74. CCSA/ITPA submits that the Commission's determination to apply the Internet Code only to the large, facilities-based ISPs was a reasonable and correct decision properly made on the basis of an extensive factual record.

75. CCSA/ITPA respectfully requests the Commission to deny, in its entirety, the Applicants' Part 1 application to review and vary TRP CRTC 2019-269.

76. CCSA/ITPA thanks the Commission for the opportunity to make these comments.

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