



**PUBLIC INTEREST ADVOCACY CENTRE**

**LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC**

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June 17, 2011

Canadian Radio-Television and  
Telecommunications Commission  
Ottawa, ON  
K1A 0N2

**BY ACCESS KEY**

Attention: Mr. Robert Morin, Secretary General

Dear Mr. Morin:

**Re: Broadcasting and Telecom Notice of Consultation CRTC 2011-344  
Fact-finding exercise on the over-the-top programming services in the  
Canadian broadcasting system - Response to Staff re: Intervenor Costs**

The Public Interest Advocacy Centre is writing in response to staff's letter of 13 June 2011 regarding ours of 6 June 2011 in which we requested clarity on whether the above-noted proceeding is a proceeding for the purposes of the intervenor costs rules. While we appreciate the certitude of the response that it is not, we do not agree with the answer.

The *Telecommunications Act* does not define "proceeding". Nor do the *CRTC Rules of Practice and Procedure* (the Rules).<sup>1</sup> In this case we take the usual common sense, plain reading approach to the word. We believe that "fact-finding", when performed by a quasi-judicial body like the CRTC, acting within its authority to regulate under the *Telecommunications Act* and otherwise conducting the exercise in accordance with the Rules, is an integral aspect of the Commission's decision-making process.

There have been three other instances of formalized "fact findings" by the CRTC we could find, but all of these were on the broadcast side.<sup>2</sup> While the *Broadcasting Act* may be flexible enough to allow such fact finding exercises,<sup>3</sup> we do not believe it is permitted under the authority of the

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<sup>1</sup> Being the Appendix to Broadcasting and Telecom Regulatory Policy CRTC 2010-958.

<sup>2</sup> See Public Notice CRTC 2001-113 "Fact finding inquiry on interactivity" (2 November 2001). This proceeding resulted in the Commission's publication of its *Report on Interactive Television Services*, released the same day as the follow-up proceeding Broadcasting Public Notice CRTC 2002-63, *Call for comments on program-related interactive television (ITV) services* (22 October 2002). Other instances include "Consultations & Fact-Finding" as Phase 1 of the Task Force on the Canadian Television Fund (News release, February 20, 2007) and Decision CRTC 85-90, *Western Approaches Limited* (13 February 1985), where a "fact-finding meeting" was held in the context of a license application that was feared to create potential interference with a popular U.S. channel.

<sup>3</sup> Potentially under subs. 14(1) of the *Broadcasting Act*: "The Commission may undertake, sponsor, promote or assist in research relating to any matter within its jurisdiction under this Act and in so doing it shall, wherever

*Telecommunications Act*. As this proceeding is a Broadcasting and Telecom Notice of Consultation, and is being conducted under the revised Rules (for both telecommunications and broadcasting) we believe using a process which may occasionally be acceptable in broadcasting to be ill-suited to combined telecom and broadcasting concerns.

By excluding the application of the intervenor costs rule to the present process, the Commission is indirectly limiting the "facts" upon which it will be deciding the very important issue of over-the-top programming by effectively only receiving the "facts" from deep-pocketed corporate parties. We note that in Telecom Regulatory Policy 2010-963, *Revision of CRTC costs award practices and procedures*, the Commission noted the same concern, at para. 12:

12. The Commission considers that costs awards are intended to encourage the participation of individuals and groups who represent subscriber interests, rather than private interests.

We also draw to the Commission's attention the context in which this "fact-finding" is unfolding.

In effect, the Commission has received an unsolicited request from a large group of Canadian broadcasters and telecommunications companies to open a "public proceeding" into the matter of over-the-top services' effect on Canadian broadcasting. While this request relies upon a recommendation of the Heritage Committee immediately prior to the election to examine this situation, the Heritage Committee was careful to request that the Commission "initiate a public consultation process" to do so. Yet, the Commission has not initiated a truly public consultation process, as it is denying funding to public interest intervenors. This turn of events is particularly unfortunate from a public perception standpoint.

Should the result of this exercise be a report upon which a future public notice is issued, our concern is that the Commission is indirectly creating a bias or at the least a perception of bias of the facts and arguments upon which it will be framing the very important issue of over-the-top programming by effectively only receiving the "facts" from well-resourced stakeholders.

Unfortunately, therefore, PIAC will not be participating in the present circumstances.

Yours truly,

*Original signed*

John Lawford  
Counsel for PIAC

cc Parties and Interested Parties to TNC 2011-77 (by e-mail only)  
Namir Anani, CRTC; Jeff Lieper, CRTC

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appropriate, utilize technical, economic and statistical information and advice from the Corporation or departments or agencies of the Government of Canada."