CNOC CORC

Canadian Network Operators Consortium Inc.

Consortium des Operateurs de Réseaux Canadiens Inc.

November 25, 2016

The Honourable Mélanie Joly
Minister of Canadian Heritage
15 Eddy Street
Gatineau, QC
K1A 0M5

Dear Honourable Minister Joly,

Subject: Public Consultation on Canadian Content in a Digital World

1.0 INTRODUCTION

1. Canadian Network Operators Consortium Inc. ("CNOC") is hereby pleased to make its submission in the public consultation on Canadian Content in a Digital World. CNOC is an organization composed of over 35 innovative competitive telecommunications service providers ("TSPs") that own or operate wireline and/or wireless networks operating in many regions of Canada. The objectives of CNOC are to promote innovation and increase the level of competitive communications services in the Canadian economy. CNOC's members offer a variety of telecommunications services, but all of them are also Internet Service Providers ("ISPs"), meaning they sell retail Internet access to Canadian consumers and businesses.

2. CNOC understands that this present consultation arises from the need to ensure that Canadian content is supported adequately in an environment in which broadcasting activities and revenues are shifting from traditional means, such as cable and satellite to new online platforms. CNOC fully understands and appreciates the importance of this consultation. At the same time, CNOC urges the Department of Canadian Heritage ("Department") to seek solutions to these new challenges from the broadcasting industry, rather than other industries.

3. CNOC's is particularly concerned about various reports that have emerged in the media that indicate that Department is considering implementing a tax on ISPs in order to fund the development of Canadian content.[1] CNOC has significant concerns about the potential imposition of a tax on ISPs to fund Canadian content. A tax on ISPs would undermine the longstanding separation in Canada's communications framework of telecommunications and broadcasting, potentially harm competition, and make Internet access less affordable for Canadians.

4. CNOC recognizes that the Department is faced with a situation where as more content moves online, the revenues of the traditional broadcasting sector are falling and that because traditional broadcasting distribution

[1] See, for example, Michael Geist, "New digital taxes may be the future of Cancon", *The Globe and Mail*, 12 October 2016; Sophia Harris, "Internet price hikes could be coming as Ottawa reviews cultural policy, critics warn", CBC News, 19 October 2016.

undertakings pay, generally speaking, 5% of their revenues into funds for the development of Canadian content, there are declining funds available for the development of Canadian content.[2] However, instead of a tax on ISPs, we encourage the Department, after consulting with experts in the broadcasting sector, to explore other policy alternatives that may include developing means to improve the discoverability of existing Canadian content, modifying the toolkit of financial support and institutions used to promote Canadian content to respond to the online era, ensuring that foreign online content providers are subject to the same taxes, such as GST, that Canadian providers pay, and/or, using additional funding from the overall tax base.

2.0 A TAX ON ISPS WOULD BE A SERIOUS POLICY MISTAKE

2.1 There is a fundamental separation between broadcasting and telecommunications

5. Implementing a tax on ISPs to fund Canadian content raises significant policy concerns. Such a tax would fracture the fundamental separation between the carriage of content, which is telecommunications, and the development and distribution of that content, which is broadcasting. This fundamental separation between carriage and content underpins Canada's communications framework and is why those entities, such as ISPs, that are responsible exclusively for the carriage of content, are regulated under the *Telecommunications Act*[3], whereas those entities that are responsible for the creation and distribution of content are regulated under the *Broadcasting Act.*[4] The Supreme Court of Canada has conclusively ruled that ISPs, when they simply provide the carriage of content that enables their end-users to access whatever they wish over the Internet, are not broadcasting undertakings and therefore are not subject to the *Broadcasting Act*.[5] This is only logical as an ISP has nothing to do with the content itself. Instead, all an ISP does is provide access to the Internet. The fact that many consumers now choose to access broadcasting content over the Internet does not make ISPs acting as broadcasters, or subject them to the *Broadcasting Act*.

6. Importantly, the *Telecommunications Act*[6] and the *Broadcasting Act*[7] contain explicit, different policy objectives that have guided how the federal government and the Canadian Radio-television and Telecommunications Commission ("CRTC") have used revenues raised within each industry to promote social objectives. Thus far, the fundamental separation between carriage and content is why revenues raised within the telecommunications industry have only been taxed to promote social objectives related to telecommunications and why revenues raised within the broadcasting industry have only been taxed to promote social objectives related to broadcasting.

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[2] CRTC, *Communications Monitoring Report 2016: Canada's Communication System: An Overview for Canadians*, at pgs 186, 189, 195-199. ("CMR").
[3] SC 1993, c 38 ["*Telecommunications Act*"].
[4] SC 1991, c11 ["*Broadcasting Act*"].
[5] *Reference re Broadcasting Act*, 2012 SCC 4 at para 5.
[6] *Telecommunications Act*, *supra* note 3, at s 7.
[7] *Broadcasting Act*, *supra* note 4, at s 3.

7. For example, many TSPs are required to contribute a portion of their revenues to the extension of basic telecommunications services[8], which are a basket of telecommunications services that the CRTC periodically determines that all Canadians must be able to access.[9] In fact, the CRTC is currently considering whether to expand the obligations of TSPs to contribute to funds designed to extend and strengthen Canada's telecommunications infrastructure.[10] Similar to the obligations of the telecommunications industry to advance social objectives related to that industry, as has already been discussed, broadcasting undertakings contribute a portion of their revenues to the development of Canadian content.

8. Thus, to the extent that ISPs were taxed in order to fund the development of Canadian content, this would represent a double-taxation of the telecommunications industry for social objectives as many ISPs are already required to pay into funds to extend Canada's telecommunications infrastructure where they also provide other telecommunications services, whereas broadcasting undertakings do not have to contribute anything to these funds.

9. CNOC also notes that ISPs already collect and remit sales taxes, as well as pay corporate income taxes, and thus make substantial contributions to the general tax revenue of the country in that regard. To the extent that the government is seeking to further support the Canadian content industry and does not deem implementing measures specific to the broadcasting sector sufficient to do so, the use of general tax revenue may be another solution worth consideration.

10. Consequently, CNOC is very concerned about the idea that the telecommunications industry should be required to subsidize the broadcasting industry through a tax on ISPs. This represents a cross-subsidization of different industries, no different than if, for example, Canadian automobile manufacturers were required to pay a tax on their revenues to subsidize the development of Canadian content.

2.2 A tax on ISPs could negatively impact competition

11. In addition to fracturing the fundamental principle of separation between carriage and content, a tax on ISPs to fund the development of Canadian content would negatively impact the state of competition in Canada's telecommunications market. One of the policy objectives of the *Telecommunications Act* is to increase the competitiveness of Canada's telecommunications system.[11] This policy objective reflects the fact that for many decades Canada's telecommunications market was dominated by just a handful of vertically integrated cable and telecommunications companies, companies such as Bell Canada and Rogers, which are collectively known in the telecommunications industry as "the incumbents". For example, approximately 89% of residential Internet access service revenues are controlled by a handful of incumbent operators whereas hundreds of competitive providers split the remaining 11%[12],

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8 *Review of basic telecommunications services*, Telecom Notice of Consultation CRTC 2015-134, 9 April 2015 at paras 16-19.
9 *Id.* at paras 13-15.
10 *Id*. at paras 32-37.
11 *Telecommunications Act*, *supra* note 3, at s 7(c).
12 CMR, *supra* note 2, at Table 5.3.2, pg 248.

12. The CRTC and the federal government have made great strides in improving the competitiveness of Canada's telecommunications industry and breaking up the duopolies of the incumbents through pro-competitive policies such as requiring incumbent telecommunications operators to provide wholesale access to their fibre networks.[13] CNOC is grateful for these efforts which have allowed its members to develop innovative business models to provide telecommunications services to consumers.

13. However, the fact remains that the vertically integrated incumbents still have market power and revenues measuring in the billions.[14] In addition, for many years CNOC's members have had their margins squeezed by punitively high wholesale access rates charged by incumbents to competitive ISPs. Just recently, the CRTC affirmed that the wholesale rates charged by the incumbents to competitive operators such as CNOC's members have not been just and reasonable and dramatically reduced the rates on an interim basis pending further investigation.[15]

14. CNOC is concerned that the imposition of a tax on ISPs would hurt the ability of its members to compete just when they are beginning to get relief from the punitive wholesale access rates they have endured for many years. In order to compete effectively, competitive ISPs in many markets may find it difficult to pass the cost of an additional tax onto consumers and may have to internalize some or all of the cost. Given that competitive ISPs already have lower margins, this internalized tax will further squeeze their margins and thus harm competitive ISPs' ability to compete against the incumbents.

15. In addition, many competitive ISPs are quite small operations, and in some cases are run by just a handful of employees. The presence of these ISPs brings important pricing discipline, innovation, and other competitive benefits to the marketplace, but they are often less able to meet administrative burdens. The imposition of an ISP tax would be another administrative cost for these smaller operators to bear in an industry that already imposes significant administrative burdens on its participants.

16. Conversely, to the extent that competitive ISPs would be in a position to pass on some or all of a new ISP tax to consumers, such a tax would reduce consumption of Internet access services by increasing costs to consumers. This means that ISP revenues would be reduced, once again hampering their ability to compete in addition to the negative affordability impacts to consumers.

17. Furthermore, as noted above, the CRTC recently released a decision requiring the incumbents to provide wholesale access to their fibre networks.[16] This decision was finely calibrated so as to incent competitive TSPs, as part of gaining access to the incumbents' fibre networks, to invest in their own transport infrastructure.[17] Competitive TSPs have been making financial plans, based on this decision, and the necessity of gaining access to

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[13] See *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 ("TRP 2015-326"); Innovation, Science and Economic Development Canada, *Statement by the Government of Canada on Bell Canada petition of CRTC wholesale decision*, 11 May 2016.

[14] CMR, *supra* note 2, at Table 3.0.3, pg 72.

[15] Telecom Order CRTC 2016-396, *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, 6 October 2016.

[16] TRP 2015-326, supra note 12.

[17] *Id.* at paras 135-36, 139, 145.

the incumbents' fibre networks, to invest in deploying transport infrastructure. The imposition of a new tax could negatively impact competitive ISPs' already thin margins, for the reasons described above, and jeopardize these new investments, which will advance Canada's telecommunications policy objectives by increasing the competitive options available to consumers and augmenting the diversity of Canada's telecommunications infrastructure.

18. We wish to stress that the negative impacts of an ISP tax will have a disproportionate negative impact on competitive ISPs, such as CNOC members. This is so for two reasons.

19. Firstly, as discussed, competitive ISPs' ability to compete is already adversely affected by the incentive and ability that the incumbents have to squeeze the margins of competitive ISPs and to subject them to other anti-competitive, including, unduly discriminatory conduct.

20. Secondly, competitive ISPs do not have the scope and scale enjoyed by the incumbents and so they are not able to absorb the negative impacts of an ISP tax to the same degree as the incumbents.

21. Overall, CNOC is concerned that a tax on ISPs to fund Canadian content could have unintended, yet very significant, negative impacts on competition, contrary to the policy objectives of the *Telecommunications Act*.

2.3 A tax on ISPs would make Internet access less affordable

22. While CNOC is very worried about a requirement for the telecommunications industry to subsidize the creation of Canadian content and the subsequent impact of such a tax on competition, CNOC is also concerned about the impact that a new tax on ISPs would have on the affordability of retail access to the Internet.

23. The CRTC recently determined that 36.5% of low income Canadians do not have home Internet access.[18] A new tax on ISPs will only make Internet access more unaffordable for low-income Canadians as, either through the direct passing on of the tax to consumers or through other negative impacts on competition, such as reduced choice. This impact will be particularly pronounced for lower-income Canadians and in lower-income communities, such as remote Aboriginal communities, that already struggle with the affordability of Internet access, something that CNOC members try to address by advocating for more competition in the telecommunications sector.

24. The impact of fewer Canadians being able to connect to the Internet cannot be overstated. In the 21st century the global economy is increasingly moving online. Canadians use the Internet to conduct banking, access e-health and e-learning services, consume news, interact with the government, communicate with their friends and family, run their businesses, and so much more.

25. Further, anyone with a an Internet connection today can create amazing content, whether it be apps, music, video content, or a blog, and put it on the Internet for the world to see. Canadians are prolific creators on the Internet.

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18 CRTC, *Communications Monitoring Report 2016: Canada's Communication System: An Overview for Canadians*, at Table 2.0.8, pg 57 ("CMR").

As the consultation document noted[19], one Canadian, Lilly Singh, has used YouTube to become one of the most recognized faces in new media today, acquiring over 10 million subscribers to her YouTube channel and over 1.5 billion views of her content.[20] Lilly Singh is just one of the more notable examples of the millions of Canadians of all backgrounds that strengthen our cultural fabric everyday by creating new Canadian content and sharing it online with their fellow Canadians and the world.

26. One of the great strengths of the Internet is that it can be harnessed by anyone, regardless of their background, to push content out to the world. An Aboriginal teenager living in a remote northern community that is connected to the Internet is just as able to create compelling content as an upper-class teenager living in a rich suburb of Toronto.

27. However, imagine the loss in terms of Canadian content if Lilly Singh had never emerged because she could not afford Internet access. Unfortunately, that is a reality for far too many Canadians today who struggle to contribute to the wealth of Canadian content online as result of affordability issues with the Internet.

28. CNOC is therefore highly concerned about the possibility of measures that would increase the cost of Internet access as a result of this consultation. . Not only would this hurt the most vulnerable Canadians the most, but it would perversely reduce the amount of Canadian content that is being produced today as well as the diversity of voices by limiting the ability of lower-income Canadians to share their stories and ideas.

29. Reducing the affordability of Internet access, and thus its availability, would also be inconsistent with the mandate given to the Minister of Innovation, Science, and Economic Development ("ISED"), which included, amongst other things, a mandate to: "[i]ncrease high-speed broadband coverage and <u>work to support competition, choice and availability of services</u>, and foster a strong investment environment for telecommunications services to keep Canada at the leading edge of the digital economy"[21] [Emphasis added]. The negative impacts of a new tax on ISPs on competition, which were noted above, as well as on the ability of Canadians to access the Internet, would thus directly undermine this mandate of the Minister of ISED. CNOC therefore urges the Minister of Canadian Heritage to adopt only those measures arising from this consultation that are not inconsistent with the mandate of the Minister of ISED..

30. Consequently, due to the deleterious effect on the affordability of Internet access that a tax on ISPs would have, CNOC urges the Department not to tax ISPs as a means of funding the development of Canadian content.

3.0 ALTERNATIVE OPTIONS

31. While some of its members also operate broadcasting undertakings, CNOC's primary focus is on telecommunications and the impact that regulatory policies could have upon the competitive telecommunications

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19 Department of Canadian Heritage, *Summary of Consultation Paper*, at pg 2.
20 YouTube, "IISuperwomanII", <https://www.youtube.com/user/IISuperwomanII/about>.
21 Rt. Hon. Justin Trudeau, PC, MP, Prime Minister of Canada, *Minister of Innovation, Science and Economic Development Mandate Letter* <http://pm.gc.ca/eng/minister-innovation-science-and-economic-development-mandate-letter>.

industry. However, the Department does have recourse to experts in the broadcasting sector to assist it in developing other means of supporting Canadian content that do not include an ISP tax.

32. Other policy alternatives that could be explored include exploring means to improve the discoverability of existing Canadian content, modifying the toolkit of financial support and institutions used to promote Canadian content to respond to the online era, and ensuring that foreign online content providers are subject to the same taxes, such as GST, that Canadian providers pay. With respect to this latter point, levelling the playing field between foreign and domestic online content providers is one avenue that could be considered to strengthen the development and availability of Canadian content as well as raise additional general tax revenues that can also be used to support Canadian content.

33. If all of the aforementioned measures are not viewed as sufficient to support Canadian content objectives, additional funding from the overall tax base is another option that may be considered. This would ensure that the inevitable economic deadweight losses that accompany taxation are minimized and not distort the markets for the provision of either telecommunications or broadcasting services.

4.0 CONCLUSION

34. In conclusion, CNOC urges the government not to impose a tax on ISPs as a means of funding Canadian content. Such an approach would not only result in a cross-subsidization of entirely different industries and potentially harm competition, but also harm the affordability of Internet access. In addition, it could also inadvertently end up harming the development of content by citizen creators, particularly those with lower incomes.

35. Other means that do not involve these types of distortionary effects could be explored by the Department, with the aid of appropriate experts, to address the need for greater support of Canadian content in an online era. These measures include exploring means to improve the discoverability of existing Canadian content, modifying the toolkit of financial support and institutions used to promote Canadian content to respond to the online era, and ensuring that foreign online content providers are subject to the same taxes, such as GST, that Canadian providers pay, and/or, using additional funding from the overall tax base (i.e., consolidated revenue fund).

Yours very truly,

Christopher Hickey
Director of Industry Affairs

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