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Secretary-General
Canadian Radio-Television and
Telecommunications Commission
Ottawa, ON
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Dear Sir/Madam:

Re: CRTC Telecom Public Notice 2007-16: Commissioner for Complaints for Telecommunications Services

1. The following are CIPPIC's reply comments in the above-mentioned proceeding. Failure to respond to a particular point or argument made by industry parties should not be taken as assent to that point or argument.

2. The Public Notice invited submissions regarding the appropriate structure and mandate of a new Telecommunications Consumer Agency ("the Agency"), and sought comments on whether the industry-established CCTS model met the requirements of the Order-in-Council that prompted said model.[1] As stated in our prior written and oral comments, the CCTS in its current form goes some way toward establishing the independent and effective Agency envisaged in the Order, but is seriously deficient in a number of respects, including but not limited to its independence, mandate, and powers.

3. In the following reply comments, we review those deficiencies and, as requested by the Chairman during the hearing, provide specific recommendations with a view to correcting them.

Membership

4. The Order-in-Council states that "…all telecommunications service providers should participate in and contribute to the financing of an effective Consumer Agency." In our view, this direction is unequivocal: all TSPs should participate. Given that some TSPs clearly will not participate voluntarily, they must be required to do so.

[1] Order in Council P.C. 2007-533.

5. The Telecom Policy Review Panel ("TPRP") as well recommended a mandatory model, backed up with new CRTC enforcement powers. Despite previous objections, the CCTS Members ("the Members") now appear amenable to a model that requires participation by all telecommunications service providers ("TSPs") operating in Canada.

6. This approach makes policy sense, since it ensures that all telecom consumers have recourse to the Agency. It also avoids the inefficiencies and confusion that arise from the existence of more than one voluntary industry body. Finally, it ensures that the Agency will continue to operate into the future, unlike previous voluntary attempts such as the Ombudsman for Long Distance Telephone Services and the Cable Television Standards Council, both of which died quiet deaths.

7. In its submissions, the Canadian Broadcast Standards Council ("CBSC") described its operations as a voluntary consumer complaint body for matters of offensive content. The CBSC is entirely distinguishable from the CCTS in a number of respects, including the fact that the broadcast services in question are regulated, and that consumers thus always have recourse to the CRTC for the same complaints that the CBSC handles. In contrast, the CCTS was set up in response to the *deregulation* of telecommunications, such that consumers no longer have recourse to the CRTC.

8. CIPPIC agrees with the sentiment of the Chairman that he doesn't "see why one consumer should have more rights than another just because his TSP decides to join or not."[2] All TSPs should be required to join the new Agency so as to ensure that all telecom consumers have equal opportunity for redress through the Agency.

9. Shaw Communications Inc. has expressed concerns about the legislative authority for creating such a body and for empowering it to make binding orders and to award compensation, noting that the Commission does not have authority to award monetary compensation.[3] CCTS Members also expressed concerns during the hearing about the enforcement of mandatory membership, noting that disconnection is an extreme and highly undesirable tool to use for this purpose.

10. CIPPIC agrees with other parties that by far the most efficient and effective way to achieve the Order's vision of full industry participation in the Agency is to give the Commission clear jurisdictional and enforcement powers under the *Telecommunications Act*, as proposed by the TPRP. In addition to amendments giving the CRTC explicit power to create the new Agency and to give the Agency powers to make binding orders and to award compensation, the TPRP specifically recommended empowering the CRTC to use administrative and monetary penalties ("AMPs") for the purpose of enforcing participation in and compliance with the new consumer Agency (p.6-13 and Rec.9-13).

11. Provisions have been added to the *Telecommunications Act* in recent years mandating TSP contribution to a high cost area fund (s.46.5), permitting the CRTC to delegate its powers re: the administration of numbering resources (46.3), and providing for monetary penalties

[2] Transcript, line 261.
[3] Shaw Submission, Oct.1st, 2007, paras.9-11.

(s.72.01) and delegation of powers (s.41.5) with respect to unsolicited communications. We see no reason why similar provisions should not be added to the Act requiring TSP participation in the new Agency, empowering the Commission to assess AMPs against non-compliant TSPs, and to delegate its powers to the Agency. McCarthy Tetrault's *Model Act to Implement the Regulatory Recommendations of the TPRP* includes specific proposals for such legislative amendments, which proposals CIPPIC endorses.[4]

12. We recommend that the Commission work with the government to introduce legislation amending the *Telecommunications Act* along the lines suggested by the TPRP so as to facilitate implementation of the Order-in-Council.

13. In the absence of such legislative change, however, we believe that the Commission can proceed to order participation and compliance by all TSPs, by making such participation and compliance a condition of service under section 24 or a condition of forbearance under s.34, as the case may be. Non-facilities-based providers can be captured as they are now, via contracts with facilities-based providers.

14. Under this approach, we acknowledge that enforcement is a challenge as long as the CRTC lacks the power to award AMPs. Disconnection is an extreme and undesirable approach that does not serve consumers. However, there are other measures such as publicity that the Commission could take to censure non-compliant TSPs. As Ms. Crowe explained (at 271 of the transcript), if the "CCTS found that the TSP they [consumers] were complaining about was not a member, presumably that member could be identified at that point…and then the Commission could decide how to handle it at that point."

15. In short, we submit that current jurisdictional and enforcement challenges are not and should not be seen as barriers to the establishment of a comprehensive, industry-wide Agency. **If legislative change is not forthcoming, the Commission should proceed under its current powers to require membership in the Agency by all TSPs as a condition of service under s.24 of the Act (or under another section of the Act, as appropriate) and to enforce compliance by whatever means possible, including publicity.**

Independence

16. The Order-in-Council is also clear that the new Agency is to be independent from industry. It states: "…the governance structure of an effective Consumer Agency should be designed to ensure its independence form the telecommunications industry…."

17. Although the Members repeatedly assert that their model is independent, the CCTS fails the independence test on a number of scores, including board composition and voting thresholds, as well as the Commissioner's ability to engage in research, investigation and reporting on systemic issues and industry trends.

[4] Model Act clauses 69.71 and 69.72. See also the proposed new definition of "telecommunication service provider" and clauses 24 and 67(1) (regarding direct jurisdiction over resellers) and clause 72.2 – 72.9 (re: AMPs).

Governance Structure: Board Composition and Voting Thresholds

18. The Members have most recently proposed a board with seven voting members, of which three are industry appointments, two are appointed by consumer groups, and two are "independent" not just of either but also of consumer groups.

19. CIPPIC fails to understand why consumer representatives should not qualify as "independent" – what matters here is independence *from industry*, not independence from public interest organizations. We therefore object to subs.33(a)(iv) of the CCTS Bylaws, and submit that it should be removed if the category of "independent directors" is maintained.

20. Also unclear is the rationale for disqualifying government employees from independent director positions. As long as the employment is unrelated to telecommunications policy or regulation, we see no reason to disqualify otherwise qualified persons from being independent directors. We therefore propose revising subs.33(a)(iii) so as to narrow the ineligible category of government employees to those whose work involves telecommunications regulation or policy.

21. More important, however, is to ensure that industry representatives are at least evenly counter-balanced with experienced consumer representatives chosen by established consumer groups active in this field. With a seven-member voting board, at least 3 should be individuals chosen by consumer groups. **Section 32 of the Bylaws should be amended to provide for at least as many board members appointed by consumer groups active in telecommunications regulation as there are industry representatives.** This is the approach taken by the Australian TIO and we recommend it here. We note that the Canadian Ombudsman for Banking Services and Investments operates under a ten-person board, of whom only three are industry representatives.

22. The Members emphasized in their comments that the Board is a corporate governance board, not a policy-making board. In fact, however, under the proposed structure it is both. Not only does it control the finances and staffing of the organization, it approves the Agency's Annual Report as well as industry codes of conduct, standards. Unlike the Australian model which separates the functions of corporate governance and policy and assigns them to different bodies with very different memberships, the CCTS model combines both policy and corporate governance in a single board.

23. Under this approach, board composition and voting thresholds become critical to the issue of independence. As long as industry representatives can veto any policy-related matters, independence is not achieved. Interestingly, the Members have seen fit to bar directors from having any involvement or exposure whatsoever to the resolution of industry complaints (Bylaws, s.51), yet do not extend this safeguard to the Commissioner's investigation and reporting of systemic issues and industry trends.

24. CIPPIC submits that there is an even greater risk of inappropriate industry interference with the Agency's activities regarding systemic issues and industry trends than there is

with individual complaint resolution. The same safeguards against such interference should apply to both. In particular, the Commissioner should be free to engage in research and analysis of relevant industry trends and systemic issues without any interference, let alone prior request, from industry.

25. Moreover, approval of the Annual Report should require no more than a simple majority vote by directors. We note that the Members have revised their proposal regarding approval of the Annual Report accordingly. This amendment should proceed.

26. The CCTS model currently requires an extraordinary resolution (requiring 2/3 industry member approval) in order to amend the Procedural Code or Bylaws. This provides industry with extraordinary power to resist changes that would enhance the Agency's effectiveness in ways that could embarrass or annoy them.

27. The Members justify this high level of control over Agency rules and procedures on the grounds that "the Procedural Code is a fundamental corporate document of the organization and therefore, as in any corporation, that kind of document would require a high level of concurrence to amend."[5]

28. In fact, the *Canada Corporations Act* (governing federally incorporated non-profits such as the CCTS) requires Special Resolutions (not less than 2/3 majority) for only certain defined "fundamental changes". Such changes include corporate name changes, changes to classes or conditions of membership, and changes to corporate mission or mandate. Changes to Bylaws or Procedures other than 'fundamental changes" do not require a Special Resolution under the law.[6] Moreover, the Act does not require more than a 2/3 majority for fundamental changes.

29. Given the novel nature of this initiative, it is likely that changes to some procedural rules will be needed in order to achieve the effective Agency envisaged by the Order-in-Council. **We submit that such changes should require no more than an ordinary majority resolution, or at most, a Special Resolution (2/3 majority).** Section 23(b) of the Bylaws should be amended accordingly.

Governance Structure - Commissioner Powers

30. Of particular concern are the various ways in which the Commissioner is prevented from engaging in the very activities set out in the Order-in-Council – in particular, "identifying issues or trends that may warrant further attention by the Commission or the government" and "the development or approval of related industry codes of conduct and standards".

31. The CCTS constating documents not only fail to set out these important functions in the relevant provisions of the Letters Patent (Part IV) and the Procedural Code (s.2.1), but they

[5] Mr. McTaggart, Transcript, p.342
[6] See Industry Canada's "Clause by clause briefing book" on Corporate Not-for-Profit Law at http://strategis.ic.gc.ca/epic/site/cilp-pdci.nsf/en/h_cl00744e.html.

explicitly *limit* the Commissioner's power to research and investigate systemic issues, complaint trends, and other issues or trends of relevance to consumer telecommunications. This is in direct contradiction of the Order-in-Council. In particular, section 86 of the Bylaws states:

> "The Corporation may, from time to time *upon request by the TSP Members,* identify and report on issues or trends that may warrant further attention by the Members, the CRTC or government, provided that any such reports shall maintain the confidentiality of TSP Members and Eligible Complainants. In addition, the Corporation may, from time to time on Extraordinary Resolution *and upon request by the TSP Members,* assist the TSP Members with the approval of related industry codes of conduct and standards." (emphasis added)

32. We propose the deletion of s.86 of the CCTS Bylaws. Instead, the Agency should be given a clear mandate to engage in research and investigation of relevant issues or trends, to report on them as it sees fit, and to initiate and develop industry codes of conduct and standards. Such activities should be in no way dependent on industry requests or subject to industry veto.

33. The Commissioner should, in addition, be free to publish reports and policy advisories from time to time, without a requirement for prior board approval.

34. CIPPIC does not, however, object to an industry veto over the final approval of industry codes of conduct and standards. Such initiatives should be consensus-based, and will not be effective if they don't have industry support.

Proposed Amendments: Governance Structure and Commissioner Powers

35. CIPPIC therefore proposes the following amendments to the CCTS Bylaws:

Subections 13(b), 50(e) and 64(a) of the By-laws should be amended to replace "Special Resolution" with "Ordinary Resolution";

Subections 23(b)(ii) & (iii) of the By-laws should be removed and not replaced, or, in the alternative, replaced by similar provisions under s.23(a);

Subsection 32(b)(ii) of the By-laws should be amended to read:

> "three (3) of the four (4) Independent Directors shall be appointed by those Canadian consumer groups recognized for the purposes of this by-law by the Board, from time to time collectively; and"

Subsection 33(iii) of the Bylaws should include an additional clause limiting this category of persons to those whose employment involves telecommunications policy or regulation;

Subsection 33(iv) of the By-laws should be removed;

Section 86 of the By-laws should be removed.

Section 91 of the By-laws should be amended to remove the requirement for an "Extraordinary Resolution", and not to replace it; or in the alternative, to replace it with a requirement for a "Special Resolution".

Mandate

36. The Order-in-Council calls for an effective Consumer Agency. It further states that:

> "the mandate of an effective Consumer Agency should include *(in addition to* resolving complaints) the development or approval of related industry codes of conduct and standards; publishing an annual report on the nature, number and resolution of complaints received for each telecommunications service provider; and, as appropriate, identifying issues or trends that may warrant further attention by the Commission and the government." (emphasis added)

37. The Members seem to have ignored this clear direction from Cabinet. They have failed to give the Agency a mandate to engage in activities other than resolving complaints and publishing an annual report. Indeed, they have placed a stranglehold on the Commissioner's ability to engage in these activities, allowing investigation of industry trends and initiation of codes of conduct only upon request by industry! (s.86, Bylaws) Moreover, they have strangely restricted the scope of matters that the Agency can address to a very narrow set of issues, leaving out some of the most common complaints that consumers have about telecommunications services.

38. Effectiveness, in CIPPIC's submission, requires that the Agency's mandate be sufficiently broad to cover all consumer complaints and issues involving telecommunications services other than those:
    - that involve services beyond the TSP's control,
    - that are being or will be resolved by another body, or
    - that have to do with content, the setting of prices, or general telecommunications policy more properly handled by the CRTC.

39. Effectiveness also requires that the Agency be empowered, indeed mandated, to research, investigate and report on systemic issues and industry trends, to initiate and develop industry codes of conduct and standards, and to publish statistics on complaints received and resolved by TSPs.

Systemic Issues

40. The CCTS model focuses almost exclusively on individual complaints, reflecting the Members' misinterpretation of the Order-in-Council as requiring the establishment of

nothing more than a "dispute resolution mechanism" that functions as an "alternative to the courts for individual and small business customers".[7] As admitted by the Members, "the *raison d'etre* of the CCTS is the resolution of complaints", [8] and "our focus is entirely on solving complaints for consumers".[9] Other key functions of the Agency, as set out in the Order-in-Council, are essentially ignored.

41. Mr. Bibic, speaking for the Members, noted that "some parties appear to have misconstrued the nature of the proceeding and offer their views as to the ideal design of a comprehensive self-regulatory body of a kind that could only be created or mandated by statute," while the Order-in-Council "describes a more focused industry-established body".

42. Neither CIPPIC nor any other party has called for anything more than has is required by the Order-in-Council. As noted above, legislative change would certainly facilitate the implementation of Cabinet's directive, but is not necessary. All parties agree that the Agency is to be focused on consumer issues with retail telecommunications service; there is no dispute on that score. What does seem to be in dispute is the extent to which the Agency should be empowered to do more than individual complaints resolution.

43. In CIPPIC's submission, there is no ambiguity on this point; the Order-in-Council is clear. Failing to respect the Order-in-Council by limiting the Agency's mandate to complaints resolution will, in our view, strip the Agency of what may be its most valuable function: the ability to deal with and resolve recurring or broad-based marketplace problems.

Development of related industry codes of conduct and standards

44. Nowhere in the constating documents is the CCTS given a mandate to initiate or develop industry codes of conduct and standards, as required by the Order-in-Council. The only references to this function that we have found relate to the "approval" of such codes or standards, which requires (a) a request by TSP members, and (b) an Extraordinary Resolution.[10]

45. Codes of conduct and standards developed by industry, consumer groups and other interested stakeholders can play a valuable role in the development and maintenance of an effective telecommunications marketplace. In Australia, codes play a central role in the regulation of telecommunications and specifically with respect to the resolution of consumer complaints and systemic issues by the Telecommunications Industry Ombudsman ("TIO"). Although codes of conduct do not play as central a role in Canada, we have generated a number of similar documents through a similar multi-stakeholder process, under CISC (e.g., Customer Transfer Rules). In CIPPIC's view, the new Agency can and should play a role in facilitating such cooperative approaches to achieving marketplace fairness.

[7] Opening Statement of the Members, pp.4 and 6.
[8] Opening Statement, p.10.
[9] Transcript, line 1591.
[10] ss.23(b)(ix) and 86, Bylaws.

46. As the Commissioner of Competition states in its Comments,

> "Taken together, the TSPs proposal for the CCTS seems to fall short of the model envisaged by the Order when it comes to voluntary codes, and may represent a lost opportunity to take steps in this area to improve the quality of information available in the marketplace."[11]

47. This function should be added to the list of objects of the Corporation in Part IV of the Letters Patent, as well as to the list of "Functions, Powers and Duties of Commissioner" in s.2.1 of the Procedural Code. Moreover, those sections of the Bylaws (s.86) that limit the Commissioner's powers to engage in such activities should be removed; the Commissioner should be empowered to initiate and work on industry codes and standards on his or her own motion, without the need for a request from TSPs.

Annual report on the nature, number and resolution of complaints received for each telecommunications service provider

48. This function is included in the Letters Patent, but does not appear in the list of "Functions, Powers and Duties of Commissioner" in s.2.1 of the Procedural Code. It should be added.

49. Moreover, the Bylaws currently require a Special Resolution of the Board to approve the Annual Report. We welcome the Member's stated intention to change the 2/3 majority approval requirement to a simple majority approval; no more should be required.

Identifying issues or trends that may warrant further attention by the Commission and the government

50. As stated by the Commissioner of Competition in its Comments,

> "The identification of and reporting on industry issues and trends is an important function as part of the overall goal of improving the functioning of the telecommunications services market, and the Bureau is of the opinion that the proposal should be bolstered to ensure that this takes place, as required by the Order."[12]

51. As with the development of industry codes, this important function is missing from the Letters Patent and s.2.1 of the Procedural Code. It should be added to both.

52. Moreover, ss.4 and 5 of the Procedural Code restrict the Commissioner's power to investigate matters other than "Eligible Complaints". While the focus and, presumably, intent of these provisions is to limit the *type* of complaints, they have the effect of limiting the Commissioner's power to investigate *systemic matters* as well. These provisions should be amended so as to apply only to complaints resolution, and not to the investigation of industry trends or other systemic issues.

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[11] para.21.
[12] para.22.

Proposed Amendments: Systemic Issues

53. We therefore propose the following amendments to the CCTS constating documents:

Part IV of the Letters Patent should be amended to include the following:
(a) inquiring into and reporting on systemic issues and industry trends; and
(b) initiating, developing and approving industry codes of conduct and standards.

Section 2.1 of the Procedural Code should be amended to include the following:
(a) inquire into and report on systemic issues and industry trends;
(b) initiate and oversee the development of industry codes of conduct and standards;
(c) make public annual reports, including statistical data on the nature, number and resolution of complaints received by TSP.

Sections 4 and 5 of the Procedural Code should be amended so as to apply only to individual complaints resolution.

Section 86 of the Bylaws should be removed.

Eligible Complaints: Regulated Services

54. With respect to the issue of non-forborne services, the Members state that they "focused on the Order-in-Council's request for [a] complaint resolution mechanism in relation to *forborne retail telecommunications services*."[13] The Members have clearly interpreted the Order-in-Council as being limited to the deregulated industry sector.[14]

55. In reply, CIPPIC notes that although the Order-in-Council does refer to the new Agency as "an integral component of a deregulated telecommunications market", nowhere does it state that the Agency's mandate should be limited to forborne services.

56. As stated in our oral argument, having two agencies deal with similar kinds of complaints is inefficient and confusing for consumers, especially as services move from one category to another. With all due respect to the Commission and its complaints handling unit, consumers with complaints are likely to be better served by an Agency whose primary mandate is complaints resolution than by the CRTC, given its much broader mandate and other priorities. We see no reason why the CRTC should not delegate its dispute resolution powers over regulated services to this new body.

57. Should the CRTC nevertheless wish to retain its complaints resolution functions over regulated services, it is critical that systems be established so as to ensure that complaints made to one body are referred quickly and seamlessly to the other as appropriate, and that consumers are not left in limbo between the two agencies.

[13] Opening Statement, p.12.
[14] Transcript, line 58.

Eligible Complaints: Matters within scope

58. As noted above, the Order-in-Council calls for an Agency to resolve consumer complaints about telecommunication services. It does not limit the type of complaints to be handled by the Agency other than to say that they should be about consumer or small business telecommunications services. In particular, it does not suggest that the Agency be empowered to handle only those complaints about breach of contract, billing, credit management, service delivery and slamming, as proposed by the Members.

59. The Members have provided no compelling justification for excluding from the scope of the Agency's mandate such matters as unfair contract terms, false or misleading advertising, and "general operating practices not covered in customer contract terms" (such as customer service and sales tactics). Yet these matters constitute a large proportion of consumer complaints about telecom service, and are precisely the kind of matters that an "effective" Agency should be handling. As noted in our oral comments, customer service and contract terms make up close to half of all matters dealt with by the Australian TIO. We suspect that the same will be true in Canada, and note that, although the recent CCTS statistics provide no no data on complaints by matter, they do show that over 40% of complaints received about Members were treated as "out of scope".

60. With respect to issues of customer service (e.g., failing to act on a customer's request, not being able to be contacted, giving incorrect or inadequate advice), we note the results of a CBC survey on customer service just published yesterday, showing high levels of dissatisfaction with Canadian telecommunications service providers. The report notes:

> "In Canada, telecommunications service providers continue to cause consumer headaches. CBC News asked for customer service stories from Canadians earlier this year, and the vast majority of negative experiences centred on the telcos."[15]

61. On the issue of misleading advertising, CIPPIC notes the submission of the Commission of Competition ("the Bureau") calling for an expansion of the CCTS mandate to include misleading advertising and deceptive business practices. The Bureau notes that these practices constitute a significant problem in the telecommunications marketplace:

> "…the Bureau routinely receives complaints from consumers alleging that they have been misled when purchasing telecommunications services. For example, complaints often involve allegations that the consumer was deceived regarding the terms and conditions associated with a telecommunications service purchased." (para.14)
>
> "The Bureau's experience to date suggests that deceptive marketing practices, such as the failure to adequately disclose terms and conditions, are a concern in the telecommunications marketplace." (para.15)

[15] http://www.cbc.ca/news/background/customer-service/index.html. Results at http://www.cbc.ca/news/background/customer-service/results.html.

62. On this point, we note another CBC report just released, on advertising of internet speeds,[16] an issue on which CIPPIC itself has received numerous complaints.

63. The Bureau also notes that it has neither the mandate nor the resources to engage in individual dispute resolution, let alone to investigate each of the misleading advertising or deceptive marketing allegations it receives. It states:

> "…given that the Bureau does not currently have the resources to resolve each of the thousands of complaints it receives each year, it focuses its limited resources on those broader, systematic deceptive marketing practices which appear to pose the greatest risk for consumers and competitors." (para.13)
>
> "The Bureau does not have the mandate or the resources to mediate each individual dispute between complainants and TSPs, and instead values intelligence regarding misleading advertising and deceptive marketing practices issues and trends, so as to allow the Bureau to focus its limited resources on those broader, systemic problems which appear to pose the greatest risk for consumers and competitors. Conversely, the CCTS is capable of resolving such disputes, and it will have the appropriate industry expertise and contacts to facilitate that function. Regrettably, the proposal as framed does not appear to capitalize on the opportunity to address these misleading advertising and deceptive marketing practices complaints, or to acquire and share this intelligence." (para.15)

64. Clearly, misleading advertising and deceptive business practices in the telecommunications marketplace are issues of great concern to consumers, and on which they have no other meaningful recourse other than in the exceptional cases that make it to court. As the Members acknowledge, the CCTS is meant to be an *alternative* to the courts,[17] recognizing that the cost of litigation makes it an elusive and inefficient remedy for most consumer issues.

65. Unfair contract terms should also be included in the scope of the Agency's mandate, given that such terms are unilaterally imposed by telecommunications service providers on consumers regardless of their legality or enforceability, and given that the only alternative recourse that consumers have for such unfair practices is litigation – precisely that for which the new Agency is meant to serve as an alternative.

66. The CCTS also treats as outside scope "policy matters", "prices", "privacy/confidentiality", and "complaints that have been, currently are, or should be before another tribunal", without any further explanation or clarification. [18]

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[16] http://www.cbc.ca/marketplace/2007/11/21/speed_bumps/.
[17] Opening Statement, p.6.
[18] July 23rd Proposal, para.35.

67. "Policy matters" could be interpreted as covering anything to do with corporate policy; it is completely unclear what is included under this term and what is not. Many legitimate complaints that should be handled by the Agency could well be rejected under this approach as being about "policy matters". Similarly, "prices" could be interpreted as covering a wide range of complaints that might otherwise be characterized as "billing" complaints. These exclusions need to be much more narrowly circumscribed and defined.

68. CIPPIC does not object to excluding complaints that "have been, currently are, or should be before another tribunal", *as long as the complainant is assured of resolution before that other tribunal*. It is critical, in this respect, that complaints are not rejected simply on the grounds that another Agency, such as the Competition Bureau or a provincial Consumer Protection Agency, has jurisdiction over them. Only those matters that *are being or will be* dealt with by the other Agency should be considered outside scope.

69. This applies to privacy/confidentiality complaints. CIPPIC submits that such complaints should not be automatically rejected on the grounds that the federal Privacy Commissioner has jurisdiction over privacy matters. An assessment should first be made as to whether the complainant has obtained or can get similar recourse via the Privacy Commissioner for that complaint. Where compensation is being sought and has not been obtained via the Privacy Commissioner, complainants should be able to have their privacy disputes resolved via the new Agency.

70. Until a body is established to receive and resolve complaints about unsolicited messages and telemarketing, CIPPIC submits that such complaints, where related to marketing practices of a telecommunications service provider (not third party marketers), should also be handled by this Agency.

71. Finally, where a given complaint can be interpreted as falling either within or outside the scope of the Agency's mandate, it should be accepted as within scope. As long as there is a reasonable interpretation that supports its inclusion, that interpretation should prevail. Also, where a given complaint involves issues that are both inside and outside scope, it should be accepted and handled with respect to the matters within scope.

Proposed Amendments - Mandate

72. CIPPIC therefore proposes the following amendments to deal with issues of mandate:

Subsection 1.1(j) of the Procedural Code and subsection 1(m) of the Bylaws should be amended so as to:

- eliminate the exclusive listing of matters within scope and instead rely on a listing of matters outside scope, or in the alternative, <u>include</u> within the definition of "Eligible Complaints" (e) unfair contract terms, (f) customer service, (g) misleading advertising, (h) deceptive business practices, (i) complaints handling, (j) telemarketing and unsolicited communications by TSPs, and (k) privacy/confidentiality;

- remove from A (the list of services/matters outside scope) (i) payphones, (m) telemarketing or unsolicited messages, (p) premium services (including, without limitation, 900/976 services);
- remove from B (list of additional matters outside scope) (q) general operating practices not covered in customer contract terms or commitments; (r) contracts or contract terms (other than compliance with a TSP Member's service contract); (s) prices; (y) policy matters;
- include in B more carefully defined exclusions covering (a) the setting of prices, (b) matters of general telecommunications policy more properly handled by the CRTC; and (c) matters beyond the TSP's control.

Subsection 1.1(k) of the Procedural Code and subsection 1(n) of the Bylaws should be amended so as to include within the definition of "Eligible Services":

- instant messaging;
- calling cards as well as features under (a) local exchange and VoIP services;
- non-forborne as well as forborne services.

A new subsection should be added to s.1.1 of the Procedural Code and s.1 of the Bylaws, immediately following the subsections defining "Eligible Complaints" and "Eligible Services", stating that:

- where a given matter can be reasonably considered to fall within the definition of "Eligible Services", it shall be treated as such even if it can also be reasonably considered as falling outside the scope of the Agency's mandate.
- where a given complaint involves matters both within and outside scope, the Agency shall deal with those matters that can reasonably be considered to fall within scope.

Section 8.2 of the Procedural Code should be amended to include the following additional clause "unless the other Agency has put its process on hold in order to let the Commissioner proceed, or unless the other Agency lacks powers to order compensation and no compensation has been paid".

Remedies

Liability Limitations in Terms of Service

73. The Members have proposed to limit consumer redress from the Agency based on whatever provisions the TSP in question has chosen to include in the Terms of Service that it unilaterally imposes on its customers. In other words, under the CCTS model, each TSP can simply deny liability for any matters handled by the CCTS and thereby avoid having to pay any compensation to any customer regardless of the Commissioner's determination and regardless of what a Court would order were the matter to be litigated. Mr. Bibic made a number of arguments in support of this astonishing proposal.

74. First, he argued that "the appropriate level of those limitations should be determined by the market".[19] As noted, consumers have absolutely no power over liability limitations in terms of service that TSPs impose on them. Mr. Bibic knows as well as the rest of us that consumers do not choose telecom service based on the fine print of the terms of service. Market forces clearly have no impact on TSP policies in this regard, as a review of TSP liability limitations in consumer terms of service will show: some replicate the outdated regulatory limit of $20, while others purport to deny customers any right to any compensation at all.

75. Unfair terms of service such as liability limitations are matters that legislatures and courts, not market forces, regulate. Unfortunately, because few consumer cases ever make it to the courts, we have little caselaw in Canada establishing the limits of enforceable liability limitation clauses in consumer contracts. Moreover, because there are no laws *prohibiting* the inclusion of unenforceable terms in consumer contracts, TSPs continue to include them in their terms of service even when they know full well that the term is not legally enforceable.

76. Mr. Bibic also asserted, without any evidence, that "courts enforce them [liability limitation clauses]".[20] Courts also, however, do not enforce them. It depends on whether the clause in question is "unconscionable" in common law or unenforceable under provincial consumer protection legislation. Just because a TSP purports to limit its liability in its terms of service does not make such limitation legally enforceable. Indeed, a given term may be enforceable in one province but not in another, depending on the relevant provincial consumer protection legislation.

77. Mr. Bibic also argued that "…in the regulated terms of service, there are limitations of liability, and we don't think it is for us to displace those". This argument applies only to regulated services, not to the services which the CCTS currently considers to be within its mandate. Even so, we submit that it should be reconsidered by the CRTC.

78. Mr. Bibic then resorted to the Order-in-Council, arguing that it was not "suggesting that the CCTS should make awards which displace contractual rights of either party…"[21] The Order-in-Council calls for an effective Consumer Agency. To allow TSPs to undermine the Agency's redress powers simply by inserting into their terms of service legally unenforceable liability limitations would clearly emasculate the Agency and render it ineffective.

79. Finally, Mr. Bibic argued that an Agency with none of the procedural safeguards of a court system should not be allowed to overrule contractual provisions established by TSPs.[22] This argument contradicts the Members' explicit acknowledgement that the Agency " has been designed to be an independent, impartial, accessible, and efficient alternative to the

[19] Transcript, line 682.
[20] Ibid.
[21] Transcript, line 692.
[22] Transcript, lines 697-704.

courts for individual and small business customers".[23] If the procedural safeguards of the CCTS are good enough for the Members with respect to matters of breach of contract (a matter that courts typically handle), then we don't see why they should not be good enough when it comes to unfair contract terms, including liability limitations.

80. Furthermore, Mr. Bibic seems to be comparing the CCTS with Superior Court, when the appropriate comparison is with Small Claims Court. Such a comparison, we submit, will show that in contrast to higher level courts, there is no formal discovery process in Small Claims Court; there is just one decision maker; and evidence is admitted as long as it is relevant.

81. Moreover, this argument once again ignores the fact that such contractual provisions are by no means necessarily enforceable in law. Indeed, CIPPIC submits that most of the TSP liability limitations that we have reviewed would likely fail the enforceability test in court.

82. CIPPIC therefore submits that all clauses in the constating documents of the CCTS making Commissioner recommendations or decisions subject to liability limitations contained in TSP terms of service should be removed.

Compensation Cap

83. The Members defend their proposed $1,000 limit on compensation again on the basis that higher values demand stronger procedural safeguards such as are available in Small Claims Court.[24] CIPPIC agrees that, in general, higher value disputes call for more procedural safeguards than do lower value disputes. However, as noted above, this Agency is similar to Small Claims Court in terms of its procedural safeguards and should therefore have similar powers to award compensation (up to $10,000).

Proposed Amendments – Remedies

84. CIPPIC therefore proposes the following amendments to the Procedural Code:

Sections 10.2(d) and 12.1 should be amended to remove the clauses "save and except for any monetary limitations of liability contained in the applicable contract", and "subject to any applicable limitations of liability".

Section 12.1 should be amended to replace "$1,000" with "$10,000".

<u>Complaint Procedures</u>

85. CIPPIC and others raised concerns about the CCTS model's formal requirements for complaints, disqualification of group complaints, and lengthy process leading up to potentially binding decisions.

[23] Opening Statement p.6 and Transcript, line 60. See also para.27 of the Members' October 1st Comments.
[24] Transcript, line 688.

Formal Requirements for Complaints

86. With respect to the requirement for complaints to be in writing, the Members have stated that they plan to amend the Procedural Code so as to give the Commissioner the discretion to accept complaints in non-written form in the appropriate situation.[25] However, they remain committed to a model under which the default rule is a requirement for complaints to be in writing, on the grounds of efficiency and record-keeping.[26]

87. CIPPIC notes that the Australian TIO does not require complaints to be in writing, but instead has implemented efficient and automatic procedures allowing TIO staff to ensure that all relevant information is taken down in writing if not provided that way in the first place. It is a relatively straightforward matter for the CCTS to implement a similar system.

88. Rather than requiring that the Commissioner make determinations on a case-by-case basis as to whether a given complainant can be relieved of the requirement to submit his or her complaint in writing, we submit that a more efficient approach is to accept complaints over the phone, as well as by e-mail, fax, mail or other media.

89. We have heard no reason why complaints should not be accepted by e-mail. Webforms should not be used for complaints unless they automatically send back to the complainant a copy of whatever he or she submitted.

90. CIPPIC has expressed concerns about other formal requirements for complaints set out in s.6.1 of the Procedural Code, specifically the requirements that the Complainant indicate what he or she would regard as a reasonable solution, and his or her consent to the bound by the Code. These, along with other content requirements in s.6.1, are not matters that a Complainant would reasonably think to include in his or her complaint. Yet, under the current approach, complaints could be ignored or rejected on the basis that they don't contain this information.

91. Rather than treating these matters as formal requirements for complaints, we suggest treating them as information that Complainants must provide upon request, if not voluntarily, for their complaints to proceed.

Group Complaints

92. Section 6.14 of the Procedural Code disqualifies group complaints. As noted by Commissioner Morin during the hearing,[27] however, there are situations in which group complaints make sense and are indeed more efficient than multiple individual complaints. The Procedural Code therefore should be amended to permit group complaints in appropriate cases.

[25] Transcript, line 474.
[26] Transcript, lines 471, 475, 487, and 498.
[27] Transcript lines 519-129.

Timelines

93. The Members have established a process under which the TSP has repeated and ongoing opportunities to resolve the complaint, and which results in a potentially binding decision if the TSP fails to resolve the matter to the satisfaction of the complainant. While we find the process to be fair, we question whether the 20 business day period for TSPs to respond (a) to the complaint initially (even though the complainant must have already attempted direct resolution with the TSP), (b) to the complaint a second time, after the Commissioner has launched an investigation, and (c) to respond to the Commissioner's Recommendation, are justified.

94. Not accounting for additional time required by the Commissioner to screen the complaint initially, to investigate and to come up with a recommendation, this amounts to 60 business days. Three months seems like an unnecessarily long time for complainants to obtain a decision on what could be a simple complaint. We suggest that the time limits applicable to TSPs be cut in half, to 10 business days.

Proposed Amendments – Complaint Procedures

95. CIPPIC therefore proposes the following amendments to the Procedural Code:

Section 6.1 should be amended to remove the "in writing" requirement and to replace the content requirements with a list of information that complainants must provide upon request.

Section 6.14 should be amended to read as follows:

"Each complaint must be filed by or on behalf of the Complainant(s) to which the complaint relates. Group complaints will be accepted only if they pertain to the same issue."

The 20 business day limits set out in ss.6.5, 6.8(a), 6.9, 11.1 and 11.3 should be amended to 10 business days.

A new provision should be added to the Procedural Code stating that the Code takes precedence over any conflicting TSP terms of service.

Confidentiality

96. CIPPIC accepts as reasonable the CCTS approach of protecting the confidentiality of TSPs in respect of individual complaints, unless and until the Commissioner renders a decision under s.11.4 of the Procedural Code.

97. We also note that the Members appear to accept the publication of TSP names alongside numbers of complaints received by type and by stage resolved, as is currently done by the

Australian TIO in its Annual Reports.[28] This is key function of the Agency – both for accountability purposes and for marketplace information purposes, so as to enhance the operation of market forces.

98. However, we are concerned that the current wording of s.15 of the Procedural Code may be over-broad and thereby restrict the Commissioner from naming TSPs with respect to systemic issues or industry trends, as opposed to individual complaints. This concern is borne out when we review s.86 of the Bylaws, which prohibits the Commissioner from naming TSPs in any reports on industry issues and trends.

99. It is obvious why the TSPs wish to preserve their anonymity – reputational damage is costly in a competitive industry. However, in the case of systemic issues and industry trends, we see no good reason why TSPs should be able to hide behind a veil of confidentiality. Rather, the Commissioner should have the power to disclose TSP names in all reports and communications other than with respect to specific individual complaints.

Proposed Amendments – Confidentiality

Section 86 of the Bylaws should be removed.

Section 15 of the Procedural Code should be amended so as to apply only to specific individual complaints and not to reporting on industry trends, systemic issues or the like.

Promotion

100. In order for the Agency to be effective, it must be well-known among consumers generally and individual consumers must be referred to it in all appropriate cases. The CRTC should therefore require that all TSP members clearly and prominently advertise the Agency on their websites, in their promotional literature, and on all bill statements. Moreover, TSPs should be required, as part of participation in the Agency, to refer all consumers who express dissatisfaction with their service to the Agency.

101. The Members objected to a suggestion that they include on every bill statement a reference to the Agency, arguing that it would be "very, very expensive"[29] and that "we don't want the CCTS getting every customer question about the bill itself…there is a risk that that is first person the customer will call with every question they have".[30]

102. CIPPIC submits that the standard bill notation need be neither expensive nor risky in terms of generating inappropriate calls to the Agency. First, it will be a standard notice that appears on every bill, so once agreed upon, the only expense is the additional paper that it consumes on hard copy bills. With respect to the desire to have consumers contact their TSP before going to the Agency, the notice can be placed under the TSP contact

[28] See definition of "Annual Report" in s.1 of Bylaws.
[29] Mr. Bibic, Transcript line 452.
[30] Ms. Crowe, Transcript line 457.

information, with a statement that all inquiries and complaints must be made first to the TSP.

103. Efforts should also be made to ensure search engine optimization and placement for the new Agency's website.

104. Finally, consideration should be given to a new name for the CCTS. The existing name is clumsy and difficult to remember, although it does have the advantage of containing likely search terms such as "consumer", "complaints, and "telecommunications".

Unsolicited Telecommunications Investigative Powers (PN-2007-15)

105. For reasons stated in our earlier comments and by other parties, CIPPIC submits that the new Agency should not be tasked with investigating complaints about non-TSP marketers. Even if funding issues can be resolved, this would require a completely different approach to complaints investigation and resolution, and could divert the new Agency's attention from complaints about telecommunications services.

106. Until a body is tasked with investigating and resolving complaints about unsolicited communications, we do however think that the CCTS can and should deal with complaints about TSP marketing practices.

Reseller claims against third party wholesalers

107. Primus Communications Inc. raised the issue of complaints against resellers, where the underlying cause of the complaint is not the reseller but rather the facilities-provider. In such instances, CIPPIC submits that the primary concern of the Agency should be resolution of the consumer's complaint. Third party claims should be recorded and noted along with statistical reporting in Annual Reports. Resellers with such third party claims should pursue them before the CRTC through the existing dispute resolution processes designed for this purpose.

Funding

108. Some TSPs raised the issue of funding for the CCTS, arguing that the current funding structure (a) discriminates against small TSPs, and (b) discriminates against resellers where the problem was caused by an underlying facilities-provider.

109. We support PIAC's recommendation for a funding mechanism that is based 50% on complaints (e.g., a per complaint charge) and 50% on TSP revenues. With respect to the reseller third party claims, we propose that they be handled by the CRTC through the current industry dispute resolution mechanisms. Consideration should be given to establishing an expedited mechanism under which resellers can obtain compensation from wholesalers for fees paid to the Agency in appropriate cases.

Conclusion

110. The Governor-in-Council has called for an independent, effective Consumer Agency with the mandate not just to resolve disputes but also to inquire into and report on industry trends and systemic issues. While the CCTS model established in short order by industry members this past summer has much to commend, it fails to meet the requirements for true independence and effectiveness in a number of respects. It also ignores Cabinet's clear direction for a mandate that includes systemic issues as well as individual complaints.

111. CIPPIC has reviewed the proposal in detail, identifying deficiencies and proposing constructive ways to resolve them. We hope that our input has been valuable and thank the Commission for the opportunity to participate in this process. We look forward to changes that will make the CCTS or its successor a truly independent and effective body.

Respectfully Submitted,

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Cc: Interested Parties, PN 2007-16