



1 June 2015

John Traversy
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: *Call for comments on proposed amendments to the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure made under the Broadcasting Act and the Telecommunications Act, Broadcasting and Telecom Notice of Consultation 2015-115 (Ottawa, 31 March 2015)*

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian broadcasting system that serves the public interest.
- 2 We appreciate the opportunity to participate in the process initiated by Broadcasting and Telecom Notice of Consultation CRTC 2015-115, which invites comments about amendments being proposed by the to remove the requirement to publish notices of consultation for licence renewal applications, and to incorporate amendments made to the *Telecommunications Act* by the most recent federal budget. Our focus in this proceeding is with the amendments related to notice with respect to broadcasting applications.
- 3 In brief, FRPC does not support the proposal to remove notices of consultation for licence renewal applications, on the grounds that the CRTC lacks the legal jurisdiction to do so, because the CRTC has not provided any evidence to support its proposal, and because removal is contrary to the public interest. Our comments are set out below.

- 4 Before setting out our comments, however, FRPC wishes to take this opportunity to set out its concern about the process followed by the CRTC in this matter. When the CRTC issued Broadcasting Notice of Consultation CRTC 2015-115 on 31 March 2015, it purported to seek comments on its proposed amendments to the *Rules*. In Broadcasting Information Bulletin CRTC 2015-116, however, which the CRTC also issued on 31 March 2015, the CRTC presents the changes proposed in Broadcasting Notice of Consultation CRTC 2015-115 as *faits accomplis*:

*The Commission **will** process the licence renewal applications under the rules for applications set out in Part 1 of the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (the Rules of Procedure). ...*

[Italics in the original, bold font and underlining added]

- 5 As we assume that the CRTC has not prejudged the outcome of Broadcasting Notice of Consultation CRTC 2015-115, we respectfully ask whether Information Bulletin 2015-116 was in fact a draft document that should have been attached to Broadcasting Notice of Consultation CRTC 2015-115 for the purposes of review and comment? If not, the presentation of proposals as accomplished facts raises extremely troubling concerns about bias¹ and the true value of public comment in CRTC proceedings. To avoid the appearance of bias we suggest that the Commission withdraw Information Bulletin 2015-116 until it has actually had an opportunity to consider comments filed about Broadcasting Notice of Consultation CRTC 2015-115.

I ***The Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (Rules): Background***

- 6 The CRTC introduced its current procedural *Rules* in 2010, to replace the *Rules of Procedure* that it had established in 1978.²
- 7 When it developed the 1978 *Rules of Procedure* the CRTC was governed by the 1968 *Broadcasting Act*.³ It required the CRTC to hold public hearings when issuing broadcasting licences, when considering licence revocations or suspensions, complaints about broadcasters and – if it would be in the public interest – when considering licence amendment and licence renewal applications:

19.(1) A public hearing shall be held by the Commission

¹ The test for bias was set out, coincidentally, in 1978, in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, [1976] S.C.J. No. 118 (QL), at 394: “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?”

² C.R.C. 1978, c. 375.

³ R.S., c. B-11, am. by c. 16 (1st Supp.) and c. 10 (2n Supp).

(a) in connection with the issue of a broadcasting licence, other than a licence to carry on a temporary network operation; or

(b) where the Commission or the Executive Committee has under consideration the revocation or suspension of a broadcasting licence.

(2) A public hearing shall be held by the Commission, if the Executive Committee is satisfied that it would be in the public interest to hold such a hearing, in connection with

(a) the amendment of a broadcasting licence;

(b) the issue of a licence to carry on a temporary network operation; or

(c) a complaint by a person with respect to any matter within the powers of the Commission.

(3) A public hearing shall be held by the Commission in connection with the renewal of a broadcasting licence unless the Commission is satisfied that such a hearing is not required and, notwithstanding subsection (2), a public hearing may be held by the Commission in connection with any other matter in respect of which the Commission deems such a hearing to be desirable.

....

20. (1) The Commission shall give notice in the *Canada Gazette* of any application received by it for the issue, amendment or renewal of a broadcasting licence, other than a licence to carry on a temporary network operation, of any public hearing to be held under section 19 and of the issue, amendment or renewal of any broadcasting licence.

(2) A copy of a notice given pursuant to subsection (1) shall be published by the Commission in one or more newspapers of general circulation within the area normally served or to be served by the application to which the application, public hearing or the issue, amendment or renewal of the broadcasting licence relates.

8 In asking for public comment on the proposed 1978 *Rules*, the CRTC explained that their objective was

... to enhance the ability of the Commission to carry out its mandate in the public interest. More specifically ...:

- A. To facilitate a more intensive examination by the Commission of major regulatory broadcasting issues.
- B. To enable the regulated industry more fully to understand and to respond to Commission concerns, thereby enhancing the industry's contribution to the effectiveness of the examination of major issues.
- C. To facilitate a wider and more informed participation by the public in the broadcasting regulatory process.
- D. To ensure the fairness of Commission proceedings for all parties.

E. To render the regulatory process as efficient as possible, consistent with the other objectives of the process.⁴

- 9 When it replaced the 1968 *Broadcasting Act* with a new statute in 1991, Parliament maintained the CRTC's duty to hold a public hearing when considering licence applications, suspensions or revocations. Parliament also maintained the CRTC's duty to hold a public hearing when considering licence renewal and licence amendment applications unless the CRTC found that the public interest would not be served by such a hearing. The 1968 and 1991 requirements for notice and public hearings are compared below:

1968 Act	1991 Act
19.(1) A public hearing shall be held by the Commission	Marginal note: Where public hearing required 18. (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with
19.(1)(a) in connection with the issue of a broadcasting licence, other than a licence to carry on a temporary network operation; or	(a) the issue of a licence, other than a licence to carry on a temporary network operation;
19.(1) (b) where the Commission or the Executive Committee has under consideration the revocation or suspension of a broadcasting licence.	(b) the suspension or revocation of a licence;
	(c) the establishing of any performance objectives for the purposes of paragraph 11(2)(b); and
	(d) the making of an order under subsection 12(2).

⁴ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, CRTC Public Announcement (Ottawa, 25 July 1978), "Working Paper", at 2.

1968 Act	1991 Act
<p>19.(2) A public hearing shall be held by the Commission, if the Executive Committee is satisfied that it would be in the public interest to hold such a hearing, in connection with</p> <p>19.(2) (a) the amendment of a broadcasting licence;</p> <p>19.(2) (b) the issue of a licence to carry on a temporary network operation; or</p> <p>19.(2) (c) a complaint by a person with respect to any matter within the powers of the Commission.</p> <p>19.(3) A public hearing shall be held by the Commission in connection with the renewal of a broadcasting licence unless the Commission is satisfied that such a hearing is not required and, notwithstanding subsection (2), a public hearing may be held by the Commission in connection with any other matter in respect of which the Commission deems such a hearing to be desirable.</p>	<p>Marginal note: <i>Idem</i></p> <p>(2) The Commission shall hold a public hearing in connection with the amendment or renewal of a licence unless it is satisfied that such a hearing is not required <u>in the public interest.</u></p> <p>Marginal note: Where public hearing in Commission's discretion</p> <p>(3) The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.</p>
<p>20. (1) The Commission shall give notice in the <i>Canada Gazette</i> of any application received by it for the issue, amendment or renewal of a broadcasting licence, other than a licence to carry on a temporary network operation, of any public hearing to be held under section 19 and of the issue, amendment or renewal of any broadcasting licence.</p> <p>(2) A copy of a notice given pursuant to subsection (1) shall be published by the Commission in one or more newspapers of general circulation within the area normally served or to be served by the application to which the application, public hearing or the issue, amendment or renewal of the broadcasting licence relates.</p>	<p>Marginal note: Notice of hearing</p> <p>19. The Commission shall cause notice of</p> <p>(a) any application received by it for the issue, amendment or renewal of a licence, other than a licence to carry on a temporary network operation,</p> <p>(b) any decision made by it to issue, amend or renew a licence, and</p> <p>(c) any public hearing to be held by it under section 18 to be published in the <i>Canada Gazette</i> and in one or more newspapers of general circulation within any area affected or likely to be affected by the application, decision or matter to which the public hearing relates.</p>

[bold font and underlining added]

- 10 Section 53(1) of the CRTC's current *Rules* also now requires the CRTC to post a notice of consultation in relation to any application to issue or renew a licence under subsection 9(1) of the *Broadcasting Act*:

The Commission must post on its website a notice of consultation in relation to any application made to the Commission for the issuance or renewal of a licence under subsection 9(1) of the *Broadcasting Act* or for the approval of the transfer of ownership or the change in control of a broadcasting undertaking and must provide in the notice an electronic link to the application.

- 11 FRPC understands that the CRTC currently deals with broadcasting applications in three ways:
- it issues notices of consultation that invite the public to submit interventions about the issuance, renewal or amendment of broadcasting licences, and publishes these on its website through the pages for ‘Today’s releases’ (<http://www.crtc.gc.ca/eng/whatsnew.htm>); these notices often set out issues or matters that the CRTC may wish to raise with applicants
 - it lists applications in the ‘Open notices of consultation’ page of its website (<https://services.crtc.gc.ca/pub/instances-proceedings/Default-Default.aspx?S=O&PA=A&PT=A&PST=A&Lang=eng>), along with Part 1 applications, and
 - it announces decisions it has made administratively involving transfers of ownership and other matters, whose applications were not published because the CRTC did not believe they required a public process, in Information Bulletins published after the fact (see *e.g.* <http://www.crtc.gc.ca/eng/archive/2013/2013-62.htm>).
- 12 FRPC supports the idea of a more systematic approach to notifying the public of applications that concern or affect their interests in broadcasting. To the extent that it has not already been done, it would be useful for the CRTC to publish notices about applications it plans to address administratively, along with notices about Part 1 applications it has received, on its “Today’s releases” page as well as in its RSS feed.

II Changes proposed by the CRTC

- 13 Broadcasting Notice of Consultation CRTC 2015-115 does not describe how the public would know that programming or distribution applications in which they have an interest will be considered by the CRTC. It simply states at paragraph 2 that
- ... the Commission proposes to remove the requirement to publish notices of consultation for licence renewal applications. This would allow the Commission to process renewal applications under the rules relating to applications set out in Part 1 of the Rules of Procedure, as indicated in Broadcasting Information Bulletin 2015-116, also issued today. The Commission will retain the flexibility to publish notices of consultation under appropriate circumstances.
- 14 More details about the process that the CRTC plans to use are set out in Broadcasting Information Bulletin 2015-116. According to the bulletin, the CRTC will issue an unknown number of notices each spring that will list the broadcasting licences expiring the following year. Broadcasters would then submit their renewal applications. The CRTC would post these applications on the ‘Part 1’ public proceeding page of its website, but would not issue a notice of consultation inviting the public to intervene unless it thought this was a good idea:

Call for applications

Starting in the spring of 2015, the Commission will publish notices of consultation calling for the submission of licence renewal applications. Separate notices will be published for radio, television and broadcasting distribution undertakings (BDUs). The Commission will normally publish the notices in the spring of each year.

The notice will include a list of all licences expiring in the following broadcast year. It will provide specific instructions on how and when licensees must submit their licence renewal applications, as well as what additional information may be required as part of the renewal process.

The calls for applications will replace the current Commission practice of sending personalized letters to licensees requesting that they submit renewal applications.

This new process will standardize the Commission's approach to licence renewals for all types of undertakings. It will ensure a more transparent licence renewal process for all Canadians: licensees and interested persons will be informed of the stations and services that will be considered for renewal by the Commission more than a year prior to the expiry date of the licences.

Part 1 proceedings

The Commission will process the licence renewal applications it receives under Part 1 of the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (the Rules of Procedure). This means that applications will be posted on the Commission's website for public comment without an accompanying notice of consultation. However, the Commission will retain the flexibility to publish notices of consultation in instances where the Commission deems a notice of consultation to be more appropriate

(Information Bulletin CRTC 2015-116, at paragraphs 1-5)

III **CRTC's jurisdiction for the proposed change not identified**

15 Neither Broadcasting Notice of Consultation CRTC 2015-115 nor Information Bulletin CRTC 2015-116 describe the source of the CRTC's authority to set rules for its procedures.

16 The *Broadcasting Act* does however refer to the CRTC's rule-making authority, in section 21:

The Commission may make rules

(a) respecting the procedure for making applications for licences, or for the amendment, renewal, suspension or revocation thereof, and for making representations and complaints to the Commission; and

(b) respecting the conduct of hearings and generally respecting the conduct of the business of the Commission in relation to those hearings.

17 In our view, section 21 authorizes the CRTC to make rules for the process for applicants to follow when they apply for licences, and for licence amendments, renewals, suspensions or revocations.

18 What section 21 does not do, is state that the CRTC may also make rules to stop providing notice about licence applications, amendments, renewals, suspensions or revocations. In fact, section 19 of the *Act* explicitly requires the CRTC to give notice about licence applications, amendments and renewals:

19. The Commission shall cause notice of

(a) any application received by it for the issue, amendment or renewal of a licence, other than a licence to carry on a temporary network operation,

(b) any decision made by it to issue, amend or renew a licence, and

(c) any public hearing to be held by it under section 18

to be published in the Canada Gazette and in one or more newspapers of general circulation within any area affected or likely to be affected by the application, decision or matter to which the public hearing relates.

19 Notice is an important aspect of fair process in administrative proceedings. When public notice is required, it need not be fulsome and it need not be perfect, but must at least be made.⁵ Public notice permits and promotes public engagement – and performs functions beyond the most obvious one of allowing the public to support or oppose a specific application.⁶

⁵ In *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227 the Court considered a notification process for a proposed official development plan which involved the publication of advertisements in newspapers and the mailing of letters to 11,000 people in the neighbourhood affected by the plan, and held that while this notification was not perfect, it was at least acceptable:

46 In my view, the notice clearly gave the flavour of the by-law being considered. Although it is always possible that an alternative wording might have attracted more people, what is required is fairness, not perfection. The notice listed the public uses proposed for the Arbutus Corridor. Moreover, it is difficult to see how a different notice would have affected the participatory rights of CPR. CPR was fully aware of the nature of the by-law the City was proposing and did not suffer any prejudice from the notice being written as it did. “[W]here it can be readily inferred from the surrounding circumstances, such as active participation in the proceeding, that a party was aware of the nature and subject-matter of the hearing, then an otherwise insufficiently specific notice may be excused”: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 9:5110, p. 9-34.

⁶ *Stevens v. Canada (Attorney General)*, 2004 F.C. 1746 (Fed. Ct):

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In

III CRTC's rationale for proposed change not supported by argument or facts

20 The CRTC says that it wishes to eliminate section 53 to streamline its process, and to make procedures more convenient for applicants.

21 The CRTC has not explained how eliminating its current public notification system will streamline its process, and has not presented any evidence to support this claim.

times of public questioning, stress and concern, they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:

I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are public inquiries. . . . I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along. [Emphasis in original.]

(S. G. M. Grange "How Should Lawyers and the Legal Profession Adapt?" in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry* (1990), 12 *Dalhousie L.J.* 151, at pp. 154-55.)

The public inquiry has been even more broadly characterized as serving a particular "social function" within our democratic culture:

. . . a commission . . . has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.

What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction. . . . Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.

(Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Jacob S. Ziegel, ed., *Law and Social Change* (1993), 79, at p. 85.)

The investigative, educational and informative aspects of inquiries clearly benefit society as a whole. As well, many commissions of inquiry have, through their recommendations, achieved improvements in the particular situation being reviewed. Nonetheless, it cannot be forgotten that harsh and persuasive criticisms have been levelled against them. Every inquiry created must proceed carefully in order to avoid complaints pertaining to excessive cost, lengthy delay, unduly rigid procedures or lack of focus. More importantly for the purposes of this appeal is the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action. These are very real dangers that must be carefully considered.

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- 22 The CRTC's failure to explain the reason it wants to make the changes it is proposing is somewhat ironic given that section 22(2) of the CRTC's current *Rules* requires applicants to set out the facts and grounds to support the decision they seek. By comparison Broadcasting Notice of Consultation CRTC 2015-115 simply sets out the result sought by the CRTC.
- 23 Respectfully, we think the CRTC owes Canadians more than a mere statement that the change proposed will 'streamline' its process in some unknown and unspecified way: will this streamlining save anyone time, and if so, how much? Will this streamlining save any money, and if so, how much?
- 24 We also note the CRTC's argument that its proposal will make "procedures more convenient for applicants." What we do not know from Broadcasting Notice of Consultation CRTC 2015-115 is why – or indeed, whether – the current *Rules* are in any way inconvenient for applicants. If they are, the CRTC should provide facts to support this argument, as well as facts to demonstrate that the change being proposed will be less inconvenient for applicants.
- 25 Finally, Broadcasting Notice of Consultation CRTC 2015-115 does not explain why it is appropriate for concerns about applicants' convenience to outweigh concerns about the loss of notice to the public about licensing applications.

IV No explanation as to how CRTC's proposed changes serve the public interest

- 26 FRPC's main concern about the CRTC's proposal is that it will reduce public engagement in the CRTC's licensing process.
- 27 Making notices of consultation an exception, rather than the norm, in licensing means that interested persons will have to maintain a continual vigil over the CRTC's Part 1 applications page. Respectfully, this would be a tremendous waste of many people's time.
- 28 Two suggestions could limited wasted time. First, the CRTC should post all new Part 1 applications on its "Today's Release" page, on the day it publishes these on its Part 1 applications page. Second, the CRTC should add a section to its website to permit interested parties to be advised when the CRTC receives applications from specific stations: someone interested in CHOI-FM, for example, should be able to sign up on the CRTC's website to receive an automatic notification when the CHOI-FM licensee seeks to amend or renew its broadcasting licence for the station.

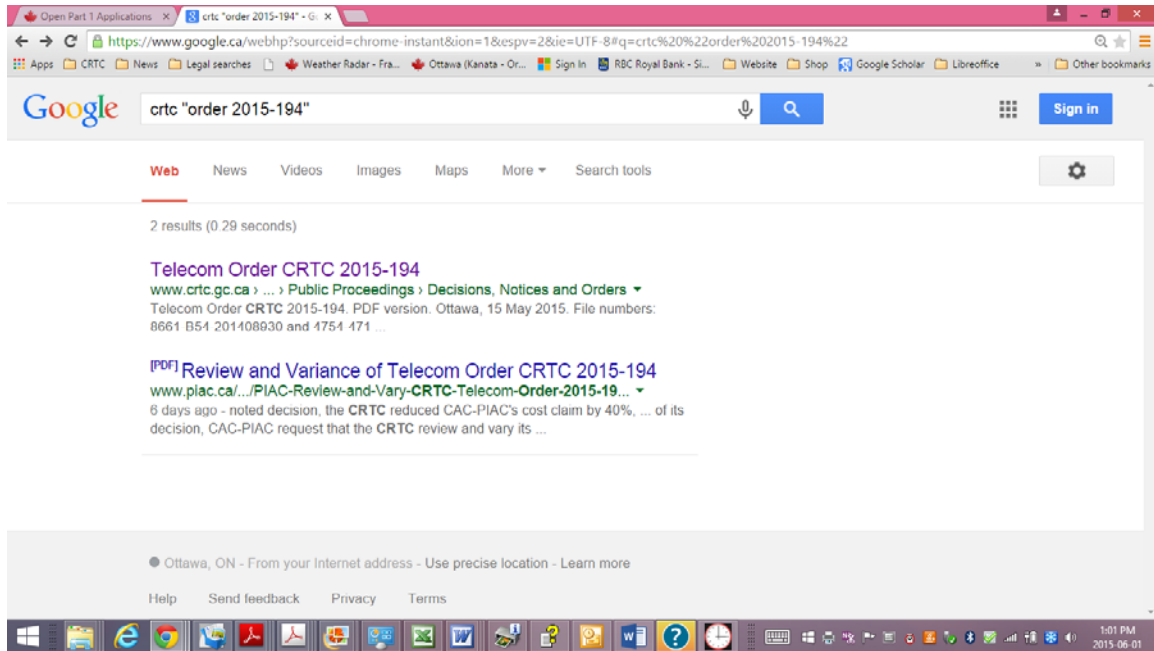
- 29 Even if the CRTC posts all new Part 1 applications on its “Today’s Release’ page and provides interested parties with an electronic notification, though, the absence of the information normally contained in a notice of consultation will require persons to guess at the concerns that the Commission might have about any given application. Interveners will no longer have any warning about the case they are required to meet.
- 30 FRPC suggests that one way of ensuring that interested parties know the case they must meet is to add a CRTC ‘summary of issues’ to the contents of each applicant’s Part 1 application.
- 31 Even with the suggestions we have noted above, however, FRPC is concerned that the changes proposed by the CRTC will reduce, rather than improve or enhance, public participation in CRTC licensing proceedings. This is because the CRTC’s Part 1 applications are almost invisible to electronic search engines like Google Chrome.
- 32 We know that the CRTC’s Part 1 applications cannot easily be found using electronic search engines because we tried to find the first Part 1 application listed on the CRTC’s “Open Part 1 Applications” page of its website on June 1, 2015:

The screenshot shows the CRTC website's "Open Part 1 Applications" page. The page includes a navigation menu, a search bar, and a table of applications. The table has the following data:

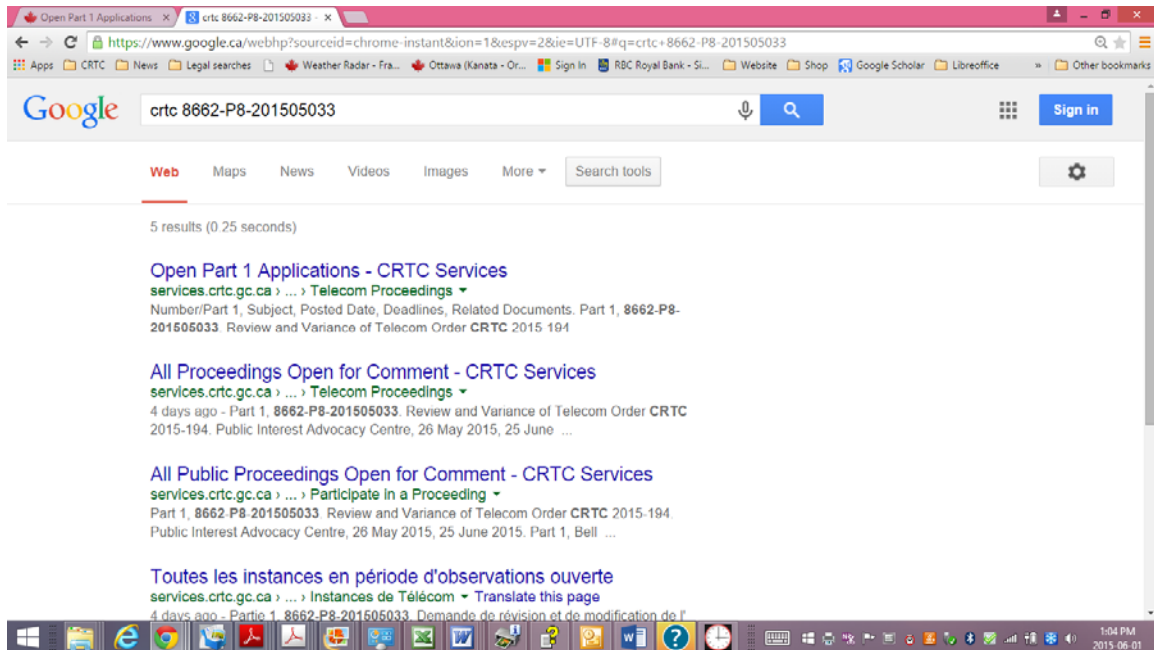
Notice Number/Part 1	Subject	Posted Date	Deadlines	Related Documents
Part 1	Review and Variance of Telecom Order CRTC 2015-194 Public Interest Advocacy Centre	26 May 2015	25 June 2015	Submit

- 33 The first Part 1 application on that page is a request by the “Public Interest Advocacy Centre” (not ‘PIAC’, the acronym by which the organization is commonly known, incidentally) for the CRTC to review and vary Telecom Order CRTC 2015-194.

34 We searched for “order 2015-194” in Google Chrome, and were presented with two (2) results – neither of which guides us to the CRTC’s Part 1 Applications page:



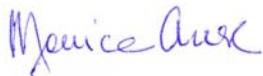
35 Google Chrome only located the Part 1 application when the complete CRTC Part 1 application number was used in the search:



- 36 The problem for the public, obviously, is that very few will know the Part 1 application number until they find the Part 1 application – and at present, they cannot find the Part 1 application unless they know the Part 1 application number. This type of chicken-and-egg problem guarantees that Canadians will grow very frustrated with and/or discouraged by the CRTC’s website, and its public procedures.
- 37 While it would be easy to speculate about potential solutions that the CRTC could use to correct these problems, we instead urge the CRTC to reconsider, rethink and reissue its proposals, along with actual evidence demonstrating how the public interest will be served by changes to the current system.
- 38 Until that happens, FRPC respectfully opposes the changes the CRTC is proposing. In our view, the changes proposed by the CRTC contradict Parliament’s express intention of ensuring the public has an opportunity to engage in the broadcast licensing process. We are not convinced that the CRTC has the legal authority to eliminate public notice of its broadcast licensing activities as its proposal appears to do. We are also not at all persuaded that the changes will serve the public interest – but can see that the changes may well serve the interest of broadcasters that do not want the public to know of, or participate in, proceedings involving their licences.

We look forward to the opportunity of reviewing other comments submitted in this proceeding. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,



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