27 February 2017

Danielle May-Cuconato
Secretary General
CRTC
Ottawa, ON K1A 0N2

CRTC reference 1011-NOC2016-0293

Dear Secretary General,

Re: *Review of the Wireless Code*, Telecom Notice of Consultation CRTC 2016-293 (Ottawa, 28 July 2016), 2016-293-1 (Ottawa, 23 September 2016), 2016-293-2 (Ottawa, 26 October 2016), 2016-293-3 (Ottawa, 5 January 2017), 2016-293-4 (Ottawa, 24 January 2017) and 2016-293-5 (Ottawa, 17 February 2017)

The Forum for Research and Policy in Communications (FRPC) is pleased to submit its final comments in the above-noted proceeding, with the understanding that, pursuant to the Commission staff's letter of 27 February 2017, it along with other parties may participate in another process related to data disclosed by the CRTC at a later date.

If you have any questions or encounter any difficulty in opening the document, please contact the undersigned.

Sincerely yours,

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Telecom Notice of Consultation CRTC 2016-293

Review of the *Wireless Code*

Final Comments

by the
Forum for Research and Policy in Communications

27 February 2017

Contact:

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Executive Summary

ES 1 The Forum for Research and Policy in Communications (FRPC) is pleased to submit its final comments with respect to Telecom Notice of Consultation CRTC 2016-293, *Review of the Wireless Code*. We address four key principles on which changes to the *Code* should be based; specific recommendations for content and wording; consumer awareness and understanding of contracts; and systemic enforcement.

ES 2 At the outset, four key principles should inform the determinations in this proceeding. First, the CRTC should recognize that protecting consumers' rights will strengthen innovation and differentiation, by setting a customer service standard that encourages WSPs to innovate in the services they offer, rather than in the complexity of their plans. Second, the *Code* must be able to function as intended in Canada's highly concentrated wireless service market, recognizing that users lack choice and continue to face barriers to switching because the market is not competitive. Third, evaluating the *Code*'s effectiveness must entail quantitative and qualitative measures, including surveys and mystery-shopping programs. Fourth, the *Code* requires a clear purpose to permit its interpretation, evaluation and enforcement; the Forum to this end supports the preamble proposed by the Union des consommateurs.

ES 3 As for specific recommendations, the *Code* must

a. incorporate provisions that more effectively address accessibility needs, including but not limited to standardized terminology and translations, and realistic data usage amounts in trial periods
b. recognize data as a key term in light of subscribers view of data as essential
c. define "account-holder" to protect those who pay the bills, from bill shock
d. disallow WSPs from asking consumers to return or pay back the value of inducements, as this has nothing to do with genuine competition, network quality or other core aspects of mobile wireless service
e. require WSPs to make the Critical Information Summary (CIS) available to users before contracts are signed, to strengthen their knowledge and sector competition
f. require trial periods to include a more reasonable amount of voice, text and, in particular, data; either to reflect half of the average actual monthly usage on the chosen plan (excluding software or hardware updates beyond users' control), or a specified minimum, such as 4GB for those who are deaf or hard-of-hearing
g. cap, reduce or – preferably – eliminate unlocking fees given the lack of evidence that locking prevents fraud effectively, but also prevents users from testing and switching networks, and
h. give equal protection to consumers of prepaid services and postpaid services

ES 4 The Forum also recommends that the CRTC strengthen both situational and longer-term awareness of the *Code* by requiring WSPs to advertise its existence in their retail outlets, attach copies to contracts, and advertise the *Code* in each customer invoice.

ES 5 Last, the CRTC must establish systemic and transparent annual enforcement measures to permit the *Code*'s results to be evaluated. Without such measures, the *Code* will have no meaningful impact, either on consumer protection, or market dynamism. With them, all wireless consumers are likely to benefit from the *Code*'s protections – not just those who have the time, tenacity and/or luck to pursue their concerns.

I Introduction: a *Code* based on four key principles

1 Our submission begins by setting out four key principles that must underlie the *Code* and revisions to it. Part II then addresses needed changes to the *Code's* content and wording. Part III addresses the issue of awareness, while Part IV concludes by addressing the necessity for systemic evaluation of a process tailored to individual complaints.

A *Protecting consumers' rights will strengthen innovation and differentiation*

2 In making specific determinations about the content and wording of the *Code*, the CRTC should keep four overarching principles in mind. These involve consumer protection, market structure, evaluation and purpose.

3 First, the goal of the *Code* must be to protect consumers' rights, not necessarily to address wireless innovation and differentiation as WSPs argued in this proceeding—and as they tried to argue in the TNoC 2012-557 proceeding.

4 WSPs presented no evidence showing that changing the *Code* would harm wireless innovation and differentiation in Canada:[1] given consumers' keen desire for new wireless phones, for instance, where are the data showing that the *Code* has in any way limited or stopped Canadian WSPs from designing new and innovative handsets? They have instead focused on 'innovating' plan configurations – with the result that they so thoroughly confused and angered Canadians that by 2012 the CRTC was forced to introduce the *Code* to protect consumers from the worst practices of a wireless oligopoly.

5 Even if the *Code* did affect innovation and differentiation – and, again, where is the evidence? – the CRTC's mandate and the *Code*'s purpose must still be to serve the public interest. If unbundling devices from wireless service serves consumers' interests by offering more choice, for instance, it would be nonsensical to reject that change to allow WSPs to continue to offer below-standard service in the name of 'innovation' and 'differentiation'.

6 Innovation and differentiation in this context should consist of a difference in the *kind* of service standards offered to customers, and not a difference in *degree* of customer service standards. Put another way, the WSPs should innovate and differentiate on the basis of different kinds of consumer-friendly practices they offer, as opposed to on the basis of varying degrees of consumer-friendliness. The Union des consommateurs (Udc) put it best:

> La *souplesse* peut être acceptable jusqu'à un certain point, mais le fait d'invoquer l'innovation technologique ne devrait pas être la potion miracle qui fait disparaitre toute règlementation.[2]

B *Canada's highly concentrated wireless market is not 'competitive'*

7 The second principle underlying the *Code* is that the *Code* only exists because of a highly concentrated mobile wireless market[3] that has become even more concentrated than when

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[1] See, *e.g.*, TELUS, Transcript I, at ¶729-30; Bell, Transcript II, at ¶1573; Quebecor Media, Transcript II, at ¶2500-01; Rogers, Transcript II, at ¶2602; and Response to TELUS(CRTC)6Feb17-6. Implementing minimum or standardized consumer protection standards will not mean WSPs are forced to stop innovating; it will simply compel them to innovate on other grounds, above a consumer-interest floor that the Commission, alongside the CCTS, would set and enforce through the *Code*.

[2] Union des consommateurs, Transcript III, at ¶3045.

the *Code* was first introduced.[4] Market concentration creates real harms, as the Competition Bureau pointed out in its recent statement about the Bell-MTS merger: "as a result of coordinated behaviour among Bell, TELUS and Rogers, mobile wireless prices in Canada are higher in regions where Bell, TELUS and Rogers do not face competition from a strong regional competitor."[5] Even if the CRTC has excluded market competition and rates from this proceeding's scope, the wireless market's current oligopolistic structure explains its lack of dynamism, and justifies the *Code*'s continued protections of individual wireless users before, during, and after their mobile wireless-seeking visits to malls and storefronts across Canada.

C *Evaluation should include quantitative and qualitative measures*

8 Third, the record of this proceeding established that confusing purposes lead to confusing outcomes and uncertainty in evaluating them. If the *Code* is supposed to promote market dynamism, does 'stable' churn mean that the market is less, the same or more 'dynamic'? Do falling numbers of complaints mean that the market is more dynamic, or—as the CCTS itself noted—do they reflect a complex complaints process in which consumers must run an escalating gauntlet of customer service representatives before reaching the CCTS, so that its own statistics only represent the tip of the iceberg in terms of the problems that wireless customers face?[6] Many give up before that point or find the process not worth their time.[7]

9 Effective public policies are clearly stated and permit desired goals to be measured against actual outcomes. The Forum asks the CRTC to set out in its TNoC 2016-293 determination a follow-up public proceeding to devise an annual evaluation plan for the *Code.* Annual measurement and annual reports on the *Code*'s outcomes are required to avoid the necessity of what SaskTel seemingly described as a "consumer uproar" threshold[8]—especially in light of the CRTC's commitment to serving the public interest.

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[3] "The Commission is required by the Act to exercise its powers to ensure that the policy objectives set out in the Act are fulfilled. Since 1994, the Commission has not regulated wireless services in as much detail as it does some other telecommunications services, having found that there is sufficient competition to protect the interests of users of wireless services. However, the Commission has retained its powers under section 24 and subsection 27(2) of the Act regarding wireless services to ensure that it has the tools necessary to address instances when market forces alone are not ensuring that the policy objectives in the Act are being met. In Telecom Decision 2012-556, the Commission found that, although it is appropriate to continue to decline to regulate certain aspects of wireless services, including rates and the competitiveness of the marketplace, it is necessary at this time to impose additional measures for consumers, using its powers under section 24 of the Act." TRP CRTC 2013-271, *The Wireless Code* (3 June 2013), at ¶23-25.

[4] See, *e.g.* The Coalition, Transcript I, at ¶162, ¶193; Middleton and Shepherd, Transcript III, at ¶3281-84, ¶3415-17; and Bradley Nickel, Transcript III, at ¶3707-09.

[5] Competition Bureau, "Competition Bureau statement regarding Bell's acquisition of MTS" (15 February 2017), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html>.

[6] CCTS, Transcript IV, at 5364-67: "So when you look at our numbers, we urge you to consider the fact that all of that stuff that happens before it gets to our shop, we don't have a window into that. We don't know what the numbers are. We don't know how fussed people are, other than what the people who do come to us tell us. … And so all we get to report is the small proportion of the tip of the iceberg that we actually were able to investigate."

[7] Pavlović, et al, Transcript I, at ¶1323-30; Consumers Council of Canada (CCC), Transcript II, at ¶2046.

[8] SaskTel, Transcript III, at ¶4141. See also the comments of Pavlović, et al, Transcript I, at ¶1437-41, regarding consumer resources: "I'd like to also add that consumers are not a uniform group. They're very different sub-categories of consumers and organizing consumers has always been a problem of a consumer

10 The CRTC's annual evaluation plan should be based on quantitative and qualitative research measures such as well-designed surveys, mystery-shopping programs and focus groups.

D A clear purpose will strengthen enforcement and evaluation

11 Annual evaluations will only be relevant if the *Code*'s actual purposes are both clear and empirically measureable. Therefore, as several groups including FRPC have emphasized since the start of this proceeding, the CRTC must define the purpose of the *Wireless Code* – setting out a regulatory 'North Star', if you will, to provide direction and guide progress. The CRTC's determination and the *Code* itself should state whom the *Code* serves, how it is intended to serve consumers' interests, how it should be interpreted by wireless service providers and CCTS, and in the longer run, how its effectiveness will be assessed.

12 In this respect, the Forum set out proposals for the *Code*'s purpose and its objectives in Appendix 3 of its 3 October 2017 submission in this proceeding. The Forum has since then also reviewed the preamble proposed by the UdC, and supports its addition to the *Code* to strengthen compliance with and evaluation of the *Code*. The highlighted passages below are the ones that in our view are absolutely critical and must be included in the *Code*'s preamble:

> *Suite à un vaste examen, motivé notamment par les nombreuses plaintes des consommateurs,* ***le Conseil a jugé essentiel de mettre en place le Code sur les services sans fil pour atteindre les objectifs de la politique canadienne de télécommunication, incluant l'offre de services abordables et de*** qualité ***et la satisfaction des exigences économiques et sociales des usagers. Le Code a pour objectif de protéger les intérêts*** *économiques et sociaux* ***des consommateurs tant sur le plan individuel que collectif.***
>
> ***Les mesures de protection prévues au présent Code****, inspirées des lois provincials de protection du consommateur,* ***visent à encadrer les droits des parties*** contractantes ***les plus vulnérables.***
>
> ***Il convient de rappeler que les consommateurs****, et plus particulièrement les consommateurs les plus vulnérables et les plus inexpérimentés,* ***doivent être en mesure de*** faire ***des choix éclairés, et de bénéficier pleinement des protections qui leur sont accordées.***
>
> ***Les droits prévus au Code doivent donc être interprétés de manière large, libérale, et inclusive, et les exceptions et les conditions de manière restrictive. Le Code, comme les contrats, doit être interprété en tout temps en faveur du consommateur.*** *Les pratiques du marché doivent être adaptées pour tenir compte des vulnérabilités particulières des consommateurs. De plus,* ***toute renonciation par le consommateur aux droits que lui confère le présent Code est nulle, qu'elle soit contractuelle ou autre.*** *Les fournisseurs ne peuvent ajouter de leur propre chef, contractuellement ou autrement, aux conditions et aux exceptions prévues au Code.*
>
> *INTERPRÉTATION*

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movement. …[T]here is in this increasing information overloaded society increased apathy as well and I also think the organisations who are capable of organizing consumers may not necessarily have the capacity and bandwidth to do that. But -- and again I don't necessarily have to tell you this or people in this room, that funding for consumer organizations over the years has dwindled and that it is very difficult for them to sustain themselves let alone have large campaigns that may actually -- not necessarily cost a lot of money, but cost a lot of resources. And if they have limited resources then they have to really split them into actions that would produce the most results." Further, see CCTS's later comments, Transcript IV, at ¶5253: "[R]emember that everybody's getting their message out there … very crowded information marketplace."

> *Le Code et les* contrats *doivent être interprétés en tout temps en faveur du consommateur. Toute renonciation par le consommateur aux droits que lui confère le présent Code est nulle, qu'elle soit contractuelle ou autre.*
>
> *Les fournisseurs ne peuvent ajouter de leur propre chef, contractuellement ou autrement, aux conditions et aux exceptions prévues au Code. Les fournisseurs ne peuvent présumer des connaissances des consommateurs :* ***leurs pratiques et leurs représentations doivent être adaptées aux vulnérabilités particulières*** des ***consommateurs.*** *Toute tentative des fournisseurs de contourner le Code ou ses principes d'interprétation doit être interprétée comme constituant une infraction*.[9]

II Content and Wording of the Code: Specific Recommendations

13 The proceeding's evidence supported changes to the *Code*'s content and wording with respect to: accessibility, the status of data as a key term, authorizations in shared plans, inducements, the availability of the Critical Information Summary (CIS) as a shopping tool, trial periods, device unlocking, and prepaid services. We address these points below.

A Accessibility

14 The Forum supports changes proposed by accessibility groups such as the Deaf Wireless Canada Committee (DWCC), including standardized terminology and translations,[10] trial periods with a realistic amount of data,[11] and contracts in alternative, accessible formats.[12]

15 Provisions related to data—including trial period amounts, overage caps, and its status as a key term—are essential for all wireless users, but are especially important for deaf and hard-of-hearing (DHoH) consumers. Customers who are deaf or hearing impaired, for instance, depend on data for the basic communications functionality that hearing Canadians receive from voice service:[13] their requirements should be recognized and protected by the *Code* as a matter of equity. The *Code* should be changed, therefore, to include provisions that address their requirements, including but not limited to the provision of at least 4GB of data in trial periods, and clearer advertising of text- and data-only wireless service plans.

16 In addition to changing the *Code* to address data, the continued absence of innovative solutions by WSPs to the legitimate and well-founded concerns of deaf and hard-of-hearing consumers requires the CRTC to act. It should evaluate how WSPs serve these consumers, and report the outcomes in its annual reports. Without this information it will be impossible for the

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9 The Forum respectfully submits that, for the purposes of translating the underlined sentence, attempts by WSPs to circumvent the Code should be viewed as a 'breach', but not as an 'infraction' as CCTS' sole role is to attempt to determine whether, with respect to each complaint, the Code has been breached: it does not otherwise regulate wireless service providers and therefore cannot determine whether 'offences' or infractions have been committed.

10 Transcript IV, at ¶4670.

11 *Ibid*., at ¶4681, 4686-88.

12 *Ibid.*, citing CCTS, at ¶4801.

13 "If I could just add, one big concern with the deaf community is video communication, and it uses a lot of data. We are trying to come to an agreement on that. The deaf community would like unlimited no cap. They don't want to worry. They want the freedom to be able to communicate and use their phone anywhere anytime we need. […] We don't want to be penalized for data overages because that's our only mode of communication. So that is one thing that we really want to emphasize, unlimited data is our preference." DWC, Transcript (9 February 2017), at ¶4706-07.

Commission, or indeed Parliament, to take further steps if required to protect the interests of all Canadians.

17 Based on their undertakings, several wireless service providers (WSPs) are amenable to producing ASL and LSQ videos as the DWCC suggested,[14] whether independently or as an industry project.[15] Multiple WSPs also noted the lack of in-house expertise regarding what would best address accessibility needs; the CRTC's coordination of an initiative with DWCC and other accessibility groups may be the best way forward.[16]

B Data as a key term

18 The TNoC 2016-293 evidence confirmed that the CRTC must formally establish data as a key term of mobile wireless contracts to protect consumers in Canada's telecommunications market. This view was supported by the CRTC's surveys in which consumers said they see data as essential, by CCTS[17] and many public-interest interveners, including the Forum, by Professors Catherine Middleton and Tamara Shepherd,[18] and by the Consumers Council of Canada (CCC).[19] As the Coalition noted, consumers today use and think of data as an essential, core aspect of mobile wireless services:

> How consumers view their contracts is data to them is essential. It's the reason why they get cell phones. And to say that it's not a key term is cheating, to be honest. It's not lining up with expectations of consumers. It doesn't line up with the words of the Code. The CCTS has said it doesn't line up with the words of the Code. How much clearer do we have to make this?[20]

19 WSPs also agreed that in this day and age, "Data is always a key term."[21] We note that Freedom Mobile and Quebecor Media already treat data as a key term and set this matter out as such in

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14 DWCC, Transcript IV, at ¶4582-92. See also DWCC Undertaking, 22/Feb17, at ¶6h.

15 Bell Undertaking, 16/Feb17, at ¶A18; Response to Québecor Média(CRTC)6fév2017-18 ACT 2016-293; Response to TELUS(CRTC)6Feb17-18 (EXHIBIT 1); Response to SaskTel(CRTC)07Feb17-17 and SaskTel(CRTC)07Feb17-18.

16 In addition, the CRTC should inquire into how much such an endeavor would reasonably cost, given the estimations among WSPs range from $15,000 for one three-minute video, to $40,000 for three such videos, including pre-production, production, and post-production, to up to $50,000 for post-production alone. In contrast, the estimate that DWCC provides in its undertaking amounts to less than $2,000 total per video. Freedom Mobile Undertaking, 16 Feb/16 at ¶A17; Response to Québecor Média(CRTC)6fév2017-17 ACT 2016-293; Bell Undertaking, 16 Feb/17, at ¶A17, page 10; and DWCC Undertaking, 22/Feb17, at ¶A3n and A3n.

17 CCTS, Transcript IV, at ¶5100-02: "Some providers have been excluding data from the main section of the contract and now adding it under a different section, usually called 'add-ons', 'optional services', or 'promotions'. … This is important because data is an essential service for many Canadians and because whether or not data is considered a 'key term' of a contract has important implications for the rights and obligations of both the customer and the provider...".

18 Middleton and Shepherd, Transcript III, at ¶3279-80: "Another is changing consumer demand, particularly around the now-central status of data, which changes the implications of the ways that plans are typically worded. In accordance with the basic service ruling of December 2016, data can no longer be considered an add-on."

19 Consumers Council of Canada, Transcript II, at ¶1847: "Smartphones and wireless access to data are becoming an essential part of their day-to-day lives."

20 The Coalition, Transcript I, at ¶467.

21 *Sic*; SaskTel, Transcript III, at ¶4179.

their respective Critical Information Summaries.[22] The *Code* should require all WSPs to take this step, by including data as a key term in their service plans and contracts.

C *Authorizations in shared plans*

20 As the Forum and others said in their intervention and oral remarks, the *Code* should address shared wireless plans, often known as "family plans". More Canadians are using these plans, and the CRTC's 2016 Wireless Code survey showed that they were more likely to experience bill shock.[23] We believe Canadians strongly support the idea that those who pay for wireless service, should be the ones to make decisions about overages.

21 The CRTC should therefore add and define the term "account-holder", to distinguish it from customer or user.[24] Both the account-holder and user of a given device should receive notifications when the user reaches a data cap or triggers data overage. Account-holders will then know what is happening on all lines, to prevent bill shock; and the users will know the situation for their phone, the tool upon which they rely for daily and emergency communications.[25]

22 The *Code* must also ensure that WSPs cannot multiply the $50 overage cap by the number of lines in a single account. Such steps go against the spirit of the *Code*, if not the letter, and increases, rather than prevents, incidents of bill shock. The CCTS noted that multiple providers currently engage in this practice, including Rogers, TELUS, and Bell,[26] although Rogers itself suggests capping multi-user accounts at a maximum of $100 total.[27]

23 Notably, smaller competitors such as Eastlink and Videotron already proactively have mechanisms in place to protect users and account-holders, including notification and consent regarding data overage charges, capping users at $0 rather than waiting for them to reach $50, and maintaining the intended $50 overage cap even on multi-user plans.[28]

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[22] Freedom Mobile, Transcript III, at ¶3652: "The data allotment, the full-speed data allotment that is included with your monthly plan that you're signing up to is a key term and it is set out in the CIS and it is -- and if the customer is on any form of term contract, that plan is held intact and in place and not changed." Quebecor Media, Transcript II, at ¶2467: "On est d'avis que ça fait partie des modalités du contrat. Donc aujourd'hui quand un client s'abonne, dans son résumé essentiel, résumé des informations essentielles, le nombre de données figure dans son contrat."

[23] As noted by the Coalition during the hearing (Transcript I, at ¶78).

[24] See also the Coalition's undertaking of 16/Feb17, at ¶47-49.

[25] As Rogers noted, "users should have some leeway to unblock themselves": Rogers, Transcript II, at ¶2764. To prevent bill shock to the account-holder, however, the CRTC could establish a secondary data overage cap at a lower dollar amount. For example, in the scenario that Rogers suggested, with the lost child, it would be in nobody's interest if a child got lost and at the same time happened to hit the overage cap of $50, and thus could not call for help. At this point, the child, as the user of the device, should be able to consent to data overage beyond $50, but only up to an additional $5 or $10—enough to call a parent or otherwise find their way home. Once that secondary cap is reached, the account-holder must be notified and only they or users they have authorized may consent to further data overage charges. This secondary cap addresses both concerns, by allowing the device user some leeway for emergencies, while also protecting the account-holder's bill liability.

[26] Response to CCTS(CRTC)9Feb17-1.

[27] Rogers, Transcript II, at ¶2598.

[28] Videotron, Transcript II, at ¶2290-97, 2231-41; Eastlink, Transcript I at ¶528, 604, and 612; and Eastlink Undertaking at response to question 4.

D *Recouping inducements*

24 Under no circumstances should the CRTC allow carriers to recoup the cost of inducements that they unilaterally decided, as sophisticated business entities, to offer. Giving promotional or "thank you" gifts as a customer acquisition strategy should be considered a part of each company's marketing budgets, and more broadly part of the cost of doing business. Both Bell and Videotron acknowledged this at the hearing.[29]

25 Allowing the recovery of inducements—or their value, however that is established—will reintroduce a barrier to switching and runs contrary to consumer expectations compared to their other shopping experiences.[30] Practical considerations militate against allowing such recovery: supposing a consumer has given away, lent, broken, or consumed the gift in the meantime, not realizing they would have to return it or pay back its monetary value after the fact? What the WSPs are doing is attempting to transform what is now a gift, into a bailment. We believe that very few Canadians support WSPs in this position, and that most oppose it.

26 Perhaps most importantly, enabling carriers to give larger and more extravagant material incentives by forcing customers to insure them would lead the retail mobile wireless services market in the wrong direction. If inducement-reimbursement were approved, WSPs would be competing on grounds far removed from their core services of data connectivity, price, network reliability, and quality of service in voice or otherwise.

27 This idea appeared repeatedly throughout the hearing. The hearing's chair specifically asked, "Why do you want to provide yet more opportunities [to] the wireless service providers to compete on everything except telecommunication service pricing?"[31]

28 Rogers noted that disallowing recouping the cost of inducements "reduces our appetite to make some of these offers"[32]— and that is precisely the point: whatever appetite WSPs have to compete on virtual reality headsets, Bluetooth headphones, smartwatches, or other product markets,[33] the CRTC should not encourage it at the expense of the carriers' own market: that of competing on mobile wireless voice and data connectivity.[34]

29 As the Forum said at the hearing,

> This is a cost that companies choose to bear. This is where they want to compete. They want to compete on the chocolate giraffe or the bunny or the teddy or whatever they want to do; that's their choice. Consumers are going to them, not to get the chocolate giraffe or the bunny; they're going to them to buy the wireless service, and possibly a phone.[35]

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29 Bell, Transcript II, at ¶1704; and Quebecor Media, Transcript II, at ¶2362.

30 The Coalition, Transcript I, at ¶92-98.

31 The Coalition, Transcript I, at ¶390. See also the Chair in Quebecor Media, Transcript II, at ¶2499: "Oui, mais il pourrait aller financer son téléphone ailleurs et on pourrait peut-être voir plus de concurrence sur les prix de télécommunications plutôt que les accessoires."

32 Rogers, Transcript II, at ¶2841.

33 *Ibid.*, at ¶2829.

34 In contrast, the United States recently saw a veritable stampede of mobile wireless service providers offering new unlimited data plans for the first time in several years, including AT&T, Sprint, Verizon, and major improvements to T-Mobile's offering from last year.

35 FRPC, Transcript III, at ¶4476.

E Critical Information Summary

30 Since the beginning of this proceeding, public interest and civil society groups have called for making the Critical Information Summary (CIS) available to mobile wireless customers before they sign their respective contracts with WSPs. The Forum believes that Canadians strongly support this position, and nothing on the proceeding's record has persuaded us otherwise.

31 If anything, the mystery shopper evidence presented at the hearing by Pavlović, *et al*, on the UOttawa Law panel only emphasized the need to present customers with a CIS before, not after, they sign a contract. Professors Middleton and Shepherd also pointed out that Bell, Rogers, TELUS and Eastlink all claim that consumers can get all the information they need from the WSPs' websites – but fail to mention that online information is often confusing:

> And yet, when examining the examples furnished by these providers […] it is apparent that the pricing plans are not quite so simple. We looked at the screenshots and links appended to these responses and found a confusing array of plans, presented in different permutations, terminology like premium, light, heavy, flex, share, tab, and easy pay, even under a single brand evidences how confusing it can be for consumers to try and navigate the offerings and understand in simple terms how one plan compares to another. […] By contrast, a standardized CIS would assist consumers to get past the marketing rhetoric with which they are obviously frustrated in order to evaluate for themselves the appropriateness of particular plans for their communication needs.[36]

32 TELUS argued that the CIS is unnecessary due to the abundance of material available elsewhere[37]— but this abundance is precisely the problem, as indicated above. Bell, in contrast, highlighted the lack of certain information in the CIS, such as network coverage, speed, reliability, handsets, or alternative plans[38] although no one is proposing that WSPs give customers the CIS alone, as a replacement for all other available materials. The fact that wireless carriers such as Freedom Mobile and SaskTel already provide the CIS to customers ahead of contract signing[39] establishes that doing so is not as onerous as other WSPs may have suggested.[40]

33 Requiring carriers to offer the CIS to customers before they sign contracts—and at least if the customers request it—recognizes that even if information such as network coverage, speed, and alternative plans is available—somewhere—what customers need today is a straightforward, no-frills summary of the actual offer being made to them, so that they can evaluate it and compare it with other offers. In truly competitive markets, sellers need no encouragement to give potential customers comparative shopping information; that is not the case in the Canadian wireless market, and the CRTC must therefore act.

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36 Middleton and Shepherd, Transcript III, at ¶3248-52.

37 TELUS, Transcript I, at ¶845, 1566-69.

38 Bell, Transcript II, at ¶1602-08.

39 Freedom Mobile, Transcript III, at ¶3468; SaskTel, Transcript III, at ¶3928; and Response to SaskTel(CRTC)07Feb17-1 NC 2016-293.

40 Relying on the competitive market – *i.e.*, the practices of Freedom Mobile and Sasktel – to change their large competitors to imitate their practices will likely be ineffective, unfortunately, due to lack of meaningful competition in the wireless market; had the market been competitive, other wireless service providers would have already adopted Freedom and Sasktel's practice.

F *Trial period*

34 Interveners such as the Coalition, the Consumers Council of Canada and the Forum all suggested that trial periods give consumers more reasonable limits within which to test out new plans and devices.[41] This is true for data, and especially true when accessibility is at issue.

35 The hearing's record further confirms this need. Freedom Mobile's practice of giving unlimited voice, text, *and* data for their trial periods[42] is a sign of what genuine competition should look like – not marketing inducements that are scarcely disguised, re-invented early cancellation fee. The *Code* should encourage other WSPs to follow suit by mandating a reasonable amount of data, voice, and texts for a given trial period, nearer to a customer's actual usage.

G *Unlocking*

36 The TNoC 2016-293 hearing was particularly illuminating with respect to locked devices and unlocking fees. It established that locked devices may not adequately address potential fraud, which is the primary reason given for unlocking fees,[43] and that device locking is initiated by carriers, not manufacturers.[44] At the time of writing no evidence from WSPs established that locked devices and/or high unlocking fees prevent fraud. But at least one provider strongly argued against this reasoning, suggesting that locking devices harms consumers even beyond hindering market dynamism and restricting competition.

37 Freedom Mobile called for mandatory free unlocking of all devices in addition to selling unlocked devices, in both its written and oral submissions and undertakings.[45] Videotron and Eastlink also maintained that abolishing unlocking fees (if not abolishing locking in the first place as Freedom advocated), would be "much easier to implement"[46] and "would not in itself entail significant installation costs",[47] compared to amortizing unlocking fees over the course of a customer's contract. Neither Rogers, Videotron nor SaskTel appeared strongly concerned with limiting unlocking fees as a form of "rate regulation", and the latter two described how fees and pricing attached to devices are in fact separated from monthly service rates.[48]

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41 The Coalition, Transcript I, at ¶369; CCC, Transcript II, at ¶1977.

42 Freedom Mobile, Transcript III, at ¶3591.

43 Freedom Mobile, Transcript III, at ¶3508-15: "[W]e've heard some carriers say well…it's a fraud protection. I'm personally a little skeptical about that for a number of reasons. … [W]e actually see a lot more harm in keeping the codes around then what you had—the harm you would prevent in terms of extra fraud by delaying the codes."

44 Bell, Transcript II, at ¶1725, 2372-76; Freedom Mobile, Transcript III, at ¶3520. Note that the letter from Samsung that Bell submitted in its undertakings appears to have been written expressly for the purpose of this proceeding, and was not, for instance, an independent pre-existing explanation that Samsung had to provide to Bell in the context of their relationship alone.

45 Freedom Mobile, Transcript III, at 3452; Response to Question 11 in Freedom Mobile Undertaking, 16/Feb17: "A far better solution [than amortization or other administration of unlocking fees] is just to abolish unlocking altogether, thus removing the need to maintain and provide unlocking codes."

46 Eastlink Undertaking, 16Feb/17, Response to Question 11.

47 Response to Québecor Média(CRTC)6fév2017-11 ACT 2016-293.

48 Response to Rogers(CRTC)16Feb17App1-10; Response to Québecor Média(CRTC)6fév2017-10 ACT 2016-293: "Le montant du bénéfice consenti lors de l'abonnement (sous forme de réduction de prix d'un appareil) ne sert qu'à calculer le frais de résiliation potentiel du client s'il se désabonne avant la fin de sa période d'engagement. Ce n'est qu'une construction réglementaire qui ne détermine pas le tarif mensuel du client."; and Response to SaskTel(CRTC)07Feb17-13 NC 2016-293:" Based on the SaskTel pricing model in place today, device

38 The evidence also established that unlocking is for the most part an inexpensive task for WSPs, which – with rare exceptions – should not cost more than $10-$30.[49] Yet CCTS reported that consumers have submitted many complaints regarding major difficulties in obtaining unlocking codes or services from their providers.[50] CCTS has also observed apparent increased interest among Canadians in unlocking their devices, if number of complaints is anything to go by.[51]

39 Locked devices impair market dynamism in at least two ways. First, it prevents consumers from being able to test out different providers' networks for core quality of service factors such as coverage, speed, and reliability.[52] Consumers are therefore less informed about available alternatives, and are less likely to explore switching providers, let alone actually switch.

40 Second, the convention of selling only locked devices with high unlocking fees inhibits the sale of unlocked devices overall: even if a carrier wanted to sell unlocked devices, it would be uniquely disadvantaged (due to the uncompetitive nature of Canada's wireless market) unless others sold unlocked devices as well.[53]

41 Third, the absence of market dynamism has in any event enabled unlocking fees in Canada to grow over the past few years.[54] Meanwhile citizens in other jurisdictions enjoy much lower unlocking fees, if any.[55] The FRPC strongly believes that Canadians oppose unfettered growth in unlocking fees, and support capping of such fees.

42 Limiting or eliminating unlocking fees through the *Code* do not constitute rate regulation, as Bell and TELUS argue.[56] The charge for unlocking devices is not a "rate" so much as an additional one-time fee—where monthly service fees exchange remuneration for service, unlocking fees appear primarily to serve to lock in customers and to prevent them from testing and easily switching to other providers' networks.

43 The CRTC should amend the *Code* to address unlocking fees. Based on the evidence at the hearing, the Forum supports the elimination of such fees by the *Code*. In the alternative, and based on indications that that the public supports a cap, we reaffirm our support for a cap on

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subsidy and rate plan prices are exclusive of one another. … SaskTel wireless customers are able to change the converged wireless rate plan they subscribe to at any time, including during their commitment period. There would be no impact to the price charged for the wireless device or the monthly rate plan."

[49] Transcript IV, at ¶3485-91 (Freedom Mobile).

[50] CCTS, Transcript IV, at ¶5348-50.

[51] Response to CCTS(CRTC)Exhibit1-2. The alternative is that Canadians have maintained the same level of interest, and providers have become worse at meeting those needs.

[52] Freedom Mobile, Transcript III, at ¶3597.

[53] *Ibid.*, at ¶3479-81: "[W]e consider unlocking fees to be 'toxic revenue'. It's revenue that we earn that basically angers and displeases customers. The problem with … not having phone locking is that we can't be the only ones out there doing it … basically, our phone inventory would disappear as a small carrier. … I don't know if it's ironic or perverse or what the right adjective is, but the impact of actually disproportionately harming us because all of a sudden our competitors, the more dominant carriers would realize that all of our customers have unlocked phones and you could imagine targeted promotional plans to Freedom customers that wouldn't necessarily apply to the other larger competitors because they still have locked phones."

[54] The Coalition, Transcript I, at ¶447.

[55] Middleton and Shepherd, Transcript III, at ¶3379-80:

[56] Bell Undertaking, 16/Feb17, at ¶A10; and Response to TELUS(CRTC)6Feb17-6.

unlocking fees, as suggested by other public interest, civil society, and academic interveners throughout this proceeding.[57]

H Prepaid services

44 As multiple interveners noted, the *Wireless Code* should not distinguish between consumers in ways that deprive particular groups of protections that other groups enjoy. Developments such as long-term pre-paid plans and monthly pre-paid plans mean the distinctions between pre- and post-paid wireless service may no longer be useful for the purpose of determining which consumers benefit from which protections in the *Code*.

45 The Forum supports the Coalition's recommendations on this issue:

> Instead of distinguishing between plans based on whether the customer pays for services before or after using them, the Code should protect all customers against changes to the key aspects of the bargain they have made. The rule should be: All customers are protected against unilateral changes to key terms.[58]

46 As Pavlović, *et al* stated, "[T]he fundamental issue is that you do have two classes of consumers. … [but] prepaid versus post-paid users don't necessarily see themselves as people in different classes with different rights."[59]

47 We note that some wireless service providers, such as Eastlink, already give more protection to prepaid customers than the *Code* mandates, including providing a copy of the Critical Information Summary.[60] The Forum sees no convincing reason, on the record or otherwise, that the *Code* should not require other WSPs to provide the Critical Information Summary to wireless users.

III Consumer Awareness and Understanding of Contract Terms

48 Evidence across the record establishes that Canadians lack awareness of the *Wireless Code* (and CCTS), and that awareness is in fact trending downward, rather than upward. Fewer than half of Canadians recall hearing about the Code[61] – and we believe that even this figure overestimates Canadians' awareness of the *Code*. Similarly, nearly three-quarters of Canadians do not recall being informed of the CCTS by their WSPs.[62] At the same time, interveners proffered evidence that WSPs are not systematically complying with awareness provisions in the *Code*. Chairman Blais noted that "only 32 percent of wireless service providers actually inform your customers of their right to recourse to CCTS,"[63] and the mystery shopper findings

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57 See, *e.g.*, the Coalition, Transcript I, at ¶100-104; CCC, Transcript II, at ¶2002-04; and Union des consommateurs, Transcript III, at ¶3166-69. See also Pavlović et al, Transcript I, at ¶1444: "I think it in general diminishes mobility just by its very nature; it's designed to do that. It's designed to keep you within one service providers service offerings and to prevent you from exploring different options, from being flexible and to responding to service that may be inadequate by moving to a different service."

58 The Coalition, Undertaking, 16/Feb17, at ¶23; see also ¶24-40.

59 Pavlović et al, Transcript I, at 1364

60 Eastlink, Transcript I, at ¶589-95.

61 TNC CRTC 2016-263, Appendix 2.

62 CRTC, *Wireless Code Public Opinion Research: Fall 2016* (18 November 2016), online: <http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/crtc/2016/027-16-e/report.pdf>, at pages 4, 35.

63 Transcript I, at ¶504.

by Pavlović, *et al*, showed that not one provider out of all twelve visits mentioned the *Wireless Code* to the customer: "Our work illustrates a distinct informational gatekeeping role currently being played by frontline wireless service providers' customer service representatives. Again, it bears repeating, you cannot use information you do not know exists."[64] The Forum agrees.

49 WSPs, on the other hand, tried to paper over this critical gap. Bell described this evidence as an "academic exercise",[65] stating that the students "stopped short of signing a contract" and thus "stop[ped] just short of triggering more disclosure that is provided when a customer is about to sign a contract".[66] Even if both true and reasonable that the mystery shoppers had to progress closer towards actual signing of a contract than they did – and we do not agree this is the case – the proper functioning of the *Code* rests on the premise that consumers are aware of it, not on the premise that they will finally learn about their rights and responsibilities either just as or immediately after they sign a contract.

50 Carriers also argued that general awareness of the *Code* (and CCTS) is less important than specifically timed awareness of the *Code* or CCTS, and is also less important than understanding the contents of their contracts.[67] This observation, even if it were true, holds little water: consumers should benefit from knowledge of the *Code* when they need it (situational awareness), *and* should be able to understand their contracts easily – without resorting to legal counsel to protect their interests.

51 In our view, provisions ensuring awareness of the *Code* and understanding of contract terms address two different problems. Understanding what is in their contract before they sign it, ensures that subscribers are aware of the specific details of their plans, and both sides' commitments. This is key to the well-known '*ad idem*' legal principle that both parties to a contract must understand its terms.

52 Then, if a contract that a consumer has signed is 'bad', or even illegal, the consumer's knowledge of that fact alone will not help them[68], if they do not *also* know their recourse: that is where situational awareness of the *Code* comes in. Without knowledge of the *Code*, the consumer may not even recognize the possibility that their rights have been breached: they would only know what the terms of their contract *are*, while the *Code* informs the customer of what the terms of their contract *ought to be*.

53 Furthermore, consumer understanding of contracts is itself still a major issue, and is simply not a viable alternative to consumers' independent understanding of their rights under the *Code*. CCTS demonstrated that what constitutes "plain language" varies significantly in practice;[69] that many complaints emerged from customers not understanding their contracts in the first place;[70] that in early years WSPs were not even retaining copies of customers' contracts,[71] and

64 Pavlović et al, Transcript I, at ¶1257-1259.
65 Bell, Transcript II, at ¶1609.
66 *Ibid.*, at ¶1610.
67 See e.g. TELUS, Transcript I, at ¶768-71, 1204-09.
68 Or it, in the case of small businesses.
69 CCTS, Transcript IV, at ¶5112-13.
70 *Ibid.*, at ¶5179-80.
71 *Ibid.*, at ¶5476-80.

that contracts still arrive too late to be of use to the customer.[72] More is needed – and that 'more' can be provided by the *Code*.

54 On the issue of late contract arrivals, the CRTC should shorten the window to send a customer their contract. As Udc said, "Il faut bien admettre que ce long délai semble difficilement justifiable dans l'univers actuel de communication instantanée, et qu'il est d'autant plus curieux lorsque l'expéditeur est lui-même fournisseur de services de communications."[73] Videotron, for instance, sends its customers their contracts within a maximum of 5 work days.[74]

IV Conclusion: From Piecemeal To Systemic Enforcement

55 If there is one theme that rose above all others over the course of this proceeding, in terms of consumer protection and the public interest, it is that changing the provisions of the *Code* will matter little unless the CRTC also monitors and enforces compliance. As Media Access Canada noted, certain *Code* "provisions are not, in fact, voluntary—but in the absence of effective enforcement, they are effectively so."[75]

56 Very simply, the *Code* will have limited effect whatever changes are made to its text, if systemic enforcement does not translate that text into real-life change for consumers in general, rather than for one tenacious, complaint-filing consumer at a time.

57 For example, the Coalition pointed out a number of systemic problems that the *Code* has failed to resolve on a meaningful level, despite addressing the practices in its text. These include: lack of disconnection notice; refusal of refunds for partial billing cycles after cancellation; having consumers waive their right to a paper copy of the contract, through contract; multiplying data overage caps such that overage exceeds $50; and difficulties fulfilling obligations to unlock devices upon request.[76]

58 As Pavlović, *et al*, stated,

> [A]dding more disclosure requirements to the Code itself may not necessarily produce the desired results and increase awareness. Because then we move into territory of regulatory compliance and then we move into the territory of how do we monitor regulatory compliance. … I'm going to repeat that increasing those obligations in the Code is not necessarily going to produce increased awareness unless the CRTC takes on a robust compliance enforcement.[77]

59 Union des consommateurs offered the CRTC a similar warning.[78]

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72 *Ibid.*, at ¶5115-19.

73 Union des consommateurs, Undertaking, 16/Feb17, at ¶10.

74 Response to Québecor Média(CRTC)6fév2017-16 ACT 2016-293.

75 Media Access Canada, Final Submission, 27/Feb17, at ¶6.

76 The Coalition, Undertaking, 16/Feb17, at ¶2.

77 Pavlović, et al, Transcript I, at ¶1347, 1353.

78 "En effet, même si le Commissaire fait un bon travail d'administration, sa gestion individuelle des cas ne garantit pas que les nombreux consommateurs qui sont victimes d'une situation de non-conformité bénéficieront de l'interprétation du CPRST. Ce n'est que par l'entremise d'enquêtes et d'interventions visant les problèmes systémiques du marché qu'on peut y arriver. Pour cette raison, nous recommandons au Conseil d'allouer des ressources à la réalisation d'enquêtes terrain qui lui permettront de prendre le pouls de l'état de la conformité et d'intervenir promptement dans le meilleur intérêt des consommateurs. Nos enquêtes terrain et celles d'autres

60 The *Wireless Code* has come a long way since 2013—and the record shows it has room to go much further. During the hearing some attention was focused on the timing of proposed changes to the *Code*; we remain convinced that WSPs will be able to adapt to such changes within six months of their publication.

61 Even more important than the implementation date of the *Code*, however, is the mechanism by which it is implemented – and by implementation, we mean enforcement. Respectfully, piecemeal 'wins' by individual consumers, often after prolonged discussions with their WSPs and CCTS, do not appear to be having their anticipated effect: the system as a whole cannot be said to be becoming more 'consumer friendly' or to be adopting more 'competitive' practices and behavior. In our view, these desirable goals can only be obtained with systemic and transparent enforcement by the regulatory body responsible for serving the public interest. Enforcement – and Canadians' knowledge of that enforcement – will permit the *Code* to meet its potential as a tool that protects consumers and market dynamism alike.

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intervenants justifient amplement à notre avis des vérifications supplémentaires sur le terrain pour obtenir un portrait de la situation plus global, exhaustif, et à jour." Union des consommateurs, Transcript III, at ¶3043-44.