17 May 2018

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

VIA GC Key

Dear Secretary General,

Re: Asian Television Network International Limited, on behalf of a Coalition (FairPlay Canada), Application to disable on-line access to piracy sites, Telecom Part 1 Application 8663-A182-201800467 – Reply by ATN (15 May 2018)

1 The Forum for Research and Policy in Communications (FRPC) submits the following comments on the procedural request submitted by the Public Interest Advocacy Centre (PIAC) on 16 May 2018 with respect to the reply and new evidence submitted on 14 May 2018by ATN in relation to its Part 1 application of 30 January 2018.

2 As noted by PIAC's request, ATN's reply consists not simply of a reply, but also new evidence – six additional reports including a survey:

a. Appendix A – May 11, 2018 report from Armstrong Consulting, "asked by the FairPlay Coalition to provide an estimate based on publicly available data of the economic impact of television program piracy on the legal Canadian broadcasting industry" (page 2, footnote omitted)

b. Appendix B – 11 May 2018 report on piracy in the UK and EU from Wiggin LLP, asked "to provide a report that gives an overview of the site blocking regime in the UK (and more broadly in the EU), and to address certain arguments that have been raised by opponents to proposals made by the FairPlay coalition to the Canadian Radio-television and Telecommunications Commission (CRTC) for a website blocking regime in Canada " (para 1.4)

c. Appendix C – 30 April 2018 memo on website blocking process from Hayes eLaw, "asked to briefly outline the steps that a content owner

would have to take to try to get an effective court order requiring Canadian Internet service providers ("ISPs") to block access to a specific infringing website, along with a very rough estimate of the legal fees involved in each such step." (page 1)

d. Appendix D – March 2018 survey "commissioned by FairPlay Canada" and "conducted between March 20th and 28th, 2018." (page 2)

e. Appendix E – 26 March 2018 memo on website blocking from Pedro Carmo Alves on website blocking in Portugal "outlining the administrative site blocking process in Portugal" (page 1), and

f. Appendix F – 24 April 2018 report on Italian laws on website blocking by M&R Europe Media & Rights "per Fair Play Canada's request ... summarizing, from the perspective of Italian laws and in the context of relevant European legislation ....." the background, legal basis, procedure, debate and litigation related to the relevant legislation (page 1).

3 The applicant's reply neither explains nor justifies its submission of new evidence, but simply describes it as "evidence" or "reply evidence". It describes

- Appendix A (the Armstrong report) as "evidence" to reply to interveners (reply, para 40)
- Appendix B (the Wiggin report) as "additional background and detail" provided "[i]n response to questions raised by some interveners ...." (reply, para 59)
- Appendix C (the Hayes memo) as its "response to the argument raised by interveners and to ensure the cmn benefits from a complete record on the point" of the efficiency and accessibility of the existing process (reply, para. 89)
- Appendix D (the Nanos survey) as "reply evidence" submitted in contrast to evidence submitted by PIAC, and in response to FRPC's survey[1] (reply, paras 56 and 101)
- Appendix E (the Alves memo) as a "response to the claims made by some interveners regarding the use of administrative models in other countries,

[1] As the Forum's purpose in this letter is to support PIAC's procedural request, the Forum is not responding to the substance of the applicant's reply; that said, we disagree with the applicant's characterization of the survey undertaken by the Forum as "not particularly relevant to the determination the Commission has to make".

and to ensure the record available to the Commission accurately reflects the realities of these regimes" (reply, para. 150), and

- Appendix F (the M&R memo) as a "response to the claims made by some interveners regarding the use of administrative models in other countries, and to ensure the record available to the Commission accurately reflects the realities of these regimes" (reply, para. 150).

4 The Forum is concerned that the applicant's submission of new evidence – three and a half months after it submitted its application – places interveners including the Forum at a disadvantage, as interveners rely on the procedures set out by the CRTC either in a notice of consultation or the *Canadian Radio-television and Telecommunications Commission Rules of Practice or Procedure* to ensure a process that treats all participants fairly.

5 The CRTC explained in 2010 that its *Rules* are to "enable informed and effective public participation in Commission proceeding", to "ensure the efficient, transparent and predictable conduct of Commission proceedings", to "eliminate unnecessary costs and delays in the regulatory process" and to provide a set of rules that is comprehensive yet flexible.[2] It commented on new evidence, noting that the Commission may dispense with or vary any rule of its own accord, "or at the request of an interested person":

> [s]ometimes it may be appropriate to change the rules for a specific proceeding. For example, it might make sense to have two rounds of submissions in a major policy proceeding or to extend the deadline for filing submissions to allow parties enough time to comment on new evidence. To provide for a process that is fair in each case, the Rules of Procedure allow the Commission to dispense with or vary any rule either by its own initiative or at the request of an interested person (section 7).[3]

6 The Forum is not aware that the applicant has submitted a request to vary the CRTC's *Rules* with respect to Part 1 applications.

7 The CRTC explained the importance of introducing new evidence, in the context of public hearings. It said,

> **[t]he Rules of Procedure provide that parties cannot introduce new evidence at the public hearing except where it supports statements already on the public record (section 41).** This rule is designed to ensure that all parties have a fair opportunity to respond to the evidence and positions of the other parties in the proceeding. However, in certain circumstances, at the request of a party

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[2] *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Telecom Information Bulletin 2010-959 (Ottawa, 23 December 2010), https://crtc.gc.ca/eng/archive/2010/2010-959.htm#z1, at para. 3.

[3] *Ibid.*, para. 22, footnote omitted.

> the Commission may grant permission to introduce new evidence to support a statement or position not already on the record. **If you wish to introduce new evidence, you must ask permission** of the Chair of the hearing before you do so.4

8 We note that the CRTC has not said that proceedings initiated by way of Part 1 applications are subject to procedural requirements that do not ensure that all parties have a fair opportunity to respond to the evidence and positions of other parties, including the applicant. To our knowledge the CRTC has not said that Part 1 applicants may submit new evidence specifically to reply to interventions.

9 In terms of requests to the CRTC such as those to introduce new evidence, – and we are unaware of such a request having been submitted to the Commission by the applicant – the CRTC explained that

> 24. The Rules of Procedure allow an interested person to request that the Commission exercise a power under the Rules of Procedure or change the Rules of Procedure for a specific proceeding (sections 5 and 7). This is generally called a procedural request.
> 25. **Examples of procedural requests include**:
> - requests to change the procedure (section 7), such as requests for an extension of the deadline, **requests to submit new evidence** at a hearing not referred to in documents filed with the Commission and requests to suspend the proceeding;
> …
>
> 26. No matter what type of procedural request you are making, it is best practice to follow some simple steps to make sure that your request is processed quickly:
> - put your procedural request in writing, addressed to the Secretary General;
> - provide reasons for the requested change and address how it might affect other persons; and
> - make your request as soon as possible.[5]
>
> [bold font added]

10 In 2002 – admittedly before the CRTC revised and re-issued its *Rules* – the CRTC considered the introduction of new evidence in a telecommunications proceeding initiated by way of a notice of consultation in which the CRTC set out deadlines for a number of different steps in the proceeding.[6] One of the parties in the proceeding "introduced a number of new facts in final argument", and the

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4 *Ibid.*, at para. 129.

5 *Ibid*., para. 25.

6 *Price cap review and related issues*, Public Notice CRTC 2001-37 (Ottawa, 13 March 2001), https://crtc.gc.ca/eng/archive/2001/pt2001-37.htm.

CRTC gave it little weight, "[g]iven that this evidence is untested …."[7] The CRTC held, therefore, that the ability to test all evidence in a proceeding is important.

11 Another party in the same proceeding submitted "references to publicly available economic literature … to provide the Commission with a reference to full documentation if it required further elaboration on certain aspects" of the party's proposal;[8] the CRTC said that the party was "subject to the same rules and procedures as are applicable to all parties in a CRTC proceeding" [9] and that

> ... the filing of new evidence as part of final argument can be unfair to parties. Depending on the circumstances, in some cases it may be appropriate to give such evidence less weight, while in other cases, such evidence should be stricken from the record.[10]

12 While the new evidence in that proceeding had been submitted in final argument, it related "to issues of core significance in the proceeding", even though the CRTC's process "was intended to allow all parties the opportunity to challenge such evidence …."[11] The CRTC struck the new evidence from the record.[12]

13 As noted above, the applicant in the current (8663-A182-201800467) proceeding has offered no rationale for submitting new evidence during this, the applicant-reply phase of its Part 1 Application. In the Forum's view, the applicant owed a duty not just to explain its circumvention of the *Rules* to the CRTC, but also to seek the CRTC's permission for its approach.

14 Perhaps the applicant believes that its statement on 29 January 2018, that "there is an urgency to find a solution to resolve internet piracy",[13] suffices as justification for its breach of the CRTC's *Rules of Practice and Procedure*. Urgency has many causes – but in this case, the applicant can scarcely claim that any urgency arises from sources beyond its control. After all, parties in the applicant coalition have been in contact with the CRTC since at least 18 May 2017, when Bell, Rogers, Quebecor and Corus made a presentation to the CRTC on "The Impact of Piracy on Canadian Broadcasting".[14] Having itself chosen to wait three-quarters of a year or more to file what it later described as an urgent

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7 *Regulatory framework for second price cap period*, Decision CRTC 2002-34, https://crtc.gc.ca/eng/archive/2002/dt2002-34.htm#sXI_1, paras. 1026-1027.

8 *Ibid*., para. 1033.

9 *Ibid*., para. 1036.

10 *Ibid*., para. 1039.

11 *Ibid*., para. 1040.

12 *Ibid.,* para. 1041.

13 Asian Television Network International Limited (ATN), *Application Pursuant to Sections 21, 24.1 36 and 70(1)(a) of the Telecommunications Act, 1993 to Disable On-Line Access to Piracy Sites*, (Markham, 29 January 2018), para. 2.

14 CRTC, Response to access to information request A-2017-00033, page 000116.

application,[15] it is disingenuous for the applicant to claim that urgent circumstances necessitate the CRTC's admission of new evidence in the reply phase of this proceedings.

15 The Forum therefore supports PIAC's request that the CRTC strike the new evidence. In our view, and in line with the principle set out by the coalition on 7 February 2018, "the important principle is simply that there be a fair and transparent process that allows all interested parties to participate fully and without unnecessary burden."[16] Admission of the applicant's new evidence will render the CRTC's current process unfair, and will not allow interested parties, including the Forum, the ability to participate "fully and without unnecessary burden."

16 If the CRTC nevertheless decides to admit some or all of the new evidence submitted by the applicant, the Forum supports PIAC's request that the CRTC permit interveners to respond to this new evidence and to the arguments of the application which the evidence supports.

17 If you have any questions, please contact the undersigned

Sincerely yours,

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cc. Applicant distribution list
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15 In an e-mail dated 19 September 2017, Rob Malcolmson, BCE's Senior Vice President, Regulatory Affairs for BCE Inc., tells CRTC Senior Legal Counsel Stephen Millington that "a coalition … will soon file an application with the CRTC under ss 24 and 3y of the Telecom Act asking the Commission tor equire ISPs to block access to egregious piracy websites. …". *Ibid.,* page 000125.

The coalition then waited just over four months to file its application on 29 January 2018.

16 At para. 7.