



National Pensioners Federation  Fédération Nationale des Retraités



**ACORN CANADA
NATIONAL PENSIONERS FEDERATION
&
PUBLIC INTEREST ADVOCACY CENTRE**

**APPLICATION TO REVIEW AND VARY
TELECOM REGULATORY POLICY CRTC 2016-496**

***Modern telecommunications services – The path
forward for Canada’s digital economy***

5 April 2017



National Pensioners
Federation



Fédération Nationale
des Retraités



5 April 2017

Ms. Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

VIA GCKEY

Dear Ms. May-Cuconato,

Re: ACORN-NPF-PIAC Part 1 Application
Application to review and vary Telecom Regulatory Policy CRTC
2016-496

Pursuant to section 62 of the *Telecommunications Act* and section 71 of the *CRTC Rules of Practice and Procedure*, ACORN Canada, the National Pensioners Federation, and the Public Interest Advocacy Centre – together “**ACORN-NPF-PIAC**” – file the attached Part 1 application with the Canadian Radio-television and Telecommunications Commission to review and vary Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada’s digital economy*.

ACORN-NPF-PIAC request that the Commission vary its decision regarding the affordability of telecommunications services for low-income Canadians – specifically by declaring the need for and advisability of an affordability funding mechanism for low-income telecommunications users, and initiating a follow-up proceeding to establish an affordability funding mechanism.

ACORN-NPF-PIAC’s application is not intended to impede or delay the establishment of the intended broadband funding mechanism, nor to undermine the Commission’s other findings made in TRP 2016-496.

However, ACORN-NPF-PIAC submit the Commission’s decision did include a number of errors which created substantial doubt as to the correctness of its determinations regarding the affordability of telecommunications services. In addition circumstances have changed, including in particular the release of Budget 2017, which justify the

review and variance of the decision. Therefore, ACORN-NPF-PIAC request that the Commission vary its decision concerning this specific issue accordingly.

Yours truly,

John Lawford
Executive Director & General Counsel to PIAC
Counsel to ACORN-NPF-PIAC

cc: Telecom Notice of Consultation CRTC 2015-134 Distribution List

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I. Nature of the Application and Relief Requested

1. Pursuant to section 62 of the *Telecommunications Act* (the “**Act**”)¹ and section 71 of the *CRTC Rules of Practice and Procedure*,² ACORN Canada, the National Pensioners Federation and the Public Interest Advocacy Centre – together “**ACORN-NPF-PIAC**” – file this application with the Canadian Radio-television and Telecommunications Commission (“**CRTC**” or “**Commission**”) to review and vary Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada’s digital economy* (the “**Decision**”).³ Specifically, ACORN-NPF-PIAC request that the Commission review and vary the Decision to:
 - 1) Declare the need for and advisability of an affordability funding mechanism for low-income telecommunications users; and
 - 2) Initiate a follow-up proceeding to establish an affordability funding mechanism.
2. The Applicants wish to stress that their proposed variance of the Decision is not intended to, in any way, delay or impede the Commission’s imminent launch of a proceeding on the creation of the Commission’s broadband funding mechanism.

II. The Decision

3. The Decision resulted from a thirteen month long public consultation which gathered evidence from individual Canadians, consumer groups, accessibility groups, non-profit organizations, academic institutions, local, provincial and territorial governments and Members of Parliament, and telecommunications service providers, from every corner of the country. ACORN Canada, the National Pensioners Federation and PIAC (together, in this application, “ACORN-NPF-PIAC”) all participated in that proceeding as members of the Affordable Access Coalition (“**AAC**”).
4. The Commission made a number of findings about Canadians’ use and need of modern telecommunications services, including that:

¹ *Telecommunications Act*, SC 1993, c 38, s 62.

² *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277, s 71.

³ Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada’s digital economy* (21 December 2016), online: CRTC <<http://www.crtc.gc.ca/eng/archive/2016/2016-496.htm>>. [**Decision**]

All Canadians, regardless of whether they live in urban centres or in rural or remote areas, benefit from having access to modern telecommunications services. Broadband Internet access services have become the catalyst for so much change – in the way businesses and governments offer and deliver services, and in the way Canadians express themselves as consumers, creators, and citizens of the digital world. Indeed, today’s networked environment has created fundamental shifts in just about every aspect of Canadians’ lives.⁴

5. The Commission also set a universal service objective, that “Canadians, in urban areas as well as in rural and remote areas, have access to voice services and broadband Internet access services, on both fixed and mobile wireless networks.”⁵
6. The Commission further “determine[d] that the following services – which form part of the universal service objective – are basic telecommunications services within the meaning of subsection 46.5(1) of the Act: (i) fixed and mobile wireless broadband Internet access services, and (ii) fixed and mobile wireless voice services.”
7. The Commission then “establish[ed] a new mechanism, pursuant to subsection 46.5(1) of the Act, to assist in funding continuing access to the basic telecommunications services that form part of the universal service objective.”
8. However, the Commission, despite extensive evidence on the need for it, rejected the creation of a similar affordability funding mechanism to subsidize retail consumer access to fixed and wireless broadband or to fixed and mobile wireless voice services.⁶

III. The Test for Review and Variance of Commission Decisions

9. Telecom Information Bulletin 2011-214 states that in order for the Commission to exercise its discretion to review and rescind or vary a decision, applicants must show there is substantial doubt as to the correctness of the decision.⁷ This could be due to a number of factors, including:

⁴ Decision at para 32.

⁵ Decision at para 37.

⁶ Decision at paras. 202-204.

⁷ Telecom Information Bulletin CRTC 2011-214 at para 5.

- i) an error in law or in fact;
 - ii) a fundamental change in circumstances or facts since the decision;
 - iii) a failure to consider a basic principle which had been raised in the original proceeding; or
 - iv) a new principle which has arisen as a result of the decision.
10. ACORN-NPF-PIAC detail below several errors of law the Commission has made in relation to not including an affordability funding mechanism in the Decision. In addition, there recently has been a fundamental change in circumstances or facts since the decision, which also supports the review and variance of the Decision.
11. While the proceeding and the Decision examined a wide range of issues, the issue of affordability of telecommunications services was one of the central recurring topics of the proceeding. Affordability of broadband was identified in the Decision's final list of issues to be determined,⁸ and was recognized as one of four key "gaps" preventing many Canadians from benefitting from the digital economy.⁹ The gaps identified in the Decision were: availability of high-quality broadband Internet access services, affordability of these services, accessibility of these services for persons with disabilities, and digital literacy skill levels.
12. Broadband access is virtually impossible to discuss without addressing the affordability of broadband internet. Yet, while stating in the Decision it supported "concerted efforts" to make progress in the affordability of broadband internet access, the Commission decided not to establish or implement any regulatory measure to ensure low-income Canadians had affordable access to basic telecommunications services.¹⁰
13. ACORN-NPF-PIAC's application therefore first details the errors of law that led the Commission to this erroneous conclusion, and then describe the changed circumstances that also support the Commission reviewing and varying the decision as requested.

⁸ Decision at para 24.

⁹ Decision at para 49.

¹⁰ Decision at para 204.

IV. Errors of Law

4.1 *Commission fundamentally misconstrued the question: affordability for low-income Canadians must be delivered below cost, not by market forces*

14. The Commission erred in law by failing to properly consider its jurisdiction with respect to the affordability of telecommunications and to advance that mandate as required by s. 47 of the *Telecommunications Act*.
15. In particular, the Commission failed to act on its specific jurisdiction and authority to ensure that telecommunications policy renders “reliable *and affordable* telecommunications services” to Canadians in all regions of Canada, as set out in subsection 7(b) of the Act. In addition, the Commission failed to give effect to the subsection 7(h) policy objective of “responding to the economic and social requirements of telecommunications users”; and finally failed to give effect to the subsection 7(a) objective of “facilitating the development of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions.”
16. The Commission failed to act to achieve these policy objectives because it confused its rate-setting jurisdiction with its jurisdiction to pursue the telecommunications policy objectives (such as pursuing affordable telecommunications services for all Canadians) even when those objectives require making a decision that is different from, contrary to or complementary to its rate-setting jurisdiction.
17. The Commission betrayed its conflation of these separate aspects of its jurisdiction when it stated in the Decision that it “does not regulate the retail rates for broadband Internet access services”¹¹ (except regarding Northwestel) when explaining how it would, in considering how to deliver affordability, “foster a competitive marketplace for broadband Internet access services”.¹²
18. The evidence on the record was clear regarding low-income access to telecommunications services, and in particular, broadband, that this access must be delivered at **below cost**. By definition, a competitive market cannot deliver services below cost. This is axiomatic.
19. For example, Rogers Communications, the only party to have a voluntary low-income access program “up and running” by the date of the hearing, noted in relation to its program:

¹¹ Decision at para. 196.

¹² Decision at para. 196.

Rogers' Connected for Success is an affordability support that we have initiated as part of our Corporate Social Responsibility activities, at below cost. Our Connected for Success program is designed to reduce the barriers to subscribing. The program allows eligible residents in community housing organizations to subscribe to broadband internet service for \$9.99 per month, with no installation fee or additional charges, and no credit checks. The program provides access to Rogers 10 and 1 megabit internet service.¹³

20. All of the parties to the proceeding confirmed that “affordability” was an exercise in dealing with below cost delivery of service not a question of just and reasonable rate-setting or forborne market rates and relied upon it to structure their positions, whether by asking for,¹⁴ or opposing,¹⁵ discounted rate-setting, or by means-tested subsidy.¹⁶
21. The Commission’s entire analysis of affordability, however, which runs to only 9 paragraphs,¹⁷ in a decision of 259 paragraphs, has 6 paragraphs which detail the Commission’s efforts to ensure fair pricing in the competitive market (as a proxy for rate-setting). All of this discussion is irrelevant.
22. The only way to deliver affordable telecommunications to the lowest-income Canadians is by delivering it at below-market rates. Numerous ACORN Canada members testified that they were required to cut back on other essentials such as food or medicine to continue to pay for Internet or cell phone access. According to the AAC’s definition of affordability,¹⁸ which was not challenged by any other party and which was apparently adopted by the Commission,¹⁹ any such reduction of other essentials to pay for communications services indicates that the service is unaffordable to the lowest income Canadians (roughly the lowest quintile).
23. Competition alone is extremely unlikely to ensure telecommunications services are affordable for low-income users. In layman’s terms, the poorest Canadians either cannot pay for broadband or cell phone service or sacrifice other

¹³ Rogers, Transcript, Vol. 9, at para. 11997, Emphasis added. See also Teksavvy, Transcript, Vol. 1, at paras. 1456-1460.

¹⁴ OpenMedia, Transcript, Vol. 14, paras. 19292; 19318.

¹⁵ MTS, Transcript, Vol. 9, para. 12726; SaskTel, Transcript, Vol. 11, para. 14699; and CNOC, Transcript, Vol. 14, para. 19525.

¹⁶ AAC, Transcript, Vol. 4, paras. 5329-5332; 5344-5345; and 5347-5351.

¹⁷ Decision at paras. 196-204.

¹⁸ AAC Intervention, 14 July 2015, Appendix C, “No Consumer Left Behind: A Canadian Affordability Framework for Communications Services in a Digital Age”, Recommendation 2, at p. 98.

¹⁹ See CRTC, *CRTC Submission to the Government of Canada’s Innovation Agenda* (21 December 2016), online: CRTC

<<http://www.crtc.gc.ca/eng/publications/reports/rp161221/rp161221.pdf>>

essentials to do so. As the record clearly demonstrates,²⁰ the amount the lowest-income Canadians believe they could “afford” without making these other sacrifices is well below cost and certainly not available in the market.²¹

24. It is clear the Commission did not consider this basic economic fact, namely that when discussing affordability for low-income consumers we are not discussing the competitive market.
25. This error in understanding the economic and logical underpinnings of the debate is all the more surprising, as this particular question is directly adverted to in the Act. For instance, while presently forborne in relation to internet access telecommunications services, subsection 27(6) allows the Commission to approve the provision of telecommunications services at a reduced rate or at no charge to “any charitable organization or disadvantaged person or other person.”
26. In addition, the Commission has also not shied away from imposing distinct conditions of service, under s. 24, related to pricing in regards to specific groups, despite its stance on regulation of the competitive market, particularly for those subscribers it recognizes as vulnerable or disadvantaged. In Telecom Regulatory Policy 2009-243, for instance, the Commission forbore from regulating the retail directory assistance services provided by incumbent local exchange carriers (“ILECs”), but required the ILECs, pursuant to section 7(h) of the Act, to maintain their exemptions from retail directory assistance charges for specific groups of customers—senior citizens and persons with disabilities in particular.²² The Commission also commonly imposes regulatory requirements, in a price forborne context, intended to promote accessibility of various telecommunications services at no charge to customers despite a general reliance on the market delivery of these services.
27. Therefore, any Commission reluctance to even consider affordable access outside of its regular rate-setting jurisdiction is an error of law in that it failed to consider its parallel jurisdiction under s. 24 and thus s. 47 and subs. 7(b) to set affordable rates for low-income persons, whatever its stance on rates to average or wealthy consumers.

²⁰ ACORN members, Transcript, Vol. 4, at paras. 6060, 6073, 6080.

²¹ The Commission also, by requiring a basic service objective speed of 50/10 Mbps, has, in essence, made “basic” broadband service more expensive and even more out of reach of the lowest income Canadians. We note the Commission’s submission to the Innovation Agenda has tables showing the lowest cost “entry level” plans for broadband (starting at about \$25/month), however, those tables are for far lower (and cheaper) speeds than 50/10 prices presently in the market.

²² Decision at para 56.

4.2 Commission erred in requiring a “comprehensive solution” then relying on clearly inadequate market efforts and community means to meet it

28. The Commission clearly identified affordability as a “broadband gap” and a genuine challenge for low-income Canadians, recognizing it as a challenge to broadband adoption in the Decision. The Commission wrote:

Moreover, analysis of pricing and income-related data from the 2016 CRTC *Communications Monitoring Report* supports parties’ views that low-income households are experiencing issues related to the affordability of their broadband Internet access services. Although spending on communications services by lower-income households was less than that by higher-income households, expenditures on communications services take up a significantly larger percentage of their annual incomes. In addition, households in lower-income quintiles are much less likely to use the Internet from home than those in higher-income quintiles.²³

29. The Commission’s recognition of the affordability challenge for low-income households was further bolstered by the Commission’s submission to the Innovation Agenda in which it wrote:

[T]he CRTC heard from Canadians forced to make difficult spending decisions due to the cost of broadband Internet access services. Given the economic, socio-cultural and civic importance of broadband, the CRTC concluded that any Canadian left behind in terms of broadband access is profoundly disadvantaged, and that coordinated national action is necessary to address this problem. The risks of non-action are too great: missed opportunities for innovation, creativity and engagement; reduced competitiveness; weakened domestic prosperity; and diminished prospects for Canadians.²⁴

30. Yet the Commission decided not to act to make broadband more affordable for low-income families for three main reasons. First, the Commission claimed that the issue of affordability required a “comprehensive solution”. Second, it refrained from exercising any regulatory action at all because it did not want to “inadvertently hinder the development of further private and public sector initiatives” to address affordability. Third, it is clear the Commission expected the Federal Government to take action to address low-income broadband access in its “Innovation Agenda”.

²³ Decision at para 202.

²⁴ CRTC, *CRTC Submission to the Government of Canada’s Innovation Agenda* (21 December 2016), online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/rp161221/rp161221.pdf>> at p 7.

31. The first two assumptions led the Commission into the legal error of misstating the scope of its jurisdiction and mandate regarding affordability – leading it to unduly constrain its own scope for action (fetter its discretion).
32. The last assumption of federal government leadership or subsidy has been proven inaccurate by subsequent facts and was improperly relied upon by the Commission.
33. Dealing first with the “comprehensive approach” the Commission said this:

“A comprehensive solution to affordability issues will require a multi-faceted approach, including the participation of other stakeholders.”
34. The Commission then claimed that “the record of this proceeding demonstrates that various stakeholders, including ISPs and community organizations, have begun to implement innovative solutions to meet the wide-ranging needs of lower-income consumers” and concluded:

“The Commission is mindful that its regulatory frameworks should be sufficiently flexible to allow for such solutions and does not want to take regulatory action that would inadvertently hinder the development of further private and public sector initiatives.”²⁵
35. The finding that a “comprehensive” solution to affordability issues would require action that was larger than the jurisdiction of the Commission is true.
36. However, the logical and ultimately legal error that the Commission committed is the assumption that the more limited scope of the Commission’s jurisdiction over affordability, in the context of telecommunications regulation of which it is the key and sole arbiter, would be of no assistance to this larger comprehensive effort.
37. In fact, the Commission’s abdication of the exercise of any of its jurisdiction to address affordability actively inhibits the creation of a comprehensive solution to broadband affordability. There will be no regulatory requirements whatever to direct profit-minded ISPs to do more than what is commercially reasonable (including minor corporate social responsibility spending on limited, voluntary affordability programs). There will be no money from the telecommunications system to fix this.

²⁵ Decision at para 203.

38. The documents summarizing Canada's Innovation Agenda do not mention affordability of telecommunications for low-income Canadians at all.²⁶ Furthermore, ISED's *Connect to Innovate* program, which provides funding to promote the availability of broadband service for rural and remote communities, and may to a limited degree address broadband pricing and pricing in those areas, also does not mention affordability for low-income Canadians.²⁷
39. The Commission's reliance on "getting out of the way" – that is allowing the "free market" to deliver affordability programs is another error. First, the record of the proceeding shows only one carrier, Rogers, providing only one program based on the proxy of social housing. The program is not guaranteed in any way beyond Rogers' claims. As noted by Judy Duncan of ACORN Canada on the AAC panel, there is a huge waiting list for social housing in Toronto, therefore this program cannot reasonably reach even all persons who qualify for social housing.²⁸
40. TELUS claimed to have a program but that it was still in development. It subsequently launched as a pilot well after the close of the record.²⁹
41. No other commercial party had a program. Community assistance programs, such as Chebucto's that are vestiges of the FreeNet movement are tragically limited in scope and scale and due to resource constraints, rely on special arrangements for upstream broadband access (typically free or nearly so from a university) and can never be scaled up at anything like the price or pace necessary to satisfy even the need in their own communities, let alone outside a small urban footprint.
42. Even were the Commission justifiably hopeful that all ISPs eventually would undertake voluntary programs (and we note here Teksavvy, a major "small ISP" indicated it could not afford to do so on present wholesale rates³⁰), the claim that "regulatory action that would inadvertently hinder the development of further private and public sector initiatives" is false. Regulatory action, in the form of a mandated, means-tested subsidy is designed to stimulate commercial involvement in low-income access. It is designed to scale, and to address across the board the vast majority of low-income access because it ensures that TSPs

²⁶ [https://www.ic.gc.ca/eic/site/062.nsf/vwapj/Innovation-for-a-better-Canada.pdf/\\$file/Innovation-for-a-better-Canada.pdf](https://www.ic.gc.ca/eic/site/062.nsf/vwapj/Innovation-for-a-better-Canada.pdf/$file/Innovation-for-a-better-Canada.pdf); <https://www.ic.gc.ca/eic/site/062.nsf/eng/home>

²⁷ <https://www.canada.ca/en/innovation-science-economic-development/programs/computer-internet-access/connect-to-innovate.html>

²⁸ See AAC, Transcript, Vol. 4, at para. ?

²⁹ See: "TELUS launches Internet for Good pilot to support 18,000 British Columbian families," 14 October 2016, online:

<https://about.telus.com/community/english/news_centre/news_releases/blog/2016/10/14/telus-launches-internet-for-good-pilot-to-support-18000-british-columbian-families>.

³⁰ Teksavvy, Transcript, Vol. 1, at paras. 1456-1460.

do not have to provide service below cost. This basic level of access would greatly assist with a comprehensive approach to eliminating affordability problems across the board and would be complementary to voluntary corporate and community efforts.

43. However, the Commission appears to have believed that it was required, by either the Policy Direction, or its “rate-setting” jurisdiction in relation to the affordability problem, to refrain from regulation to allow the market to deliver affordable access.
44. Again, however, by its definition, the problem of affordability for low income Canadians is that the telecommunications service must be delivered **below cost**. In this case, and for these Canadians, the CRTC is still tasked with trying to provide them affordable telecommunications service (subs. 7(b)).
45. It is an error for the Commission to rely upon “market principles” or upon other parties to deliver comprehensive below cost service to all low-income Canadians struggling to pay for telecommunications service. The record of the proceeding shows clearly that there are tragically few community programs, that cannot scale, that are serving only tiny numbers of low-income subscribers. The record also shows very limited corporate social responsibility commitments to this problem.
46. In determining its own regulatory authority, according to s. 47 of the Act, the Commission must exercise its powers with reference to the telecommunications policy objectives, which explicitly include ensuring **affordability** (section 7(b)) and responding to the economic requirements of users (section 7(h)). Having concluded that action was needed to address the affordability of telecommunications services for low-income Canadians, the Commission erred in law by failing to fully consider and act upon its core mandate under the telecommunications policy objectives.³¹ The Commission also erred in law by determining that affordability initiatives undertaken by other stakeholders absolved the Commission from establishing its own regulatory measures to ensure the rendering of affordable telecommunications services for low-income users.

³¹ In addition, section 46.5 of the Act, which states the Commission “may require any telecommunications service provider to contribute, subject to any conditions that the Commission may set, to a fund to support continuing access by Canadians to basic telecommunications services” does not require any rate-setting investigation prior to creating funds to continue that access.

4.3 Commission's affordability analysis at odds with availability and accessibility determinations

47. ACORN-NPF-PIAC also note the Commission's decision regarding the issue of affordability was substantially different from its decisions related to the broadband gap issues of "availability" and "accessibility."
48. As noted above, the Commission identified four key gaps preventing many Canadians from benefitting from the digital economy. These were:
- Availability of high-quality broadband Internet access services,
 - Affordability of broadband internet services,
 - Accessibility of broadband internet services for persons with disabilities, and
 - Digital literacy skill levels.³²
49. In the Decision, the Commission decided not to act with respect to two of these issues: affordability and digital literacy. In concluding it would not implement any new measures regarding digital literacy, the Commission stated that "responsibility for the issue of digital literacy is not within the Commission's core mandate."³³ However, in deciding not to implement measures which would address affordability, the Commission maintained it was because any solution would require a "multi-faceted approach" and therefore a "sufficiently flexible" regulatory framework.
50. However, the Commission's conclusion regarding affordability seems to contradict the Commission's decisions to establish regulatory measures to address the broadband gaps of availability and accessibility, despite the fact that the same rationales could apply to both latter issues. One could equally argue that addressing availability and accessibility would also require "multi-faceted approaches" and a "sufficiently flexible regulatory framework."
51. In fact, in respect of the issue of availability, this was the very case. At the time of the Commission's proceeding, there were various broadband deployment programs in effect, including at the provincial, territorial and municipal levels; private, public and non-profit; and the Government of Canada's *Connecting Canadians* program. Yet, the Commission did not find the availability and operation of these programs deterred it from creating its own broadband funding mechanism. The Commission concluded:

While the Commission expects that continued investments from the private sector and funding programs from various levels of government

³² Decision at para 49.

³³ Decision at para 245.

will assist in achieving the broadband portion of the universal service objective, the record of this proceeding demonstrates a need for Commission intervention in closing the availability gap in Canada.³⁴

52. In order to accommodate other existing broadband “availability” initiatives, the Commission stated that applicants to the broadband funding mechanism would need to secure a minimum level of financial support from a government entity, in addition to the applicant’s own proposed investment in the project.³⁵ The Commission also stated it would “attempt to align its funding mechanism with the broader ecosystem of current and future funding and investments.”³⁶
53. Therefore, ACORN-NPF-PIAC fail to see how the Commission, in considering its core mandate, was able to establish its own regulatory measures to address the availability of broadband, even considering the need for a “multi-faceted approach,” yet was unable to do so to address broadband affordability. In fact, the number of other broadband availability initiatives on the record of the Commission’s proceeding far outweighed the number of affordability initiatives. Rather, the Commission demonstrated it could design a policy solution which complemented these other existing initiatives where it so decided.
54. Similarly, addressing the accessibility of broadband for persons with disabilities requires a multi-faceted approach, yet the Commission did not appear to be precluded from imposing additional accessibility requirements in the Decision.³⁷ ACORN-NPF-PIAC further note that accessibility for persons with disabilities, although a very laudable objective which ACORN-NPF-PIAC support and which may well be covered by several telecommunications policy objectives, is not – unlike affordability – *explicitly identified* in the objectives set out in section 7 of the Act. ACORN-NPF-PIAC are perplexed, therefore, as to why the Commission would find it would not be appropriate in the case of affordability of telecommunications services, which *is* explicitly set out in the Commission’s core mandate, to implement regulatory measures to assist disadvantaged and vulnerable groups such as low-income Canadians. The Commission’s final determinations regarding affordability alone therefore appear arbitrary.
55. ACORN-NPF-PIAC submit the Commission erred in law by failing to fully consider its core mandate to advance the affordability of telecommunications services for low-income Canadians in the Decision. Meanwhile, the Commission’s reasoning did not deter it from implementing complementary regulatory measure regarding other issues such as broadband availability and accessibility for persons with disabilities.

³⁴ Decision at para 129.

³⁵ Decision at para 141.

³⁶ Decision at para. 137.

³⁷ Decision at paras. 211-217 and 223.

4.4 Commission erred in relying on Innovation Agenda when it was not on the record

56. ACORN-NPF-PIAC also note that the Innovation Agenda was officially announced on 14 June 2016.³⁸ Meanwhile, final written reply comments on the Commission's proceeding were filed by all parties on 13 June 2016. Therefore, the Innovation Agenda was never placed on the record of the Commission's proceeding either by parties or the Commission itself.
57. We submit that it is a legal error to rely upon evidence not on the record and only discoverable after the record is closed to make a decision on a key issue in the proceeding. This reliance by the Commission on the Innovation Agenda, which the parties did not and could not address, violated the principle of *audi alteram partem*.
58. In addition, the reliance on the Innovation Agenda, released after the close of the record, is a breach of natural justice, in that the parties were denied the ability to be heard on a matter which clearly influenced the Commission's final Decision.

4.5 Commission erred in delivering reasons from proceeding outside of Decision in submission to Innovation Agenda

59. Finally, as a separate legal error that impedes the Applicants of their ability to appeal the Decision, the Commission appears to have delivered its findings in this proceeding outside of the formal Decision. Instead, it delivered a large portion of its reasons and reasoning in the context of its parallel submission to the federal government's consultation on the Innovation Agenda released at the same time as the Decision.³⁹
60. This effectively constitutes a refusal to give reasons in the Decision for that portion of the submission to the Innovation Agenda that should have been in the Decision.

³⁸ Government of Canada, "Positioning Canada to Lead: An Inclusive Innovation Agenda" (14 June 2016), online: Government of Canada <<http://news.gc.ca/web/article-en.do?nid=1084739>>.

³⁹ CRTC, *CRTC Submission to the Government of Canada's Innovation Agenda* (21 December 2016), online: CRTC <<http://www.crtc.gc.ca/eng/publications/reports/rp161221/rp161221.pdf>>

61. The Applicants and any other party seeking to challenge the Decision are impeded by the Commission's move of what appears to clearly be reasons and reasoning based on the record of the proceeding to this Innovation Agenda consultation response. The AAC's argument and its evidence were extensively cited in the Innovation Agenda submission. However, that evidence and argument now is not considered as part of the Decision, despite the fact that it is clearly based on the AAC submissions to the Commission in the context of the proceeding. This is both a refusal to give reasons and a breach of the principle of *audi alteram partem*, as the evidence of the AAC was relegated to a non-official document rather than being considered in the Decision. This also constituted a breach of natural justice in that the AAC was not informed that its opinions on this issue were being relegated to a separate, non-adjudicative function of the Commission.

4.6 Commission erred in relying on Innovation Agenda to dismiss all telecommunications affordability needs when Agenda only speaks to broadband

62. The Decision was also erroneous in relying on the Innovation Agenda to address telecommunications affordability for low-income Canadians because the Innovation Agenda only mentions affordable access to *high-speed Internet*.

63. The Innovation Agenda only states that Canada must do more to give low-income Canadians "affordable access to *high-speed Internet*."⁴⁰ Meanwhile, the Commission's proceeding, although placing a large emphasis on high-speed Internet access, examined a range of telecommunications services offered by TSPs. Moreover, the evidence on the record demonstrated low-income Canadians do not struggle merely with the affordability of internet service but also other telecommunications services such as wireless voice services as well.

64. The affordability funding mechanism proposed by the AAC was designed to give low-income consumers choice to meet each family's telecommunications needs. Similarly, the Commission's mandate under the subsection 7(b) policy objectives is to promote affordability of *all* telecommunications services. Therefore, the Commission made an error of law by relying on the Innovation Agenda to address the affordability of all telecommunications services for low-income households when that initiative clearly was limited in scope only to high speed Internet access.

⁴⁰ *Ibid.*

V. Budget 2017 Constitutes a Fundamental Change in Circumstances Justifying Review and Variance of the Decision

65. The 2017 Budget, released 22 March 2017, announced the Government of Canada's strategy for addressing affordability for low-income Canadians. Specifically, the Government of Canada committed to invest "\$13.2 million over five years in a new Affordable Access program, which will provide a confidential portal to allow Internet service providers to offer low-cost home Internet packages to low-income families, bundled together with refurbished computers."⁴¹
66. This "Affordable Access program" does not directly do what the name might suggest; it instead provides only money to build an eligibility checking online tool so that a means-based subsidy or private corporate or community social responsibility effort can determine eligibility of participants.
67. This new information constitutes, under the test for review and variance, a clear change in circumstances that justifies the Commission re-examining the issue of affordability. The Commission refrained from acting on affordability in TRP 2016-496 in large part because it was waiting on the federal government to set out a comprehensive strategy. The Government of Canada has now set out its strategy.
68. It is now crystal clear that the federal government has no intention of creating a government-funded subsidy to support low-income access to broadband or telecommunications in general. However, such a tool does support a means tested subsidy program, which is exactly the type of program suggested by the AAC in this proceeding to address affordability.
69. The Applicants therefore request that the Commission, on the basis of these changed circumstances, convene a new proceeding specifically on the issue of the creation of a means-tested, nation-wide, comprehensive Affordability Funding Mechanism as proposed by the AAC in the proceeding leading to this Decision. The Government of Canada should be encouraged to participate in this proceeding to ensure the Commission's decision is informed by and consistent with the Government's overall strategy.

⁴¹ <http://www.budget.gc.ca/2017/docs/plan/chap-05-en.html>

VI. Conclusion and Relief Requested

70. Therefore, based on the reasons set out above, ACORN-NPF-PIAC submit the Commission made several errors in law in the Decision in regards to the affordability of telecommunications services for low-income users. In addition, changed circumstance post-Budget 2017 make it appropriate for the Commission to review and vary the Decision. We ask that the Commission review and vary its decision to:
- 1) Declare the need for and advisability of an affordability funding mechanism for low-income telecommunications users; and
 - 2) Initiate a follow-up proceeding to establish an affordability funding mechanism.
71. The Applicants contend that there was ample evidence regarding affordability of telecommunications on the record for the Commission to conclude that affordability should be comprehensively addressed with a dedicated subsidy under s. 46.5.
72. We therefore submit that it is not necessary for the Commission to reconvene a new hearing on affordability of telecommunications to rehear parties on the need for affordable telecommunications access, nor what that entails.
73. The Commission further has a detailed proposal from the AAC for a means-tested subsidy, along with estimated costs and a proposed revenue contribution on the record that it can use as an initial position in a subsequent hearing on the details of the means-tested subsidy.
74. The Applicants stress that their proposed variance of the Decision is not intended to, in any way, delay or impede the Commission's imminent launch of a proceeding on the creation of the Commission's broadband funding mechanism.
75. However, it would be both possible and appropriate to conduct this follow-up proceeding on the shape of a means-tested affordability subsidy immediately after the follow-up proceeding to create the broadband funding mechanism.
76. The affordability of telecommunications services for all Canadians, but particularly those who are disadvantaged or vulnerable, remains an essential part of the Commission's mandate under the Act. Any regulatory measure could complement the small number of existing affordability initiatives as well as the Federal government's commitment to create a database to facilitate means-testing.

77. So long as no action is taken, however, low-income families continue to be the ones bearing the financial burden and challenges of affording telecom services. The evidence presented during the CRTC hearing was very clear that low-income Canadians have been seeking relief for a long time, and that action needs to be taken now. The Commission clearly recognized, in its Innovation Agenda submission, the disadvantages to the lowest income Canadians of a lack of access to broadband. Yet, by abstaining from acting to address affordability of telecommunications in the Decision the Commission has failed to promote and reinforce the telecom policy objectives which form part of its core mandate.
78. Therefore, ACORN-NPF-PIAC respectfully ask the Commission to review and vary Telecom Regulatory Policy 2016-496 as requested in this application.

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