

MEDIAACCESS CANADA

9 September 2010

Filed electronically

Robert Morin
Secretary General
CRTC
Ottawa, ON
K1A 0N2

Dear Mr. Secretary General,

Re: *Converged Rules of Procedure, Broadcasting Notice of Consultation CRTC 2010-509 (Ottawa, 23 July 2010)*

I Introduction

1. Media Access Canada, (MAC) is a not-for-profit corporation whose mandate is to increase the quantity and quality of accessible content in Canadian broadcasting and telecommunications. As the Commission knows, accessible content refers not only to closed captioning but to descriptive video.
2. Since its inception, MAC has worked with the broadcast and accessibility industries to develop harmonized and professional accessibility standards, to promote education and awareness and to undertake research and development.
3. We are providing our comments on the CRTC's ongoing review of its *Rules of Procedure*.
4. The CRTC's proposal for ensuring the accessibility of documents for Canadians with disabilities is unacceptable as currently drafted. MAC has proposed acceptable alternative wording.
5. Similarly, the CRTC's proposals for ensuring the accessibility of documents electronically ignore all issues related to the needs and

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interests of Canadians with disabilities, and are therefore unacceptable as currently drafted. MAC has proposed alternatives.

II Section 13 is unacceptably paternalistic and must be rewritten

6. In our 17 December 2009 comment on the CRTC's proposed *Rules* MAC initially asked simply that the CRTC give consideration to accessibility in its procedures:
 3. Insofar as accessibility is concerned, Mediac welcomes section 12 ("Alternative formats") of the proposed rules, which enables the Commission to order that documents be filed in an alternative format if persons with disabilities make such a request. We trust that the Commission will similarly also accept comments, submissions and interventions from persons with disabilities in alternative formats.
7. In our 22 January 2010 reply to other comments on the CRTC's *Rules*, we addressed comments by Bragg, Astral and Corus concerning the 'costs' of ensuring accessibility. We addressed their recommendation that the CRTC should simply request (rather than order) licensees or applicants to provide documents in an accessible format – and that companies should then be able to propose an alternative. A strikingly unfair part of their recommendation that we identified, was that parties who require accessible content would receive no right of reply:
 3. The first of our three specific concerns in relation to other parties' comments involves accessibility. The Bragg cable company has asked the Commission to clarify the wording of subsection 21(2)(h) concerning "any reasonable accommodation" that interveners require to participate at public hearings. Bragg says that it
 - ... anticipates that the Commission's intention in formulating subsection 21(2)(h) was to provide for reasonable accommodation of those who have disabilities that might affect their ability to fully participate in Commission proceedings, who may require an interpreter or who would not be able to attend a hearing other than by way of teleconference. However, the current wording of subsection 21(2)(h) is not limited to

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those situations. As a result, Bragg is concerned about potential misuse or confusion regarding that provision and submits that it may be helpful to provide clarification to the wording of subsection 21(2)(h) by listing examples of the type of accommodation that would be required.

We agree that the Commission should provide some clarification in the notice introducing its final Rules of Procedure, but point to the fact that the Commission specifically included the word “reasonable” in this section. We do not believe the section as phrased will result in abuse of the CRTC’s hearing process by the disabled, and we are somewhat concerned that a more extensive list of the examples of the type of accommodation required may lead people to consider the list of examples to be exhaustive. As a result, we do not support Bragg’s suggestion.

We have also noted the comments by Astral and Corus, regarding the cost of ensuring accessibility:

53. In short, based on paragraph 3(1)(p) of the Broadcasting Act, we submit that a “reasonableness” test that takes into consideration resources available for the purpose should be applied to any request for the production of a document in alternative format. This means that the Commission should determine the reasonableness of the request taking into account the associated cost and the ability of the party to fulfill the request, based on the resources that are currently available in the market. **It also means that the party should, where appropriate, be able to propose the production of the document in a different manner than that requested, provided that it is comparable in terms of access.**

54. Accordingly, Astral and Corus recommend that, before issuing an order to a party to produce a document in alternative format, the Commission should provide that party with an opportunity to address the reasonableness of providing the document as requested. In those cases where the production of a document in alternative format is either unfeasible or cost-prohibitive, the party will be able to file the particulars with the Commission and to offer a reasonable alternative. The Commission will make a final decision on the basis of the information filed.

We are concerned that the Commission may lack the expertise required to assess properly arguments about the costs of generating alternative formats. We are also concerned that the disabled party who actually needs the alternative format, would

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under the recommendation above, actually be excluded from the debate over costs and reasonableness.

We therefore urge the Commission that if it wishes to initiate a debate about the costs of providing alternative formats to the disabled in the context of a specific proceeding, it must obtain and access the relevant expertise in this area. **We recommend that the CRTC ensure that the disabled party is also permitted to comment, and that the Commission also contact a third party with expertise in this area so as to elicit their views. Simply accepting one side's argument that providing alternative formats for the disabled is prohibited by cost, does not permit verification of the true costs involved or the final benefits.**

[bold font added]

8. The CRTC has ignored our recommendations. The new *Rules* simply adopt the broadcasters' recommendation:

Alternative formats

13. (1) The Commission may, on its own initiative or at the request of a person with a disability or their designated representative, request a party to file and serve a document in an alternative format.

Alternative measure

(2) Within 10 days after the day on which the Commission makes its request, the party must comply with the request or propose an alternative measure.

9. MAC opposes section 13 as it is now written because it is paternalistic. Its clear effect is to deny Canadians with disabilities the right to respond in matters affecting their own rights, presumably because broadcasters or the CRTC may look after them.
10. Canadians with disabilities are entitled to respond on their own behalf to decisions that affect their rights and their ability to participate effectively in CRTC proceedings. The normal process of any discussion over legal rights affords all parties the right to comment, and the right to reply to other parties' comments. Allowing broadcasters to make submissions on their own ability to provide alternative formats without permitting Canadians or parties with disabilities to respond to these submissions is fundamentally unfair

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and inequitable. For this reason alone we require the Commission to amend section 13.

11. As currently drafted section 13 also ignores the guidelines the CRTC has issued to explain its *Rules of Procedure*, in *Proposed Guidelines on the CRTC Rules of Procedure*. Those *Guidelines* purport to assure Canadians with disabilities that as interveners, they have “all the rights ... of a party” – when this simply not the case:

An intervener is an interested person who is not an applicant or a respondent but who wishes to be a party to the proceeding. In a proceeding initiated by the Commission where there is no applicant, including policy proceedings, all parties will be interveners.

Interveners have all the rights and responsibilities of a party discussed above.

[bold font added]

12. As currently drafted, section 13 of the CRTC's *Rules of Procedure* will leave Canadians with disabilities subject to the whims of broadcasters and other applicants, and the good will of Commission members and staff who happen to concern themselves with requests of this nature. This section of the *Rules* is entirely unacceptable.
13. In fact, if the CRTC were operating as an agency of the province of Ontario, the CRTC's proposed procedure would be, quite simply, unlawful. Almost 2 million Ontarians – 1 in 7 people – have a disability, and the province estimates that by 2030 1 in 5 Ontarians will have a disability.¹
14. Therefore, since 2008 the Ontario government's *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005* requires, pursuant to *Regulation 429/07*, that those who provide service provide copies of requested documents in the format required by the person who requests the document:

¹ Ontario, Ministry of Community and Social Services, “Understanding accessibility” <http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/understand_accessibility/index.aspx>.

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9. (1) If a provider of goods or services is required by this Regulation to give a copy of a document to a person with a disability, the provider shall give the person the document, or the information contained in the document, in a format that takes into account the person's disability.

(2) The provider of goods or services and the person with a disability may agree upon the format to be used for the document or information.

15. Ontario has explained how section 9 works, noting that discussions can occur between service providers and those with disabilities:

People with disabilities use methods other than standard print to access information. These methods are often referred to as alternate formats of documents. For example, many people who are blind and some people with learning disabilities may use cassette tapes or digital audio formats to access information. The standard requires that providers take into account the person's disability when meeting their request for documents required by the standard.

Some people with disabilities may be able to use the documents in a variety of formats. For example a person who has low vision and has a cassette or digital audio player and computer may be able to use several formats. They may be able to read a large print copy of a document or listen to a cassette tape or digital audio version of the document. They may also be able to read an electronic version (such as a version sent by e-mail or a mailed DVD) using a large print program on their computer. Other individuals, depending on their disability and circumstances, may have only one option. For example a person who is deaf-blind and who does not have access to an accessible computer may only use Braille.

If a person with a disability asks for a document in a different format, you may want to discuss what options they have available to them and then agree on the format you will provide.²

16. The CRTC must not offer Canadians with disabilities a lower level of accessibility than they already enjoy from agencies operating in a different jurisdiction.

² Guide to the Accessibility Standards for Customer Service, Ontario Regulation 429/07, <<http://www.mcscs.gov.on.ca/en/mcscs/programs/accessibility/ComplyingStandards/guideToAccessibilityStandards/docRequirements.aspx>> (last modified 30 August 2010).

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17. MAC therefore recommends that the CRTC adopt either of the following proposals for section 13, with the changes we have indicated in italics:

Alternative formats

13. (1) The Commission may, on its own initiative or at the request of a person with a disability or their designated representative, request a party to file and serve a document in an alternative format.

Alternative measure

(2) Within 5 days after the day on which the Commission makes its request, the party must contact the person with a disability or their designated representative, to discuss the alternative format required by the person with a disability.

(3) If the party declines to provide the alternative format required by the person with a disability, the CRTC shall order the party to provide an alternative format.

(4) Persons with a disability who have requested and/or received documents in an alternative format shall be granted an extension of time for the submission of interventions, and parties that reply to such interventions may seek an extension of time for their reply

Alternative formats

13. (1) The Commission may, on its own initiative or at the request of a person with a disability or their designated representative, request a party to file and serve a document in an alternative format.

Alternative measure

(2) Within 10 days after the day on which the Commission makes its request, the party must comply with the request or propose an alternative measure.

(3) Upon receipt of an alternative measure from a party, the Commission shall

(a) issue a Notice of Consultation inviting comment from Canadians with disabilities within 10 days, or

(b) provide the person with a disability or the person's designated representative with an opportunity to reply to the party's alternative measure,

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and shall extend any deadline for interventions that has already been announced by 15 days.

18. We have included within these amendments a reference to the extension of deadlines. It is bad enough that Canadians with disabilities will be forced to debate broadcasters' ability to provide appropriate accessible formats, but it will be adding insult to injury to be required to work faster than any other party in a proceeding to meet deadlines that do not take into account the needs and interests of Canadians with disabilities.

III Accessibility of CRTC hearings

19. MAC notes that the discussion of the proposed *Rules* regarding hearings is silent with respect to accessibility issues. Section 33 addresses notices of consultation. Section 34 addresses the obligations of applicants. Section 35 sets out requirements related to notices of appearance. Section 36 describes preparatory conferences that the CRTC may hold. Section 37 introduces *in camera* hearings. Section 38 discusses the designation of confidential information. Section 39 sets out the order of appearance at hearings. Finally, sections 40, 41, 42 and 43 address evidence, oaths, simultaneous sittings and the format of *subpoenas*.
20. Canadians with disabilities who consult these *Rules* once they are enacted will be left uninformed about the CRTC's procedures concerning hearing accessibility. We note parenthetically that we also oppose the use of secret *in camera* hearings, on the grounds that this limits Canadians' ability to participate in, understand and/or challenge CRTC determinations with respect to its policies and decisions.
21. MAC recommends that the CRTC incorporate a new section to address accessibility at hearings, which addresses the following concerns:
 1. Canadians are entitled to access public CRTC hearings.

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2. Hearings made available on the CRTC's website should be presented in an accessible format.
3. The CRTC should provide Canadians with disabilities who attend CRTC hearings with devices that enable them to understand and participate in the proceedings.

IV CRTC must make its website accessible

22. MAC generally supports the CRTC's desire to move to electronic document processing. We note the following sections of the proposed *Rules of Procedure* that involve websites of the CRTC or broadcasters:

Posting of application

21. The Commission must post on its website all applications that comply with the requirements set out in section 20.

...

23. (1) A respondent may file an answer with the Commission within 30 days after the day on which the Commission posts the application on its website.

...

24. (1) Any interested person may intervene in a proceeding in writing within 30 days after the day on which the application is posted on the Commission's website or, if a notice of consultation is posted by the Commission on its website, within the time period set out in the notice.

...

Notice of consultation

33. (1) Before holding a public hearing during which the Commission will request any of the parties to appear before it, the Commission must post a notice of consultation on its website.

...

34. (1) If a public hearing is in respect of an application, the applicant must

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(a) no later than five days after the day on which the Commission posts the notice of consultation on its website, post the notice or an electronic link to it on the homepage of their own website and keep it posted until the deadline for intervening in the proceeding;

...

51. The Commission must post on its website a notice of consultation in relation to any application made to the Commission for the issuance or renewal of a licence under subsection 9(1) of the Broadcasting Act, and must provide in the notice an electronic link to the application

23. MAC has two concerns about website accessibility, however.
24. First, we note that neither the proposed *Rules of Procedure* nor the various 'explanatory notices' states that the CRTC intends to issue address the accessibility of websites.
25. As Canada's federal regulatory agency for broadcasting and telecommunications, the CRTC must do more than follow the crowd insofar as accessibility is concerned: the CRTC must lead by example.
26. At this point, we note that the consultation notice in this current proceeding does not even specifically address the concept of accessibility.
27. Moreover, the CRTC's own website is not fully accessible and should comply with WC3 standards for accessible web design. The CRTC's website lacks text description of graphs and logos, and does not provide either captioning and description functionality for audio/video content.
28. We draw your attention to the standards that the government of Ontario has developed, which include requirements for accessible websites. *Ontario Regulation 429/07* applies to public sector

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organizations and others that offer services – such as regulation and broadcasting, we suggest – to the public.³

29. Since 2008 Ontario has required that those who provide services and communicate with persons with disabilities take these disabilities into account. This is mandated by section 3(4) of 429/07:

3(4) When communicating with a person with a disability, a provider shall do so in a manner that takes into account the person's disability.

30. While MAC is aware that the CRTC has chosen to forbear from regulating the internet or Canadian websites, the CRTC must nevertheless set an example for its licensees. Leadership by example shows that the CRTC acts on behalf of all Canadians.
31. The CRTC must set an example by making its website accessible to the standard of, and using the, web content accessibility guidelines 2.0 of the WC3. These guidelines are available online at: <http://www.w3.org/TR/WCAG20/> .

V CRTC must show leadership in accessibility

32. Finally, as a matter of historical record, we note that the proposed *Rules of Procedure* as currently set out, suggest that the CRTC is moving to a paperless system of record-keeping. We have grave concerns about such a move. Electronic information is too easy to modify or lose.
33. We have recently learned, for instance, that information about the level of accessible content aired by Canada's private over-the-air TV broadcasters CRTC in 1999/2000 is unavailable, because the database containing the data is 'out of service'. Quite frankly, this is shocking.

³ Section 1(1) of 429/07 states that: "This Regulation establishes accessibility standards for customer service and it applies to every designated public sector organization and to every other person or organization that provides goods or services to members of the public or other third parties and that has at least one employee in Ontario."

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34. We also understand that the CRTC has destroyed all of its electronic financial records from before 1990 related to all of its licensees. This is also shocking – indeed, the decision to destroy such information can only be described as unconscionable.
35. To avoid the loss of yet more information that is critical to our understanding of broadcasters' approach to accessibility, we call on the CRTC to retain printed copies of its records, including applications.

Thank you for the opportunity to comment on your proposals for new procedural rules. We look forward to reviewing the submissions of other parties.

Sincerely yours,



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