

**Broadcasting - Staff Letter addressed to various parties interested
in Broadcasting Notices 2023-138, -139 and -140**

**Submission by
Professor Michael Geist
Canada Research Chair in Internet and E-commerce Law
University of Ottawa, Faculty of Law
Centre for Law, Technology and Society**

May 29, 2023

1. I am a law professor at the University of Ottawa where I hold the Canada Research Chair in Internet and E-commerce Law and serve as a member of the Centre for Law, Technology and Society. I focus on the intersection between law and technology with an emphasis on digital policies. I submit these comments in a personal capacity representing only my own views.
2. I have been active participant in the policy development of Bill C-11, including appearances on the bill as an expert witness before the House of Commons Standing Committee on Canadian Heritage and the Senate Standing Committee on Transport and Communications. I look forward to continuing that work by providing submissions to some of the Commission's expected consultations on the implementation of the bill.
3. My initial response to the consultations, posted on my personal website on May 18, 2023, drew attention to concerns regarding the exceptionally short deadlines for public submissions. I noted:

With short timelines, no resources or support mechanisms for new groups and entities interested in participating, and the absence of the policy direction, this is not a serious attempt to fully engage in Canadians. Despite the rhetoric of regulating platforms rather than users, the implications of these regulations for users – as creators, consumers, and cultural participants – are enormous. Yet the CRTC has established a timeline that virtually guarantees that only the well-established groups familiar with Commission practices will participate. There are no defined resources for newer groups and little time for more participatory organizations to canvass members for their thoughts. How can the CRTC claim to support public participation but leave questions on support for that participation until after consultation deadlines have concluded? This creates a myriad of problems, not the least of which is that the CRTC's evidentiary record and participants in an in-person hearing in November will be decidedly lopsided with key voices likely missing.¹

4. To be clear, I had absolutely no involvement in the current application. That said, I support the applicants, who represent groups from across the political and policy spectrum seeking more reasonable deadlines that will better allow both supporters and

¹ <https://www.michaelgeist.ca/2023/05/ready-fire-aim-eleven-thoughts-on-the-crtc-bill-c-11-consultations/>

critics of Bill C-11 to provide the Commission with more robust, evidence-based submissions as it develops the necessary policies to implement the law.²

5. I do not believe the current deadlines properly allow for full participation of many groups and individual Canadians in the Commission process. The deadlines limit the ability to canvass membership, conduct research, develop recommendations, and craft submissions.
6. If the only two options are the Commission's initial deadlines and those proposed by the applicants, I strongly support the applicants' revised schedule which has the benefit of extending the timeline for initial submissions but retaining the expected dates for hearings in November 2023. In other words, the applicants' proposal will enable better public participation without impacting the Commission's preferred timeline for completion of these particular consultations.
7. While I support applicants' plan as a marked improvement over the Commission's initial timeline, I do not think it is the optimal timeline to allow for fully informed and engaged public participation.
8. In my view, there are two essential conditions associated with these consultations that are absent from both the Commission and applicant timelines: (1) completion of the government's policy direction process including approval of a final policy direction; and (2) completion of the Commission's process for determining support mechanisms for public interest group participation in the Bill C-11 CRTC process. Both of these conditions are essential to provide participants with the information necessary to offer informed responses and to ensure a level playing field among the wide range of Bill C-11 stakeholders.
9. Canadian Heritage Minister Pablo Rodriguez on behalf of the government has long maintained that a policy direction is an essential component of Bill C-11. Minister Rodriguez advised the Standing Committee on Canadian Heritage on May 29, 2023 that

² <https://www.michaelgeist.ca/2023/05/crtc-chair-vicky-eatrides-faces-her-first-big-test-is-the-commission-serious-about-public-participation-on-bill-c-11/>

the draft policy direction would be released shortly, followed by public consultation and the release of the final direction in accordance with the requirements under the Broadcasting Act.

10. As the Commission is no doubt aware, the policy direction process includes the public release of a draft policy direction, mandates a minimum of 30 days for public comment, followed by government review and analysis of the public commentary, and the approval and publication of the final policy direction.
11. I am aware that the government is required to consult with the Commission before a draft policy direction is published in the Canada Gazette for public comment. However, Minister Rodriguez advised the Standing Committee on Canadian Heritage on May 29, 2023 that the Commission had not been provided the draft direction. It is possible that Minister Rodriguez interpreted the question narrowly and that there have been consultations.
12. Regardless, even if the Commission was provided with advance insights into the draft policy direction, such knowledge is not the same as accounting for a final direction approved by the government. Indeed, **to infer that the draft direction is sufficient for public comment pre-supposes the outcome of the policy direction consultation that is required under the Broadcasting Act.** If that consultation is genuine, the Commission cannot possibly provide the public with assurances that its consultation documents are consistent with the future, final policy direction.
13. The CRTC Chair has noted that it can adjust the Commission's approach as needed in response to the policy direction.³ However, the current Commission deadlines will not allow for public responses that properly account for a final policy directive. In fact, even if the government were to release the draft policy direction today, the Commission's deadlines for the consultations would conclude even before the draft policy direction consultation is complete. The release of a final policy direction is expected to take many

³ <https://www.newswire.ca/news-releases/statement-by-the-crtc-chairperson-and-chief-executive-officer-vicky-eatrides-on-the-online-streaming-act-808691088.html>

more weeks given the requirements under the Broadcasting Act and there would be no opportunity for Canadians to ensure their submissions are consistent with the final policy direction.

14. In fact, the risk that the deadline for submissions to the Commission will precede the release of the final policy direction is also virtually certain to arise with the applicants' timeline.
15. The CRTC Chair has emphasized the importance of public participation in the Bill C-11 regulatory process. For that process to be viewed as a genuine consultation that incorporates the full range of public perspectives, it is essential that the final policy direction be concluded before the CRTC's consultation submission deadline. This would ensure that stakeholder comments account for how the government expects the bill to be interpreted.
16. In my view, **a better approach on the consultation deadline would be to set the deadline for initial comment at 15 days after the final policy direction has been released.** This would place the onus on participants to begin to craft their submissions well before the deadline and provide a short opportunity to adjust in light of the final policy direction. The further deadlines related to replies and the full hearing would follow with appropriate timelines for participation.
17. The second pre-condition for participation for many public interest groups is certainty with respect to support mechanisms for their participation in the Bill C-11 CRTC process. 2023-138 asks the question (Question 10) about directing initial base contributions to the BPF or other funds with similar objectives. There may be additional questions forthcoming about mechanisms to provide support for public interest participation.
18. The timing related to support mechanisms for public interest participation places public interest groups at a distinct disadvantage, creating an unfair and unlevel playing field. Groups require certainty with respect to available support before their participation, not months later when they have already incurred significant costs. The Commission approach creates enormous uncertainty and may inhibit public interest participation in the Bill C-11 process.

19. The Commission should prioritize the issue as a pre-condition for moving forward with the Bill C-11 consultations. Such an approach would enable broader public participation with a wider range of perspectives. Given my recommendation at Paragraph 16, there is the potential to address this issue immediately and still leave time for public interest participation in the substantive Bill C-11 consultations that would follow the conclusion of the policy direction process.

*** END OF DOCUMENT ***