

## • CRTC RATTLES SABRE AT ISPs WHO BREACH INTERNET TRAFFIC MANAGEMENT RULES •

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The CRTC has introduced new procedural guidelines — including a range of enforcement mechanisms it may use against non-compliant Internet Service Providers (“ISPs”) — to deal with complaints from customers who claim that ISPs are inappropriately slowing down access to certain internet content.

The CRTC had already established a principle-based 2009 policy to deal with Internet Traffic Management Practices (“ITMPs”), which are economic or technological measures used by ISPs to control the flow of traffic on their networks in order to prevent or respond to congestion issues, including disproportionate use by some users.

That policy, which favours network builds and pricing initiatives to deal with internet traffic congestion, generally requires that ISPs be transparent with their customers with respect to any technological traffic management practices, such as slowing down or “throttling” a particular type of traffic, like Peer-to-Peer applications or gaming. The policy also requires that any such practices be applied in a neutral way, neither preferring the ISP’s own business interests nor disadvantaging those of its competitors.

Likely motivated by both the filing of misconceived public complaints and allegations that the CRTC has not been effective in its enforcement of the ITMP policy, the new guidelines appear to be intended to provide procedural certainty to complainants and ISPs alike with respect to the CRTC’s handling of complaints concerning compliance with that policy.

However, in what appears to be a clear shot across the bow for ISPs, the guidelines also spell out the range of enforcement tools that may be brought to bear against ISPs found to be in violation of the ITMP policy. These measures, which range from simple requests for further information to more drastic measures, such as mandatory, court-enforced orders, include:

- Compliance meetings with the ISP;
- On-site inspections or third party audits;
- Commencement of a public proceeding;
- Show cause hearing for the issuance of a mandatory order to take corrective actions, including partial customer reimbursement;
- Publication on the CRTC website of the ISP’s name and the nature of the complaint;

As provided by the *Telecommunications Act*, S.C. 1993, c. 38, mandatory orders may be registered with the Federal Court, where they may be enforced as orders of that court.

The possibility of on-site inspections or third party audits may be particularly noteworthy, because it is a common complaint of consumers and net neutrality advocates that it is almost impossible for an individual complainant to prove that traffic was throttled, since they do not have access to ISP data, such as overall traffic loads. Although the CRTC’s inspection and audit powers are extremely intrusive to ISPs, and have to date been used very sparingly by the Commission, even the possibility that these

powers may be used in ITMP complaints may give some comfort to these critics.

There is nothing really new in any of the enforcement tools set out in the guidelines: each of the measures is rooted in the *Telecommunications Act* (many as explicit powers granted to the CRTC), and has always been available to enforce the ITMP policy. What is noteworthy is the Commission's laying out of these enforcement measures in the guidelines, sending a clear signal to critics and ISPs alike that it may "get tough" with non-compliant providers.

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