

**Petition to the Governor in Council by
Southwestern Integrated Fibre Technology Inc.
concerning Telecom Regulatory Policy 2018-377**

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**Comments
of
Xplornet Communications Inc.**

February 18, 2019

INTRODUCTION AND EXECUTIVE SUMMARY

1. Xplornet Communications Inc. (“Xplornet”) has reviewed the Petition to the Governor in Council concerning Telecom Regulatory Policy CRTC 2018-377¹ (“Petition”) filed by Southwestern Integrated Fibre Technology Inc. (“SWIFT”) and is pleased to provide its comments on the matters at issue.
2. Xplornet provides its comments to the Governor in Council as an Internet Service Provider with extensive experience in deploying networks to serve rural Canadians. Xplornet was founded almost 15 years ago with a simple mission: to make fast, affordable, high-speed broadband services available to rural Canadians, wherever they choose to live. Since then, we have established ourselves across the country as a facilities-based, competitive provider with a vast national network. Xplornet’s LTE fixed wireless network extends across every province and is complemented by broad coverage from state-of-the-art high-throughput satellites. Today, we are offering rural Canadians home Internet packages with speeds of 25 Megabits per second (“Mbps”) with a range of data plans, including unlimited usage. We are proud to connect more than 350,000 rural and remote homes and businesses across every province and territory. We are continually investing to expand the reach of our network and to leverage new technologies to increase our service offerings.
3. In its Petition, SWIFT has requested that the Governor in Council exercise its jurisdiction set out in section 12 of the *Telecommunications Act* (“*Telecom Act*” or “*Act*”) to issue an order varying certain determinations made by the Canadian Radio-television and Telecommunications Commission (“CRTC” or “Commission”) in TRP 2018-377 concerning the structure of its Broadband Fund (“Fund”). Specifically, SWIFT alleges that certain Commission determinations in this decision are inappropriate related to:
 - 1) Criteria for eligible bidders;
 - 2) The rejection of the proposal to provide funds to local governments or third-party organizations to distribute to projects according to their discretion;
 - 3) How the Commission will use its aspirational service level targets for basic service to guide the Broadband Fund process, particularly relating to:
 - a) The determination that a commitment to deploy services that will meet the aspirational service level targets set by the Commission will not be a pre-requisite for a bid to be eligible for Broadband Fund subsidy;
 - b) The exclusion of underserved areas of the country located immediately adjacent to served areas from eligibility for funding;
 - c) Monitoring and enforcing obligations on Fund recipients;
 - 4) Coordination of the Fund with other investments and initiatives; and
 - 5) Confidentiality of applications to the Fund.

¹ Telecom Regulatory Policy CRTC 2018-377, *Development of the Commission’s Broadband Fund*.

4. Xplornet does not support the relief requested by SWIFT in its Petition.
5. Xplornet agrees with SWIFT that the design of the Broadband Fund does not contain necessary protections to ensure that subsidies awarded by the Fund do not displace or interfere with other public or private investments; however, Xplornet does not support the relief sought by SWIFT to address this issue.
6. In order to ensure that subsidies awarded from the Broadband Fund do not displace or interfere with other public and private investments, SWIFT has argued for increased requirements on Fund applicants to consult with communities and to demonstrate that proposed bids are coordinated with other public programs. SWIFT's proposed variances are inappropriate because they risk inappropriately depriving Canadians in communities with which consultation is not feasible from the benefits of the Broadband Fund. Furthermore, SWIFT's proposed variances are insufficient to address the broader coordination issues present in the Fund's design.
7. To address coordination issues, Xplornet submits that the Commission should implement a mechanism to canvas investments that are currently being undertaken or will be undertaken by public and private entities in order to ensure that subsidies awarded do not interfere with other initiatives. As the Fund is currently structured, the Commission has no means to receive information about current or planned projects. Without this information, the Broadband Fund risks duplicating and/or displacing other projects, resulting in the inefficient use of Broadband Fund resources and the Fund's failure to maximize the benefits it extends to Canadians living in areas of the country requiring new broadband infrastructure.
8. With respect to the other matters raised by SWIFT in its Petition, Xplornet does not believe these determinations represent the inappropriate exercise of the Commission's jurisdiction, nor do they foster results that are not in the public interest. Accordingly, Xplornet submits that the requests for variance set out in SWIFT's Petition are without merit and should be denied by the Governor in Council.

BACKGROUND TO TRP 2018-377

9. In 2015, the Commission held its TNC 2015-134² proceeding to assess which telecommunications services Canadians require to meaningfully participate in the digital economy. As a result of this proceeding, in TRP 2016-496,³ the Commission explicitly determined that broadband services had become a basic telecommunication service that Canadians require and established a universal service objective designed to ensure that "Canadians, in urban areas as well as

² Telecom Notice of Consultation CRTC 2015-134, *Review of basic telecommunications services*.

³ Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy*.

in rural and remote areas, have access to voice services and broadband Internet access services, on both fixed and mobile wireless networks.”⁴ The Commission described that it would consider the universal service objective to be achieved when Canadians can access speeds of at least 50 Mbps download and 10 Mbps upload (“50/10 service”).⁵ Innovation, Science and Economic Development Canada (“ISED”) has supported the Commission’s universal service objective.

10. While Canadians in large urban centres generally have access to Internet services that meet or exceed the Commission’s universal service objective, many Canadians in smaller urban, rural and remote areas of the country do not yet have such services.
11. Much work has been undertaken to bring increased broadband access to Canadians, with a particular focus on extending services meeting the Commission’s universal service objective to more areas of the country. In recent years, ISED has undertaken three major initiatives to support broadband deployment to rural and remote areas of the country: (1) in 2009, ISED committed \$225 million through its Broadband Canada program; (2) in 2014, ISED committed \$305 million⁶ through its Connecting Canadians program; and (3) in 2016, ISED committed an additional \$500 million through its Connect to Innovate program.
12. In TRP 2016-496, the Commission determined that it would create its \$750 million Broadband Fund to support the deployment of broadband facilities to areas of the country without access to Internet services meeting its universal service objective.
13. While substantial resources are being directed to supporting broadband deployment, recent estimates from ISED are that it may cost at least \$6.5 billion to bring 50/10 service to all areas of the country.^{7,8} Indeed, in creating its Broadband Fund, the Commission recognized that “[c]losing the gap in broadband Internet access service availability in Canada is an enormous financial challenge, requiring billions of dollars in funding and investments that can only be overcome through shared responsibility.”⁹ Accordingly, the Commission has approached its Broadband Fund from the beginning with an acknowledgment that its efforts would not fully address bringing 50/10 service to all Canadians, but would only make a contribution to these efforts. The Broadband Fund would be a part of the solution, in conjunction with other subsidy programs and private investments.

⁴ TRP 2016-496, paragraph 80.

⁵ *Ibid.*, paragraph 80.

⁶ \$65 million was later transferred to the Connect to Innovate program.

⁷ *2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 1 – Connectivity in Rural and Remote Areas*, page 10.

⁸ Xplornet disputes these estimates, as we believe that technological upgrades to be implemented in the near term will allow for many areas of the country to be served with a minimum of 50/10 service at lower costs and without the need for government assistance.

⁹ TRP 2016-496, paragraph 128.

14. As a result, the Commission has had to consider how its Broadband Fund should be structured to ensure it extends maximum benefits to Canadians currently without 50/10 service. To this end, the Commission set out certain fundamental guiding principles in TRP 2016-496 to guide the Fund's design. These included determinations that:

- 1) The funding mechanism will focus on underserved areas in Canada;
- 2) The Commission will attempt to align its funding mechanism with the broader ecosystem of current and future funding and investments; and
- 3) To the greatest extent possible, the funding mechanism will be managed at arm's length, based on objective criteria, and will be administered in a manner that is transparent, fair, and efficient.¹⁰

15. The particulars of the role that the Broadband Fund would serve, including how it would be designed and operated, were considered in a follow-up proceeding that resulted in TRP 2018-377. As part of this decision, the Commission made determinations concerning the types of projects that would be eligible for Broadband Fund support and the areas of the country that would be eligible, among other things.

SWIFT'S APPLICATION

16. In its Petition, SWIFT has challenged certain of the determinations made by the Commission in TRP 2018-377 and asked the Governor in Council to vary this decision to correct what it alleges to be errors. SWIFT has specifically challenged determinations made by the Commission concerning:

- 1) Criteria for eligible bidders;
- 2) The rejection of the proposal to provide funds to local governments or third-party organizations to distribute to projects according to their discretion;
- 3) How the Commission will use its aspirational service level targets for basic service to guide the Broadband Fund process, particularly relating to:
 - a) The determination that a commitment to deploy services that will meet the aspirational service level targets set by the Commission will not be a pre-requisite for a bid to be eligible for Broadband Fund subsidy;
 - b) The exclusion of underserved areas of the country located immediately adjacent to served areas from eligibility for funding;
 - c) Monitoring and enforcing obligations on Fund recipients;
- 4) Coordination of the Fund with other investments and initiatives; and
- 5) Confidentiality of applications to the Fund.

17. For the reasons below, SWIFT's Petition and requested relief should be denied.

¹⁰ TRP 2016-496, paragraph 137.

The Commission's criteria for eligible bidders do not inappropriately restrict access to the Broadband Fund

18. SWIFT has asked the Governor in Council to vary the Commission's determinations concerning applicant eligibility set out in TRP 2018-377 to reinstate the Commission's preliminary views as set out in TRP 2016-496.¹¹

19. In TRP 2016-496, the Commission provided the following preliminary view on applicant eligibility:

Eligible recipients will be required to meet the following criteria:

- be legal entities, incorporated in Canada, that already operate or intend to operate broadband infrastructure. These include private sector companies; provincial, territorial, regional, municipal, and First Nations entities; and non-profit organizations. Individuals and federal entities (including Crown corporations) are not eligible.
- demonstrate experience in deploying and operating broadband infrastructure. If the entity does not itself have a track record in operating broadband infrastructure, it must demonstrate that it has appropriate resources with experience deploying and operating broadband infrastructure as part of its project team or contractual resources.
- demonstrate solvency and reliability through supporting documentation.¹²

20. In the process leading to TRP 2018-377, the Commission further considered comments from interested parties concerning these eligibility criteria and determined that the criteria were appropriate.¹³

21. The sole changes that the Commission made to these criteria were as follows:

- 1) The Commission expanded the first bullet of its preliminary view to clarify that partnerships, joint ventures or consortia composed of incorporated bodies, provincial/territorial/municipal entities, and/or band councils/Indigenous governments are equally eligible to apply for funding;
- 2) For the second bullet of its preliminary view, the Commission clarified how it would assess whether an applicant has experience in deploying broadband infrastructure. The Commission stated that to meet this criterion, an applicant must show two things:

¹¹ Petition, paragraphs 13 to 15.

¹² TRP 2016-496, Appendix 1.

¹³ See TRP 2018-377, paragraph 119.

- That the applicant (or at least one member of a partnership, joint venture or consortium) is eligible to operate as a Canadian carrier; and
- That the applicant (or at least one member of a partnership, joint venture or consortium) has experience deploying and operating broadband infrastructure in Canada for a minimum of three years, or has entered into a contractual agreement with an incorporated entity, provincial/territorial/municipal entity, or a band council/Indigenous government, that has such experience.

22. Accordingly, it is clear that the Commission's determinations in TRP 2018-377 do not introduce new restrictions on applicant eligibility as SWIFT suggests. The Commission's preliminary views already provided that applicants would be required to demonstrate that they have the appropriate expertise to deploy and operate broadband infrastructure in order to be eligible to receive subsidy. In TRP 2018-377, the Commission has merely provided guidance to potential applicants that, in order to demonstrate such expertise, the Commission will be looking for the applicant to be (or be working with) a Canadian carrier that has a minimum of three years experience in deploying and operating broadband infrastructure (or that the applicant is working with a party with such experience).

23. Clarification of this nature is reasonable and provides helpful guidance to potential applicants. SWIFT's request that the Governor in Council remove such guidance would harm the efficient operation of the Broadband Fund and should be denied.

The Commission should not be required to delegate its jurisdiction over the Canadian telecommunications system to local governments or third-party organizations

24. SWIFT has also requested that the Governor in Council vary the Commission's determination¹⁴ set out in TRP 2018-377 not to provide funding to local governments or other intermediaries who would in turn determine how funding should be distributed.¹⁵

25. Oversight over the development of the Canadian telecommunications system is a federal endeavour that the CRTC has been entrusted to oversee through its powers in the *Telecom Act*. If the CRTC were to provide funding to third parties to disburse using their own discretion, the Commission would be delegating a core function of its jurisdiction to these third-party organizations.

26. While local governments, or organizations like SWIFT, may believe that they are well placed to make decisions concerning the local allocation of funding for broadband projects, local governments and third-party organizations are not able

¹⁴ TRP 2018-377, paragraph 117.

¹⁵ Petition, paragraphs 14 to 15.

to make decisions that ensure the effective development of Canadian telecommunications as a whole. It is most appropriate for oversight over the allocation of Broadband Fund resources to remain with the CRTC.

27. As described below, there are other means for the Commission to ensure that Broadband Fund subsidies are coordinated with other public and private broadband initiatives and it is not necessary for the Commission to delegate its powers as requested by SWIFT. Xplornet submits that SWIFT's request that the Governor in Council delete paragraph 117 of TRP 2018-377 should be rejected.

The Commission has not reduced the standard it is setting for basic service

28. SWIFT has argued that the Commission has abandoned its commitment to the basic standards for service that it referred to in TRP 2016-496.¹⁶

29. In TRP 2016-496, the Commission established its universal service objective for basic service,¹⁷ which it stated it would consider to be achieved when Canadians can access speeds of at least 50 Mbps download and 10 Mbps upload,¹⁸ (referring to actual speeds delivered and not those advertised¹⁹), in packages that provide an unlimited data allowance option.²⁰ The Commission also determined that it would set additional quality of service metrics for other service characteristics (i.e., latency, packet loss and jitter) to help define high-quality service.²¹

30. In making these determinations, the Commission clarified that the universal service objective was meant to “consider what is currently available to the vast majority of the population and what is likely to be required in the future for Canadians to have new and creative ways to participate in the digital economy.”²² Accordingly, it is a forward-looking standard that contemplates beyond the needs of Canadians today to provision for Canadians' future needs.

31. In setting such a forward-looking standard, the Commission recognized that it would require significant investments over an extended period of time to be realized. For certain areas of the country, the Commission noted that the universal service objective may need to be met in stages through intermediate steps. As the Commission stated:

“The universal service objective will take time and significant investments to achieve, and will require efforts from all stakeholders. The Commission

¹⁶ Petition, paragraph 17.

¹⁷ TRP 2016-496, paragraph 80.

¹⁸ Ibid., paragraph 80.

¹⁹ Ibid., paragraph 81.

²⁰ Ibid., paragraph 97.

²¹ Ibid., paragraph 110.

²² Ibid., paragraph 79.

therefore expects that funding from the public sector and investments from the private sector will be required over many years.

Canada's vast land mass and low population density in rural and remote areas constitute major challenges in building modern telecommunications networks for underserved households and businesses. The costs to reach these locations are not the same across the country. In communities that are more densely populated and closer to the transport network (the backbone), the per-household cost to upgrade or build infrastructure is lower. Conversely, remote or sparsely populated communities require significantly higher investments per household.

Given the state of current telecommunications infrastructure in Canada, the Commission expects fixed broadband Internet access services, based on the criteria set out above, to be available in 90% of Canadian premises by the end of 2021, and in the remaining 10% of Canadian premises within 10 to 15 years. **In communities where distance, geography, and limitations to existing technologies present challenges, the Commission expects that intermediate steps will be taken to progress towards these goals.**²³ [Emphasis added]

32. The Commission's determinations in TRP 2018-377 are entirely consistent with these initial determinations set out in TRP 2016-496. For the reasons below, SWIFT's arguments that in TRP 2018-377 the Commission has abandoned its service level targets for basic services should be dismissed.

The Commission has appropriately allowed flexibility for bids submitted to the Broadband Fund with respect to meeting aspirational service level targets

33. SWIFT has asked the Governor in Council to vary the Commission's eligibility criteria for Broadband Fund applications to include all of its aspirational targets relating to speed and quality of service as pre-requisites. In other words, if a project does not propose to provision service that meets all of the aspirational targets (e.g., speed, latency), then it would not be considered for funding.²⁴
34. Such a proposal is not appropriate or in the public interest. As noted above, in TRP 2016-496, the Commission explicitly recognized that many areas of the country would be subject to circumstances that would require the universal service objective to be obtained over time through intermediary steps.
35. If the Commission's eligibility criteria were to be varied to require the aspirational targets be met by all bids, this would directly preclude these areas of the country from receiving support for service upgrades from the Broadband Fund, denying much needed benefits to consumers.

²³ Ibid., paragraphs 112 to 114.

²⁴ Petition, paragraph 19.

36. To provide flexibility for applicants to broadly apply to the Fund in order to ensure a wide range of applications assisting all areas of the country, the Commission has taken two steps to ensure the Fund's eligibility criteria are designed in a manner that supports all Canadians to the greatest degree possible.
37. Firstly, the Commission has decided to provide flexibility to bidders who propose to perform service upgrades but who cannot provision speeds of 50/10 in a particular area at this point in time. As the 50/10 standard contemplates the future needs of Canadians, the Commission deemed that it would be appropriate to defer the delivery of 50/10 service for the time being in certain hard to serve areas of the country in order to focus on meeting the current needs of Canadians. As most Canadians today are using service of 25/5, the Commission determined that this should be the minimum level of service that must be delivered for a project to be eligible for funding. Provisioning speeds of 25/5 would ensure that the current needs of Canadians are met. However, in areas where bids propose a speed of less than 50/10, the Commission expects that proposed projects would be scalable in order to allow for upgrades to provision 50/10 service to be performed at a later date to ensure the future needs of residents can also be met. This is set out in TRP 2018-377 as follows:

“The universal service objective includes both download and upload speed criteria. **A speed eligibility criterion of 25 Mbps download and 5 Mbps upload would likely result in projects covering underserved areas that would deliver a broadband Internet access service that the majority of Canadians use today.** Accordingly, the Commission considers that a minimum speed eligibility criterion of 25 Mbps download and 5 Mbps upload would be meaningful and a significant first step towards meeting the universal service objective. These speeds are to be the actual speeds delivered, not merely those advertised.

In light of the above, the Commission determines that to be eligible for funding, proposed projects that would build or upgrade access infrastructure must be capable of providing a minimum download speed of 25 Mbps and a minimum upload speed of 5 Mbps.

However, **the Commission expects that proposed projects that do not meet the universal service objective-level speeds of 50 Mbps download and 10 Mbps upload will be scalable, meaning that speeds of 50/10 Mbps will be provided to the target community at a future date** through capacity upgrades in the access or transport infrastructure. The Commission will evaluate the scalability of each proposed fixed broadband Internet access service project in the assessment stage.”²⁵ [Emphasis added]

²⁵ TRP 2018-377, paragraphs 104 to 106.

38. Secondly, the Commission has determined that quality of service metrics other than speed would not serve as pre-requisites for applications to the Fund. Instead, its aspirational quality of service targets would be set to define what represents “high-quality Internet access service”. With this definition, the Commission would be able to evaluate bids received to assess the quality of the service that would be deployed by a particular applicant. As meeting the quality of service targets may not be possible in certain areas of the country, this flexible approach was adopted.²⁶
39. SWIFT is seeking to remove these elements of the Fund’s design, restricting the scope of Canadians who can benefit from the Broadband Fund’s resources. SWIFT argues that the level of flexibility provided by the above determinations encourages inefficient upgrades to legacy infrastructure that will not meet the future needs of Canadians.²⁷ However, as noted above, the Commission is taking steps to prevent investments of this nature through scalability requirements. SWIFT’s concerns are without merit and should be dismissed.

Areas without access to 50/10 service that are immediately adjacent to areas that are served should not be eligible for funding

40. SWIFT has additionally argued that the Commission has failed to properly rely on its universal service objective in defining areas of the country that are eligible for subsidy. SWIFT argues that all areas of the country where there is evidence that the universal service objective is not being met should be eligible for subsidy.²⁸
41. The crux of this aspect of SWIFT’s Petition surrounds the Commission’s determinations in TRP 2018-377 to use ISED’s 25-square-kilometre hexagons to map the country, and to include only hexagons where no household has access to broadband speeds meeting the universal service objective as eligible for funding. In other words, partially-served hexagons are not eligible for Broadband

²⁶ Xplornet notes that in setting its aspirational quality of service metrics to define “high-quality Internet access service”, the Commission has set unduly aggressive targets that undermine Canada’s ability to bring service to all underserved areas of the country.

For example, in Telecom Decision CRTC 2018-241, the Commission set an aspirational target for latency at 50 milliseconds (“ms”) round-trip between a customer’s modem and an Internet exchange point, measured at peak times. This decision is now subject to an application to review and vary this threshold filed by Northwestel.

While Xplornet appreciates that the Commission is striving to set high thresholds in defining “high-quality service”, setting unattainably high thresholds is not in the public interest. There was significant evidence on the record of the proceeding that led to Decision 2018-241 that demonstrated that even the most advanced users do not require a latency threshold of 50 ms round-trip as set by the Commission. Having a definition for “high-quality service” that effectively paints many service technologies that well serve the needs of Canadians as being less than “high-quality” is not appropriate and is inconsistent with the reality that, for a country like Canada that has a large geographic land mass and a dispersed population, a diversity of technologies will be necessary to close the broadband gap. Discrediting technologies that will be an integral part of the broadband solution is counter-productive and not in the interest of Canadians.

²⁷ Petition, paragraph 75.

²⁸ Ibid., paragraph 18.

Fund support. SWIFT has also filed an application with the CRTC seeking variance of these determinations.

42. Xplornet submits that the Commission's determinations are appropriate, advance important policy goals, and should not be varied as requested by SWIFT.
43. When the Commission created its Broadband Fund in TRP 2016-496, it explicitly recognized that "[c]losing the gap in broadband Internet access service availability in Canada is an enormous financial challenge, requiring billions of dollars in funding and investments that can only be overcome through shared responsibility."²⁹ The reality of the Broadband Fund is that it will only be able to provide benefits to a portion of underserved households and it is up to the Commission to determine how to best allocate its scarce resources.
44. In this regard, the Commission set certain guiding principles for the Fund that are designed to ensure the Fund achieves maximum impact with the available resources. These included a principle that the Fund will complement and not displace other investments. While we do not believe that enough has been done to protect against such outcomes – as described below – the Commission's determination not to consider partially-served hexagons as eligible for funding furthers this objective.
45. In its process that led to TRP 2018-377, the Commission specifically sought comments on how the Broadband Fund's limited resources should be allocated for maximum impact. Numerous parties submitted comments to the Commission that it should direct subsidies to those areas of the country that are least likely to receive service without subsidy, such as remote areas unlikely to be served by market forces.³⁰
46. Ultimately, in TRP 2018-377, the Commission determined that it would not expressly prioritize certain underserved areas over others based on geographic considerations with respect to fixed broadband Internet access service projects.³¹

²⁹ TRP 2016-496, paragraph 128.

³⁰ See for example, comments of Rogers and Quebecor:
Rogers(CRTC)16Oct17-7 TNC 2017-112:

"... Rogers does not believe that setting aside some funds for remote and Indigenous communities is sufficient. These areas, which include satellite communities and communities where capital will not be deployed over the next five years to create networks sufficient to meet the universal service objective, should become the central focus of the new broadband funding regime. The Commission should leave the much easier-to-reach communities, including those communities located in close proximity to markets already served, or close to fibre transport facilities, to the competitive market to serve. This approach will ultimately result in better access to all underserved communities."

Quebecor, TNC 2017-112, Final Submission, paragraph 20.

"Québecor Média, pour sa part, estime que la répartition des fonds à partir d'enveloppes attribuées aux collectivités autochtones, aux collectivités dépendantes des satellites et aux régions ne pose pas en soi de problème de principe. Cependant, peu importe la décision du Conseil à cet égard, il nous paraît impératif qu'il s'assure que les subventions soient octroyées aux communautés véritablement éloignées, où les forces du marché sont moins susceptibles de garantir le déploiement de la large bande."

³¹ TRP 2018-377, paragraph 290.

47. However, in recognition that market forces are more likely to address service gaps in underserved areas adjacent to areas currently receiving 50/10 service, the Commission determined that partially-served hexagons would not be eligible for funding:

“If one household within a hexagon is deemed to be served, it is likely that market forces will bring improved levels of broadband Internet access service to the remaining households in the hexagon. The Commission therefore considers that all households in a hexagon must be underserved for that hexagon to be deemed underserved and thus eligible for funding.”³²

48. In this manner, the Commission has provided some measure to ensure that the Fund adheres to its fundamental guiding principle to coordinate with private investments. As we describe below, further protections of this nature are required, as other investments to expand 50/10 service will not be limited to within partially-served hexagons. Many underserved areas of the country will be addressed by private investments that will not be accounted for as part of the Broadband Fund process.

49. If SWIFT’s request to allow all areas that are without 50/10 service to be eligible for funding (i.e., areas within partially-served hexagons), this would increase the degree to which the Fund interferes with private investments, contrary to the Fund’s fundamental guiding principles, and limit the benefits that the Fund may extend to Canadians.

50. Accordingly, the variances sought by SWIFT concerning eligible areas should be denied.

The Commission is well positioned to monitor and enforce contracts related to subsidies

51. SWIFT has additionally requested that the Governor in Council vary language from TRP 2018-377 in which the Commission discussed the enforcement of commitments to deploy using Broadband Fund support.³³ Xplornet submits that SWIFT’s requested variances are unnecessary and should be dismissed.

52. In TRP 2018-377, the Commission made extensive determinations concerning how obligations will be imposed and enforced upon successful applicants. For example, at paragraphs 306 to 308 of the decision, the Commission stated as follows:

“In addition, **the Commission will set out the conditions and obligations specific to each recipient in the funding decision for the project.** If the project changes materially from what the Commission had approved, the recipient must request Commission approval for such changes. Similarly,

³² Ibid., paragraph 85.

³³ Petition, paragraphs 23 to 24.

applicants will have to commit to informing the Commission should their amount of funding from any other source(s) change.

In light of the above, the Commission determines that funding decisions will include conditions related to project timelines, reporting, auditing, and material changes. Failure to comply with these conditions could result in funding not being disbursed until the conditions are met, or the implementation of other compliance measures.

The Commission will impose certain conditions, pursuant to sections 24 and 24.1 of the *Telecommunications Act*, regarding the offering and provision of broadband services using facilities funded through the Broadband Fund, such as the speed and capacity of broadband services provided, the level of retail pricing, reporting, and associated wholesale access service offerings, that would apply once the infrastructure is built. The conditions imposed on the offering and provision of broadband services will apply to the funding recipients, as well as to any subsequent purchasers of the infrastructure built with the help of funding from the Broadband Fund. **In addition, the Commission may require recipients to participate in a broadband performance measurement program to enable the Commission to monitor the quality of the broadband services being provided over the funded infrastructure.**

53. Clearly, the Commission is taking the enforcement of obligations related to broadband deployment using Broadband Fund resources very seriously.
54. SWIFT has requested that this language be varied to state that service performance standards will be included in funding agreements.³⁴ Xplornet does not believe this variance is necessary. As highlighted above, in paragraph 306 of TRP 2018-377, the Commission directly stated that the funding decision for a project will set out the conditions and obligations specific to each recipient. As the level of service to be provided by a recipient is a fundamental aspect of the application, surely the Commission intends to indicate details of this nature in the funding agreement, and is addressing this through this statement.
55. SWIFT has requested that the Governor in Council vary the last sentence of paragraph 308 to state that the Commission *will* require recipients to participate in broadband performance measurement programs.³⁵ Xplornet does not believe that this variance is necessary. The Commission has all of the tools it requires to address performance issues should they arise. There is no reason for the Governor in Council to doubt the Commission's commitment to the success of its Broadband Fund program to grant this variance.

³⁴ Ibid., paragraph 24.

³⁵ Ibid., paragraph 24.

The Broadband Fund requires greater coordination with private and public investments and initiatives

56. SWIFT has raised concerns that the Commission's design of the Broadband Fund has not included sufficient protections to ensure that it observes its fundamental guiding principle to coordinate with other private and public investments.³⁶
57. Xplornet agrees with SWIFT that further protections are needed. However, Xplornet does not support the variances that SWIFT is requesting.
58. SWIFT is requesting that coordination concerns be addressed by requiring private sector applicants to the Fund to coordinate with local governments and public entities in submitting bids for Funding. SWIFT seeks two specific variances.
59. The first variance sought by SWIFT is to impose a requirement on applicants to secure a nominal amount of financial support from a government entity to be eligible to place a bid to the Broadband Fund.³⁷ SWIFT appears to believe that such financial support would be evidence that the project is coordinated with other public initiatives.
60. Xplornet does not believe this is an appropriate requirement. Indeed, the Commission considered a requirement of this nature as part of the process leading to TRP 2018-377 and determined it was not appropriate because it could disadvantage Canadians in communities that are less able to support applicants. As basic Internet service is a requirement for all Canadians, it is not appropriate to introduce requirements that could easily preference and disadvantage certain Canadians over others.
61. SWIFT has additionally sought to vary the requirement set out by the Commission in paragraph 223 of TRP 2018-377. This paragraph reads as follows:

In light of the above, the Commission determines that to be eligible for funding from the Broadband Fund, an applicant must

- **provide evidence that it has consulted, or attempted to consult, with communities affected by proposed projects, either individually or through elected officials, community associations, or other representative bodies;** and
- indicate whether the proposed project will affect any established or asserted Aboriginal or treaty rights, and commit to undertaking any further consultations that may be necessary. [Emphasis added]

62. SWIFT seeks to vary this requirement to: 1) remove any contemplation that an applicant may not be able to successfully consult with a community, despite having attempted to do so; and 2) require applicants to provide proof of such

³⁶ Ibid., paragraphs 20 to 22.

³⁷ Ibid., paragraph 21.

consultation, including evidence that the project does not conflict with a public funding initiative.³⁸

63. Xplornet equally does not support these variances. If applicants are not able to consult with a community, despite genuine attempts to do so, they should not be prevented from submitting a bid to the Fund. If this were the case, this would unfairly disadvantage Canadians in those underserved communities.
64. Xplornet further submits that the proposed variances are not sufficient means for the Commission to ensure that Broadband Fund subsidies are coordinated with other public and private investments. SWIFT's proposed variances are insufficient to address the broader coordination issues present in the Fund's design.
65. In order to implement protections that ensure the Broadband Fund is coordinated with other public and private initiatives, Xplornet submits that the Commission should implement a mechanism to fully canvas public and private entities of their existing and planned future investment plans. Only by being aware of these plans can the Commission properly coordinate its own investments.
66. To-date, the Commission has implemented no means to understand what the future plans are of private and public entities. For example, in its on-going mapping exercise to determine areas of the country that have access to services meeting the universal service objective to identify areas that will be eligible for subsidy, the Commission has not asked service providers to provide any information concerning planned future builds in order to ensure subsidies are not awarded in a manner that interferes with private projects.
67. In its proposed Application Guide for the Broadband Fund ("Application Guide"),³⁹ the Commission has made additional statements related to coordination with current and future projects of other parties; however, no further protections have been introduced to ensure proper coordination can occur. For example, at section 4.3 of the Application Guide, the Commission encourages applicants to do their own due diligence to "consider whether new projects have been completed since the CRTC's [mapping] data was collected, or whether new projects are under way or will be under way within their project's time frame." However, there is no way for applicants to know what the planned investments of other parties may be. Accordingly, this statement fails to address coordination issues.
68. The CRTC further advises in section 4.3 that it will not only consider the information presented in its eligibility maps when evaluating eligibility; it will also consider other information that it has access to. However, the CRTC has had no process to canvas existing or future plans of service providers, so the CRTC is not equipped to ensure it coordinates its projects with other investments.

³⁸ Ibid., paragraph 22.

³⁹ Set out in TNC 2019-45, *Call for comments – Application Guide for the Broadband Fund*.

69. The sole recognition of future builds that has been incorporated into the Commission's mapping process is its determination that partially-served hexagons are likely to receive service through market forces, as discussed above. While Xplornet agrees with this determination, the network deployments that will address underserved areas within partially-served hexagons will not be limited to only serving the remaining portions of partially-served hexagons. Many other underserved areas will equally be addressed by private investments. The Commission's Fund design does not recognize these projects.
70. The Commission has determined that, in order to be eligible for funding, applicants must demonstrate through standardized financial projects that their proposed project would not be viable without Commission funding.⁴⁰ Xplornet agrees this is an important requirement, but highlights that this requirement only demonstrates that a project to serve an area is not viable without subsidy *for the particular applicant*. The Commission continues to have no means to understand if another party can provide service without subsidy, and if that party has plans to do so.
71. The concerns that we are raising are not hypothetical. Based on the Commission's latest eligibility maps, Xplornet has already invested to deploy infrastructure capable of providing service that exceeds the Commission's universal service objective in many of the areas that the Commission has deemed eligible for subsidy. We intend to introduce service meeting and exceeding the universal service objective in the near future. However, the Commission is unaware of these plans.
72. If the Commission continues to provide subsidy to build in these areas, it will be using Broadband Fund resources to overbuild our network in an inefficient, redundant manner, interfering with our investments, and depriving Canadians in other underserved areas of the country from benefits that the Fund could extend to them.
73. Furthermore, uncertainty caused by the design of the Broadband Fund is interfering with our investment plans by hindering our ability to build reliable business plans needed to enable investments to augment our network infrastructure. Given the likelihood that the Commission will provide subsidy to other parties to overbuild our business in various, undetermined, areas of our territory, we cannot assess the business case of where we should direct our investment dollars. As a result, we must delay investments until after the Broadband Fund process has determined which areas will receive funding, and then finalize our investment plans. The uncertainty caused by the Commission's Broadband Fund process is delaying our investments, displacing investments that would otherwise take place, and preventing some investments from taking place altogether.

⁴⁰ TRP 2018-377, paragraph 129.

74. For these reasons, Xplornet submits that the variances sought by SWIFT are not sufficient to address the Fund's lack of coordination with other private and public initiatives and should be rejected.

75. The Commission should formally canvas input from public and private entities to ensure it understands where other parties are currently and are planning to invest in broadband projects. Only by properly understanding these initiatives can the Commission ensure the Fund does not interfere with and displace these investments, ensure that the Fund adheres to its fundamental guiding principles, and ensure that the Fund provides maximum benefits for Canadians.

Bids from Fund applicants must be maintained in confidence

76. Finally, SWIFT has requested that the Governor in Council vary determinations related to the confidentiality of bids to the Fund.⁴¹

77. The Commission has specifically recognized that the contents of an applicant's bid will be confidential, and accordingly, applicants should be permitted to file their applications with the Commission in confidence.⁴² This approach is entirely consistent with that that has been used by ISED in its various subsidy programs.

78. Xplornet submits that it is critical that information regarding applicant bids be maintained in confidence. Bids will contain information that falls directly within information that may be designated as confidential under section 39 of the *Telecom Act* and that should equally benefit from the third-party information exemptions from disclosure set out in the *Access to Information Act* ("ATIA").

79. Bids to the Broadband Fund will necessarily contain financial, commercial and technical information that is consistently treated by applicants as confidential (as contemplated paragraph 39(1)(a) of the *Telecom Act* and by paragraph 20(1)(b) of the *ATIA*). Bids will provide explicit insight into a service provider's costs of network deployment, its business case and its network design. The release of any such details would provide competitors with invaluable information concerning their business operations that could prejudice their competitive position and cause financial harm. In light of the potential for financial harm and competitive prejudice, bids should also be protected from disclosure by paragraph 39(1)(c) of the *Telecom Act* and paragraph 20(1)(c) of the *ATIA*.

80. If applicants are not able to submit bids to the Fund in confidence, this could harm the ultimate success of the program by discouraging potential applicants from submitting bids.

81. Accordingly, Xplornet submits that SWIFT's requests to place information about bids on the public record is inappropriate and should be rejected.

⁴¹ Petition, paragraphs 25 to 26.

⁴² TRP 2018-377, paragraph 408.

CONCLUSION

82. Xplornet does not support the relief requested by SWIFT in its Petition.
83. Xplornet agrees with SWIFT that the design of the Broadband Fund does not contain necessary protections to ensure that subsidies awarded by the Fund do not displace or interfere with other public or private investments; however, Xplornet does not support the relief sought by SWIFT to address this issue.
84. To address coordination issues, Xplornet submits that the Commission should implement a mechanism to properly canvas investments that are currently being undertaken or will be undertaken by public and private entities in order to ensure that subsidies awarded do not interfere with other initiatives. As the Fund is currently structured, the Commission has no means to receive information about current or planned projects. Without this information, the Broadband Fund risks duplicating and/or displacing other projects, resulting in the inefficient use of Broadband Fund resources and the Fund's failure to maximize the benefits it extends to Canadians living in areas of the country requiring new broadband infrastructure.
85. With respect to the other matters raised by SWIFT in its Petition, Xplornet does not believe these issues represent the inappropriate exercise of the Commission's jurisdiction, nor do they foster results that are not in the public interest. Accordingly, Xplornet submits that the requests for variance set out in SWIFT's Petition are without merit and should be denied by the Governor in Council.
86. We thank the Governor in Council for the opportunity to provide these comments.

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