Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Regulatory Policy CRTC 2011-601

PDF Version

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Regulatory framework relating to vertical integration

This document sets out the Commission's decisions on its regulatory framework for vertical integration. Vertical integration refers to the ownership or control by one entity of both programming services, such as conventional television stations, or pay and specialty services, as well as distribution services, such as cable systems or direct-to-home (DTH) satellite services. Vertical integration also includes ownership or control by one entity of both programming undertakings and production companies. Vertically integrated companies include Rogers Communications Inc., Quebecor Media Inc., Bell Canada and Shaw Communications Inc. The Commission's objective is to ensure that consumers continue to benefit from a wide choice of programming in a broadcasting system where programming and distribution have become increasingly integrated.

The Commission currently permits conventional television stations and pay and specialty services to acquire exclusive rights to programs since these services are offered to all cable systems and DTH satellite distributors. This ensures that most Canadians have access to these services. In this policy, the Commission addresses the availability of programming on new media such as mobile or retail Internet access services. The Commission has decided that programming designed primarily for television cannot be offered on an exclusive basis to a mobile or retail Internet access service. This approach will ensure that customers will not have to subscribe to several distributors in order to view the most popular programming.

The Commission also recognizes that, in today's communications environment, Canadians expect to be in control of what they watch and that their expectations are likely to be heightened with the ongoing transition to digital technology. To this end, the Commission is requesting vertically integrated companies to report by 1 April 2012 on how they have provided consumers with more choice and flexibility in the services they can subscribe to, while at the same time providing them with the ability to only pay for the services they want to watch.

The policy also sets out a number of decisions designed to ensure fair treatment for independent broadcasting distribution and programming services that must compete against strong vertically integrated competitors, protection of commercial information, and timely resolution of disputes between parties in the Canadian broadcasting system. In Appendix 1, the Commission sets out a Code of conduct for commercial arrangements and interactions. *This code sets out general objectives to govern commercial*

arrangements between broadcasting distribution undertakings, programming services and new media undertakings.

The process

1. On 22 October 2010, the Commission issued Broadcasting Notice of Consultation 2010-783 (the Notice of Consultation) initiating a review of its regulatory framework relating to vertical integration.[1] For purposes of interpretation, "vertical integration" refers to the ownership or control, by one entity, of both audiovisual programming and distribution undertakings, or, both audiovisual programming undertakings and production companies.

2. Over the past several years, the Commission has approved a number of transactions that have increased consolidation and vertical integration within the Canadian broadcasting industry. These transactions include:

    - the transfer of control of TVA to Quebecor Media Inc. (Quebecor) – Decision 2001-384;

    - the transfer of five Citytv stations to Rogers Media Inc. – Broadcasting Decision 2007-360;

    - the transfer of effective control of Canwest Global Communications Corp.'s (Canwest Global) licensed broadcasting subsidiaries to Shaw Communications Inc. – Broadcasting Decision 2010-782; and

    - the transfer of effective control of CTVglobemedia's (CTVgm) licensed broadcasting subsidiaries to BCE Inc. (BCE) – Broadcasting Decision 2011-163.

3. However, in Broadcasting Decision 2010-782, the Commission concluded that in light of the concerns expressed by several interveners in regard to recent transfers of ownership and the growing trend of industry consolidation, there was merit in initiating a policy hearing. The objective of this hearing was to consider whether additional regulatory tools and measures were necessary to deal more effectively with vertical integration issues and to prevent anti-competitive behaviour that would have a negative impact, such as reducing the ability of Canadians to receive diverse high quality programming. Accordingly, in the Notice of Consultation, the Commission sought comments on whether additional regulatory safeguards and measures should be put in place to clarify what would constitute anti-competitive behaviour on the part of a vertically integrated (VI) entity.

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[1] See also Broadcasting Notices of Consultation 2010-783-1, 2010-783-2, 2010-783-3 and 2010-783-4.

4. This proceeding included a public hearing that began on 20 June 2011. Those appearing at the hearing included VI entities, independent broadcasters, independent broadcasting distribution undertakings (BDUs), members of the creative sector (guilds, associations of creators, etc.) and public interest representatives.

5. The Commission accepted final written comments after the hearing from parties that appeared at the public hearing. The complete record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

6. This regulatory policy discusses and sets out the Commission's decisions on various issues raised during this proceeding.

Context

7. The Commission has traditionally examined issues arising from vertical integration on a case-by-case basis when considering applications for new services or for transfers of ownership or control involving BDUs and programming undertakings. The Commission acknowledges that the potential for preferential treatment exists in such cases yet remains of the view that vertical integration can lead to benefits, such as cost savings and increased efficiencies, which will enable Canadians to have access to programming that fulfills the objectives set out in the *Broadcasting Act* (the Act).

Issues

8. After reviewing the record of this proceeding, the Commission considers that it is appropriate to address the following issues:

    - exclusivity;
    - consumer choice in programming services;
    - independent programming undertakings;
    - independent BDUs;
    - protection of confidential information;
    - code of conduct for commercial arrangements and interaction;
    - negotiations, dispute resolution and enforcement;
    - payment of tangible benefits related to the transfer of ownership or change of control of BDUs;
    - access by programming undertakings to the customer information held by BDUs; and
    - monetary remedies for regulatory non-compliance.

Exclusivity

Background

9. Historically, the Commission has permitted programming undertakings such as conventional television stations and specialty services to acquire exclusive rights to broadcast programs. As such, individual programming undertakings may be the only ones that broadcast a particular program or series.

10. However, the Commission requires through its regulations that programming services be offered to all BDUs (e.g. cable and DTH services). In this way, most Canadians have access to broadcast programs that have been acquired on an exclusive basis. This serves to implement the objectives set out in section 3(1)(d) of the Act.[2]

11. The question of exclusive distribution of programming to new media broadcasting undertakings (mobile and retail Internet) remains to be determined. However, in paragraph 87 of Broadcasting Decision 2010-782, in which it approved the transfer of effective control of Canwest Global's licensed broadcasting subsidiaries to Shaw Communications Inc., the Commission noted that:

> Shaw committed to the principle of programming non-exclusivity and, accordingly, to making available to competitors in the Canadian broadcasting system, on negotiated commercial terms, mobile and broadband rights from Shaw's over-the-air and specialty services. Moreover, Shaw stated that its competitor should make the same commitment.

12. Subsequent to that decision, the Commission imposed a moratorium on BCE in Broadcasting Decision 2011-163, pending the outcome of the vertical integration hearing. The moratorium prohibited BCE from entering into new exclusive programming agreements that would prevent it from making available to its distribution competitors, on commercial terms, mobile and broadband rights to television programming from its conventional and specialty services. The Commission added that it expected other VI entities to abide by the moratorium.

13. In the Notice of Consultation, the Commission set out questions that would allow it to put in place norms for commercial interaction among concerned parties within the broadcasting sector in order to provide all players with a fair opportunity to negotiate for programming rights.

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[2] The Commission has taken a distinctive approach to pay-per-view (PPV) and video-on-demand (VOD) services. Since BDUs may offer their own PPV and VOD services, they are not permitted to acquire exclusive rights to programs. This ensures that the most popular PPV and VOD programming is widely available to other PPV and VOD undertakings.

Positions of parties

14. Several parties, including Rogers Communications Partnership (Rogers), the creative sector, and independent BDUs and telecommunications companies, requested that the Commission prohibit total or partial exclusivity on new media platforms by VI entities. While some parties, notably TELUS Communications Company (TELUS) and the creative sector, requested that exclusivity be prohibited for all forms of programming, others, such as Rogers, suggested that exclusivity could be permitted for ancillary content.

15. Parties such as TELUS and Cogeco Cable Inc. (Cogeco) argued that allowing exclusive content on new media platforms could result in potential harm for consumers as they would have to acquire multiple devices and subscribe to different services in order to be able to access all the content that they want to watch. These parties argued that the moratorium set out in Broadcasting Decision 2011-163 should be maintained.

16. On the other hand, Quebecor, Shaw Media Inc. (Shaw), and Bell Canada, which collectively represent affiliated programming undertakings that are responsible for the bulk of viewing in Canada, requested that the Commission lift the moratorium against exclusivity instituted in Broadcasting Decision 2011-163. Bell Canada argued that exclusives can be an important funding and promotional mechanism for innovation and for supporting the creation of more and better Canadian content. Bell Canada suggested that a flexible case-by-case complaint-based mechanism would be the best way for the Commission to monitor and deal with programming exclusivity.

17. Corus Entertainment Inc. (Corus) suggested that exclusive rights should be permitted for content that is new, different, or offered on demand. Corus stated that this would provide mobile and other new platform operators with an incentive to acquire or to create new content.

18. The Canadian Broadcasting Corporation (CBC) stated that, although it would take no definitive position on this matter, it did not see any valid reason to prevent independent broadcasters from making exclusive deals with any distributor.

Commission's analysis and decisions

19. The Commission considers that the record of this proceeding demonstrates that VI entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control. As a result, a consumer would have to subscribe to the distribution platform owned by the VI entity to have access to the exclusive content. The potential increase in the market share of the distribution services that form part of the VI entity would provide an incentive for a VI entity to deny competing distribution systems access to popular programming.

20. Parties indicated that distribution services account for most broadcasting revenues in Canada. As a result, the benefits of securing stable, high-margin, recurring revenues

for distribution services may outweigh any unrealized revenues that would result from a loss of viewers associated with denying programming to competing distributors.

21. In light of the above, the Commission considers that permitting VI entities to exercise exclusivity with respect to the distribution on new media platforms of programming designed primarily for conventional television, specialty, pay and VOD services would result in harm to consumers and the competitiveness of the industry. The Commission further considers that the same harm would result if industry players that are not VI entities exercised such exclusivity.

22. Accordingly, the Commission has decided that no person operating under the *Exemption order for new media broadcasting undertakings* (New Media Exemption Order) may offer programming designed primarily for conventional television, specialty, pay or VOD services on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service. Rights for such programming shall be acquired on terms that allow them to be made available to competitors as part of a licensing agreement, or other such arrangements, thereby ensuring the availability of the programming to consumers of competing distributors on fair and reasonable terms. The Commission considers that this approach will ensure that the most popular programming is available to consumers subject to normal commercial terms and that consumers will be able to receive their preferred programming from a variety of distributors.

23. However, to encourage innovation in programming, the Commission finds that exclusivity may be offered for programs that are created specifically for new media platforms.

24. Accordingly, before the end of the year, the Commission will publish a proposed amendment to the New Media Exemption Order and a notice of consultation calling for comments on draft regulations, as appropriate, to reflect the decision set out above.

Consumer choice in programming services

Background

25. In the Notice of Consultation, the Commission announced that it would discuss the composition of the regulated basic service in the context of an increasingly vertically integrated broadcasting system. The aim of this discussion was to increase consumer choice.

Positions of parties

26. Several parties commented on the potential adoption of a “skinny” basic service, i.e. a limited, low-cost, possibly all-Canadian basic service. Public interest groups supported the idea of a skinny basic service, arguing that such a measure would help ensure the achievement of the policy goal of affordability set out in the Act.

27. However, the adoption of a “skinny” basic service received limited support from other parties, including most BDUs. Several BDUs (both vertically integrated and independent) stated that they had offered a smaller basic service in the past with little interest from subscribers. Some added that because of recovery of capital costs, it would be difficult to offer a basic service at a significantly lower cost to subscribers.

Commission’s analysis and decisions

28. In Broadcasting Public Notice 2008-100, the Commission examined the possibility of introducing a requirement that BDUs distribute a skinny basic service, but rejected it on the basis that BDU competition was sufficient to ensure that rates are affordable and that there was insufficient evidence to suggest that BDU subscribers would be interested.

29. The Commission reiterated this view in *The implications and advisability of implementing a compensation regime for the value of local television signals* (March 2010), a report prepared pursuant to section 15 of the Act. Here the Commission stated:

> The only way for the Commission to ensure that a skinny basic service would be offered at a price that is significantly lower than the current price of basic would be for the Commission to re-regulate the price of the basic service. To intervene in this manner, however, would be contrary to the recent course of the Commission's overall broadcasting policies. While acknowledging that it is necessary, in certain instances, to regulate in pursuit of the objectives of the Act, the Commission considers that solutions based on market forces are preferable when they permit achievement of the Act’s objectives.

30. The Commission considers that information presented by parties in the current proceeding provided insufficient evidence that the adoption of a skinny basic service would ensure affordability and choice to Canadian consumers. Nonetheless, the Commission is of the view that the consolidation and vertical integration taking place in the Canadian broadcasting industry could have a considerable negative impact on consumer choice. For example, VI entities might attempt to include many of their own services on the basic service.

31. With respect to the consumption of programming today, Canadians expect to be in control of what they watch, and these expectations are likely to be heightened with the ongoing transition to digital technology. Since VI entities provide online content on a basis of “see what you want, where you want, when you want,” it might be difficult for consumers to accept that BDUs do not offer more choice and flexibility. The Commission is concerned that the lack of choice and flexibility could motivate consumers to leave the regulated broadcasting system.

32. The Commission notes that some BDUs have changed their digital offerings to provide subscribers with more flexibility in the choice of services that they receive. For example, Videotron Ltd. is offering a small basic service package coupled with

enhanced pick and pay options. In order to ensure that consumers also benefit from the changes happening in the industry, such as vertical integration and the progressive transition to digital technology, the Commission expects VI entities to make significant strides to offer consumers more choice in the near future with respect to their BDU offerings.

33. The Commission directs the VI entities to report by 1 April 2012 on how they have provided consumers with more choice and flexibility in the services that they can subscribe to, while at the same time providing them with the ability to only pay for the services they want to watch, such as a pick and pay model. In the event the Commission finds that insufficient progress has been made in this area, it will issue a notice of consultation to determine what obligations should be imposed on BDUs to achieve such results.

Independent programming undertakings

34. In the Notice of Consultation, consistent with its long-standing approach of supporting independent programming services, the Commission advised that it wished to explore what specific measures, if any, might be needed in order to take into account the particular situation of smaller independent broadcasting services.

3:1 ratio for the distribution of Category B programming services

Background

35. Sections 19(3) and 19(4) of the *Broadcasting Distribution Regulations*, as set out in Broadcasting Regulatory Policy 2011-455, stipulate that, for each related Category B service[3] that a BDU distributes, it must distribute at least three unrelated Category B services. If the Category B service of the related programming undertaking is a French-language Category B service, at least two of the three unrelated programming undertakings that are to be distributed must be French-language services.

36. As is the case with most of the carriage rules established by the Commission over the years, this requirement was put in place to ensure that Canadians have access to a diversity of programming services.

37. Consolidation and vertical integration within the Canadian broadcasting industry and the existence of four major VI entities (Rogers Communications Inc., Quebecor Media Inc., Bell Canada and Shaw Communications Inc.) have made it appropriate to re-examine whether the 3:1 ratio for the distribution of Category B services is sufficient to ensure diversity.

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[3] Category B services are pay and specialty services designated as such by the Commission. They do not have access rights for distribution by BDUs.

Positions of parties

38. Most independent broadcasters (i.e. not affiliated with a VI entity) argued that vertical integration constitutes a threat to smaller independent players. They argued that VI entities could make mutual distribution agreements and only distribute Category B services related to other VI entities in order to comply with the 3:1 rule. To minimize the potential for this kind of behaviour, some independent broadcasters proposed that the 3:1 rule be maintained, but modified to include a provision specifying that one of the three unrelated Category B services must be independent. Other parties suggested modifying the ratio to establish it at 5:1, as was the case before the implementation on 1 September 2011 of the amendments to the *Broadcasting Distribution Regulations* set out in Broadcasting Regulatory Policy 2011-455.

39. VI entities stated that the existing 3:1 ratio is already an obstacle that prevents them from offering popular licensed Canadian specialty services to viewers. They submitted that this situation would be exacerbated if the Commission were to require that one of the three unrelated Category B services be independent. Shaw proposed that the 3:1 ratio be eliminated, or at least replaced by a 2:1 ratio. This would not limit Shaw's ability to offer Corus and Shaw programming services, both of which are owned or controlled by Shaw Media.

40. Independent BDUs argued that they should not be affected by additional measures taken to limit the potential of anti-competitive behaviour by VI entities. Accordingly, they submitted that any safeguards established to protect independent broadcasters should only apply to VI distributors.

Commission's analysis and decisions

41. In Broadcasting Public Notice 2008-100, the Commission recognized that the then existing 5:1 ratio could raise concerns for some BDUs and decided that a ratio of three unrelated Category B services for every related Category B service would give BDUs greater flexibility while still ensuring the distribution of a range of unrelated Category B services.

42. While the 3:1 ratio was announced in 2008, it only became effective on 1 September 2011. There is no compelling evidence to revise the Commission's previous conclusion that 3:1 is the appropriate ratio to ensure the distribution of a range of unrelated Category B services.

43. The Commission acknowledges that, in an increasingly consolidated and vertically integrated broadcasting system, there is a possibility that VI entities might prioritize the distribution of related services and of services related to other VI entities over the distribution of independent programming services, thus limiting the programming to which Canadians have access. In light of this possibility, the Commission considers that the current 3:1 ratio might not provide sufficient protection for independent Category B services.

44. The Commission has decided that one of the three unrelated Category B services required to be carried by a BDU must be independent. This will ensure that at least 25% of Category B services offered by distributors are independent, without imposing additional safeguards on BDUs without ownership interest in programming services. Accordingly, the Commission will amend the *Broadcasting Distribution Regulations* to include provisions to ensure that:

- for each related Category B service that a BDU distributes, it must distribute at least three unrelated Category B services, of which one must be independent; and

- for each related French-language Category B service that a BDU distributes, at least two of the three programming services of the unrelated programming undertakings shall be French-language services, of which one must be an independent French-language Category B service.

45. Before the end of the year, the Commission will issue a notice of consultation containing draft amendments to the *Broadcasting Distribution Regulations* to implement this decision.

Annual audit of subscriber information by programming undertakings

Background

46. In Broadcasting Public Notice 2005-34, the Commission established a set of general guidelines related to the auditing of subscriber information held by BDUs. These guidelines help ensure that programming services obtain reasonable access to information regarding BDU subscribers that have access to their programming. The guidelines deal with the selection of an auditor, the scope of information audited, the timeframes for the conduct of audits, the confidentiality of information, and the resolution of discrepancies found in audits. The Commission indicated that it would be prepared to amend the *Broadcasting Distribution Regulations* to incorporate these or other provisions at a later date should these guidelines prove ineffective in reducing the number of audit-related disputes that the Commission is asked to resolve.

47. In Broadcasting Notice of Consultation 2010-931, the Commission called for comments on a number of proposed amendments to the *Broadcasting Distribution Regulations* which came into effect on 1 September 2011. The following amendment addressed audits:

> 15.1 A licensee shall give access to its records to any Canadian programming undertaking that receives a wholesale rate for its programming services to enable the programming undertaking to verify the subscriber numbers for the programming services of the programming undertaking in accordance with the terms prescribed in Broadcasting Public Notice CRTC 2005-34, dated April 18, 2005 and entitled *Auditing of distributor subscriber information by programming services*.

Positions of parties

48. Comments indicated that how audits are conducted remains an issue for a number of parties. A number of independent broadcasters – Independent Broadcasters Group (IBG), Allarco Entertainment 2008 Inc. (Allarco), Fight Media Inc., GlassBOX Television Inc. (GlassBOX), ZoomerMedia Limited (ZoomerMedia), Pelmorex Communications Inc. (Pelmorex) and the CBC – identified the delays encountered when they submitted a request for an audit to a BDU to obtain subscriber information for their programming services. In order to address delays, they proposed that the Commission impose a requirement that VI BDUs file with the Commission an annual report of each audit request received and how it was dealt with, or that the report be posted on the BDU's website. The selection of an auditor to secure the appropriate information from the BDU was also identified as a challenge. Certain parties proposed that auditors be selected from a predetermined list approved by the Commission pursuant to the criteria set out in Broadcasting Public Notice 2005-34.

Commission's analysis and decisions

49. The Commission expects that the amendment to the *Broadcasting Distribution Regulations* to add the audit provision in section 15.1, as announced in Broadcasting Regulatory Policy 2011-455, will provide a measure of assurance that audits will be conducted in an appropriate and timely manner according to the guidelines that are contained in Broadcasting Public Notice 2005-34. However, this proceeding demonstrates that additional details on the conduct of the audit process may be needed and that the *Broadcasting Distribution Regulations* should be further amended.

50. Accordingly, before the end of the year, the Commission will publish a notice of consultation seeking comments on specific provisions with respect to the conduct of audits involving VI BDUs. Potential provisions include:

- standard information to be provided by BDUs to programming services annually and on receipt of an audit request;
- the audit process, including step-by-step timeframes for the conduct and completion of audits; and
- the method and timeframe by which auditors will be selected by parties and possible disputes resolved.

51. After completion of the above proceeding (expected to by June 2012), the Commission will issue a notice of consultation containing draft amendments to the *Broadcasting Distribution Regulations* to implement this decision.

Dual status services

Background

52. Formerly, a service with dual status was a service that Class 1 terrestrial BDUs were required to distribute as part of the basic service, unless the operator of that service consented to its distribution as a discretionary service.

53. In Broadcasting Public Notice 2006-23, where the Commission set out its framework for the migration of broadcasting services to digital distribution, it concluded that the existing dual status designations did not necessarily reflect current priorities and might create inequities between older specialty services and those that have been licensed in more recent years. Therefore, the Commission determined that, in a digital distribution environment, the dual status designations shall cease to apply. The Commission reiterated this decision in Broadcasting Public Notice 2008-100. Therefore, the dual status designations were not included in the amended *Broadcasting Distribution Regulations*, which came into effect on 1 September 2011.[4]

Positions of parties

54. ZoomerMedia and TV5 Québec Canada both submitted that, in light of industry consolidation, the elimination of dual status designations would have a material impact on their respective services and hamper their capacity to fulfill their mandate. They argued that distribution on the basic service is essential if their respective services Vision TV and TV5 are to remain viable and continue to contribute to the broadcasting system. Accordingly, they submitted that dual status designations should be maintained.

55. Other parties from the creative sector and public interest groups supported the idea of maintaining dual status designations, especially for TV5.

Commission's analysis and decisions

56. In Broadcasting Decision 2007-246, the Commission denied applications for Vision TV and TV5, among others, to be granted mandatory distribution on the basic service under section 9(1)(*h*) of the Act.[5] The Commission considers that the protection granted to Category A services such as Vision TV and TV5 through their "must-carry" status[6] and the *Code of conduct for commercial arrangements and interactions* (Code of conduct) set out in Appendix 1 to this document is sufficient to ensure that BDUs distribute these services on fair and reasonable terms. In particular, the Commission considers sections 3 to 6, which address packaging, access to multiple distribution platforms, and marketing support, are relevant to Vision TV and TV5.

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[4] See Broadcasting Regulatory Policy 2011-455.

[5] The Commission found that Vision TV and TV5 did not satisfy the criteria for mandatory distribution on the basic service under section 9(1)(*h*) of the Act.

[6] "Must-carry" services are services that must be offered to subscribers by BDUs.

57. In light of the above, the Commission does not consider that recent consolidation and vertical integration within the Canadian broadcasting system supports a change from its previous decision to terminate dual status designations.

58. In Broadcasting Regulatory Policy 2010-629, the Commission stated that it would not consider new applications for mandatory carriage on the basic service until after 1 June 2012. If the licensees of Vision TV and TV5 wish to be considered for such carriage, they may file new applications at that time.

Independent broadcasting distribution undertakings

59. The Commission also considered what regulatory measures, if any, might be needed to take into account the particular situation of independent BDUs.

Carriage terms and tied selling of programming services on a wholesale basis

Positions of parties

60. Most independent BDUs argued that the Commission should establish a rule prohibiting programming undertakings (or, at a minimum, the programming undertakings of VI entities) from imposing unreasonable carriage terms on distributors. Specifically, they stated that the Commission should prohibit practices such as tied selling of programming services to BDUs, under which BDUs must offer one or more programming services in order to offer another, as well as minimum penetration requirements and excessive packaging requirements.

Commission's analysis and decisions

61. The Commission has concluded that, because of their dominant position in the broadcasting system, VI entities and consolidated entities licensed to operate numerous programming services could potentially use their most popular programming services to leverage favourable carriage terms for programming services of lesser value.

62. The Commission is particularly concerned with the alleged tied selling of programming services to BDUs on a wholesale basis, which would result in BDUs being obliged to offer consumers services they do not want. While the Commission is not opposed to broadcasters offering bundles of services to BDUs at the wholesale level, it will require that all programming services also be made available to BDUs on a stand-alone basis and on reasonable terms.

63. Accordingly, before the end of the year, the Commission will issue a notice of consultation containing draft regulatory amendments that include a provision that all programming services must be made available to BDUs on a stand-alone basis. The Commission has also included a provision to that effect in the Code of conduct set out in Appendix 1 to this document.

64. The Code of conduct also includes provisions prohibiting the imposition of other commercially unreasonable carriage terms, such as unreasonable rates, minimum penetration or revenue levels, and excessive activation fees.

Anti-competitive head start

Background

65. In recent years, the Commission has received complaints regarding VI entities launching affiliated programming services on their own distribution platforms before making them available to competing distributors, or without making them available to competitors on reasonable terms.

Positions of parties

66. Most independent BDUs argued that no programming service related to a VI entity should be allowed to launch on a VI BDU before it has been offered to other distributors, especially to independent BDUs. They argued that such "head starts" amounted to *de facto* exclusivity.

67. VI BDUs generally stated that there was no need for a rule prohibiting head starts, since it was not in a VI entity's best interest to limit the availability of a programming service for a prolonged period of time. They also argued that such a prohibition could prevent a distributor from launching a new programming service because another distributor might not agree on proposed terms of carriage.

Commission's analysis and decisions

68. The Commission agrees with independent BDUs that the practice whereby a programming undertaking makes its service available to a BDU without also making it available to all other distributors on reasonable terms and in a timely manner is effectively a form of exclusivity, since the result is a linear programming service that is made available solely on one distribution system for a certain period of time. However, the Commission also recognizes that a "no head start" rule could have the unintended consequence of postponing the launch of ready-to-air programming services during the negotiation period between the programming undertaking and BDUs that have expressed interest in distributing the service.

69. The Commission rejects the argument that a rule prohibiting head starts is not necessary in a vertically integrated environment. The Commission has determined, as reflected in its discussion surrounding exclusivity of programming content on new media platforms set out earlier, that the disproportion of revenues between the distribution sector and the programming sector is such that the incentive could exist in certain circumstances for a programming undertaking owned by or affiliated with a distribution undertaking to limit the availability of its programming service.

70. The Commission has concluded that it is possible to prevent head starts and avoid the undesirable consequence of postponing ready-to-launch programming. This will be

achieved through a mechanism to ensure that programming services are made available to all distributors for launch even in the absence of commercial agreements. Accordingly, the Commission will require that, once a programming undertaking is ready to launch a new pay or specialty service, it must make that service available to all BDUs. Any BDU might then announce its intention to distribute the service. [7] If a commercial agreement between the programming undertaking and the BDU is not reached before the actual launch of the service, the BDU might then file for dispute resolution with the Commission and distribute the programming service pending the resolution of the dispute. The rates determined by the Commission or agreed to by the parties prior to the Commission reaching a decision will be applied as of the date the programming service is made available to the concerned BDU.

71. In addition, consistent with the policy on exclusivity set out earlier in this document, the "no head start" rule will also apply to television programming distributed on new media distribution platforms such as mobile and retail Internet.

72. Accordingly, before the end of the year, the Commission will, issue a notice of consultation containing draft amendments to the appropriate regulations and the New Media Exemption Order to implement the mechanism set out above.

Protection of confidential information

Safeguarding commercially sensitive information

Background

73. In the Notice of Consultation, the Commission sought comments regarding what measures, if any, are needed to address the sharing of certain information between different undertakings within a VI entity.

Positions of parties

74. A number of parties expressed concern that VI entities would have opportunities to gain a competitive advantage through the sharing and use of information obtained over the course of negotiation or other interaction between programming undertakings and BDUs. This interaction usually includes disclosure of matters deemed competitively sensitive by one or both parties (such as pricing, subscriber numbers, packaging, and marketing and business plans).

75. To address this concern, most independent programming undertakings and independent BDUs asked that the Commission require VI entities to use dedicated Customer Service Groups (CSGs) to restrict the sharing of commercially sensitive information. For instance, TELUS asked that the Commission impose conditions of

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[7] All new programming services must receive Commission approval. BDUs can monitor Commission decisions to keep informed of programming services that will launch in the near future.

licence requiring separate sales, marketing, customer service and affiliate relations between the divisions of a VI entity. Cogeco submitted that CSGs should be required to handle all interaction and information exchanged between a VI entity's programming services and unrelated distributors and requested that the Commission monitor the effectiveness of the CSG on an ongoing basis. The IBG similarly requested that the Commission require the establishment of CSGs to isolate the commercially sensitive, confidential information of independent programming undertakings, including the information obtained by the BDU via the set-top box.

76. In discussing the CSG option, most parties stressed the need for confidentiality agreements, pointing out that non-disclosure agreements can serve as an additional safeguard to ensure commercially sensitive information is not shared within a VI entity.

77. On the other hand, Bell Canada and Shaw rejected a CSG requirement. They submitted that no additional measures are required to address this issue as affiliation agreements already contain standard non-disclosure clauses that preclude inappropriate use of confidential information. Bell submitted that there is no evidence of any information sharing problem after ten years of vertical integration.

Commission's analysis and decisions

78. In Broadcasting Public Notice 2000-81, the Commission required Rogers, Shaw Media, Quebecor and Cogeco to establish CSGs. These CSGs were to handle cancellations received from a third party, such as a competing licensee, so that information was not communicated to the sales and marketing group. This ensured that customers did not receive calls from the sales and marketing group of the existing service provider. In Broadcasting and Telecom Regulatory Policy 2011-512, the Commission decided that this requirement was no longer appropriate, and that customers should have as much information as possible, including improved service offers from the existing operator.

79. The Commission is of the view that strong measures need to be in place to prevent the growing potential for inappropriate use of competitively sensitive information generally, and particularly in the case of VI entities. It is not persuaded, however, that reintroducing a CSG requirement at this time is either necessary or practicable. The Commission considers that the broad range of information typically exchanged throughout the year by many parties would likely make the proper functioning of a CSG cumbersome and resource intensive and, hence, negatively impact the efficient business functioning of the VI entity. In the Commission's view, a properly framed non-disclosure agreement is the appropriate method to protect against the misuse of confidential information and to minimize the level of intrusion in the business functions of the VI entity.

80. However, the Commission considers it appropriate to develop a record on the content necessary for these agreements and to whom they need to apply in order to fully protect against the misuse of confidential information. Accordingly, before the end of

the year, the Commission will issue a notice of consultation launching a follow-up written process to develop a record on this matter, with the objective of establishing a standard form non-disclosure agreement. The notice of consultation will address matters such as carriage information, packaging and marketing plans in advance of finalizing contracts, discussions around business plans for certain systems, subscriber numbers, affiliation payments for each service, serving technology (analog or digital) by system, individual tier penetration by system, subscriber wholesale rates by system, bulk discounts by system, and/or discounts and promotional allowances.

81. Following publication of the Commission's decisions on the content and applicability of non-disclosure agreements (the target date being 1 June 2012), the Commission will require parties to implement appropriate measures.

Publication of financial results for specialty services

Background

82. The Commission received a request from High Fidelity HDTV Inc. (High Fidelity) dated 25 November 2010 outlining concerns regarding the publication of financial information for individual independent Category 2 (now referred to as specialty Category B) services. As a result, the Commission issued Broadcasting Notice of Consultation 2010-783-2, in which it indicated that it considered it appropriate to include the matter of confidentiality of financial information for individual independent specialty Category B services within the scope of the current proceeding.

Positions of parties

83. The Commission received numerous comments regarding the request to grant confidentiality to the annual returns of individual independent specialty Category B services. These comments were divided fairly equally between those who supported and those who opposed the request.

84. Independent programming undertakings and industry associations generally supported High Fidelity's request. They generally agreed with the arguments put forward by High Fidelity that specialty Category B services compete against other regulated and unregulated sources of programming, and that the negotiating position of independent programming undertakings may be adversely affected by the publication of the financial information on an individual service level.

85. BDUs and VI entities generally opposed High Fidelity's request. Various public interest groups and members of the creative sector also opposed the request. Many of these parties expressed the view that Canadian cable and DTH subscribers pay for specialty services through subscription fees and should therefore be able to view the financial information of these services.

86. As stated in Broadcasting Public Notice 2006-19, the current financial information published for individual pay and specialty services benefits the creative sector and the general public. However, the Commission acknowledges the merit of the arguments made by High Fidelity and agrees that the negotiating power of independent specialty Category B services may be negatively affected when negotiating with a VI entity.

87. As a result, the Commission has determined that it is appropriate to publish partial financial information for all independent individual specialty Category B services. The information to be published will include total revenues, total programming expenses, and total Canadian programming expenses. Total Canadian programming expenses currently includes the following subcategories, which will also be published: acquisition of rights, script and concept, filler programming, as well as program production and investment in programming. The Commission will also publish complete financial information for all independent specialty Category B services on an aggregate basis. The Commission considers that the above-mentioned publication guidelines will maintain confidentiality of competitively sensitive information regarding the profitability and subscriber revenues for individual independent specialty Category B services while ensuring key information remains available to industry stakeholders and the general public.

88. The Commission will also continue to publish complete financial information for Category A services and those specialty Category B services owned or controlled by a VI entity. The Commission intends to use the same approach for Category C services that it has adopted for Category B services.

Code of conduct for commercial arrangements and interaction

Background

89. In Broadcasting Notice of Consultation 2010-783, the Commission noted that the aim of the public hearing was to put in place norms for commercial interaction amongst interested parties within the broadcasting sector that would provide all players with a fair opportunity to negotiate key elements such as programming rights and details of carriage.

Positions of parties

90. Parties such as Rogers, the IBG, several independent BDUs such as Cogeco, TELUS and MTS Allstream Inc. (MTS Allstream), and some independent programming undertakings submitted, with their written comments, draft codes of conduct that would guide the commercial interactions between VI entities and other industry stakeholders. These parties argued that, without clear principles guiding their behaviour, VI entities would use their market power to gain significant advantages and benefits over competitors.

91. At the public hearing, the Commission requested that appearing parties submit a draft code of conduct that would address the concerns and issues raised in the oral presentations and throughout the public hearing.

92. Some parties such as Quebecor stated that a code was not necessary as the Commission's current rules were sufficient to mitigate the effect of market power during commercial negotiation processes.

Commission's analysis and decisions

93. The Commission has received sufficient evidence to conclude that there is a potential for abuse of market power and that clear guidelines are necessary to ensure that the Canadian broadcasting system remains competitive and healthy and delivers a diversity of high quality programming services to Canadians. The Commission therefore considers that a code of conduct is necessary to guide the commercial interactions between the various industry stakeholders and to ensure that no party uses its market power to engage in anti-competitive behaviour.

94. Accordingly, the Commission has set out in Appendix 1 a Code of conduct that establishes the guidelines for commercial arrangements between BDUs (including exempt BDUs), programming undertakings and undertakings that are exempted under Broadcasting Order 2009-660 (new media exempt undertakings). The Code of conduct shall apply to all aforementioned parties and shall serve as a basis for guiding commercial interactions between these parties while negotiating agreements in the broadcasting market. The Commission considers that the principles set out in the Code of conduct will permit all industry players to negotiate on fair and equal terms.

95. Moreover, the Commission will refer to the principles set out in the Code of conduct when making its determinations on complaints or other applications should it be called upon to intervene in cases where negotiations between parties fail. The Commission will refer to these principles while conducting dispute resolution processes, whether they be expedited hearings or undue preference complaints.

Negotiations, dispute resolution and enforcement

96. The Commission has identified the following key concerns with regard to negotiations, dispute resolution and enforcement:

- instituting a standstill rule;
- applying reverse onus;
- filing affiliation agreements with the Commission;
- final offer arbitration;
- improving the timeliness of dispute resolution; and

- making Commission decisions public.

Standstill rule

Background

97. The concept of a standstill rule is that, during an ongoing dispute between programming undertakings and BDUs, both parties are to provide continued access to programming services and carriage. A standstill rule is already set out in the *Pay Television Regulations, 1990*, and in the *Specialty Service Regulations, 1990* for existing relationships.

98. In the Notice of Consultation, the Commission expressed the preliminary view that a party to a dispute should generally be held harmless during the period in which the Commission is considering the dispute.

99. In Broadcasting Regulatory Policy 2011-415, the Commission further determined that, pending the outcome of the current proceeding, the following practice would apply:

> A programming undertaking that is in negotiations with a broadcasting distribution undertaking or the operator of an exempt distribution undertaking with respect to the terms of carriage of programming originated by the programming undertaking should continue to provide the distributor or operator with its programming services on the same terms and conditions as contained in the last agreement reached between the concerned undertakings.
>
> A broadcasting distribution undertaking that is in negotiations with a programming undertaking with respect to the terms of carriage of programming originated by that programming undertaking should continue to distribute the programming services of that programming undertaking on the same terms and conditions as contained in the last agreement reached between the concerned undertakings.[8]

Positions of parties

100. The VI entities submitted that the standstill rule should continue to be evaluated by the Commission on a case-by-case basis upon application and that a blanket standstill rule is not necessary. Moreover, they argued that any standstill rule should:

- apply only to existing relationships;
- apply only to access and not to establishing a rate; and

[8] Broadcasting Regulatory Policy 2011-415 specified that the determinations set out therein would remain in effect until 30 days following the publication of the current regulatory policy.

- be limited to a specific time period, for example, 90 days.

101. The majority of other parties supported instituting a standstill rule during ongoing disputes, noting that the threat of loss of service made negotiations difficult. Some submitted that they were often reluctant to come before the Commission during the negotiation process when things were getting difficult between the parties for fear of retribution in future negotiations with those parties.

Commission's analysis and decisions

102. The Commission considers that eliminating the threat of loss of service during ongoing disputes between programming undertakings and BDUs will aid in leveling the playing field during the negotiation process. The Commission is further of the view that instituting a standstill rule will protect consumers from loss of service during such disputes.

103. Further, the Commission considers that its establishment of a Code of conduct to assist parties with future negotiations as well as a standstill provision will provide parties with an enhanced opportunity to resolve a dispute and/or outstanding issues on their own. As a result, they will need to apply to the Commission only in instances where disputes cannot be resolved by the parties themselves.

104. In light of the above, the Commission considers that during any dispute[9] between an operator of a programming undertaking (whether licensed or exempt) and the operator of a distribution undertaking (whether licensed or exempt) concerning the terms of carriage of programming or any right or obligation under the Act, each licensee or operator shall continue to provide its services or distribute the programming services on the same terms and conditions as it did before the dispute. The rates determined by the Commission or agreed to by the parties prior to the Commission reaching a decision will be applied when the last agreement reached for the distribution of the service expires. The standstill rule will thus prevent a distributor from simply dropping services or a programmer from ceasing to provide its services to a distributor until the Commission has ruled on the dispute.

105. Accordingly, before the end of the year, the Commission will issue a notice of consultation containing regulatory amendments to implement the standstill rule described above. The decisions reached in Broadcasting Regulatory Policy 2011-415 will remain in effect until these amendments are made.

[9] The standstill rule will take effect once written notice of a dispute is provided to the Commission and copied to the other undertaking that is subject to the dispute. This notice could take the form of the filing of an undue preference application, a request for staff-assisted mediation, a request for arbitration or a simple notification to the Commission of the existence of the dispute.

Reverse onus

Background

106. The concept of reverse onus as applied to undue preference or disadvantage complaints operates such that, once a complainant has demonstrated the existence of a preference or disadvantage, the respondent then shoulders the burden of demonstrating the preference or disadvantage is not undue. The reverse onus provision is already set out in the *Broadcasting Distribution Regulations,*[10] the New Media Exemption Order,[11] and the standard conditions of licence for VOD undertakings set out in Broadcasting Regulatory Policy 2011-59.

107. In the Notice of Consultation, the Commission stated its preliminary view that the reverse onus provisions should be made generally applicable to all programming undertakings as well as to all BDUs.

Positions of parties

108. The majority of parties agreed that reverse onus should apply in all undue preference applications filed before the Commission. Several noted that reverse onus already applies in the case of telecommunication applications of unjust discrimination dealt with pursuant to section 27 of the *Telecommunications Act*.[12]

Commission's analysis and decisions

109. The Commission confirms its preliminary view that reverse onus provisions should be made applicable to all programming undertakings as well as to all BDUs with respect to undue preference applications filed with the Commission. In this regard, the Commission considers that it is the party conferring a preference or a disadvantage that will have the necessary information required for the Commission to determine the facts of the case in order to issue a ruling.

110. Accordingly, the Commission determines that (1) no licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage; and (2) in any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

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[10] In the case of an allegation of undue preference and/or undue disadvantage filed by a programming undertaking against a BDU, once the complainant has established that a preference and/or disadvantage exists, the BDU is required to demonstrate that the preference and/or disadvantage is not undue (Section 9(2) of the *Broadcasting Distribution Regulations*).

[11] In the case of an allegation of undue preference and/or undue disadvantage in the new media broadcasting environment, once the complainant has established that a preference and/or disadvantage exists, the onus shifts to the alleged infringing party to demonstrate that the preference and/or disadvantage is not undue (Section 3 of the *Exemption order for new media broadcasting undertakings*).

[12] Subsections 27(2) and 27(4) of the *Telecommunications Act.*

111. By the end of the year, the Commission will issue a notice of consultation containing proposed regulatory amendments that include a reverse onus provision.

Affiliation agreements

Background

112. Affiliation agreements outline the rates, terms and conditions relating to both programming rights and carriage between a programming undertaking and a BDU. The Commission notes that affiliation agreements contain commercially sensitive information and are typically granted confidential treatment by the Commission.

Positions of parties

113. While parties acknowledged the confidential nature of affiliation agreements, a few requested that affiliation agreements, specifically those involving VI entities, be filed with the Commission on an annual basis. Parties submitted that this would allow the Commission to assess wholesale rates and inappropriate activities.

Commission's analysis and decisions

114. The Commission notes that there are hundreds if not thousands of affiliation agreements in the industry. It considers that it would be administratively cumbersome to require parties to file their affiliations agreements on an annual or other regular basis.

115. The Commission further considers that, apart from when required to resolve a dispute, it would not be appropriate or necessary for it to review the terms and conditions of affiliation agreements that have been commercially negotiated. The Commission also notes that, when applying for the Commission's dispute resolution processes, parties generally file supporting information, including affiliation agreements. If these agreements are not provided, the Commission will request that they be provided for its review at that time.

116. In light of the above, the Commission does not consider it appropriate to establish new filing requirements for affiliation agreements.

Final offer arbitration

Background

117. Final offer arbitration (FOA), as used by the Commission, is a mechanism whereby the Commission requires parties to a bilateral dispute that is exclusively monetary in nature to put forward a final offer regarding the resolution of the dispute along with supporting rationale. In Broadcasting and Telecom Information Bulletin 2009-38, the Commission outlined the following procedure:

> After the Commission arbitration panel selects one or the other of the offers in its entirety, the Commission will issue its decision. The Commission intends to

release final offer arbitration decisions within 55 days of having accepted a request for final offer arbitration, in those cases where parties have met their filing obligations.

Only on a very exceptional basis, where neither party's final offer is, in the opinion of the Commission, in the public interest, both final offers will be rejected by the Commission and the parties involved will be so advised. In this event, the Commission may refer the matter to an expedited hearing.

Positions of parties

118. A few parties recommended the Commission establish an FOA process.

Commission's analysis and decisions

119. The Commission notes that it already employs an FOA process. The Commission considers that the current FAO process, as described in Broadcasting and Telecom Information Bulletin 2009-38, remains appropriate and does not require any alteration at this time.

Making results of dispute resolution processes public

Background

120. In Broadcasting and Telecom Information Bulletin 2009-38, the Commission addressed disclosure of information as follows:

- All information and materials submitted by the parties in the course of staff-assisted mediation, as well as the existence of such mediation and all discussions in the course of such mediation, will be confidential and will not be disclosed by the parties or the Commission and may not be used by any of the parties in subsequent proceedings before the Commission. As noted in paragraph 18 of the Information Bulletin, if all parties agree, the Commission may issue a Staff Mediation Report identifying issues remaining for resolution. That report, with the consent of all parties, may form part of the record for consideration in another Commission proceeding on issues identified in the report.

- For FOA and expedited hearing proceedings, existing Commission confidentiality rules and practices will apply. When a party files information with the Commission in confidence, the party must provide sufficient details as to the nature and extent of the direct harm that it considers would result from the disclosure of the information subject to the confidentiality claim. The party is also to file an abridged version of the document for the public record accompanied by reasons for the confidentiality claim or reasons for objecting to the filing of an abridged version.

- Information filed with the Commission will be placed on the public record unless the party filing the information asserts a claim for confidentiality at the time of filing. When the Commission is of the opinion that any specific direct harm likely to result from public disclosure is insufficient to outweigh the public interest in disclosing the information, it may place information for which confidentiality has been claimed on the public record. It will do so on its own initiative or at the request of a third party, after providing the party filing the information a further opportunity to justify its claim for confidentiality.

- For disputes subject to section 12 of the *Broadcasting Distribution Regulations*, information filed with the Commission will generally be kept confidential. For such disputes, parties are not required to request confidentiality for materials filed with the Commission. When the Commission is of the preliminary opinion that it is in the public interest that information filed pursuant to a dispute subject to section 12 be made public, the Commission will provide the filing party an opportunity to assert a claim for confidentiality as set out above.

121. In addition, the *CRTC Rules of Practice and Procedure* (Rules of Procedure) provide that an application for the resolution of a matter under an alternative dispute resolution process must be made in accordance with the procedural requirements established by the Commission in Broadcasting and Telecom Information Bulletin 2009-38, as amended by Broadcasting and Telecom Information Bulletin 2009-38-1.

Positions of parties

122. A few parties suggested that the outcomes of all dispute resolution processes should be made public. If that were to be the case, those opposing publication suggested that at the very least, parties should be permitted to redact any confidential or sensitive information that may result in direct harm to the company prior to the Commission publishing the decision.

Commission's analysis and decisions

123. As noted by the Commission in previous instances, the accessibility and transparency of the regulatory system must be maximized to promote learning and information sharing and to build public trust in the quality of Canadian regulation and the integrity of regulatory processes. Policy objectives should be clearly defined. Regulators must explain their priorities and decisions, show why and how these decisions are in the public interest, and be subject to public scrutiny. Information on regulatory programs and compliance requirements should be readily available in print and electronic formats. The regulatory system should also be predictable and provide certainty to those regulated. Citizens and businesses should participate through active consultation and engagement.

124. In light of the above, the Commission determines that it will now publish the determinations of all dispute resolution applications considered by the Commission. Parties will, however, be provided with an opportunity to redact sensitive information for which they have claimed and have been granted confidentiality by the Commission.

Improving timeliness of dispute resolution

Background

125. In Broadcasting and Telecom Information Bulletin 2009-38, the Commission stated that it intends to issue its decisions for dispute resolution within 55 days of accepting a request for final offer arbitration,and within 70 days of accepting a request for an expedited hearing. In Broadcasting and Telecom Information Bulletin 2011-222, the Commission stated that it intends to issue its decisions on undue preference applications within four months after the close of record.

Positions of parties

126. A number of parties recommended improvements to the dispute resolution timelines but few provided specific details concerning how to achieve that goal. However, parties argued that speeding up the processes would reduce the associated costs of any ongoing dispute for a company.

Commission's analysis and decisions

127. As an additional means to encourage the speedy resolution of disputes, the Commission will introduce a mandatory mediation mechanism before a member of the Commission. Such a mechanism is already provided for under section 12(3) of the *Broadcasting Distribution Regulations.* The Commission intends to incorporate this mechanism into the *Television Broadcasting Regulations, 1987,* the *Specialty Services Regulations, 1990* and the *Pay Television Regulations, 1990*.

128. This new process will be similar to the mandatory mediation processes instituted by the courts in various Canadian jurisdictions and will be so conducted without adding to existing timelines for either undue preference/disadvantage or dispute resolution under section 12 of the *Broadcasting Distribution Regulations* (arbitration and expedited hearing processes). In both cases, mandatory mediation will take place immediately following completion of the written record. The existing timelines for undue preference/disadvantage processes set out in Broadcasting and Telecom Information Bulletin 2011-222 and in Broadcasting and Telecom Information Bulletin 2009-38 for final offer arbitration and expedited hearings will remain in place.

129. The Commission expects parties to the dispute to cooperate fully in scheduling and attending the confidential mandatory mediation session within the week following completion of the record. At that point, the presiding Commission member will hear brief submissions from the parties (client and counsel) and will state his/her non-binding views on, for example, the likely disposition of the dispute in question.

The entire oral process should take from one to two hours. As is the practice in the courts, the Commission is introducing this process to encourage settlement and lessen the burden on the Commission's docket. The Commission member involved in the mandatory mediation process would not participate in any subsequent substantive disposition on the matter, should that prove necessary.

130. Finally, it should be noted that this introduction of mandatory mediation before a member of the Commission does not alter the continued availability and utility of voluntary Commission staff mediation.

Payment of tangible benefits related to the transfer of ownership or change in control of broadcasting distribution undertakings

Background

131. When the Commission considers applications for transfers of ownership or changes in control of programming undertakings, it applies a benefits test that requires the purchasing party to propose a set of financial initiatives that would yield clear and unequivocal tangible benefits to the Canadian broadcasting system.

132. In Public Notice 1996-69, the Commission eliminated the application of the benefits test in the case of transfers of ownership or changes in control of BDUs. The Commission concluded that:

> with adoption by the Commission of a policy that removes all or most of the existing licensing restrictions on market entry and which, in fact, encourages the imminent entry of new competitors using a variety of distribution technologies, the underlying rationale for applying the benefits test in considering future applications for authority to transfer the ownership or control of distribution undertakings has essentially disappeared.

133. In the Notice of Consultation, the Commission stated that it wished to examine whether the aforementioned determination on the application of the benefits test should be upheld or reversed in light of the growing trend of industry consolidation.

Positions of parties

134. VI entities and independent BDUs such as Cogeco, TELUS, MTS Allstream, Saskatchewan Telecommunications (SaskTel) and the Canadian Cable Systems Alliance (CCSA) all opposed the reintroduction of the tangible benefits test on transfers of ownership or changes in control of BDUs. These parties stated that the Commission's position set out in Public Notice 1996-69 still applies to the current state of the distribution market and that the Commission's competition-based rationale for discontinuing the application of the benefits test is still relevant. Moreover, Quebecor stated that BDUs now contribute 5% of their gross revenues to programming via their contributions to production funds such as the Canada Media Fund.

135. On the other hand, the creative sector – ACTRA National, the Directors Guild of Canada, the Canadian Conference of the Arts, the Writers Guild of Canada – supported the reinstatement of the benefits test benefits test on transfers of ownership or changes in control of BDUs. They were of the view that BDUs should also contribute to Canadian programming. Furthermore, these parties stated that, since the publication of Public Notice 1996-69, the distribution market has not remained sufficiently competitive because of increased consolidation in the distribution industry.

Commission's analysis and decisions

136. After reviewing the public record of the proceeding, the Commission has determined that the evidence submitted was not sufficient to establish a need to reverse its determination set out in Public Notice 1996-69. Consequently, the Commission will continue its current practice of not applying the benefits test on transfers of ownership or changes in control of BDUs.

Access by programming undertakings to the customer information held by broadcasting distribution undertakings

Background

137. Another matter raised by a number of parties in this proceeding related to whether the Commission should implement measures to ensure that programming undertakings have access to customer information held by BDUs. These parties suggested that such measures are needed as vertical integration increases the potential for anti-competitive behaviour. They were concerned that a BDU that is part of a VI entity could provide its programming arm with subscriber data to be used for marketing purposes while independent programming undertakings would not have such access.

Positions of parties

138. A number of parties (notably, Astral Media Inc., the IBG, the CBC, Pelmorex and ZoomerMedia) requested that the Commission require that programming undertakings be given access to certain customer information including customer names, addresses and listed telephone numbers. The IBG requested that, as part of its proposed Code of conduct, independent programming undertakings be given access to information obtained through the set-top box that is comparable to that which VI entities give to themselves, related services and other VI undertakings.

139. In response to privacy concerns related to this proposal, Astral filed a legal opinion in support of its position that the *Personal Information Protection and Electronic Documents Act* (PIPEDA) does not prevent the Commission from requiring disclosure of subscriber information.

Commission's analysis and decisions

140. The Commission considers that this issue may, in fact, be more important in a VI environment than was previously the case. For example, a programming undertaking that is part of a VI entity could derive advantage through more effective targeted marketing to the detriment of independent programming undertakings. However, the Commission is concerned that disclosure of customer information raises issues of a more fundamental nature about the customer/BDU/programming undertaking relationship. In that respect, the Commission considers that this issue raises legitimate privacy concerns, on which there is little information on the record.

141. While the Commission recognizes the importance of access to customer information for a number of parties and notes the potential for anti-competitive behaviour in this area as a result of vertical integration, it is not in a position to implement any measures to mandate access by programming undertakings to customer information, due to the limited record on this subject. Accordingly, the Commission expects programming undertakings and distributors to resolve this issue among themselves within one year. Failure to do so may cause the Commission to launch a public proceeding to address the matter, including exploring the feasibility of implementing measures with respect to programming undertaking access to customer information, taking into account, in particular, existing privacy law requirements.

142. With regard to the broader concern about the marketing of programming services, the Commission notes that its Code of conduct set out in Appendix 1 includes a provision to ensure that BDUs provide independent programming undertakings with marketing support that is comparable to that afforded to similar or related services.

Monetary remedies for regulatory non-compliance

Background

143. During the proceeding, the Commission sought comments on its jurisdiction under the Act to impose an administrative monetary penalty (AMP) in situations where a party has been found in violation of the Commission's regulatory framework.

Positions of parties

144. Parties argued that the Commission's jurisdiction to impose an AMP would require an explicit statutory authority that is not currently found in the Act.

145. Both Bell Canada and TELUS submitted legal opinions prepared by outside legal counsel. Bell Canada argued that section 12(2) of the Act could not be interpreted as providing the Commission with the authority to issue an AMP and that the prosecution provisions set out in sections 32 through 34 were a complete code with respect to the possible application of financial remedies under the Act.

146. TELUS argued *inter alia* that "although the CRTC has no express power to order a financial remedy, such a power can be implied where it is a "necessary adjunct" to

one of its express powers or a "practical necessity" to accomplish Parliament's objects." Further, TELUS argued that "the CRTC also has the power to make mandatory orders under section 12(2) to require compliance with the Act or any regulation, licence decision or order made or issued by the CRTC under part II of the Act."

Commission's analysis and decisions

147. Under the Act, the Commission has the responsibility to regulate and supervise the Canadian broadcasting system. It also has a responsibility to deal with non-compliance of broadcasting licensees with their regulatory obligations. As well, the Commission has the power to make remedial orders to compensate for harm suffered either by specific players in the broadcasting field or by the overall broadcasting system as a result of non-conforming behaviour by entities under the Commission's jurisdiction.

148. The Commission agrees with the position advanced by Bell Canada that, in order to impose AMPs on specific entities, legislative authority is required. However, where non-compliant behaviour causes specific harm, the Commission can make orders of restitution or compensation. Similarly, in instances where non-compliant behaviour causes general harm to the overall broadcasting system, it can make orders to repair the harm caused. This can include orders requiring contribution to a specific fund for the benefit of the system as a whole or for the benefit of a large group that cannot be reasonably defined or identified.

149. In the appropriate case, the Commission will impose a financial remedy in the form of an order to pay an amount into a fund for the benefit of the Canadian broadcasting system.

Secretary General

Related documents

- *Issues related to customer/carrier services groups*, Broadcasting and Telecom Regulatory Policy CRTC 2011-512, 19 August 2011
- *Amendments to the* Broadcasting Distribution Regulations *and other Commission Regulations*, Broadcasting Regulatory Policy CRTC 2011-455, 29 July 2011
- *Review of the regulatory framework relating to vertical integration – Continuation of service*, Broadcasting Regulatory Policy CRTC 2011-415, 8 July 2011
- *New service objectives for the processing of broadcasting and telecommunications applications as of 1 April 2011*, Broadcasting and Telecom Information Bulletin CRTC 2011-222, 1 April 2001

- *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries,* Broadcasting Decision CRTC 2011-163, 7 March 2011

- *Standard requirements for video-on-demand undertakings,* Broadcasting Regulatory Policy CRTC 2011-59, 31 January 2011

- *Call for comments on amendments to the* Broadcasting Distribution Regulations, Broadcasting Notice of Consultation CRTC 2010-931, 10 December 2010

- *Review of the regulatory framework relating to vertical integration,* Broadcasting Notice of Consultation, CRTC 2010-783, 22 October 2010; amended by CRTC 2010-783-1, 16 December 2010; 2010-783-2, 8 February 2011; 2010-783-3, 1 March 2011; and 2010-783-4, 28 June 2011

- *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries,* Broadcasting Decision 2010-782, 22 October 2010

- *Criteria for assessing applications for mandatory distribution on the digital basic service,* Broadcasting Regulatory Policy CRTC 2010-629, 27 August 2010

- *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings,* Broadcasting Order CRTC 2009-660, 22 October 2009

- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings,* Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009

- *Transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media Inc.,* Broadcasting Decision CRTC 2007-360, 28 September 2007

- *New digital specialty described video programming undertaking; Licence amendments; Issuance of various mandatory distribution orders,* Broadcasting Decision CRTC 2007-246, 24 July 2007

- *Digital migration framework,* Broadcasting Public Notice CRTC 2006-23, 27 February 2006

- *Confidentiality of annual returns of pay and specialty programming services,* Broadcasting Public Notice CRTC 2006-19, 16 February 2006

- *Auditing of distributor subscriber information by programming services,*

Broadcasting Public Notice CRTC 2005-34, 18 April 2005

- *Transfer of effective control of TVA to Quebecor Média inc.,* Decision CRTC 2001-384, 5 July 2001

- *Revised policy concerning inside wire regime; Call for comments on proposed amendments to section 10 of the* Broadcasting Distribution Regulations, Public Notice CRTC 2000-81, 9 June 2000

- *Call for comments on a proposed approach for the regulation of broadcasting distribution undertakings,* Public Notice CRTC 1996-69, 17 May 1996

Appendix 1 to Broadcasting Regulatory Policy CRTC 2011-601

Code of conduct for commercial arrangements and interactions

This code sets out general objectives and guidelines that the Commission considers should govern the commercial arrangements between broadcasting distribution undertakings (BDUs), programming undertakings and new media exempt undertakings. While it remains of the view that such matters are generally best determined by negotiations between the parties without its intervention, there may be circumstances where the Commission determines that it must intervene in the public interest. The Commission expects that this would primarily occur in cases where, for example, the attainment of the objectives set out in the *Broadcasting Act* could be compromised or when the provisions set out in the present code have not been respected by the parties engaged in commercial arrangements. Accordingly, this code should be seen as providing guidance not only on matters that should be considered by parties as part of the negotiation process between BDUs, programming undertakings and new media exempt undertakings, but also as being illustrative of the kinds of information that the Commission will consider in any subsequent Commission process whether these be concerning allegations of undue preference/disadvantage or requests for a dispute resolution determination.

1. A programming undertaking, BDU or new media exempt undertaking **shall not** require a party that it is contracting to accept terms or conditions for the distribution of programming on a traditional or ancillary platform that are commercially unreasonable, such as:

    a. requiring an unreasonable rate (e.g., not based on fair market value);

    b. requiring minimum penetration or revenue levels that force distribution of a service on the basic tier or in a package that is inconsistent with the service's theme or price point;

    c. refusing to make programming services available on a stand-alone basis (i.e., requiring the acquisition of a program or service in order to obtain another program or service);

    d. requiring an excessive activation fee or minimum subscription guarantee;

    e. imposing, on an independent party, a most favoured nation (MFN) clause or any other condition that imposes obligations on that independent party by virtue of a vertically integrated entity or an affiliate thereof entering into an agreement with any vertically integrated entity or any affiliate thereof, including its own.

2. Where applicable, negotiating a wholesale rate for a programming service based on fair market value should take into consideration the following factors:

a. historical rates;

b. penetration levels and volume discounts;

c. the packaging of the service;

d. rates paid by unaffiliated BDUs for the programming service;

e. rates paid for programming services of similar value to consumers;

f. the number of subscribers that subscribe to a package in part or in whole due to the inclusion of the programming service in that package;

g. the retail rate charged for the service on a stand-alone basis; and

h. the retail rate for any packages in which the service is included.

3. Where a BDU includes related programming services in themed packages, it shall include all relevant non-related programming services in those packages.

4. An independent Category A programming service shall, unless the parties agree otherwise, be included in the best available package consistent with its genre and programming.

5. Where a BDU provides its related programming services with access to multiple distribution platforms, it shall offer reasonable terms of access that are based on fair market value to non-related programming services.

6. A programming service shall be given comparable marketing support by the BDU as is given to similar or related services.

Appendix 2 to Broadcasting Regulatory Policy CRTC 2011-601

Follow up proceedings and activities

Topic	Proceedings and measures
Exclusivity	• Notice of consultation to confirm appropriate wording for amendments to the New Media Exemption Order. • Notice of consultation calling for comments on the wording of amendments to the *Television Broadcasting Regulations 1987*, the *Specialty Services Regulations, 1990* and the *Pay Television Regulations 1990*.
Protection of Independent programming undertakings	• Notice of consultation calling for comments on the wording of amendments to the *Broadcasting Distribution Regulations* to ensure distribution of the appropriate ratio of independent programming undertakings.
Audits of vertically integrated (VI) broadcasting distribution undertakings (BDUs)	• Notice of consultation calling for comments on specific audit provisions for VI BDUs. • Notice of consultation calling for comments on the wording of amendments to the *Broadcasting Distribution Regulations* to reflect audit provisions.
Protection of independent BDUs	• Notice of consultation calling for comments on the wording of regulatory amendments, including amendments to the *Pay Television Regulations, 1990*, the *Specialty Services Regulations, 1990* and the New Media Exemption Order to prevent head starts. • Notice of consultation calling for

	comments on the wording of amendments to the *Broadcasting Distribution Regulations*, the *Pay Television Regulations, 1990* and the *Specialty Services Regulations, 1990* to specify that services must be offered on a stand-alone basis.
Protection of confidential information	• Notice of consultation to establish standard wording for non-disclosure agreements.
Dispute resolution	• Notice of consultation on the wording of amendments to the *Broadcasting Distribution Regulations*, the *Pay Television Regulations, 1990* and the *Specialty Services Regulations, 1990* to introduce a standstill provision. • Notice of consultation on the wording of amendments to the *Television Broadcasting Regulations, 1987*, the *Pay Television Regulations, 1990* and *the Specialty Services Regulations, 1990* to incorporate reverse onus. • Notice of consultation on the wording of amendments to the *Television Broadcasting Regulations, 1987*, the *Specialty Services Regulations, 1990* and the *Pay Television Regulations, 1990* to incorporate mandatory mediation.
Consumer choice	• VI entities to report by 1 April 2012 on their efforts to increase consumer choice.
Access to BDU customer information by programmers	• Programming undertakings and distributors to resolve the issue in one year. If not, the Commission may initiate a follow-up proceeding.