CCSA
Canadian Communication Systems Alliance
100-560 Main Street, Building A, Saint John, NB E2K 1J5
T: 506 849 1334 | info@ccsaonline.ca | ccsaonline.ca

REGULATORY

BNC 2025-2 The Path Forward – Working Towards a Sustainable Canadian Broadcasting System

Feb 24, 2025

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Mr. Marc Morin Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin,

ES-1 The Canadian Communication Systems Alliance ("CCSA") is a national organization representing more than 100 small independent broadcasting distribution companies and ISPs providing TV, internet and telecommunications services to nearly half a million Canadian residents and businesses in urban and rural communities, from coast to coast to coast.

ES-2 The CCSA appreciates the thoroughness of the Commissions questions on the matter of working towards a sustainable Canadian Broadcasting System from both an industry and consumer perspective. Before the CCSA addresses the questions raised, the CCSA will note two other points for consideration. The first, is a proposal to balance 'broadcasting' responsibilities in the industry. The second, relates to the CCSA discovering multiple examples of what it believes are anti-competitive practices and behaviours, which in its view, appear to have been done to reduce competition, or disadvantage small independent competitors across the country and ultimately serve to limit Canadian choice.

ES-3 The CCSA requests that bulk sales practices in condo and apartment buildings be banned in their entirety, or if the Commission would prefer more flexibility, that terms and conditions around bulk selling be regulated to ensure a fair and open environment for competition.

ES-4 The CCSA's asks the Commission to reiterate the importance of s10(1)(h.1) of the Broadcasting Act on issues of transport, Online Undertakings, and more generally, anti-competitive behaviours including: price discrimination and undue preference.

ES-5 The CCSA seeks to resolve inconsistencies in the Commission's policies and regulatory interpretations regarding uniformity of the definition of 'exemption.' Additionally, the CCSA would like the Commission to consider reassessing its framework for supplying funding to Canadian production to ensure funds taken from the broadcasting system are not placed more broadly into 'cultural content', instead returning back into the broadcasting system.

ES-6 The CCSA proposes a 'bottom-up approach' to competition as the best approach to encourage sustainability.

ES-7 Finally, the CCSA will directly address selected questions from the Commission's Notice.

1 In making this submission, the CCSA is mindful of the 'small business lens' section offset out in Policy Direction SOR/2023-239 which ask the Commission to :

"…to consider certain factors and policy goals while it designs and implements a new regulatory framework with the active participation of all interested parties, including small and medium-sized businesses and the organizations that represent them"[1]

Further the policy direction also states that:

"Ultimately, small and medium-sized Canadian businesses will benefit from the following:

- a flexible and adaptable regulatory framework that minimizes the regulatory burden and promotes competition and innovation where possible;"[2]

Bundling

2 The CCSA will be framing some of its arguments broadly. This is largely because of economies of scope across service offerings of Vertically Integrated companies.

3 If a Bell or Rogers representative comes to a customers' door and offers them services in one combined 'deal' on one simplified bill (such as a 10% discount on home internet at comparable speeds to the customer's current supplier; cable TV or Crave TV at 5% cheaper than their existing service; and a 10% discount on their household cell phone bill), then the representatives, through their sales practices, are blending the service offerings.

4 The Vertically integrated and large incumbents, with significant market shares, cannot have their cake and eat it too. If they are bundling services to compete, they are linking broadcasting and telecommunications, thereby acting as a unified supplier of services. While not inherently right or wrong, the use of bundling by a few 'big' companies that collectively control approximately 90% of the combined market necessitates the Commission ensure that competition across both industries is addressed with a specific focus of protecting the small independent BDUs so that they can create downward market forces to the benefit of Canadian consumers.

Bulk Sales Practices

Bulk Sales Practices

5 The first anti-competitive issue the CCSA would propose the Commission address is the issue of Bulk Sales Practices in multi-dwelling buildings[3] first raised before the Commission in Telecommunications Hearing 2023-56 by Beanfield.

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[1] Found in Policy Direction SOR/2023-239 'Small business lens' section. https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html

[2] Found in the last paragraph of the 'Benefits' section, as the fourth reference to 'competition' if searched. https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html

[3] In particular high-rise new build condo and apartment buildings.

6 It was argued that large ISPs that develop exclusivity contracts with condos based on penetration rates are negatively impacting smaller competitors by precluding their ability to compete effectively in densely populated areas like high-rise condo and apartment buildings. If competitors are unable to compete to attract customers because of anti-competitive practices that provide an unreasonable disadvantage, these practices should be banned. This issue was further raised in Beanfield's reply to the CRTC #: 8662-B75-202305466 dated Nov 6, 2023. Though the Commission has not yet rendered a decision from Beanfield's 'Part 1 Application' initially dated September 20, 2023, Beanfield's evidence in its submissions (already available with the Commission) are relevant in a broadcasting capacity independently of Beanfield. The CCSA is raising this with the Commission having received multiple distinct complaints of other similar instances of Bulk Sales Practices (BSPs) across the country from our members regarding the impacts on broadcasting. The CCSA is bringing this to the Commission's attention as a pertinent issue to the sustainability of competition in the broadcasting sector. This is particularly as Canada faces a housing shortage that can only be remedied by the rapid expansion of multi-dwelling unit buildings.

7 If a newly built apartment building has 'Company X' as the exclusive supplier of internet for the building as a 'utility cost', any tenants moving into that building will be stripped of their choice of supplier to use for provision of services. If a tenant had a bundled package from Rogers for internet, TV, and cell phone service, now at least one of those services is being directly undermined because it is no longer based on reasonable competition, but rather on where a Canadian (or immigrant) can afford to find a home. Given the price of renting an apartment in major urban centres, most Canadians may be more concerned with the monthly rental costs and may not be asking if their "communications contracts/bundled services going to change or increase if I take this apartment" when they are viewing these units.

8 If a young family has only one supplier for internet in their condo building, and the suppliers offer a bundled price that is comparable in cost to any rival for TV, an unfair competitive advantage exists by the nature of the suppliers' monopoly over the internet service in that building. Further, that customer is being denied choice, which eliminates access to a free market. If there is no free market in condo or apartment buildings with these BSP agreements, perhaps it would be reasonable for the Commission to probe deeper into their terms and conditions. It could then be determined whether price discrimination or unjust discrimination is affecting customers through anti-competitive practices.

Member Issues Around Bulk Sales Practices

9 Narrowing the focus strictly upon how telecommunications impacts independent BDU's and their customers, if an internet bulk sales deal for a building precludes 'other bulk sales deals,' but does not specify 'exclusively' for internet, then it is overly broad, and as such, that particular internet bulk sales contract precludes any other BDU from offering a bulk sales deal for broadcasting distribution services in the building – again removing fair access to choice for non-competing services[4].

10 Small independent broadcasters are facing an unreasonable disadvantage in the market. For instance, one 20 storey building might represent hundreds of homes. So, for the smaller broadcasters, a single building like that could represent half, if not all, of their total subscribers. If smaller BDUs are unable to solicit new business in such a building due to pre-existing agreements between the building owner and an incumbent, this could be considered anti-competitive.

[4] Internet service provision precluding broadcasting distribution

11 The CCSA is not seeking retroactive penalties on this practice if it is found to be anti-competitive. We would simply request that the Commission review through the lens of fairness and access, and either 1). end the practice multiple dwelling unit bulk arrangements completely, or 2). set up regulations in market to ensure the playing field is level for all and that consumers continue to have fair and open environment for competition. The practice as it exists now is anti-competitive and impacts the Broadcasting market for both small independent BDU's and consumers.[5]

Competition

Due Versus Undue

Due

12 The CCSA is often the first choice and partner for many new broadcast undertakings seeking to distribute new TV services to customers. As a result, the CCSA is well positioned to speak to the legitimate challenges new BDUs face. First and foremost, there are significant costs associated with transport and access to broadcaster signals. While the CCSA provides a tremendous resource for new BDUs to access channels from around the world in one convenient packaging system, for truly 'new' BDUs starting up their business, the financial burdens associated with establishing transport and access to signals can be quite intimidating.

13 Other legitimate barriers to entry cited often include: marketing budgets and attracting new customers that may be served by any incumbents in the area. This combined with the challenge posed by competitors who offer a diverse range of product offerings, makes it exceedingly difficult for a new BDU (operating solely as a BDU) to enter the market. Competitors' who have pre-established economies of scale make starting a small BDU a daunting exercise.

14 Today, TV is simply a 'requirement' to be in business, so that bundling of these services with telecommunications can be marketed and sold to consumers. Essentially, many new entrants[6] into the broadcasting and media space view broadcasting distribution as a legitimate burden of doing business because it is an obligatory legacy service to be able to provide the more lucrative telecommunications services.

Undue Preference

15 There are also undue challenges impacting CCSA members, including concerns regarding: price discrimination, and attempts by vertically integrated companies to squeeze out small established BDUs. Such practices would be in breach of multiple pieces of federal legislation[7] [8]. Further, there is threat of exponentially increasing costs without justification, as well as outright elimination of essential business

[5] Found in the last paragraph of the 'Benefits' section, as the fourth reference to 'competition' if searched. https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html

[6] Those without established customer bases over a decade or more.

[7] Competition act 1985. s78(1)a, i. Found at: https://laws-lois.justice.gc.ca/eng/acts/c-34/fulltext.html

[8] Broadcasting Act 1991 s10(1)(h.1) Found at: https://laws-lois.justice.gc.ca/eng/acts/b-9.01/FullText.html

resources (transport) solely for the purposes of driving competitors to close and/or sell their business to the transport supplier.[9] [10] [11]

16 The CCSA is aware of current and ongoing concerns, where such practices have been the root cause for at least one small independent broadcaster shutting down, and for others who are being similarly pressured to either shutter or sell to their business to the 'offender'. The evidence could demonstrate that through a monopoly on infrastructure there has been a serious breach of s10(1)(h.1) of the Broadcasting Act.

17 Transport aside, the CCSA is aware of at least one instance of undue preference where TV programming was made prohibitively expensive (beyond historically reasonable norms) to competitors. This was potentially done to prevent the purchase of programming by any other competitors in order to give the vertically integrated broadcasting signal supplier and broadcast undertaking a temporary monopoly on those programming products in the market at the time of launch. Ultimately this would give them an unfair competitive advantage.[12] This practice might be called: "pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market."[13] [14] This action has ultimately led to a reduction of previously long-standing available content that many BDUs including CCSA members were able to offer customers.

Monopolies Can Exist

18 Transport infrastructure is one area where monopolies can still exist. In effect, this can still create a bottleneck for abuse of monopolistic power, and the CCSA would request that the 'standstill rule': section 15.01 of the BDU regulations be expanded to apply during negotiations over transport costs only in instances of:

1). significant increases in costs without justifiable reasons, and
2). instances where transport with no alternative supplier is available is being removed or shutdown without cause.

For there to be no protection in such cases, essentially allows the infrastructure owner to dictate the terms and costs allowing for unjust enrichment, or worse, elimination of competition entirely.

Online Undertakings

19 As Bill C-11 and the CRTC decision 2024-121 demonstrate, Netflix, Disney and Amazon Prime are big names in the broadcasting system. If small independent broadcasters do not have similar access to distribution of these services to their customers as larger competitors do, it puts the small independent broadcasters at an exceptional competitive disadvantage.

20 The CCSA would note that the distribution of Online Undertakings has not been uniform, creating disparity in the market. While CCSA has recently had positive conversations with one Online Undertaking about access to our members' systems to offer customers their channels, we have only been able to secure a

[9] In apparent violation of the Wholesale code 5, 5a, 5b. Found at: https://crtc.gc.ca/eng/archive/2015/2015-438.htm
[10] Competition act 1985. s78(1)c,e,g Found at: https://laws-lois.justice.gc.ca/eng/acts/c-34/fulltext.html
[11] Broadcasting Act 1991 s10(1)(h.1) Found at: https://laws-lois.justice.gc.ca/eng/acts/b-9.01/FullText.html
[12] In apparent violation of the Wholesale code 5a, 5b, 5e Found at: https://crtc.gc.ca/eng/archive/2015/2015-438.htm
[13] Competition act 1985. s78(1)e, j. Found at: https://laws-lois.justice.gc.ca/eng/acts/c-34/fulltext.html
[14] Though this may also be fall under the scope of Broadcasting Act 1991 s10(1)(h.1)

brief conversation with another, and to date, we have been unable to have any others meaningfully engage with us to date.

21 This reluctant response to Canada's smaller independent broadcasters, or outright lack of engagement by some of the major online undertakings, creates a clear competitive disadvantage and demonstrates a necessary ongoing concern for the Commission as to whether Section 10(1)(h.1) is being respected. The CCSA appreciates we have a diverse membership with technologies that are not always uniform. However, for CCSA members who use backend technology that is consistent with other larger industry players, to be excluded from even exploring the option of carriage is unjust discrimination in the interpretation of the legislation.

22 How is it not market distortion when Telus is so far advanced in its relationships with all streamers that it can offer 'stream+' which provides a discount by offering a savings of 20% off combined streaming services if a customer switches to its service. And yet in comparison a small independent First Nations Broadcasting undertaking, as a member of CCSA can't even offer Netflix to its customers?

23 The CCSA seeks a regulatory decision for wholesale access to Online Undertakings (OU's) for all conventional broadcasters. The CCSA seeks a level playing field with larger broadcasters, not an unfair advantage.

Unfair Business Practices

24 The CCSA would ask the Commission to reiterate to all BDUs of all sizes that misleading statements by third party contractors or internal sales teams acting as agents on their behalf should be deemed by the Commission to be in violation of s10(1)(h.1) going forward.

25 Additionally, CCSA also requests that the Commission apply the same section of the Act if a competitor is shown to be using discriminatory pricing or undue discrimination. The CCSA would expect the Commission to take a particularly negative view of such unlawful behaviour if it is shown to be a pattern.

Competition Through Consolidation

26 The CCSA recognizes that sometimes small companies are simply unable to grow or shift with changing technologies. This is the ebb and flow of business, particularly in a capital-intensive industry like broadcasting. It is inevitable that some consolidation is likely over time.

27 In the policy rush to establish four national carriers, those policy developers misunderstood the number of competitors for quality of competition. Today we have less quantity on a national scale and decreasing quality of competition. As a result, the CCSA is very concerned about the long-term viability of the broadcasting market.

28 Small Independent BDUs act as a lever to provide a market pressure that keeps larger incumbents competitive, particularly in smaller markets where no competition exists from other national options. CCSA hopes that the Commission recognizes that, if CCSA's members are the litmus test for a healthy market by offering consumers access to choice, there may be distinctly troubling times ahead if regulatory correction does occur quickly to stem any abundance of consolidation.

Regulatory Consistency

Funding Challenges for Existing Broadcasting Undertakings

29 The first issue the CCSA raised in hearing BNC 2024-288 was for broadcasters to pay into a regulatory program was not inherently undue. However, when those benefiting from funds from the broadcasting industry are also third parties in competition with the broadcasting industry, there is the possibility of regulatory complicity in creating unreasonable enrichment by the Commission contrary to the objectives it seeks to achieve. It can be interpreted as antagonistic to the objectives sought in the Broadcasting Act Sections 5(2)b,d,e,e.1,e.2, and importantly 5(3) in relation to 3(1)b[15], 3(1)(d)(ii,iii-iii.6, vi)[16] 3(1)(e).

30 If approximately 1/5th of the funds being drawn from regulatory intervention[17] intended for re-investment into broadcasting programming are being diverted to industries broadly creating 'cultural content' that is not 'broadcast programming', then it is outside the scope of the intended purpose as defined in the Act.[18] The Commission must address this in favour of the Broadcasting policy objectives set out above.[19]

31 The CCSA requests the Commission ensure its regulatory framework for funding mechanisms for broadcasting is in alignment with the outcomes defined in legislation. If not, the Commission should immediately address how regulations can be brought into compliance with the intent of the Act. The CCSA proposed in its first round submission to CRTC BNC 2024-288 in paragraphs 22-23 two options: "either the Commission could reduce the regulatory burden on broadcasters proportionally to the amount the CMF decides to contribute to those business initiatives, or the Commission could simply establish as a condition of license that all licensed broadcasters must re-invest a proportional amount that they previously had to pay into the CMF into their own national and regional productions[20]. Any funds not spent by broadcasters in a given fiscal year would then be transferred to the CMF as overflow funds for any given purpose in subsequent years.

2024-121 Versus Conventional BDU Exemption

32 In response to OUTtv's application for status, the CCSA requested exemption for all small independent broadcasting undertakings with fewer than 20,000 subscribers.

33 While the CCSA still acknowledges the importance of 9(1)h services (now referred to as 9.1(1)h services), based on the criteria set out in hearing decision 2010-629[21] (paragraphs 10-11), in the intervening

[15] With specific reference to programming – as provided through "broadcasting" videogames do not qualify as per the definition of 'Broadcasting' as per section 2(1). The definition refers specifically to 'reception by the public' of transmission of a program. Even if we accept videogames as 'programs' which has never been tested or argued in favour of, the interpretation of the 'transmission' element of such a 'program' cannot be applied to videogames in a broadcasting context.
While social media does create 'programs', social media is necessarily excluded from relevance because of s4.1(1), 4.1(3) of the Act.

[16] Ibid.

[17] Sections 34(2) & 52(1) Broadcasting Distribution Regulations SOR/97-555 https://laws-lois.justice.gc.ca/eng/regulations/sor-97-555/FullText.html

[18] According to the CMF's 2023-2024 annual report, on page 95, the funding breakdown describes some $47m for the 'experimental total'. The CMF total funds were $379.7m. Page 88 lists the experimental stream as web-based games on apple/google platforms, Nintendo, Steam, etc, game systems. Then there is the "experimental and immersive digital media content' which appears to be separate but additional funding to videogames on page 98, to the amount of $32.7m.
There is also the CMF's digital creators pilot program (DCPP) for video content specifically for 'social media', with funding just shy of $500,000. Combined these programs represent $80.2m. Sources found at: https://ar-ra23-24.cmf-fmc.ca/

[19] Broadcasting Act 1991 Found at https://laws-lois.justice.gc.ca/eng/acts/b-9.01/FullText.html

[20] If it were to include local/community content, it would artificially distort the ability for small independent broadcasters to compete with VI-BDU services, allowing larger BDUs to invest disproportionately large amounts or resources to drive smaller not for profit services out of business.

[21] Found at: https://crtc.gc.ca/eng/archive/2010/2010-629.htm

years, the fundamentals of the market have changed so greatly as to render the definition of what is an appropriate balance in 2009, not to be representative of the same balance in 2025.

34 While the policy objectives remain, the industry has seen contraction and impact of longstanding protections eroded. This is simply a recognition that times have changed to the detriment of Canadian BDUs (among others), and that it is time to consider re-evaluation of the 15-year-old decision[22] so as to bring it in line with the differences that exist in 2025.

35 The CCSA notes the definition of 'distribution undertaking' in the Act excludes Online Undertakings. They are excluded or 'exempted' from the distribution undertaking classification, and are therefore not bound by s9.1(1)h of the Act, but are instead bound by s9.1(1)i.

36 The CCSA also notes, however, that while 'BDUs' with 2,000 or more subscribers have 'must carry obligations' both in terms of content and financial burdens, OU's do not. The CCSA would suggest that whether a service is classified as 'exempt' regardless of definition criteria (size or title), the effect should be the same for the purposes of regulatory burden.

37 A justification for this concern is based on the recent decision from BRP 2024-121[23]. In that decision, the Commission exempted online streaming services with an annual income below $25M from contributing revenues to the Canadian broadcasting system in addition to these online streaming services already not required to distribute 9.1(1)h services. In doing so, the Commission gave a tremendous and inequitable advantage to the online market.

38 The CCSA is seeking uniformity in the Commission's regulatory policy and an end to the long-standing discriminatory advantages that have been applied to online services who small independent BDUs have to compete against.

39 It is reasonable for the Commission to modernize its policies with the times and the shifting broadcasting market. The CCSA's membership believes that this updating should create a simplified definition for 'exempt' BDUs at a level of 20,000 subscribers per system for traditional broadcasters. And that the new unified exemption threshold should be unified in terms of burden with those of Online Undertakings.

Sustainability and Community Programming

The 30,000 Foot Perspective

40 Before addressing the questions that the Commission has sought input on below, the CCSA would like to address the element of sustainability. The Commission's summary section of this notice of consultation the Commission states:

"The Commission considers that a sustainable Canadian broadcasting system is one that is resilient, adapts effectively to change, supports Canadian and Indigenous content and facilitates its discoverability, and promotes fair competition, diversity, and innovation."[24] (emphasis added for effect)

[22] BRP 2009-544, has had alterations and amendments over time.
[23] BRP 2024-121 paragraphs: 57-59, Found at: https://crtc.gc.ca/eng/archive/2024/2024-121.htm
[24] Paragraph 2 of the Summary section of BNC 2025-2 https://crtc.gc.ca/eng/archive/2025/2025-2.htm

41 While the questions below address some of these issues, the questions as they are worded are more narrowly focused and does not allow for a more wholistic or 30,000-foot perspective. Addressing each underlined section above, the CCSA will be filing with this submission some (Confidential) projections alongside this submission for the next five years that the CCSA has modeled.

Supporting Canadian and Indigenous Content

42 The CCSA has more than 100 members. Some produce hyper-local content for local hamlets of under 300 people, and some provide content more broadly for local geographic regions. Unfortunately, with declining revenues across the industry, the local connection is increasingly becoming financially unsustainable. There are CCSA members who have already consolidated offerings as much as they can in order to reduce how much money they lose when they are doing the extremely valuable work of connecting communities. Whether they are helping providing access to voices during municipal/provincial elections, or they are creating local Indigenous content, there is a very real risk of these connections ceasing in some, if not many, rural communities. The CCSA wants to highlight the urgency of this concern with the Commission.

What the Numbers Show

43 Based on the CRTC's numbers alone, the Canadian broadcasting system can be seen to be in steady and long-term decline. 'Resilient', and 'effectively able to adapt to change/innovation' cannot reasonably be determined to be characteristics of the broadcasting system when considered in the context of its steady decade-long declines in both audiences and profits. Those two determinative factors will erode the industry's ability to 'support Canadian and Indigenous content, facilitate discoverability, innovation or diversity'. Additionally, as profits and customers further decline, fair competition will also grow more competitive to the point of becoming more anti-competitive as the number of industry competitors - but there are fewer pieces of pie to share. The CCSA already has examples of such behaviour on record.

A Vision for Broadcasting

44 In the first line of the Summary section of this Notice of Consultation, the Commission is seeking "to examine the market dynamics between small, medium, and large programming, distribution, and online services, and the tools available to ensure the sustainability and growth of Canada's broadcasting system."

45 Being 'the little guys', CCSA's members often have the 'hardest time'. We have small indigenous members who are struggling with the funding limitations and resultant staffing issues; three to five person teams trying to operate the BDU where the CEO is also tech support and the 'on air talent' – not as a career choice or because of ego, but out of necessity. For the benefit of our smallest members, the CCSA would welcome any new tools or regulatory considerations to reduce their operating pressures.

46 If Rogers and Bell are the pinnacle of the industry, they can only be so competitive in the market before they cross the threshold into being anti-competitive. They effectively become limited in being facilitators of sustainability or growth in the industry. Any meaningful results the Commission seeks to encourage must therefore come from below that 'peak'. The Commission should determine whether it is optimal to aim at the proverbial middle and its (often) regional competitors or if it should take a bottom-up approach focusing primarily on enabling smaller independent BDUs to achieve sustainability and growth.

47 The impact of Online Undertakings and their distributors (telecommunications) who have long been able to take advantage of regulatory and policy directed exemptions have distorted the market and further cast the sustainability and growth into question. Moreover, we cannot labour under the illusion that they are going to exit the market and that when they do, the broadcasting equilibrium will return to pre-2010 levels.

48 The CCSA would humbly suggest a bottom-up approach represents the most effective long-term opportunity for the Commission to achieve growth and sustainability in the market. By bottom-up, the CCSA means that small independent BDUs and independent programmers be given prominence of consideration from the Commission, with VI-BDUs and programmers considered subsequently.[25] This would yield an equity of opportunity as opposed to equality of opportunity approach to policy and regulation by the Commission. This is not to suggest that the Commissions' approach should be exclusionary to other concerns. The intent of this approach to make it attractive to start and grow a broadcasting business, then new competitors will naturally want to enter, grow, innovate, and in time scale their business to become medium-sized. That in turn will increase competitive pressure upward to the larger regional and national services. The CCSA is proposing the Commission employ a greater emphasis on a trickle-up approach to policy and regulation.

49 The CCSA's membership represent a unique group of companies many of whom for have been in operation for over 40 years who have worked individually and collectively to support and grow service levels within local communities- to increase communications in local communities. Through a bottom-up (or trickle-up) approach to policy and regulatory implementation on the many small independent providers, the Commission can decrease any unintentional consequences that have traditionally been created by regulation that is uniformly applied to both VI-BDU's and the smaller providers. Such application can result in disproportionately burdensome impacts for the small independents. The CCSA appreciates the scale and scope of such an ask but notes that the biggest BDU's are comparatively less impacted by regulatory change or a shifting industry than are smaller BDUs with less available resources to adapt to change. The CCSA would request the Commission change the starting point for scope from the 'industry as a whole' to what are the 'bottom-up' effects on any policy decisions for the market.

50 The CCSA respectfully requests that the Commission reflect on the outcomes it seeks and whether past decisions have yielded more or less sustainability, particularly in light of current market circumstances. The CCSA suggests that the rate of market decline cannot be remedied by maintaining the status quo. CCSA hopes the Commission will consider the proposal to try something different and reduce the erosion of small independent broadcasters in the industry and ultimately choice for Canadians.

Conclusion

51 On the next page are the CCSA's answers to the questions posed by the Commission. Though the CCSA sought input from all members on these questions, some members have been unable to respond by the given deadline for first round submissions. As such, the CCSA responses contained in this submission may 'evolve' over time as additional or new perspectives are brought forward by members.

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[25] The CCSA makes this suggestion in recognition that 3(1)(d)(iii.5) of the Broadcasting specifically focuses on independent Broadcasting Undertakings playing a "**vital**" role, with no equivalent reference for Vertically Integrated or Online Undertakings. This combined with the language around the Policy Direction SOR/2023-239 in the "opportunities for business" paragraph before the "Small business lens" section. It states: "…a stronger broadcasting sector with more sustainable independent broadcasting and programming undertakings, including those run by communities and non-profits" https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html

52 The CCSA sincerely thanks the Commission for holding this consultation to ensure there can be more opportunity for certainty and encouragement of best practices in the provision of programming as we move into the middle of the 21st century. Though the CCSA's proposals may be more forward-looking than might have been expected, it is only through effective and fair competition that innovation and opportunities can be realized in Canada's vital broadcasting space.

Sincerely,

John P. Roman
Director, Legal & Regulatory
Canadian Communications Systems Alliance (CCSA)

CRTC Questions and CCSA Responses

Q1. What are the main challenges to ensuring that existing broadcasting undertakings and new entrants to the broadcasting system do not face undue structural, financial, technological, or regulatory barriers? What barriers should be considered undue? What barriers demonstrate market failure?Footnote8 Do these challenges vary depending on the size of traditional and online undertakings?

A1.

1.1 The CCSA, having addressed some of these concerns in the above sections, would seek to clarify the issues of market failure and whether they are contingent on size.

1.2 From a BDU perspective, is market failure taking place because of changes in broadcasting or telecommunications? How is the Commission choosing to define 'the market' and is that an acceptable definition given Online Undertakings, higher-speed internet provision expanding to remote and rural areas, and so on? Switching the question's context to programming undertaking markets, is there enough of an audience to justify provision of service? Are there enough funds to make diverse and interesting content and ensure it is accessible?

1.3 From the small independent BDU perspective, market failure is far away for some, close for many, and some see the market as a zombie - already dead but still marching on. From the programmer perspective[26], it would seem that getting more money into the system is the only way possible to encourage more content which should be appealing to Canadian audiences.

Q2. Are there challenges specific to the English-language and French-language markets? If so, please explain these challenges.

A2.

2.1 From the English perspective, there are approximately 32 million Canadians spread across a large geographic area. While many are now connected, getting the infrastructure out to the remaining underserved areas is extremely difficult and costly. Aside from government- led initiatives for ground-based infrastructure installation, satellite has been instrumental in connecting these Canadians. However this is a distinct problem now that OTTs (now referred to as Online Undertakings) are considered part of the regulated broadcasting system. If satellite is unreliable because of weather and atmospheric changes, then necessarily the 'online element' of the broadcasting system in those areas is similarly vulnerable.

2.2 On the French side, those challenges exist, however, there are also additional challenges surrounding consolidation in the market (more so than on the English side) as CCSA's smaller members have their infrastructure surrounded and then anti-competitively targeted by a transport provider. This was referenced in CCSA's previous discussion points.

Q7. Should the Commission consider collecting and publishing data relating to the ownership and control of undertakings by Indigenous peoples, members of OLMCs, members of equity-deserving groups, and other Canadians of diverse backgrounds, including those from diverse ethnic and cultural communities? If so, what specific data points would be useful and why? What are the challenges associated with the collection of this type of data and how could the Commission address those challenges?

[26] From our members who also produce content

A7.
7.1 While the CCSA appreciates the Commission's willingness to take on more research, and data publishing, given the government's current funding and staffing provisions for the regulator, the CCSA does not believe additional burdens would be sufficiently beneficial for the outcomes to be achieved.

Q9. What specific challenges do broadcasting undertakings, as distinct from individual creators and producers, face in having their services and content promoted and discovered? Does the Commission's current regulatory framework help or hinder the discoverability and prominence of broadcasting undertakings? Should the Commission support the efforts of particular classes of broadcasting undertakings to effectively sustain or grow audiences—and, if so, how? How do these challenges differ for traditional services and online services?

A9.
9.1 CCSA's members are typically not in positions to be producing national content if they are able to make any content at all. If they have the ability, it is common for them to focus instead on the local communities in which they serve. As such, while CCSA members are not competing with each other for the funding attention of a Bell or Rogers for a documentary or sitcom, funding for production of community content is still an issue.

9.2 As noted previously, community content should be deemed a national priority – perhaps on the scale of PNI by the Commission and from various funds and support mechanisms.

Q11. How can the Commission encourage the discoverability and prominence of Canadian and Indigenous programming services across both traditional BDUs and online undertakings, in both the English- and the French-language markets, and both domestically and internationally?

A11.
11.1 The Commission already has 9.1(1)h services focused on Indigenous programming for traditional broadcasting between APTN and now Uvagut TV. Other independent organizations turn to YouTube and other social media services. The CCSA would welcome new collaborative initiatives to support creation of and discoverability, but 'prominence' is a challenging outcome. While very prevalent in regulation and policy, if the application of prominence is to mean: 'conspicuous', that could be seen as being achieved already. If the meaning is intended to be 'well known' or 'famous', that is a matter of audience appreciation, which is beyond the scope of the policies. The Commission's jurisdiction does not extend internationally so that should not be a priority of the Commission.

11.2 The CCSA would suggest that additional funding for local content would naturally encourage the outcomes sought.

Q13. Is there a need for measures or incentives to ensure that programs of national and cultural significance are accessible by the public? Should the Commission consider adopting regulatory measures similar to those in other jurisdictions, for example, measures related to anti-siphoning? If so, please explain why and what measures could be implemented. Are there differences between how these measures could be implemented across the English- and French-language markets or for Indigenous communities, OLMCs, and other equity-deserving groups?

A13.
13.1 The CCSA would suggest that community programming is of cultural significance. Incentives and regulatory measures to strengthen community connection should be adopted.

Q14. How have connected devices impacted access to the Canadian broadcasting system? Do these impacts differ according to language market or for Indigenous communities, OLMCs, equity-deserving groups, and Canadians of other diverse backgrounds?

A14.
14.1 As mentioned in previous sections, the CCSA believes internet connected devices have changed the nature of the broadcasting system. Children watching programs from phones or tablets in the back seats of cars on long drives are now a luxury not available to prior generations of parents. Alternatively, being able to watch a bit of cheeky entertainment while at work is also a guilty pleasure some might take too far.[27] Nintendo and Steam mobile gaming platforms, as well as phones, have changed transportation experiences on public transit from awkward silences to opportunities to ignore humanity around you. Today, subscribers can enjoy entertainment and news while waiting for a train or sitting on a bus.

Q15. Are broadcasting undertakings operating in Canada facing challenges in obtaining access to (including equitable preferred placement or prioritization on) the interfaces and platforms on connected devices? Please provide specific examples.

A15.
15.1 CCSA's members are facing difficulty in this regard as previously noted. For a number of years CCSA was being rebuffed by OTTs. Their exemption status in the system made this quite justifiable in a regulatory sense. Now with the modernization of the Broadcasting Act, the CCSA has started – and hopes to continue to build relationship with Disney, and its fledgling relationship with Amazon Prime, but has been unable to start discussions with Netflix. CCSA must note that this is a distinct competitive disadvantage for small independent broadcasting undertakings.

Q21. Should support for services of exceptional importance, such as mandatory distribution pursuant to paragraph 9.1(1)(h) of the Act, be similar in the traditional system and in the online environment, or should the Commission adopt a different approach in each case? What principles or guidelines should be applied to the Commission's use of its power set out in paragraph 9.1(1)(i) of the Act? Please explain your reasoning.

A21.
21.1 CCSA's view is that exempt services should be exempt from mandatory carriage of services of exemptional importance. Exempted services should be able to offer those services to subscribers, but it should be the choice of Canadian citizens as to what they view as exceptional importance. Whatever decision the Commission ultimately makes, the CCSA would request that a level playing field between Online Undertakings and traditional Broadcasters is essential.

Q23. What additional or revised tools could be implemented to support access for Canadian traditional independent undertakings that are shifting their services online?

[27] "Disgraced Tory MP Neil Parish 'broke law' by watching porn in Commons" a story from the UK in 2022 https://www.theguardian.com/politics/2022/apr/30/disgraced-tory-mp-neil-parish-broke-law-by-watching-porn-in-commons

A23.
23.1 As addressed previously, the CCSA views bulk deals for condos and apartments as an anathema competition in the market. CCSA requests such practices be banned.

23.2 For small independent services, CCSA would ask that they be given special dispensation from CRTC decision TRP 2024-180 to get 'priority or preferential' treatment and lower rates. At present, the rates are too high to impact the ability for small independent broadcasters to shift their services online. The standard exempt thresholds seem appropriate for implementation of any priority status.

23.3 However, while the CCSA does not expect such reconsideration this year, this decision is completely unpalatable to CCSA members. The CCSA would ask the Commission to be hyper vigilant and prepared to re-evaluate this each year. We expect results to reveal that few small independents will make use of what should be a good opportunity for small independent BDUs and thus, will result in little to no new competition.

Q28. Are there any specific elements of the Wholesale Code that should be revised or replaced? If so, in what ways should they be revised or replaced? Are there new tools that could be employed to supplement the Wholesale Code?

A28.
28.1 In the Wholesale Code under Section 5 for commercially unreasonable practices, the Commission should add a new provision to deal with the fast-paced changing environment of content rights. The provision should address that a programming undertaking provide fair access to content rights (including any features and functionalities required to utilize such content rights by consumers) to BDUs. If a programming undertaking has granted content rights to one broadcast undertaking, then those same content rights should be made available to all broadcast undertakings. This should not be deemed an MFN provision.

28.2 For commercially reasonable practices under Section 6, subsection (e) should be removed because it is not possible to determine that a set number of subscribers are subscribing to a package of programming services because of the inclusion of one programming services versus another. This data point is not helpful in determining fair market value of the programming service.
In addition, to all other fair market evaluations, the Commission should consider adding net margin on packages to factor in fair market value because simply assessing the retail rate on packages in subsection (g) is not providing the full view of the cost pressure the proposed deal terms would have on the broadcast undertaking.

28.3 Modification should be made to Section 13 under Affiliation agreements from 120 days preceding the expiry date of the agreement to 180 days.

Q29. To what extent should the Wholesale Code or an updated code be made applicable to online undertakings, both audio-visual and audio?

A29.
29.1 This is a complex issue, in which CCSA would support an equivalent of the wholesale code where Online Undertakings were required (where technologically reasonable). If they can provide access to be on one BDU service as a channel they should have to provide similar accessibility where reasonable. This would

make an Online Undertaking on 'channel XYZ123' effectively a premium programming service for $X through an external subscription, but at least it would be standardized and in the lineup.

29.2 The CCSA would not suggest that subscription-based services should have to change their financial model for application of the wholesale code in Canada.

Q32.When defining or examining the applicability of "good faith" negotiation under subsection 9.1(9) of the Act, which relates to distribution orders for online undertakings, are there existing concepts that the Commission should consider, such as those developed under the Quebec Civil Code or in labour relations? Should behaviours, actions, and/or metrics be considered? These could include, for example, transparency, timeliness of responses, or fairness. If so, please propose a definition or approach, specifying which of these aspects should be considered and why.

A32.
32.1 The CCSA has difficulty defining the language around 'good faith' as it pertains to s9.1(9) of the Act as there is no frame of reference regarding 'good faith' negotiations relating to other forms of negotiations between BDUs. The CCSA would like to see a regulatory policy that extends 9.1(9) uniformly across the industry to remove any potential perception of bias against one class of undertaking in the market.

32.2 The CCSA proposes a regulatory policy that would define a code of practice/conduct around negotiations that would be further supported by s10.(1)(h.1) to encourage 'fairness' for all contributors to the broadcasting system.

Q33. What behaviours or practices would indicate non-compliance with the obligation set out in subsection 9.1(9) of the Act to negotiate the terms for carriage in good faith? At what point should the Commission consider acting on non-compliance, and what tools should the Commission consider using?

A33.
33.1 Practices like refusing to engage in any negotiations or intentionally slowing negotiations to unnecessarily long delays for the effect of denying negotiation should be seen as non-compliant. Additionally, if Online Undertakings are proposing unreasonable terms that are not inline with similar agreements already executed by such Online Undertakings with others should be deemed as non-compliant.

Q34. Identify any differences between the data generally available to traditional programming undertakings, BDUs, and producers, and to online undertakings. How do these differences impact the commercial relationships and negotiations between broadcasting undertakings, and what influence do they have on their business models? How can these differences be reconciled?

A34.
34.1 Larger broadcast undertakings generally have more set-top box viewership data available to them because they are in a position to make the large capital investments needed to access such data. This results in a stronger negotiation position for these larger broadcast undertakings when negotiating fair market value of wholesale rates for programming undertakings. Likewise, online undertakings have similar in-depth viewership data available to them because of the financial investments made to build products to capture such data from subscribers. If the Commission required the sharing of such data, in an aggregated manner, and at a

geographical level that protected subscriber privacy, then all broadcast undertakings could benefit from such data for use in negotiations.

Q38. Are the Commission's existing ADR mechanisms, procedures, and methods still appropriate in today's broadcasting environment? Please explain your reasoning and provide specific examples.

A38.
38.1 In terms of the methods the Commission would consider relevant during ADR, there should be greater consideration given to other factors that relate to negotiations for content such as the overall margin pressure a BDU is under given TV is not generally sold standalone and bundled with other products and services. Generally, the Commission focuses on the trend of prior deals negotiated between the parties, programming investments made, distribution changes and customer behaviour. This will normally lead into driving increases versus keeping a status quo or in some cases decreases on programming services.

Q39. Given the limits on the Commission's ability to engage in ADR involving online undertakings, and given the lack of symmetry between the applicability of ADR mechanisms for traditional and online undertakings, is there value in the Commission continuing to be involved in ADR for traditional broadcasting undertakings? If so, how should the Commission remain involved? Please explain your reasoning.

A39.
39.1 There is value in having the Commission's involvement in ADR for traditional broadcast undertakings in order to facilitate an environment in which parties in a dispute can find reasonable options to resolution. If ADR did not exist, then the bigger more powerful players would dominate to the detriment of the smaller ones.

Q40. Given the Commission's limited authority under the Act to assist in disputes involving online undertakings, are there ADR mechanisms that the Commission could offer to parties in such disputes that could be used on a voluntary basis?

A40.
40.1 Having a voluntary option to utilize ADR mechanisms is not helpful in dealing with online undertakings because voluntary still means there is no way to force the online undertaking to actively engage and participate.

Q41. What role should the Commission play if it is asked to facilitate negotiations, pursuant to subsection 9.1(10) of the Act? Is there a process that should be put in place for such negotiations, or are they best facilitated on a case-by-case basis?

A41.
41.1 Best facilitated on a case-by-case basis.

Q42. Are there any ADR tools, procedures, or methods the Commission does not currently use that could benefit Canadian broadcasting undertakings by promoting competition, diversity, and innovation without increasing the regulatory burden? If so, please comment on how the Commission could adopt or implement those tools, procedures, or methods and discuss their advantages and disadvantages.

A42.

42.1 The Commission should adopt a mediation style that is a blend between facilitative and evaluative mediation. While the facilitative style has been very helpful in getting parties to discuss the key issues in the negotiation, it is not helpful in dealing with an imbalance of power between the parties. For example, when negotiating with a programmer that makes up 35% of your overall cost of sale and provides access to a substantial number of programming services, there is more negotiating power residing with that programmer. The Commission adopting more of an evaluative approach would help in balancing the power between the parties because the Commission would play a more active role by making recommendations and expressing opinions on the subject matter of the dispute.

Q43. Have the remedies imposed by the Commission in cases of dispute resolution or undue preference generally been sufficient to address the concerns of the party seeking relief? If not, please provide specific examples where the remedy was inadequate and explain why the remedy did not address the issue.

A43.

43.1 Experience with the Commission's involvement for dispute resolution has not resulted in the Commission imposing a remedy on the parties. The practice utilized by the Commission is to encourage discussions between the parties in an effort to get the parties to come to a resolution.

Q45. In their current form, are the Commission's SAM services effective in the informal resolution of broadcasting disputes? If not, what changes to these services would you propose? How could the Commission improve its SAM services to better support good faith negotiations?

A45.

45.1 SAM services have been helpful to use in order to get to a resolution, but improvements could be made in terms of establishing clear timelines for the parties to adhere to in order to come to a meaningful solution in a timely manner, clearly demonstrating good faith efforts by the parties to adhere to timelines. Without this in place, SAM sessions can go on for several months which ties up organizational resources causing harm to smaller sized organizations. The current structure of the SAM services is to encourage discussions amongst the parties. It would be helpful if the Commission's SAM services included a structured regime that empowers the Commission's SAM team to impose penalties on a party if that party is using their market strength and power to be difficult in the negotiations in order to force a smaller operator to agree to unreasonable terms. An example of a penalty could be a period of time of waiving of fees paid by a broadcast undertaking if the programmer is being needlessly challenging to negotiate with. An established timeline for mediation should be set for a period of 3 or 6 months, thereafter the dispute would go to FOA. This will encourage good faith negotiations by both parties. During the mediation process, attendance should be done in person for 50% of the sessions to ensure all parties are actively engaged, financially vested and negotiating in good faith to come to a resolution. Mediations held by video conference do not facilitate and drive the same outcome as in person sessions.

Q46. Should SAM services be offered exclusively for disputes involving broadcasting undertakings with limited resources, since larger players generally have the capacity to engage external mediation, arbitration, or other dispute resolution mechanisms?

A46.

46.1 Yes, SAM services should be offered exclusively to smaller size broadcasting undertakings so long as it is clear that larger size programmers must attend and participate in dispute resolution with the smaller size broadcast undertakings.

Q48. Should the standstill expire after a defined period (e.g., 90 days), requiring the submission of a new request?

A48.
48.1 The CCSA values the intent of the standstill rule as a tool to be used in the system. It supports the proposed change outlined in question 48. CCSA would support a renewal request after the 90-day period that should necessitate a shorter period for renewal. A 30-day renewal period should be the relevant period for all subsequent requests on the same issue after the first 90 days, with justifications and progress reports required to facilitate informed regulatory oversight.

Q49. Please comment on the effectiveness of FOA as a dispute resolution mechanism. Should the Commission's FOA approach or process be updated? If so, please explain why.

A49.
49.1 As a last resort option, FOA is effective as a dispute resolution mechanism forcing the choice of one offer versus the other.

Q50. Are the current factors used to determine fair market value still appropriate?

A50.
50.1 The Commission should remove the fair market value criteria "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, taking into consideration viewership" because it is not possible to determine that a set number of subscribers are subscribing to a package of programming services because of the inclusion of one programming services versus another. This data point is not helpful in determining fair market value of the programming service. In addition to all other fair market evaluations, the Commission should consider adding net margin on packages to factor in fair market value because just assessing the retail rate on packages is not providing the full view of the cost pressure the proposed deal terms would have on the broadcast undertaking.

Q51. Should access to FOA be restricted to broadcasting undertakings with limited resources, or should access to FOA continue to be available to all entities, regardless of size?

A51.
51.1 FOA should be made available to all broadcast undertakings because FOA decisions are made available for everyone to see and understand the criteria by which the Commission made the choice of offers, which helps all broadcast undertakings. Excluding larger broadcast undertakings from this process would be a disadvantage to all broadcast undertakings.

Q52. Should the Commission consider making FOA mandatory when programming undertakings and BDUs are unable to reach an agreement within a fixed period of time?

A52.

52.1 No, the Commission should not make FOA mandatory.

Q57. Should the undue preference framework be updated to reflect current broadcasting undue preference situations, including those related to online undertakings, both audio-visual and audio? If so, what updates to the framework are needed? Is there a need to redefine the term "undue preference"?

A57.
57.1 An undue preference framework should be as agnostic as possible. If Broadcasting and programming undertakings are intentionally being anti-competitive, the technology or platforms in question are immaterial. If sales targets and negotiations tactics, or ignorance go beyond the scope of ignorance and negligence to reach the threshold of intent to be anti-competitive the Commission must realize that it is not the only regulator that injured parties can or should think of.

57.2 A framework for fostering fair and transparent commercial relationships only works if the Commission is prepared to set examples when breaches occur. While the Commission has s9(1) and 9(2)[28] in the Broadcasting Distribution Regulations SOR/97-555, and 10(1)(h.1) of the Broadcasting Act. The test as it is applied by the Commission is well laid out in the fairly recent Broadcasting Decision 2023-94.

Q58. Should the Commission provide guidelines around the types of anti-competitive behaviours, and behaviours that ought otherwise to attract the Commission's attention for policy reasons, that could be considered an undue preference or disadvantage (e.g., the no head start rule or the prohibition on exclusivity)? What types of behaviours should be included in the guidelines? What form should that guidance take?

A58
58.1 The Commission should include in guidelines for determining the types of anti-competitive behaviours, (i) the initial offer from one party to another being so grossly unreasonable that one party is purposely frustrating the process in order to drive a benefit for themselves; (ii) unwillingness to provide terms in offers because larger broadcast undertakings have not yet agreed to terms; and (iii) assessment of marketing support made available to broadcast undertakings and the availability of such marketing support to all broadcast undertakings on a fair and equitable basis. Vertically integrated organizations use their power to drive unreasonable terms and conditions in negotiations because there are no rules established by the Commission to hold them accountable.

Q59. Should complaints of undue preference involving online undertakings be handled using the same procedures as those used to address complaints involving traditional undertakings? For both traditional and online undertakings, are Part 1 applications the most effective way to process such complaints?

A59.
59.1 The policy direction,[29] does not clarify any special requirements or exceptions regarding anti-competitive behaviour. Online Undertakings as outlined in the Broadcasting Act are governed by the rules therein. The government was supportive of flexibility in the regulatory framework, however unless the

[28] https://laws.justice.gc.ca/eng/regulations/SOR-97-555/FullText.html
[29] Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework): SOR/2023-239: Canada Gazette, Part II, Volume 157, Number 24; November 9, 2023
https://canadagazette.gc.ca/rp-pr/p2/2023/2023-11-22/html/sor-dors239-eng.html

Commission can justify flexibility to enable anticompetitive behaviour by foreign broadcasters at the expense of domestic competitors (or vice versa), the CCSA believes a fair and competitive marketplace should be the priority.

Q60. Should the burden to establish that any preference given or disadvantage caused is not undue remain with the undertaking on which the complaint is served? If so, please explain why. If not, please explain why not. Should this vary between traditional and online undertakings? Please provide specific examples.

A60.

60.1 The CCSA will reserve its response to this question until it reviews the arguments made by other interveners on this subject.