Submission of

Rogers Communications Inc.

Review of Canada's Communications Legislative Framework

January 11, 2019

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I. EXECUTIVE SUMMARY

1. Rogers Communications Inc. (Rogers) is pleased to submit this proposal for legislative change in accordance with the process outlined by the Broadcasting and Telecommunications Legislative Review Panel (the Panel) in its call for comments issued on September 24, 2018, as amended on November 2, 2018.

2. Rogers is one of Canada's leading communications and media companies with state-of-the-art networks, strong media brands and advanced communications services. We are Canada's largest wireless communications provider and a leading provider of cable television, high-speed Internet and telephony services. In 2018, we invested $2.5 billion in capital on our distribution platforms, in order to ensure that Rogers has the capability to meet the needs of Canadians. Through Rogers Media, we are engaged in radio and television broadcasting, televised shopping, magazines and trade publications, sports entertainment, and digital media. Last year alone, Rogers Cable and Rogers Media together contributed more than $900 million to Canadian content. Our objective is to provide consumers with a range of compelling content that inspires, informs and entertains and to do it on the platform of their choice.

3. Rogers acknowledges the difficult task that lies ahead for the Panel. It will not be a simple or straightforward exercise to update and modernize the legislative framework for Canada's communications sector – comprising the *Broadcasting Act*, the *Telecommunications Act* and the *Radiocommunication Act* – in a way that takes into account the realities of Canadian consumers, businesses, artists and broadcasters while improving competition, innovation, and affordability. The rapid growth and development of new technologies has changed the way that Canadians connect with each other, do business and discover, access and consume content. This review must modernize our legislative framework so that Canadian broadcasting can better adapt and thrive in this constantly changing environment and Canadian telecommunications carriers can build the networks that will bring to Canadians the innovative services, products and applications of the future.

4. In considering changes to these three communications statutes, however, Rogers also believes that it is important not to lose sight of the fact that the current legislative framework has been flexible and has succeeded in enabling the development of a communications system in Canada that rivals that of every other country in the world. Despite being implemented 26, 28 and 30 years ago, respectively, the *Telecommunications Ac*t, the *Broadcasting Act* and the *Radiocommunication Act* have been remarkably resilient and have held up well, despite changes to technology, consumer behaviour and competitive forces.

5. All of these statutes were enacted at a time that pre-dates the advent of the public Internet, digital media and ubiquitous wireless communications. Notwithstanding this, it is clear that the legislative framework has been sufficiently flexible to enable Canadian consumers, businesses, artists and

broadcasters, as well as the administrative bodies that regulate them, to participate in and contribute to the development of what has become a world-class communications system in Canada.

6. The existing legislative framework has certainly proven capable of adjusting to many of the changes that have taken place within Canada's broadcasting and telecommunications industries over the past three decades. There is, however, growing evidence that this framework no longer provides the Canadian Radio-television and Telecommunications Commission (the Commission or CRTC), Innovation, Science and Economic Development Canada (ISED) and other regulatory bodies with the tools they need now and in the future to ensure that Canadian consumers and those engaged in Canada's broadcasting and telecommunications industries continue to maximize the benefits and public interest associated with a world-class communications system.

7. The changes that are taking place within Canada's broadcasting and telecommunications industries will only accelerate in the years to come. The development of the Internet of Things, the expansion of 5G networks, the growth in the number of over-the-top (OTT) services and other app-based content and the shift to IPTV platforms will all have a significant impact on Canada's telecommunications networks. They will significantly increase consumption of broadband capacity. Canada will need a legislative framework that addresses this seemingly insatiable appetite for more capacity. In doing so, it will need to further address the enormous economic challenge of ensuring that Canada's network providers can satisfy those demands, while also ensuring that Canadian consumers can access all the emerging telecommunications services as well as the Canadian and non-Canadian programming they desire.

8. In light of the challenges and opportunities created by new technologies, changing consumer habits and growing competition, we believe there is a broad consensus around the need to change the existing legislative framework. Having said that, the amendments that are required may not be as radical as some might suggest. Rogers is proposing amendments to Canada's legislative framework that are targeted and are designed to provide the Commission with more direction on how the broadcasting and telecommunications industries are to be regulated.

9. With these preliminary thoughts in mind, Rogers is proposing a plan for amending the communications legislative framework that, we believe, will ensure that Canada will be able to adapt to the challenges that lie ahead while maintaining our world-class communications system. It has the following 8 principles:

Principle 1 - General: Three Distinct Statutes

- The three statutes that are the subject of this Review should remain separate in order to ensure that their specific constituents, policy objectives and purposes are adequately addressed. There is no valid public policy rationale

for requiring that the *Broadcasting*, *Telecommunications* and *Radiocommunication Acts* be combined into a single statute.

Principle 2 - Broadcasting: Platform, Content and Producer Agnostic Regulation

- The broadcasting policy for Canada set out in the *Broadcasting Act* should be streamlined to focus on the creation, exhibition, access/discoverability, diversity and protection of Canadian programming and program rights. Further, it should be a foundational policy objective for the Commission to foster an equitable competitive marketplace for the broadcasting undertakings regulated under the Act. This means that all regulatory obligations and funding mechanisms used to support the creation, production, exhibition and distribution of programming in Canada should be governed by the following three rules:

  - platform agnostic – all platforms that are used to distribute audiovisual content and operate in a like manner should be subject to a comparable set of regulatory rules and obligations;
  - producer agnostic – all Canadian producers of audiovisual content should have access to funding mechanisms, whether they are independent producers or affiliates of Canadian broadcasters; and
  - content agnostic – all Canadian content should be treated the same, both in terms of accessing funding to create it and in respect of Commission regulations.

Principle 3 - Broadcasting: Equitable Contributions

- Every broadcasting undertaking that transmits programs directly or indirectly, by radio waves, digital technology or other means of telecommunications, for reception by the public and whose activities have a material impact on the Canadian broadcasting system should be required to contribute in an appropriate and equitable manner to the production, exhibition and distribution of Canadian programming. In order to contribute to furthering the objectives of the *Broadcasting Act* and to foster an equitable competitive marketplace, each undertaking should be required to fund, exhibit and provide access to Canadian programming. This would include OTT services, such as Netflix, Google, YouTube, Facebook, Amazon, DAZN and CBS, all of which are delivering their audiovisual content directly to Canadian consumers.

- As is the case today, Canadian ISPs and wireless carriers should not be regulated under the *Broadcasting Act*. Nor should they be required to contribute to the production of Canadian programming. Canada needs its telecommunications carriers to build strong, reliable networks that will be the foundation of the digital economy. Their sole function should continue to be investing in and managing the networks through which others deliver all types of content, including audiovisual programming, to Canadians. Only those broadcasting undertakings (including BDUs and OTT services) that rely on these networks to provide Canadians with audiovisual content and whose

entire business model requires those networks to be strong, reliable and affordable should contribute to fund, exhibit and provide access to Canadian programming.

Principle 4 - Broadcasting: Reliance on Market Forces

- With few exceptions, regulations established under the Act should be efficient and proportionate and should interfere with the operation of competitive market forces to the minimum extent necessary to achieve their purpose. Market forces and market-based competition should be relied on to the maximum extent feasible to encourage broadcasting undertakings to create and monetize Canadian programming for domestic and international consumption. This means that things like wholesale fees paid by broadcasting distribution undertakings (BDUs) to broadcasters and retail rates charged to subscribers should be set by the market and should cease to be established or arbitrated by the Commission or any other regulatory body.

Principle 5 - Broadcasting: News, Diversity and Program Piracy

- The three exceptions to the requirement to rely on market forces involve the creation and exhibition of news and information programming, the need to ensure that a diversity of programming is maintained within the Canadian broadcasting system and the measures needed to prevent program piracy or content theft:

  - With respect to news and information programming, the Commission should be required to foster and maintain a healthy and diverse environment for journalism of a high standard, which would include the requirement for BDUs to continue to give priority carriage to local television stations that produce and exhibit news.

  - As for diversity, the Commission should ensure that the Canadian broadcasting system includes a level of diversity that meets the programming needs of underrepresented groups, including Indigenous, third-language and official language minority communities (OLMCs), and Canadians with disabilities.

  - Finally, the issue of program piracy or content theft[1] continues to be a serious threat to the Canadian broadcasting system because it robs creators, producers, broadcasters and distributors of their right to be paid for the content they create, exhibit and distribute. If effective measures are not taken to address program piracy under the *Broadcasting* and *Telecommunications Acts,* any other measures or requirements implemented to support Canadian programming will not be commercially sustainable.

[1] While we use the term “program piracy” in this submission, the Commission recently used the term “copyright piracy” to describe this harmful activity: Telecom Decision CRTC 2018-384.

Principle 6 - Telecom: Reliance on Market Forces

- The policy guidelines set out in the *Telecommunications Act* should be streamlined and amended to ensure that facilities-based competition and market forces are to be relied on as the primary mechanism to regulate the industry. Specifically, the paramount policy objective in the Act should be to rely on market forces to the maximum extent feasible. Any regulatory measures implemented should be efficient and proportionate to their purpose and should interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives. Encouraging the growth and development of competition among facilities-based carriers should be a central feature of these policy guidelines.

Principle 7 - Telecom: Net Neutrality

- The principle of net neutrality, which is tied to the long-standing principle of common carriage, should be formally acknowledged in the Act. Such a principle should also recognize that neutrality and openness of the Internet would have to accommodate certain public interest objectives, such as the protection of privacy and personal security for digital consumers, provided that these accommodations do not impede technological innovation.

Principle 8 - Telecom: Access to Support Structures and Rights of Way

- The Commission should be granted exclusive authority under the *Telecommunications Act* to establish the terms under which carriers can gain access to municipal and utility infrastructure (including rights-of-way and support structures, such as poles, ducts and municipal buildings and street furniture) for wireline broadband, wireless 5G and future technologies deployment. Efficient and timely broadband and 5G deployment are fundamental to the ongoing development of Canada's leading edge digital economy, and are highly dependent on timely and affordable access to supporting infrastructure owned by third parties.

10. As noted, implementing these principles, while significant and critically important to the future success of Canada's broadcasting and telecommunications industries, will not require massive changes to the legislative frameworks governing them. In this submission, we are proposing several amendments to the *Broadcasting* and *Telecommunications Acts*, including:

- Amending the broadcasting policy and regulatory objectives in subsections 3(1) and 5(2) of the *Broadcasting Act* to

  - require the Commission to rely, to the maximum extent feasible, on market forces as the means to achieve Canada's broadcasting policy and regulatory objectives;

  - acknowledge the importance of ensuring that Canadians can continue to access professionally-produced news and information programming; and

  - protect the integrity of the Canadian broadcasting system, including preserving a distinct program rights market where possible and establishing measures to prevent program piracy and content theft.

- Granting the Commission the express and specific authority under section 9 of the *Broadcasting Act* to regulate online service providers by establishing a new regulatory mechanism involving service agreements.

- Granting the Commission the power under subsection 12(2) of the *Broadcasting Act* to impose administrative monetary penalties to ensure compliance with licence conditions and service agreements.

- Amending section 7 of the *Telecommunications Act* to

  - create a presumption that competition and market forces are to be relied upon to the maximum extent feasible to regulate the telecom industry; and

  - recognize the principle of net neutrality.

- Granting the Commission the authority under sections 43 and 44 of the *Telecommunications Act* to decide the terms under which both wireless and wireline carriers obtain access to passive support structures of municipalities and electrical utilities.

11. While we propose several amendments to Canada's communications legislative framework that should be adopted as part of this review, Rogers believes that three of the changes are more urgent than others and should be implemented even before the Panel issues its final report on January 31, 2020. The first relates to amendments to sections 43 and 44 of the *Telecommunications Act* in order to enable the deployment of 5G services. Ensuring that all wireline and wireless carriers have access on reasonable terms to supporting structures owned by electrical utilities and to passive physical assets, which extend beyond traditional supporting structures (poles, strands and ducts) to public property owned by, or licensed to, municipalities or local authorities, is vital for an orderly and timely rollout of 5G services in Canada. In our view, it would be wise to make the amendments to sections 43 and 44 recommended in this submission immediately, given the importance of 5G services for Canadians and the Canadian economy.

12. A second set of amendments that should be implemented in a timely fashion relates to program piracy. Given the enormous adverse impact that program piracy is having on the Canadian broadcasting system, which was acknowledged by the Commission in Telecom Decision CRTC 2018-384, Rogers believes it is imperative that the Canadian Government take immediate steps to amend the *Telecommunications* and *Broadcasting Acts* to enable the Commission to address this harmful activity.

13. With respect to the *Broadcasting Act*, another action that Rogers believes should be implemented immediately is for the Governor in Council to issue a policy direction to the Commission requiring it to update the Digital Media Exemption Order[2] or issue a new exemption order under subsection 9(4) of the *Broadcasting Act* that would require OTT services, like Netflix, to make contributions to furthering Canada's broadcasting policy objectives. While we believe that the Commission has the authority to do this on its own initiative today, we believe a policy direction would provide all stakeholders with a clear understanding of the Government's policy objectives for non-Canadian digital broadcasting undertakings.[3] By issuing a policy direction under section 7 of the Act, the Governor in Council could provide direction to the Commission on the manner in which the policy objectives in subsection 3(1) and the regulatory objectives in subsection 5(2) should be achieved by establishing regulatory obligations for this class that would be comparable to those imposed on linear Canadian broadcasting undertakings.

14. In the remainder of this submission, the above-mentioned eight principles and the corresponding proposed amendments to the *Broadcasting Act* and the *Telecommunications Act* are discussed in more detail. We do so in the context of the four themes identified by the Panel in its September 24, 2018 Call for Comments:

    i. Reducing barriers to access by all Canadians to advanced telecommunications networks;

    ii. Supporting the creation, production and discoverability of Canadian content;

    iii. Improving the rights of the digital consumer; and

    iv. Renewing the institutional framework for the communications sector.

15. In addition, we have responded in **Appendix A** to this submission to each of the questions highlighted by the Governor in Council in the Terms of Reference document that was provided to the Panel.

16. We begin, however, by providing an overview of the business opportunities and challenges that we expect to experience in the coming years.

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[2] *Amendments to the* Exemption order for new media broadcasting undertakings *(now known as the* Exemption order for digital media broadcasting undertakings*)*, Broadcasting Order CRTC 2012-409, 26 July 2012

[3] *Harnessing Change: The Future of Programming Distribution in Canada*, "Conclusions and Potential Options".

II. ROGERS' BUSINESS OPPORTUNITIES AND CHALLENGES

(a) The Economics of Wireline Networks

17. As background to Rogers' proposals to amend the *Broadcasting Act* and the *Telecommunications Act*, we believe it is crucial to have an understanding of the economics of Rogers' wireline network that provides high-capacity cable video programming distribution (our BDU service), high-capacity and high-speed Internet service and wired telephony service. This understanding will make clear the substantial economic challenges facing the industry and the implications for the creation and support of Canadian content. It will also explain why superficially attractive ideas, such as a tax on Canadian ISP revenues in order to support the creation of Canadian content, would be poor public policy. Such a policy would:

    i. significantly increase Internet rates (ISPs would have to compensate not only for the 5% CMF contribution but also for the 35% of cable revenue that flows to Canadian discretionary services today) with the unintended consequence of harming affordability; and

    ii. fail to address the challenges facing Canadian content (does not address program piracy and the loss of a distinct Canadian rights market and does not support the discoverability of content).

18. An understanding of the economics will also make it clear why steps must be taken to require foreign OTT services to contribute to the broadcasting system in an equitable manner and why steps must be taken to address program piracy. The numbers in the following Table are taken from Rogers' public aggregate BDU returns filed with the CRTC for the 2017 and 2018 Broadcast Years (September 1st - August 31st of each year). Our 2017 numbers are found on the Commission's website.[4] The numbers for 2018 have been filed with the CRTC and will be posted shortly by the Commission.

[4] https://crtc.gc.ca/public/5040/Rogers_2017_BDU_Aggregate_Return_public.pdf.

Rogers Wireline Financials				
Row	***($ millions)***	**2017**	**2018**	**% Change**
1	*Revenues*			
2	*Cable TV*	1,464 (43% of total)	1,414 (41% of total)	-3.4%
3	*Internet and Telephone*	1,971	2,060	+4.5%
4	*Total Revenue*	3,435	3,474	+1.1%
5	*less: Non-programming Expenses*	1,157	*1,198*	+3.5%
6	*Programming Expenses*	613	618	+0.8%
7	*Operating Profit*	1,665	1,658	-0.4%
8	*less: Depreciation Expense*	870	898	+3.2%
9	*Interest Expense*	174	172	-1.1%
10	*Income Tax* +	165	156	-5.4%
11	*Net Income*	456	432	-5.3%
12	*Gross Assets in Use*	10,149	11,989	
13	*Net Assets in Use* ++	3,921	4,153	
14	*Return on Net Investment (row 11/row 13)*	11.6%	10.4%	-10.3%
15	*Capital Expenditures*	*991 (29% of revenue)*	1,304 *(38% of revenue)*	+31.6%
+ Pro-forma Income Tax at 26.5% statutory rate excluding impact of 2017 $484 million write-down of previous IPTV product				
++ Net Assets are Gross Assets minus Accumulated Depreciation				

19. The economics of this network are challenging and this in turn presents great challenges to the creation of Canadian content. The Table reveals that in 2018, Rogers made a 10.4% return on our investment, down from 11.6% in 2017. This is a modest return given the high risk of deploying over one billion dollars in fixed capital expenditure per year, with much of the investment incapable of being redeployed to other uses should demand not materialize (i.e. the investment is not fungible). The industry is not a money tree that can be picked. There is no free cash flow.

20. Revenue in total increased by a mere 1.1% in 2018, with the 3.4% decline in cable TV revenue offset by the 4.5% increase in Internet and telephony revenue. At the same time, average monthly data use by high-speed residential Internet service subscribers increased by 30% from 2016, to 166 GB in 2017[5], requiring massive investment. A reduction in cable revenue impacts networks, investment, prices and support for Canadian content creation as discussed in the following two sections.

(b) Networks, Investment and Prices

21. The bandwidth made available on our enormous wireline network will continue to be principally dedicated to the distribution and consumption of audiovisual content, of which streaming television programming will be the most important component. This bandwidth distributes programmers' and OTT services' audiovisual content to consumers at no cost to the programmers or platforms. Without the massive investments in wireline facilities that companies make at significant risk, there would be no wireline consumption of content. Often,

[5] 2018 CRTC Communications Monitoring Report, Infographics 5.2. 2017 data is the most current public data available. Rogers believes similar growth occurred in 2018 as such high growth rates have been experienced for many years.

programmers and other commentators state that ISPs should contribute to the production of Canadian programming, completely ignoring the fact that facilities-based network providers enable the content industry to exist by building the networks over which content is distributed. This contribution is existential for programmers and OTT services. It should be noted, as well, that Internet service is valued by consumers for many more uses than streaming audiovisual content. Evidence of this value is the fact that at the time of Netflix's entry into Canada in late 2010, Rogers already had close to 1.7 million Internet subscribers, which is 75% of the number we have today.

22. The costs associated with building, operating and maintaining our wireline network are recovered by revenues we receive from the cable, Internet and telephony services provisioned on that network. Any material reduction in the revenues from our cable business would mean that Rogers (as would be the case for other BDUs) would have less money to invest in the wireline network, thereby reducing the quality of the network and jeopardizing any geographical expansion unless we are able to generate more revenue through our Internet and telephony services.

23. To explain further, Rogers' local wireline distribution plant has gross assets of $12 billion including capital investment of just over $1.3 billion in 2018. Rogers has consistently invested approximately $1 billion annually in our wireline plant over the past decade. This annual investment is funded by revenues from three sources, cable TV ($1.46 billion in 2018), Internet ($1.74 billion in 2018) and telephony ($0.32 billion in 2018). The cable TV revenues must also fund affiliation (carriage) payments to programmers, contributions to local programming, independent production funds (e.g. CMF), retransmission and music copyright payments as well as operating and maintenance costs.

24. Any significant reduction in cable TV revenue, which was 41% of wireline revenue in 2018, will cause serious harm to network investment unless this revenue can be replaced with Internet revenue. The replacement source will have to be Internet because telephony revenue is declining year-after-year as wireline voice becomes an application on the Internet.[6] With the Internet market maturing at over 87% household penetration today, increased Internet revenues will have to come from price increases. In order to merit further network investment, these increases will have to recover the lost margin from cable TV service and the costs of carrying enormous increases in video as consumers, who on average watch 27 hours of television a week, move this viewing to the Internet. Twenty-seven hours of streaming video is approximately 250 GB per month of Internet traffic, which is double plus 50% the average 166 GB per month used by Internet customers in 2017 according to the *2018 CRTC Communications Monitoring Report*.[7]

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[6] Rogers wireline telephony revenues declined by 20% in 2017 relative to 2016 (2017 and 2016 Rogers Annual Reports). A similar loss occurred in 2018 based on third quarter results.

[7] Ibid, Infograhics 5.2.

25. Therefore, any cable TV revenue declines will require increases in Internet revenue to pay for an increasing share of fixed capital expenses over and above the increases that are required to pay for the 30% annual increases in traffic per subscriber already experienced today. Taken together, these two factors will place great pressure on Internet rates, which in turn, raises concerns about affordability for low-income families.[8]

(c) Canadian Programming Investments Supported by BDU Revenues

26. Loss of cable subscribers and revenues due to substitution of legal (but unregulated) OTT services and to stolen content provided by illegal streaming services[9] seriously undermines the ability of Canadian BDUs and broadcasters to continue to fund Canadian programming at today's levels.

27. The business model for Canadian discretionary services depends on established distribution networks to reach viewers and on the revenues received from BDUs. The Canadian discretionary sector would simply be unable to sustain its current level of investment in Canadian programming without a healthy distribution sector.

28. Many commentators focus on the challenges that producers of Canadian content face as the 5% of revenue that BDUs must contribute to the CMF or local expression shrinks with revenue decreases. This money is certainly important but it pales in comparison to the larger direct payments made by BDUs to Canadian programming services in order to carry their channels. In the case of Rogers in 2018 as the Table above explains, we paid $618 million to programmers, which was fully 44 cents of every dollar of revenue, with 80% of that amount, or $491 million, paid to Canadian discretionary services (35 cents of every cable revenue dollar). Put differently, for every dollar reduction in cable revenue, Canadian discretionary services directly lose 35 cents of revenue.

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[8] We note that Rogers offers a low cost $10 plan to low–income, rent-geared-to-income households (Connected for Success) as well as participating in the government co-ordinated low-cost $10 plan offered to households receiving the maximum Child Care benefit (Connecting Families). Rogers will also begin in 2019 to pay a CRTC internet tax to assist in extending higher-speed internet access to rural and remote locations.

[9] The total number of households accessing content illegally through those types of devices (Kodi set-top boxes) and through subscriptions to online sites steaming pirated content has been estimated at somewhere between 10 and 15%. [Cartt, "Why fighting content piracy is so hard and so necessary - between 10% to 15% of households are accessing pirated content via set-top boxes in some manner," Linda Stuart (October 29, 2017).] Moreover, in 2017 there were at least 1.88 billion visits made by Canadians to piracy websites. [MUSO Global Piracy Report – 2017 Canada Country Level Report, page 3.]

29. This reduction significantly impacts the growth and development of Canadian programming because on average 40% of every dollar of revenue received by a discretionary service is invested in the creation of Canadian content. [10]

30. Therefore, when Rogers loses a dollar of cable revenue, discretionary services lose 35 cents of revenue and, in turn, there is 14 cents less put towards the production of Canadian content (40% of the lost 35 cents is 14 cents).[11] This 14% contribution-to-Canadian-content figure is roughly three times larger than the 5% CMF and local expression contribution. Taken together, almost 20% of revenue that is lost would have supported the creation of Canadian content. The huge importance of cable revenues for Canadian content is obvious. And this is not the end of the story, as Rogers Cable also makes retransmission copyright tariff payments of $1.17 per month per subscriber (roughly another 2% of cable revenue) that are reduced in total as cable subscriber numbers fall. A portion of these payments goes to rightsholders of Canadian content.

31. Contrast these contributions with the situation when video service is received via a legal OTT provider or a provider of stolen content where zero contributions are being made to the Canadian Media Fund, zero affiliation payments are being made to Canadian programmers and, in the case of illegal services, zero copyright royalties are being paid to rightsholders.

(d) The Super-Aggregator Model - The way of the Future

32. Despite all of the challenges, Rogers remains optimistic about the future. On the broadcasting distribution side, our strategy is to strengthen our role as an aggregator of the best content from within Canada and around the world and to make it easily accessible to Canadians from one source. We have continually invested in our networks and have recently developed and launched a new IPTV

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[10] CRTC Discretionary and On-Demand Services Statistical and Financial Summaries 2013-2017, page 1, 2017 Year: https://applications.crtc.gc.ca/OpenData/CASP/Financial%20Broadcasting%20Summaries/Books%202017/Discretionary/2017%20Discretionary%20and%20On-Demand_Statistical%20and%20Financial%20Summaries.pdf

[11] This figure understates the harmful impact on Canadian programmers as some portion of the other 60% of the cable payment, 21 cents per dollar, that is lost will reduce the funding of indirect Canadian content expenses such as promotion, distribution and general and administrative support expenses incurred by the specialty programmers over and above direct programming costs paid to producers. In total, the amount of money that is directed to Canadian content from Rogers Cable is, at a minimum, as follows: $15M (copyright) + $70M CMF & local expression + $215M Affiliation payments directed to Canadian programming = $300M. To calculate an upper bound on the impact on Canadian content, the $215M portion of our Affiliation payment amount would be replaced by our total $491M Affiliation payments to Canadian discretionary and on-demand services. Therefore, Rogers Cable directs $300-576M a year to the creation and support of Canadian programming. This amounts to 22% - 41% of our total cable revenues of $1.414B in revenue in 2018. For the Rogers organization as a whole, another $80M for Canadian audio content is contributed by Rogers Radio and $520 million for Canadian content from CityTV and our discretionary services (Canadian Programming Expenditures (CPE)). Therefore, Rogers contributes between $900 million and $1.18 billion towards Canadian content today. With the exception of the radio dollars, these contributions are at grave risk due to migration to OTT and significant and growing program piracy.

platform using the Comcast-enabled X1 platform. This new platform provides us with the ability to integrate and aggregate traditional linear broadcasts, VOD content, OTT services, and app-based content and make all of it available to Canadians in one place.

33. We know that in the near-term Canadians will continue to access audiovisual programming through multiple providers – cable and satellite distribution, IPTV and foreign and domestic OTT services – but the prominence of legacy cable and satellite platforms will recede as more and more Canadians transition to IPTV, OTT and other app-based content offerings. The fact that Canadians will increasingly access audiovisual programming from non-traditional platforms is the reason why OTT services must be brought into the Canadian broadcasting system. We address how to do that in more detail below. However, in the environment where there will be a variety of subscription OTT and app-based options for Canadians to access, we believe there will still be a significant need for content aggregators. It will be even more important than ever before for consumers to have an easy-to-use interface and advanced search and recommendation functions to support navigation and discoverability. We are investing in new distribution platforms as a way to ensure that Rogers can continue to respond to the needs of Canadians.

34. Other distributors are doing this as well. Comcast and Cox in the U.S. have both adopted the X1 IPTV platform. In Canada, Rogers, Shaw and Videotron have similarly adopted the new X1 platform. Collectively, all of these distributors are investing billions of dollars to upgrade their offerings, with a recognition that this new technology is critical to the evolution and future success of the Canadian broadcasting system.

35. In the future, we believe most Canadians will want to subscribe to a single content aggregator that can provide traditional linear services as well as multiple OTT services and apps in order to ensure that they get all of the content they want from one source.

III. THEME 1 – ACCESS TO ADVANCED TELECOMMUNICATIONS NETWORKS

(a) Rely on competitive market forces rather than economic regulation to the maximum extent feasible - Principle 7

36. Rogers believes that the *Telecommunications Act* should be amended to create a presumption that competitive market forces are to be relied upon to the maximum extent feasible to achieve the objectives of the Act, rather than presume a need for regulation as the default starting point. The Telecommunications Policy Review Panel (the TPRP) made this a cornerstone recommendation in 2006, in respect of the *Telecommunications Act*, when it released its Final Report:

> *…it is time to reverse the current presumption in the Telecommunications Act that all services should be regulated unless the Canadian Radio-television and Telecommunications Commission (CRTC) issues a forbearance order. This should be replaced with a legislative presumption that services will not be regulated except in specified circumstances designed to protect end-users or maintain competitive markets.*[12]

37. The TPRP recommended that the policy objectives in section 7 of the Act be updated and clarified. The TPRP was of the view that the policy should continue to focus on the core objective of promoting affordable access to telecommunications services in all regions of Canada. However, it also determined that a forward-looking policy should go well beyond that, should reflect the current telecommunications environment and should include important objectives for the future that are not clearly set out in the existing objectives. The TPRP, therefore, proposed that the objectives be updated and clarified:

- to better focus regulatory and other government measures by more clearly articulating Canada's national telecommunications policy objectives;
- to place greater emphasis on market forces as a means to achieve policy objectives;
- to ensure that, in an increasingly market-driven environment, important social goals are properly protected and advanced;
- to recognize that regulation and other forms of government intervention have costs and can, in some circumstances, undermine achievement of policy objectives; and
- to provide guidance, which is not currently provided in the Act, on the extent to which regulation and other forms of government intervention should be applied in competitive markets.[13]

38. The TPRP found the current policy objectives outlined in section 7 of the *Telecommunications Act* to be overlapping and inconsistent, while others are vaguely worded. Rogers would add that some of the objectives, such as paragraphs (d) and (e), are largely outdated considering the changes that have already been made to the legislation and the applicable policies pursued by the Commission.

39. The TPRP also considered that section 7 should distinguish between policy objectives, such as promoting affordability and efficiency of telecommunications markets, and the means for achieving those objectives, such as regulation or reliance on market forces. We would point out that this proposal is similar to the

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[12] Page 4.

[13] TPRP Final Report, page 2-4.

approach currently used in the *Broadcasting Act*, where there are policy objectives in subsection 3(1) and regulatory objectives in subsection 5(2). The TPRP also proposed to clarify the social objectives of telecommunications policy to give better guidance to the Commission.

40. The TPRP therefore proposed to delete the current section 7 and to replace it with the following:

> 7. It is hereby affirmed that telecommunications performs an essential role in enabling the economic and social welfare of Canada and that Canadian telecommunications policy has as its objectives:
>
> (a) to promote affordable access to advanced telecommunications services in all regions of Canada, including urban, rural and remote areas;
>
> (b) to enhance the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy; and
>
> (c) to enhance the social well-being of Canadians and the inclusiveness of Canadian society by:
>
> (i) facilitating access to telecommunications by persons with disabilities;
>
> (ii) maintaining public safety and security;
>
> (iii) contributing to the protection of personal privacy; and
>
> (iv) limiting public nuisance through telecommunications.[14]

41. Rogers agrees with this recommendation and would urge the Panel to implement this reform.

42. As referenced above, the TPRP went on to propose that the following provisions be included in the *Telecommunications Act* to guide the Commission in the exercise of its powers under the Act.

> 7.1 All telecommunications policy measures and decisions of the Government of Canada, a minister of the Crown, the Commission and any other agency of the Government of Canada shall be made with a view to implementing the Canadian telecommunications policy objectives and shall comply with the following guidelines:
>
> (a) market forces shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives;

[14] TPRP Final Report, page 2-9.

> (b) regulatory and other government measures shall be applied only where:
>
> > (i) market forces are unlikely to achieve a telecommunications policy objective within a reasonable time frame, and
> >
> > (ii) the costs of such measures do not outweigh the benefits; and
>
> (c) regulatory and other government measures shall be efficient and proportionate to their purpose and shall interfere with the operation of competitive market forces to the minimum extent necessary to meet the objectives.[15]

43. A version of these principles was eventually embodied in the Direction to the Commission on Implementation of the Canadian Telecommunications Policy Objectives in section 7,[16] but they were never enacted into the legislation itself.

44. In Rogers' view, they should now be enshrined in the Act in order to have the same status as other sections.

45. In addition, Rogers believes that a further guideline should be added to require the regulators to rely on facilities-based competition to the maximum extent feasible as the means of achieving the telecommunications objectives. ISED and the Commission have recognized that facilities-based competition produces the greatest benefits to consumers and business users. Without competition at the facilities level, networks are unlikely to innovate and costs are unlikely to be driven down. Resale activity does not provide a replacement for facilities-based competition and, in some cases, it endangers network innovation and quality. The experience in the EU with mandated resale of mobile wireless services underscores the pitfalls of relying on the resale model. As related by a number of witnesses in the Commission's proceeding on wholesale wireless services[17], mandated resale in Europe discouraged investment by carriers and resulted in the slower deployment of new technologies, and much slower speeds than were experienced in North America under a facilities-based model. This has left Canada at or near the top of these metrics among G-7 countries plus Australia.[18] In Rogers' view, the concept of facilities-based competition should be added to the new regulatory guidelines proposed above as part of section 7.1 as follows:

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[15] TPRP Final Report, page 2-9.

[16] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives* (SOR/2006-355)

[17] Telecom Regulatory Policy CRTC 2015-177 – *Regulatory framework for wholesale mobile wireless services*, May 5, 2015

[18] Canada is ranked 4th highest among G7 + Australia for 4G availability. (Source: Open Signal, State of LTE report, Feb 2018); Canada is ranked fastest among G7 + Australia for mobile download speeds and nearly twice as fast as the USA .(Source: Ookla speedtest, November 2018); Canada spends the highest per wireless subscriber in the G7 & Australia (Bank of America Merrill Lynch Q3 2018 Global Wireless Matrix).

facilities-based competitive service providers shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives;

46. These changes will provide greater guidance to the Commission on the manner in which it is to regulate the telecommunications industry.

*(b) Net Neutrality should be a Guideline in the Telecommunications Act - **Principle 8***

47. The Commission has already established an effective, yet flexible, regulatory regime to ensure net neutrality in Canada both for today and for the future as new technologies and services are introduced. It has used subsection 27(2) of the *Telecommunications Act* as the source of its power to enact forward-looking policies to implement its net neutrality regime.[19] It has also relied on its powers in section 24 to impose conditions of service on ISPs to ensure traffic management practices are followed that do not undermine the principles of net neutrality.[20]

48. In Rogers' view, these sections give the Commission the flexibility to continue to provide consumers and business users with non-discriminatory access to the Internet and the ability to navigate it without restrictions, other than those imposed by law or regulation. Any more prescriptive provisions that might be introduced in the Act could prove to be problematic in the future as technology develops and new problems arise that are not currently foreseeable. For example, lower latency might be required for certain Internet-based services, such as remote surgery, that might not be required for other less exacting services. We also have no way of knowing where the new 5G wireless revolution will take us. Self-driving cars, for example, may require higher service levels than other applications. Care must be taken to ensure that hard and fast rules do not limit future use of this technology.

49. Rather than provide for more prescriptive laws, Rogers proposes that a new clause be inserted under the new regulatory guidelines we proposed for inclusion in section 7.1 of the Act (discussed above). This clause would provide as follows:

(c) the principles of net neutrality shall be relied upon to the maximum extent feasible as the means of achieving the telecommunications policy objectives;

50. This regulatory guideline, in conjunction with subsection 27(2) and section 24 of the Act, will enable the Commission to address net neutrality issues that arise in

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[19] Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers.*

[20] Telecom Regulatory Policy CRTC 2017-104, *Framework for assessing the differential pricing practices of Internet service providers.*

the future on a case-by-case basis, or to develop and implement additional net neutrality policies as the need arises. Unlike prescriptive rules, this proposal ensures a regulatory approach that supports market-based innovation.

(c) Telecom: Access to support structures and rights of way - Principle 9

51. Improved access to passive physical facilities is vital for wireline broadband deployment and wireless 5G deployment. The deployment of 5G technology is, in turn, vital for a leading edge digital economy. This is an area where the current provisions of the *Telecommunications Act* are wholly inadequate.

52. The need for regulated access to passive physical assets must extend beyond traditional supporting structures of telecommunications carriers (poles, strand and duct). It must include all public property that is capable of supporting both wireline and wireless telecommunications facilities (e.g. streetlights, traffic lights, signs and public buildings), whether located on public or private land. It must also include the supporting structures (poles and ducts) owned by provincially-regulated electrical utility undertakings. The short spacing between antennae used for 5G services will necessitate many more attachments than are currently required for either wireless or broadcasting distribution services. It is vital that the scope of access to possible support structures be significantly broadened.

53. It is important that attachments to supporting structures not be left entirely to negotiation by the parties. These are essential facilities and owners of them cannot be permitted to exact a monopoly price for their use. Relying solely on negotiation would adversely affect Canadian consumers and the telecom service providers from which they will receive their 5G services. Past experience has demonstrated that Rogers and other carriers pay significantly more for access to support structures that are either unregulated or provincially-regulated, than they do to access support structures that are subject to Commission oversight. Given the essential nature of these facilities, carriers can be forced to pay far more than is reasonable. This has serious implications for the roll-out of 5G networks. Should the carriers decide to pay these costs, these costs will inevitably be passed on to consumers. If they decide the costs are too exorbitant, this will result in extended delays to, or the absence of, 5G implementation in some communities. Injecting the Commission as an arbiter of access and rates when the parties cannot agree on terms will help to ensure that excessive rates are not imposed on carriers by the owner of the supporting structures.

54. At the present time, section 43 of the *Telecommunications Act* appears to have an emphasis on wireline facilities, using the undefined term “transmission line” to describe the facility that is permitted to attach to a supporting structure. This is clearly outdated, as the word “line” appears to exclude wireless services, including 5G wireless services. Since the initial passage of the Act in 1993, wireless communications have exploded, and wireless infrastructure now makes up an integral part of Canada’s telecommunications networks. For many Canadians, wireless is their primary means of communication and access to the

Internet. Texting and email have become essential communications tools and rely, to a large extent, on wireless access. It must be clear that the statutory right of access under the *Telecommunications Act* includes wireless facilities. The term "transmission line" should therefore be changed to "telecommunications facilities" which is defined in section 2 of the Act as follows:

> *telecommunications facility means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility;*

55. This amendment would make the dispute resolution mechanism in section 43 of the Act available for both wireline and wireless facilities.

56. Under the current regime, the Commission lacks the statutory authority to regulate access to support structures that are owned by a provincially-regulated electrical utility undertaking. This is a result of the Supreme Court of Canada's decision in the case of *Barrie Public Utilities vs. Canadian Cable Television Association*[21] where the Court determined that the Commission's jurisdiction over supporting structures carrying "transmission lines" did not extend to electrical lines. This has left access to supporting structures owned by electrical utility undertakings either unregulated, or regulated by provincial electricity regulators who have no interest in ensuring that such access advances the objectives of the *Telecommunications Act*.

57. Under this regime, the rates for access to supporting structures of electrical utility undertakings have soared, making the provision of telecommunications services that utilize these structures more expensive. This is a direct result of the electrical utility undertakings and their regulators trying to maximize revenues derived from these facilities to offset electricity rates. Unfortunately, their interests and statutory mandates are not aligned with the Canadian telecommunications policy objectives. For example, in Ontario, the rates set by the Ontario Energy Board (OEB) for attachments to hydro poles are several times higher than the rate set by the Commission for access to identical poles owned by Canadian carriers.

58. This is a particular problem in rural areas where the cost of service is already higher than in urban areas due to the fact that more poles are required to serve customers in rural areas and the only means of deploying telecommunications facilities is attaching to power poles. Prohibitive rates to attach to these poles will threaten the extension of 5G services to these areas.

59. Given the vital interest of the federal government in improving access to supporting structures in order to enable the deployment of 5G services, Rogers proposes that electrical utility undertakings be made subject to Commission jurisdiction under the *Telecommunications Act* - but only where the parties are

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[21] [2003] 1 SCR 476.

unsuccessful in reaching agreement as to the terms and price of access to supporting structures.

60. While it is true that electrical utility undertakings are otherwise subject to provincial jurisdiction in terms of their electricity distribution obligations and the rates that they charge for this service, in the case of support structures - as noted in the above paragraph - the federal government has a vital interest in ensuring that these structures are available to provide support for telecommunications facilities in a manner that advances the policy objectives of the *Telecommunications Act*. This extends not only to wireline facilities such as coaxial cable or fibre - but also increasingly to wireless facilities that have been traditionally excluded from the support structure regime. With the pending explosion of small cells required to support 5G services, the inclusion of wireless facilities in the regime becomes imperative.

61. Rogers notes that the TPRP supported the extension of section 43 to support structures owned by electrical utility undertakings in its 2006 Final Report:

> *In the Panel's view, the issue of access to support structures owned by electrical utilities is similar from a jurisdictional perspective to the issue of access to municipal rights of way that Parliament addressed in section 43 of the Telecommunications Act. This section of the Act requires telecommunications carriers wishing access to highways of other public places to obtain the consent of the municipality or other public authority having jurisdiction over the property in question. When consent cannot be obtained on terms acceptable to the telecommunications carrier or broadcasting distribution undertaking, ss. 43(4) empowers the CRTC to resolve the dispute and to set terms and conditions of access.*
>
> *In the Panel's view, a similar approach should be taken to support structures owned by provincially regulated electrical utilities, municipalities and others. The parties should be required to attempt negotiations on a commercial basis, and the CRTC should be empowered to resolve access disputes and to establish terms and conditions of access to the telecommunications space on or in support structures when the parties are unable to agree.*[22]

62. As stated above, carriers will also require regulated access to supporting structures owned by municipalities or public authorities, whether they are located on public or private property. If telephone or power poles are not available, other structures such as streetlights, bus shelters and public buildings, must be made available to attach telecommunications facilities.

63. The following proposed amendments will address all of the concerns noted above:

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[22] TPRP Final Report, 2006, page 5-9.

i. Section 43 introduces the concept of “electrical utility undertakings” and an expansive definition of “supporting structures”;

ii. Section 43 applies to the attachment of “telecommunications facilities”, rather than “transmission lines”;

iii. Section 43 gives carriers the right to access supporting structures owned by a municipality, whether located on public or privately-owned land;

iv. Section 44 allows the CRTC to intervene where a carrier and a municipality cannot agree on terms of access to municipal supporting structures; and

v. Section 44 also allows the CRTC to intervene where a carrier and an electrical utility undertaking cannot agree on terms of access to its supporting structures.

64. The legal opinion of the Honourable Mr. Michel Bastarache, C.C., Q.C., former Justice of the Supreme Court of Canada and now senior counsel at the Ottawa-based law firm Caza Saikaley is appended to this submission as **Appendix E**. It discusses the constitutional principles that support the extension of federal jurisdiction over access to supporting structures of provincial electrical utilities located on both public and private land, as well as access to non-traditional supporting structures, such as lamp posts, transit huts and buildings. The same constitutional principles that support federal jurisdiction over the construction of telecommunications facilities along municipal roads and in public places apply equally to these other municipal supporting structures that have become essential to the telecommunications industry.

65. Rogers, in collaboration with other Canadian telecommunications carriers, shared our proposed amendments to section 43 and 44 (set out in **Appendix B** of this submission) with the Honourable Mr. Bastarache and asked him to consider whether they are within the constitutional competency of the federal level of government. His opinion on this issue is unequivocal:

After considering the above doctrines in detail, this opinion comes to the following three conclusions:

i. The proposed amendments are intra vires because of Parliament’s legislative power over telecommunications.

ii. Should the legislative amendments be adopted, any provincial measures that address the same subject matter would be inoperative pursuant to the federal paramountcy doctrine

iii. These provincial measures would also be inapplicable pursuant to the doctrine of interjurisdictional immunity.[23]

[23] Appendix D, Opinion of Michel Bastarache, section 1.

66. All of these proposed amendments are essential for an orderly and timely rollout of 5G services in Canada and for the provision of telecommunications services at affordable rates. Without them, the rollout of 5G services in Canada will not go as smoothly as it otherwise might, 5G deployment will be more expensive and its success could be jeopardized. In rural areas, the cost of services offered by telecommunications carriers and distribution undertakings will be much higher than it would otherwise be under Commission oversight. None of these outcomes would serve the broader public interest nor would they benefit Canadian consumers.

67. Because of the importance of these amendments to the rollout of 5G services, Rogers urges the Panel to recommend that they be implemented on an expedited basis in order to coincide with the rollout of 5G services. It would be possible to make the proposed amendments in advance of the other amendments proposed for the communications legislation. Given the importance of 5G services for Canadians and the Canadian economy, it is, in Rogers' view, justifiable to expedite these amendments.

68. Canada is already significantly behind the United States and the European Union, which have recognized the need to update their regulatory frameworks to accommodate the deployment of 5G services and have taken steps to do so. These jurisdictions recognize the benefits that their citizens and businesses will receive from an early deployment of 5G and the negative effects that their current regulatory regime will have in impeding this technological revolution. They also recognize the benefits of being early adopters of 5G technology. Most importantly, they recognize that access to support structures is a lynch pin to the success of a 5G strategy. As stated by Chairman Pai of the Federal Communications Commission (FCC):

> *Spectrum policy of course features prominently in our 5G strategy. We're pushing a lot more spectrum into the commercial marketplace. On November 14, for example, our 28 GHz band spectrum auction will begin, and after it ends, our 24 GHz band spectrum auction will start. And in 2019, we plan to auction off three additional spectrum bands.*
>
> *But all the spectrum in the world won't matter if we don't have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That's because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don't exist today.*[24] (emphasis added)

69. This led the FCC to take action more than a year ago initiating proceedings to consider how to streamline the processes for both wireline and wireless access

[24] Pai Statement, FCC Facilitates Wireless Infrastructure Deployment for 5G, https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g/pai-statement

to supporting structures.[25] In subsequent decisions, the FCC has released new regulations that address small cell deployment. This includes the right to attach wireless facilities to property located within State or local government rights of way and the establishment of faster timeframes for negotiation of arrangements with State and local authorities, called “shot clocks”. While recognizing the ability of municipalities to charge for use of their facilities, the FCC has limited their recovery to a reasonable approximation of their administration costs associated with processing applications.[26] According to FCC Commissioner Brendan Carr, this initiative will cut approximately $2 billion in red tape, stimulate $2.5 billion in additional investment and create 27,000 new jobs in the United States.[27]

70. The European Commission has similarly updated the European Electronic Communications Code to include a section on small cells. Like the FCC’s approach, Article 56 of the Code states that authorities shall allow the deployment, connection and operation of small-area wireless access points and shall not unduly restrict such deployment through the permitting process. The small-area access points are not to be subject to any charges beyond an administration fee.

71. Given that Canada is already far behind the United States and the EU in addressing access to supporting structures for small cell deployment, the Canadian telecommunications industry cannot afford to wait for three or four years for the Review Panel to make its recommendations and for the Government of Canada to enact new legislation addressing the myriad issues under consideration. It is urgent that steps be taken to bring this issue to the attention of the Government now and to recommend the early enactment of provisions to empower the Commission to take the steps necessary to enable an efficient and robust deployment of 5G technology in this country. Waiting for the rest of the telecommunications and broadcasting amendments will seriously impede Canada’s 5G initiative.

72. In **Appendix F** to this submission, Rogers has proposed a “road map” indicating our view on how the transition from the existing framework for access to support structures, highways and public places, to the new proposed regime, would take place.

IV. THEME 2 – SUPPORTING CREATION, PRODUCTION AND DISCOVERABILITY OF CANADIAN CONTENT

73. Rogers believes that enhancing the creation, production and discoverability of Canadian content can best be achieved in three ways:

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[25] WC Docket 17-84, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment, and WT Docket 17-79: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment

[26] WT Docket No. 17-79, FCC Declaratory Ruling and Third Report and Order, Adopted: September 26, 2018.

[27] Carr Announces Next 5G Order in Indiana Statehouse Speech, FCC News, September 4, 2018.

a. maintain the three separate statutes governing the broadcasting and telecommunications industries;

b. focus the legislative framework for broadcasting on supporting the creation, production, access, discoverability, diversity and protection of Canadian programming; and

c. predicate the *Broadcasting Act* on the principle of equitable treatment to ensure the regulatory frameworks developed for the production, exhibition and distribution of programming are applied evenly to all undertakings that operate within the Canadian broadcasting system.

(a) Three Separate Acts - Principle 1

74. This first principle that fits within the Panel's theme of supporting the creation, production and discoverability of Canadian programming is a simple one. We believe there should continue to be three distinct statutes. In our view, there is no reason to change the current model, which has been effective in ensuring that the policy objectives underlying each statute are being achieved. Each framework has a different purpose and fulfills a distinct function within Canada's communications system.

75. The *Radiocommunication Act* clearly has a unique and valuable role that is different than the other two communications statutes. Its mandate is to manage the use of radio waves and spectrum and to certify equipment for use in Canada. It has a unique purpose and it functions in a largely distinct environment. We are not proposing any changes to this statute.

76. The foundation of the *Telecommunications Act* is common carriage and, more recently, net neutrality. The Commission's mandate under the Act has been to ensure the rates charged by telecommunications carriers are just and reasonable and not unjustly discriminatory. Having a distinct *Telecommunications Act* enables the Commission to focus its regulatory efforts on adopting frameworks that encourage network efficiency, investment and innovation and ensuring Canadians have access to telecommunications services. This important responsibility and unique mandate should be maintained in an era of massive broadband expansion and the launch of 5G wireless networks. Telecommunications carriers, including ISPs and mobile carriers, should not, as a general rule, be required to advance broadcasting policy objectives. The one exception to that would be program piracy. As described in more detail in section IV (b) (iv) below, the reason that ISPs and wireless carriers should be involved in the fight against program piracy is because they are best-positioned to do so economically and efficiently.

77. Maintaining separate statutes will advance the Panel's first theme of reducing barriers to access by all Canadians to advanced telecommunications networks. Again, the appeal of our approach is that ensuring Canada continues to have the most advanced communications networks in the world is a pure

telecommunications issue that should be addressed by the Commission as such. Issues of broadband extension, 5G implementation and affordability are matters that should continue to be assessed and addressed under the *Telecommunications Act*.

78. The regulatory framework developed under the *Telecommunications Act* will need to rely on common carriage and net neutrality principles. It will further need to encourage telecommunications carriers (both wireline and wireless) to invest the resources necessary to update and expand their networks and to do so in an efficient and affordable manner that benefits all Canadians, regardless of whether they live in larger centres or in more rural and remote areas.

79. The principles underlying the *Broadcasting Act* are fundamentally different than those set out in the *Telecommunications Act*. The *Broadcasting Act* has primarily a cultural aim,[28] which we believe should be maintained. The Commission's mandate is to create rules to ensure that the cultural imperative can be achieved by establishing frameworks that make certain Canadian consumers are able to access high quality Canadian programming. Unlike telecommunications carriers, broadcasting undertakings are responsible for the programming they broadcast and are required to control the content of their programs and influence its meaning and purpose. The creation, production, exhibition and discoverability of that programming can only be achieved with a regulatory framework that is actively engaged with those who produce, exhibit and distribute that content.

80. While all three Acts are related and somewhat interdependent, each statute clearly has a distinct mandate and purpose. The *Broadcasting Act* is unique in other ways as well. It is interconnected with a series of other legislative frameworks that fall outside the communications sphere, but which are used to influence behaviour. While the Supreme Court of Canada correctly recognized that the *Broadcasting Act,* the *Radiocommunication Act*, the *Copyright Act* and the *Telecommunications Act* are part of an interconnected statutory scheme,[29] the *Broadcasting Act* is also connected to variety of other statutes – including the *Income Tax Act*, *Privacy Act*, *Personal Information Protection and Electronic Documents Act* (PIPEDA)*, Canada Investment Act*, and *Canada Elections Act* – that are specifically designed to influence the behaviour of broadcasting undertakings and/or those who interact with them.

81. The Canadian broadcasting system is now mature. The broadcasting industry is no longer operating in a closed and protected environment. Today, Canadians are able to access programming from anywhere in the world online. In our view, the communications revolution we have witnessed over the last decade has meant that many of the regulatory frameworks established under the current *Broadcasting Act* are no longer sustainable or appropriate. There is an urgent need to prioritize Canada's broadcasting policy and regulatory objectives and to

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[28] Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 [2012] 3 SCR 489 Value for Signal SCC case, paragraph 32.

[29] Ibid, paragraph 34.

adjust the legislative framework so that the Commission has the appropriate tools and mandate to develop new regulatory frameworks that address the current environment in which programming is being delivered and consumed.

82. The role and responsibility of the Commission under the *Broadcasting Act* needs to be clearly stated and focused on advancing a streamlined set of clear and consistent policy objectives. Those objectives would then be used to develop new regulatory frameworks for the regulation of all broadcasting undertakings – both Canadian and non-Canadian – that are engaged in broadcasting in Canada.

83. We do not believe that there would be any role for the Commission to regulate telecommunications carriers, like ISPs or wireless carriers, under the *Broadcasting Act*. These carriers would continue to be regulated under the *Telecommunications Act*. The critical role that they will have in Canada's communications system and the contribution they will continue to make to it will be to innovate and invest in the networks that the broadcasting undertakings (and other non-broadcasting businesses) will use to deliver programming and other types of data and content to Canadians.

84. It is important to recognize that not all Canadians who are online are consuming large quantities of audiovisual content. Most Canadians are using the Internet for a multitude of purposes unrelated to watching movies and television shows. These include search and business activities, retail shopping, distance education, engaging with social media platforms and email and a variety of other activities that do not involve "broadcasting". As such, Canada's telecommunications networks and facilities are not being used today by all Canadians to access long-form television-quality programming. Nor can we predict the types of content that will dominate these networks in the future. Given advances in technology, we believe that, in the future, the large capacity users could very well be things like connected cars and 5G applications, such as remote surgery, smart homes, advanced security and surveillance and smart farming. Therefore, it would make no sense to regulate ISPs and wireless carriers under the *Broadcasting Act* in circumstances where their only function is to build the networks that others are using to deliver content, much of which is not "programming" as that term is defined in that *Act*.

85. In our view, regulating those who invest in, maintain and operate the networks under the same legislative framework that is used to regulate those who create, produce, exhibit and offer the programming and platforms that use those networks would be inappropriate. This would not only increase the likelihood for market distortion, it would also act as a disincentive for telecommunications service providers to make the investments necessary to maintain Canada's place as a world-class communications hub.

86. With all of this in mind, Rogers believes that Canada's three communications statutes should remain to be separate.

(b) Canada's broadcasting policy should focus on the creation, production, access, discoverability, diversity and protection of Canadian content - Principle 2

87. The starting point for updating the *Broadcasting Act* is to streamline the multitude of broadcasting policy objectives set out in subsection 3(1) and 5(2). This involves removing those policy objectives that are no longer relevant in the current broadcasting environment, while expanding the range of regulatory objectives in subsection 5(2) of the Act to provide direction to the Commission as to the manner in which it should regulate the industry moving forward. The current set of broadcasting policy and regulatory objectives focus almost exclusively on the production, exhibition and distribution of Canadian programming, without any consideration for the interests of consumers or any notion of relying on market forces and competition.

88. While many of those current objectives remain important, we believe that four key changes need to be made to subsections 3(1) and 5(2) of the *Broadcasting Act*.

(i) Reliance on market forces

89. First, the concepts of market forces and competition must be incorporated into the Act. The Canadian broadcasting system has changed dramatically over the past three decades. When the current *Broadcasting Act* was enacted in 1991, it was a closed system that was dominated by monopoly providers. That is no longer the case. Today, Canadian broadcasting undertakings are competing in the same markets against other Canadian broadcasting undertakings and, more importantly, against foreign competitors who are operating in Canada without any regulatory oversight or obligations.[30]

90. As the market share and revenues of these foreign competitors has grown in Canada, a massive competitive imbalance has developed that is threatening the future viability of the Canadian broadcasting industry. This is not only a threat to current business models for Canadian broadcasting undertakings that rely on a distinct program rights market for Canada, it is also a threat to the funding mechanisms that have supported the creation, production and discoverability of Canadian programming for most of the past three decades.

91. The best way to address this competitive imbalance while continuing to encourage the growth and development of Canada's broadcasting industry – and to do so in a way that maximizes the creation, production and discoverability of Canadian content – is to ensure that market forces are relied upon to the maximum extent feasible as the means to achieve the policy objectives of the Act. As the marketplace continues to evolve, relying on market forces will help

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II. [30] See the Commission's discussion of the current market in *Harnessing Change: The Future of Programming Distribution in Canada*, "Market Insights".

ensure that strong, well-financed Canadian competitors will continue to be able to operate in Canada.

92. We believe that new objectives should be added to subsections 3(1) and 5(2) of the *Broadcasting Act* that both recognize the benefits of competition and market forces and require the Commission to rely on market forces to the maximum extent feasible as the primary means to regulate the broadcasting industry. Any regulation adopted by the Commission should also interfere with the operation of competitive market forces to the minimum extent necessary to meet its objective. Our proposed changes to subsections 3(1) and 5(2) of the Act are set out in **Appendix C** to this submission.

(ii) News programming created in accordance with high journalistic standards

93. The second change relates to news and information programming. Rogers believes that the broadcasting policy objectives in the *Broadcasting Act* must include a commitment to news and information programming that is professionally-produced and adheres to high journalistic standards. We are living in an age where false news and information is becoming more and more prevalent on digital platforms. Canada's news organizations are also suffering financially as advertising revenues continue to be siphoned away by large non-Canadian digital platforms such as Google, Facebook and Twitter, none of which produce news content.

94. Now more than ever before in Canada's history, there needs to be an express recognition in the *Broadcasting Act* of the importance of news and information programming. This will help to ensure that there continues to be a place in the Canadian broadcasting system for Canadian citizens to access high quality news and information programming that is produced and delivered in accordance with professional journalistic standards.

95. To this end, we propose that a new broadcasting policy objective be added to paragraph 3(1)(i) of the *Broadcasting Act*. This objective would state that programming provided by the Canadian broadcasting system should include local, regional and national news and information programming produced in accordance with professional journalistic standards. See **Appendix C** for the precise wording of our amendment to paragraph 3(1)(i) of the Act.

(iii) Ensuring Canadian programming reflects Canada's diversity

96. The third change is to ensure that there are broadcasting policy objectives in subsection 3(1) of the *Broadcasting Act* that focus on ensuring Canada's diversity is accurately reflected in the Canadian programming being produced. This means that the regulatory measures and the funding available from support mechanisms should be used to help fund the production of Canadian programming that is devoted to reflecting Canada's diversity. This includes ensuring that there are sufficient amounts of programming reflecting Canada's

Indigenous Peoples, third-language communities, OLMCs and persons with disabilities.

97. We are not suggesting that refocusing the broadcasting policy objectives in subsection 3(1) of the Act would require each broadcasting undertaking to create, produce or exhibit programming from all of these niche genres. Rogers believes that these genres must continue to be supported by the Canadian broadcasting system as a whole to ensure that programming created by and for these communities continues to be present and accessible to all Canadians. This will ensure that members of these groups are accurately portrayed and reflected on every device that is capable of receiving audiovisual content.

98. At the same time, in proposing to refocus on diversity objectives, we are not suggesting that market forces and competition be eliminated or abandoned from this segment of the Canadian broadcasting system. Rather, we are simply saying that those who have the best programming ideas and most developed business plans should be encouraged to create and produce programming serving these communities and should be eligible to access funding to do so.

99. We have proposed amendments to subsection 3(1) of the *Broadcasting Act* to ensure the focus of the policy objectives is on the creation, production and discoverability of programming that reflect these underrepresented communities within the Canadian broadcasting system. See **Appendix C**.

(iv) Program Piracy

100. The final set of changes we are proposing to make to the policy and regulatory objectives in the *Broadcasting Act* relate to program piracy. We are also proposing amendments to the *Telecommunications Act* that would enable the Commission to implement a mechanism under that Act to require ISPs and wireless carriers to block access to IP addresses that are engaged in program piracy. We believe that these changes must be made immediately rather than waiting for the outcome of the Review given the impact program piracy is and will continue to have on the broadcasting system.

101. As every Canadian broadcaster, distributor and producer is acutely aware, program piracy has become a critical problem within Canada's broadcasting system. Canadian broadcasters, distributors and producers are paying large sums of money to produce programs and/or to acquire the rights to exhibit and distribute programs. These exclusive program rights are being undermined by online thieves, who have not invested in or purchased the rights to these programs but are selling them to consumers in Canada and around the world without any payments flowing back to rightsholders. They are essentially reselling stolen property for profit.

102. A broad coalition of broadcasting industry members took part in the FairPlay Coalition's Part 1 application to the Commission on January 29, 2018 seeking approval to implement a proposed IP address blocking regime to address

program piracy. While the Commission denied the application on the grounds that it did not believe the *Telecommunications Act* provided it with the jurisdiction to adopt such a regime, it did acknowledge that there is evidence that program piracy results in harm to the Canadian broadcasting system and to the economy in general.[31]

103. The harm caused by program piracy has not gone away since the application was filed in 2018. In fact, the evidence would suggest that it continues to have a material adverse impact on the Canadian broadcasting system today. The total number of households accessing content illegally through Kodi set top boxes and through subscriptions to online sites steaming pirated content has been estimated at somewhere between 10 and 15%.[32] It has been estimated that subscription piracy alone results in an annual financial loss to the industry in North America of US$4.2 billion.[33] If approximately one tenth of those losses are attributable to the Canadian market, the impact would be approximately $500 million for the Canadian broadcasting system in lost cable subscriptions. Piracy affects the entire Canadian value chain, and it directly impacts English, French and third language broadcasters, distributors and producers of all sizes.

104. To combat this threat to Canada's broadcasting industry, we propose adding a definition of "program piracy" to subsection 2(1) of the *Broadcasting Act* and including a new policy objective in subsection 3(1) and a new regulatory objective in subsection 5(2). In doing so, we believe the Commission should be encouraged to take all steps necessary under the *Broadcasting Act* to combat program piracy.

105. We know, however, that the issue of program piracy cannot be addressed solely under the *Broadcasting Act*. The Commission's regulatory authority under that Act extends only to "broadcasting undertakings". The entities that actually have the ability to effectively and efficiently combat content theft are telecommunications common carriers, which are regulated under the *Telecommunications Act*. As a result, we are also proposing amendments to the *Telecommunications Act* that would expressly provide the Commission with the authority to establish a regime that would enable ISPs and wireless carriers to block IP addresses or to take other actions to prevent piracy or content theft as a means to advance broadcasting policy objectives.[34]

III. [31] Telecom Decision CRTC 2018-384

[32] *Supra* note 10 above..

[33] *Application Pursuant to Sections 24, 24.1, 36, and 70(1)(a) of the Telecommunications Act, 1993 to Disable On-line access to Piracy Sites*, FairPlay Canada Coalition, January 29, 2018 at para. 45. See also: https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf at 4.

[34] In the event that program piracy is addressed through some other legislative change, either in amendments to the *Copyright Act* or the enactment of another statutory measure, this proposal to grant the Commission authority to implement an IP address blocking regime may have to be adjusted or not implemented at all, depending on the nature of that new statutory regime that is established by the Government of Canada.

106. Specifically, we believe the *Telecommunications Act* should be amended to implement a regime to prevent program piracy in a manner that would be similar to the one currently used in section 28 of the Act with respect to the transmission of programs and the allocation of satellite capacity. Today, under section 28 of the *Telecommunications Act*, the Commission is required to have regard to the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act* when determining whether there is an unjust discrimination involving the transmission of programs or in resolving a disagreement as to the allocation of satellite capacity for the transmission of programs.

107. We believe a similar approach should be adopted for program piracy. A provision would have to be added to the *Telecommunications Act* that would refer to the policy objectives in subsection 3(1) of the *Broadcasting Act*. We suggest the following language:

> *The Commission shall have regard to the broadcasting policy for Canada set out in subsection 3(1) of the Broadcasting Act in determining whether Internet service providers or wireless carriers should block access to Internet Protocol (IP) addresses that are determined by the Commission to be engaged in the piracy or theft of copyrighted programming.*

108. Section 36 of the *Telecommunications Act*, which prohibits ISPs and wireless carriers from controlling the content or influencing the meaning or purpose of the content distributed over their networks, would not have to be amended because it already provides the Commission with the authority to allow carriers to take such actions. When the Commission makes a determination under our proposed provision that certain IP addresses are engaged in piracy or theft of copyrighted programming, it would also authorize carriers to block access to them pursuant to section 36 of the Act.

109. All of the above-noted proposed amendments to the objectives in subsections 3(1) and 5(2) of the *Broadcasting Act* and the additional provision relating to program piracy that we are proposing to include in the *Telecommunications Act* are critical amendments that, we believe, must be implemented to address the Panel's theme of enhancing the creation, production and discoverability of Canadian content.

(c) The Broadcasting Act must be grounded in the principles of equitable treatment to ensure the regulatory frameworks developed for the creation, production, exhibition and distribution of programming are applied in a neutral manner

110. Rogers also submits that the *Broadcasting Act* should be amended to ensure that the Commission adopts a principled approach to regulating the broadcasting industry that is based on equitable treatment of all distributors, broadcasters and producers. The current regulatory frameworks that have been developed under the *Broadcasting Act* have resulted in an uneven regulatory "playing field". For

example, while digital media undertakings, like Netflix, operate and compete in Canada and are not subject to any regulation, traditional BDUs and broadcasters are subject to a plethora of regulations that undermine their ability to effectively compete with those unregulated digital service providers. The playing field must be levelled and all players must be treated equitably. To that end, our proposal would require the Commission to adopt regulatory frameworks that are platform, producer and content agnostic.

111. This means that all regulatory obligations and funding mechanisms used to support the distribution, production and creation of Canadian programming should be guided by the following three principles:

- **platform agnostic** – All platforms that are used to distribute audiovisual content and operate in a like manner should be subject to a comparable set of regulatory rules and obligations.

- **producer agnostic** – All Canadian[35] producers of audiovisual content, affiliated or independent, should have access to funding mechanisms and other support measures for the production of Canadian.

- **content agnostic** – All Canadian content should be given equal treatment, both in terms of access to funding and Commission regulations.

(i) Platform Agnostic

112. One of the key legislative mechanisms to support the creation, production and discoverability of Canadian content is to ensure that there continues to be a steady supply of programming online. This not only involves maintaining a regulatory framework under the *Telecommunications Act* that is based on the principles of common carriage and net neutrality, but also one that has a legislative framework in place that encourages and mandates facilities-based telecommunications service providers to focus on being innovative, efficient and investing in their networks. That is what they do best. That is their contribution to Canada's communications system.

113. Another mechanism is to give the Commission the powers it needs under the *Broadcasting Act* to develop a regulatory framework that captures all Canadian and non-Canadian broadcasting undertakings, including all foreign and domestic digital OTT services or digital media undertakings. This will ensure that all such platforms used for distributing content are contributing on an equitable basis to the creation, production and exhibition of Canadian programming. Those Canadian and non-Canadian digital media undertakings that provide consumers in Canada with programming and are deriving revenues from those commercial activities are having a material impact on the Canadian broadcasting system. All of these entities should be required to contribute in an appropriate and equitable manner to furthering Canada's broadcasting policy objectives.

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[35] As defined in section 3 of the *Investment Canada Act.*

114. Today, Canadian BDUs and broadcasters are subject to a myriad of regulatory obligations, while foreign digital media undertakings have no obligations whatsoever. Most or all of them do not pay corporate income taxes in Canada despite deriving significant revenues from Canadian consumers and several do not pay sales tax.[36] This needs to change to keep pace with Canadians' changing audiovisual consumption habits, the growth and accessibility of new digital platforms for the delivery of audiovisual content and the eroding investments that traditional BDUs and broadcasters are able to direct to the production of Canadian programming.

115. Under our proposal, all commercially-operated digital media undertakings that materially impact the Canadian broadcasting system through the direct monetization of content (either by soliciting advertising in Canada or by receiving subscription fees from Canadian consumers) would be required to contribute to the Canadian broadcasting system in a manner that is comparable to traditional broadcasters. Non-Canadian digital media undertakings, like Netflix, Amazon Prime Video, DAZN and CBS All Access, operate in manner that is similar to on-demand programming services. They have all the characteristics of a programming service. They acquire rights for certain broadcast windows, they commission the production of certain programs and they arrange access to those individual programs in a manner that they believe makes sense for their target audience. Rather than distributing that content through an intermediary like a BDU, they deliver it directly to consumers using a digital platform. Establishing a legislative framework that would enable the Commission to regulate their activities in Canada would further Canada's broadcasting policy objectives and ensure that Canadian BDUs and broadcasters are not competitively disadvantaged as they respond to the changing communications environment.

116. This platform agnostic principle could be implemented under the *Broadcasting Act* in a number of ways.

117. One way to do it immediately, without amending the Act, would be for the Commission to use its exemption power in subsection 9(4) to adopt additional terms and conditions under which the larger non-Canadian digital media undertakings would be required to operate. The current Digital Media Exemption Order could be amended or a new exemption order could be implemented that would contain obligations relating to financial contributions to support Canadian program production and Canadian content requirements, which would apply to those non-Canadian digital media undertakings, like Netflix, that are having a material impact on the Canadian broadcasting system. To date, the Commission has chosen not to pursue this regulatory approach without receiving direction from the Government of Canada. To address the Commission's reluctance to act, the Governor in Council could issue a policy direction under section 7 of the Act requiring the Commission to update the Digital Media Exemption Order or to

[36] In saying this, we acknowledge that beginning this year OTT services will be required to pay provincial sales tax in the province of Quebec. We reference this below in paragraph 142.

issue a new exemption order under subsection 9(4) of the *Broadcasting Act* that would require OTT services, like Netflix, to make contributions to furthering Canada's broadcasting policy objectives. We believe it is imperative for the Governor in Council to act on this quickly before the outcome of this Review given the adverse impact that Netflix and other OTT services are having on the Canadian broadcasting system.

118. A second way to implement the platform agnostic principle would be to amend the *Direction to the CRTC (Ineligibility of Non-Canadians)* (the Ownership Direction) by requiring non-Canadian digital media undertakings that operate in Canada through the solicitation of advertising or by receiving subscription fees from Canadian consumers to be licensed. The Governor in Council has done something similar to this in the past when it authorized foreign entities to hold broadcasting licences in Canada. This occurred, for example, when BC Tel (a foreign-owned and controlled entity) was authorized to operate as a licensed BDU in Canada. The Governor in Council issued an amendment to the Ownership Direction that specifically permitted such a foreign entity to hold a broadcasting licence.[37]

119. Another legislative mechanism that would capture foreign digital media undertakings under the *Broadcasting Act* builds on the Commission's concept of "binding service agreements" that was outlined in its Report titled *Harnessing Change: The Future of Programming Distribution in Canada*.[38] This new service agreement model would apply to all foreign and Canadian digital media undertakings that are engaged in a commercial business in Canada. It would also be available to larger Canadian broadcasting groups that operate multiple types of broadcasting services.

120. The binding service agreement approach would <u>not</u> eliminate the current "licensing" regime, set out in subsection 9(1) of the *Broadcasting Act*, which is based on Canadian ownership and control. That licensing regime would still apply to smaller Canadian-owned and controlled broadcasting undertakings as well as to larger broadcasting groups that opt for licensing rather than the service agreement model.

121. Under our service agreement model, a new provision would be added to section 9 of the *Broadcasting Act* that would require all digital media undertakings that are either soliciting advertising in Canada or receiving subscription fees from Canadians to enter into binding service agreements with the Commission. As noted, this is similar to the regime proposed by the Commission in its *Harnessing Change Report* and would require each digital media undertaking to enter into an agreement with the Commission that would set out the terms and conditions under which it could continue to provide service in the Canadian market. Those terms and conditions would be determined by the parties, but would likely include

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[37] *Direction to the CRTC (Ineligibility of Non-Canadians),* SOR/97-192, April 8, 1997, as amended by SOR/98-378, July 15, 1998.

[38] *Harnessing Change: The Future of Programming Distribution in Canada*, "Potential Options".

obligations to support the production, creation and exhibition of Canadian programming through various means.

122. In proposing a service agreement model for digital media undertakings, we also considered the agreement that Netflix entered into with the Department of Canadian Heritage to produce programming in Canada in 2017.[39] Netflix's commitment to spend $500 million over 5 years, while not a substantial contribution to the Canadian broadcasting system (compared to the more than $2 billion spent by Canadian English-language broadcasters in 2016 alone),[40] appears to demonstrate that the largest global OTT service provider is willing to commit to furthering the broadcasting policy objectives in Canada through a service agreement.

123. We would also point out that our proposal for a platform agnostic approach to regulation using the service agreement model would not offend the recently signed Canada-United States-Mexico Agreement (CUSMA) because it is consistent with the principle of non-discriminatory treatment of digital products embedded in Article 19.4 of CUSMA.[41]

124. If the service agreement model were to be adopted, the *Broadcasting Act* would be amended to specifically reference the concept of a "service agreement". References to "licensing" would remain in the Act, but would be often included in the same context as service agreements. We have included the concept of service agreements in the amended version of the *Broadcasting Act* that we have attached as **Appendix C** to this submission.

125. Under our proposal, the power to exempt persons carrying on broadcasting undertakings of any class would continue to be included in section 9 of the *Broadcasting Act*. Maintaining this power would give the Commission the ability to continue to exempt certain classes of broadcasting undertakings from the requirement to hold a broadcasting licence or to enter into a service agreement. As the Commission does today with respect to BDUs that service fewer than 20,000 subscribers and discretionary services that serve fewer than 200,000 subscribers, the Commission would have the authority to exempt digital media undertakings that have not achieved some yet-to-be-established revenue or subscriber threshold from entering into a service agreement in order to operate in Canada. Those smaller digital media undertakings would likely continue to be exempt under the Commission's *Digital Media Exemption Order*, as amended from time to time.

126. Despite the licensing and new service agreement approach, foreign-based programming services that choose to operate in Canada indirectly through

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[39] Canadian Heritage, *Launch of Creative Canada - The Honourable Mélanie Joly, Minister of Canadian* Heritage, 28 Sept 2017.

[40] CRTC, *Consultation on the future of program distribution in Canada: Reference Document*, Chart 25.

[41] *Canada-United States-Mexico Agreement*, Chapter 19: https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-19.pdf.

program supply agreements with Canadian broadcasters or via the *List of non-Canadian programming services and stations* (e.g. CNN), rather than directly to Canadian consumers, would be exempt from the new service agreement requirement set out in the *Broadcasting Act* and associated regulations. This means that the Commission would retain the authority under paragraph 10(1)(g) of the *Broadcasting Act* to maintain the *List of non-Canadian programming services and stations authorized for distribution*, which is currently used to authorize BDUs to re-distribute foreign programming services. Similarly, Canadian owned and controlled broadcasters would continue to acquire programming from foreign sources, like ESPN and HBO, as part of their programming services.

127. In addition to the above, providing the Commission with all of the tools necessary to ensure that foreign and Canadian broadcasting undertakings comply with the terms of their service agreements or licences would have to be addressed. In our view, the decision to require non-Canadian digital media undertakings to contribute to the creation and production of Canadian programming would require the Commission to have additional enforcement powers, as a means to ensure ongoing compliance. Under our proposal, section 12 of the *Broadcasting Act* would be amended to provide the Commission with the requisite power to enforce compliance with the new service agreement model through new measures, such as administrative monetary penalties (AMPs). The Commission could also see fit to continue to rely on other existing enforcement powers set out in the Act.

128. In this respect, there should be no concern that an administrative tribunal, like the CRTC, would act as both a party to the service agreement and as the regulatory authority with enforcement powers. This is not without precedent in Canadian regulation. Provincial securities and exchange commissions, for example, use consent agreements to enforce their mandates under provincial securities legislation. For example, the Ontario *Securities Act* expressly grants the Ontario Securities Commission the capacity to contract and to enter into settlement agreements with private parties in the context of enforcement proceedings.[42]

129. Federally, the *Competition Act* enables the Commissioner of Competition to enter into consent agreements with third parties in order to enforce its mandate.[43] In doing so, the Commissioner has the power to impose conditions which could be the subject of a court order, as well as additional terms.[44] These consent agreements have the same force and effect as an order of the court.[45]

130. The CRTC itself has also used consent agreements as a means to enforce its regulatory obligations in several cases over the years. For example, in

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[42] *Securities Act*, RSO 1990, c S.5, ss 3.2(1) and 3.4(2).

[43] *Competition Act*, RSC 1985, c C-34, s 74.12(1).

[44] *Ibid*, s 74.12(2).

[45] *Ibid*, s 74.12(4).

Broadcasting Decision CRTC 2014-591, the Commission entered into a consent agreement with a company that had been broadcasting in Canada without a license. In this Decision, the Commission issued a mandatory order directing the private party to comply with the terms of the consent agreement.[46] In a subsequent decision granting that company a broadcasting licence, the Commission imposed compliance with the mandatory order (and, by extension, the terms of the consent agreement) as a condition of licence. In doing so, the Commission ensured that any breach of the consent agreement would constitute a breach of its conditions of licence.[47]

131. As these cases demonstrate, there should not be any concern that agreements could be used by an administrative tribunal today to enforce regulatory and legislative requirements.

Other Like-Minded Countries Already Regulate Netflix and other OTT Services

132. In proposing this platform agnostic model, which would require all non-Canadian digital media undertakings to contribute to the Canadian broadcasting system in a manner comparable to traditional Canadian BDUs and broadcasters, Rogers is not suggesting a model that is somehow unique to the world. The European Union and several member states have already taken, or are in the process of taking, steps to regulate on-demand audiovisual media services, like Netflix and other OTT services, in an effort to preserve their cultural identity and national film industry.

133. On November 26, 2018, the European Union (EU) enacted a new *Audiovisual Media Services Directive* (Directive), which established a general regulatory scheme for video-on-demand and streaming services. Pursuant to the *Directive*, member states are compelled to designate one or more national regulatory authorities or bodies responsible for the regulation of OTT services within their borders and for ensuring compliance with the *Directive*. These authorities will be responsible for the implementation of the various regulatory and policy obligations imposed on OTT Services within their respective jurisdictions.

134. The EU member states have twenty-one (21) months to implement the necessary legislative and regulatory changes to bring themselves in compliance with the *Directive*. Some states, most notably France, Belgium, Italy and Spain, have already implemented regulatory measures. Those measures will have to be adapted to ensure compliance with the *Directive*.

135. A table outlining the regulatory requirements implemented in key western democracies is attached as **Appendix D** to this submission.

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[46] Broadcasting Decision CRTC 2014-591 and Broadcasting Order CRTC 2014-592.

[47] Broadcasting Decision CRTC 2016-464.

136. In Belgium,[48] France,[49] and Italy,[50] OTT services subject to the regulations are required to make a declaration to the competent regulatory authority prior to the commencement of regulated activities. The regulatory authority then has the power to authorize or oppose the operations of the media service provider. In Spain, OTT services must propose codes of conduct that would set out their obligations with respect to content, due diligence duties and compliance. These codes must be approved by the competent regulatory authority in order to ensure that they are compliant with the existing regulations.[51]

137. The legislative and regulatory initiatives currently being implemented by EU countries largely focus on three mechanisms: national or local content quotas; prominence of local works; and financial contributions to the production of local works.

138. With respect to quotas, under the EU's *Directive*, member states must ensure that on-demand and streaming media services reserve at least 30% of their catalogues for European works.[52] In France, OTT services offering more than twenty (20) long cinematographic works or twenty (20) audiovisual works must dedicate at least 60% of their catalogue to European works, 40% of which must include works of original French expression. Likewise, Italy's legislation provides that on-demand and streaming services must respect the European works quotas in force pursuant to any Audiovisual Media Services Directive issued in the previous five years, but in any event must dedicate no less than 30% of their catalogues to European works. In addition, 50% of this percentage must be reserved for works of original Italian expression.[53]

139. As for obligations relating to prominence, the EU's *Directive* requires OTT services to accord due prominence and facilitate access to European and local works on their respective platforms. OTT Service providers meet this obligation through various means, including by: having a dedicated section for European or local works that is accessible from the service's homepage; by providing a search mechanism for European or local works; by featuring European and local works in the service's promotional campaigns; or by promoting European or local works through the use of banners or similar tools.[54] Belgium and France have already implemented similar measures. Belgium, for example, requires OTT

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[48] *Le décret du 14 juin 2018 modifiant le décret sur les services de Médias Audiovisuels coordonné le 26 mars 2009*, ss 38, 39 and 77.

[49] *Loi No 86-1067 du 30 septembre 1986 relative à la liberté de communication* (consolidated December 4, 2018), s 34.I.

[50] *Single Text for Audiovisual and Radio Services (legislative decree No 177 of July 31, 2005)*, s 22.

[51] *General Law No 7/2010 of 31 March on Audiovisual Media*, ss 12.1 and 12.2.

[52] *Audiovisual Media Services Directive*, adopted November 6, 2018, s 13.1.

[53] *Single Text for Audiovisual and Radio Services (legislative decree No 177 of July 31, 2005)*, s 44-quarter.

[54] *Audiovisual Media Services Directive*, adopted November 6, 2018, preamble, s (35).

services to give prominence to European works in their catalogues by highlighting the list of European and French Belgian works in an attractive way.[55]

140. With respect to investments in European works, the EU's *Directive* imposes a general obligation on member states to ensure "adequate levels of investment in European works" through the imposition of financial contribution obligations on OTT services. These financial contributions can include direct contributions to the production of European works; acquisition of rights in European works; or payment of levies to a national fund, on the basis of the revenues generated by the on-demand or streaming services.[56] Significantly, these financial obligations must be proportionate to those imposed on locally established service providers, and cannot be discriminatory.[57] Each of Belgium, France, Italy and Spain have already implemented financial contribution obligations for OTT Services operating within their jurisdictions. Italy, for example, requires OTT services to make a financial contribution to independent European works of no less than 20% of annual net revenues, 50% of which shall be reserved for works of original Italian expression.[58]

141. It is significant to note that Belgium and Spain provide that OTT services may enter into agreements with regulatory authorities, as well as associations representing film producers, authors and performers, in order to determine the modalities by which services may discharge their financial obligations.[59]

142. These types of initiatives extend beyond the European Union. In fact, beginning on January 1, 2019, we understand that the Government of Quebec has imposed sales tax on consumers' subscription fees for OTT Services, such as Netflix and Amazon Prime. These services, in turn, will be compelled to remit this tax to the Government of Quebec. This is estimated to generate $155 million in revenues for the province.[60]

143. Clearly, in proposing a new service agreement legislative model and a requirement for all digital media undertakings to be regulated on a platform agnostic basis and in a manner comparable to traditional Canadian BDUs and broadcasters, Rogers is not proposing a set of legislative amendments to the *Broadcasting Act* that would be unique to Canada. Nor are we proposing mechanisms that have never been implemented in other like-minded countries. By amending the *Broadcasting Act* in the manner we have proposed, the

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[55] *Le décret du 14 juin 2018 modifiant le décret sur les services de Médias Audiovisuels coordonné le 26 mars 2009*, s 46.

[56] *Audiovisual Media Services Directive*, adopted November 6, 2018, preamble, s (36).

[57] *Audiovisual Media Services Directive*, adopted November 6, 2018, s 13.2.

[58] *Single Text for Audiovisual and Radio Services (legislative decree No 177 of July 31, 2005)*, s 44-quarter.

[59] *Le décret du 14 juin 2018 modifiant le décret sur les services de Médias Audiovisuels coordonné le 26 mars 2009*, s 41; *General Law No 7/2010 of 31 March on Audiovisual Media*, s 5.3.

[60] Katie Dangerfield, *Quebecers have to start paying a Netflix tax - here's why the rest of Canada doesn't*, Global News, April 6, 2018.

Canadian Government would be following in the footsteps of the European Union and a number of its member states.

(ii) Producer Agnostic

144. The second aspect of our equitable treatment principle that should be incorporated into the new legislative framework is the requirement to establish producer agnostic rules relating to the production of Canadian content. This means that all Canadian producers[61] of audiovisual content, regardless of whether they are affiliated with a broadcasting undertaking or are independent, should have access to funding mechanisms and other support measures for the production of Canadian programming.

145. In suggesting this approach, we are not proposing to place Netflix and other non-Canadian digital media undertakings on the same footing as Canadian linear television broadcasters, unless they are "Canadian" as that term is defined in the *Investment Canada Act*. While non-Canadian digital media undertakings will be required to contribute to the Canadian broadcasting system through commitments made in their service agreements, we do not believe that they should be extended the right to access CAVCO tax credits or funding from the CMF and Telefilm. For reasons of equity and fairness, we believe that only those broadcasting undertakings, including digital media undertakings, that are incorporated in Canada and pay and collect taxes in this country should have access to the financial support mechanisms that are largely funded by Canadian taxpayers and used to fund the production of Canadian programming.

146. Such measures would not offend the CUSMA because they would fall within the cultural industries exemption in Article 32.6. These would be measures that would involve persons engaged in "the production, distribution, sale, or exhibition of film or video recordings" and/or "the production, distribution, sale, or exhibition of audio or video music recordings," both of which are a "cultural industry" as that term is defined in section 1 of Article 32.6 of the CUSMA.[62]

147. Access to these support mechanisms would, however, be subject to an additional obligation. If a producer is affiliated with a broadcasting undertaking (including a digital media undertaking), that broadcasting undertaking must also be subject to regulatory requirements that are equitable to those imposed on traditional Canadian broadcasters or BDUs, either through licensing or through a binding service agreement. Provided that this condition is met, our approach would require that the regulations established under the *Broadcasting Act* permit all Canadian independent and affiliated producers to access those support mechanisms to fund Canadian content.

148. Rogers is a strong proponent of proposals to revamp the current subsidy programs and funding models for Canadian program production. As Canadian

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[61] As defined in section 3 of the *Investment Canada Act.*

[62] CUSMA, Article 32.6.

broadcasters move to digital platforms and compete to acquire program rights with foreign digital media undertakings (like Netflix and DAZN) that have a global scale, the regulatory restrictions, which have historically limited a Canadian broadcaster's ability to own the content exhibited on its service, must be relaxed. To compete effectively, Canadian broadcasters will need the ability to monetize their investments by owning their own content, in the same way that Netflix and other digital media undertakings have been doing for a number of years.

149. Rogers also believes that a vertically-integrated company should be permitted to make commitments as part of its binding service agreement to use its revenues to support the production of programming by its affiliated broadcasting arm. This commitment could replace, in whole or in part, current obligations to make contributions to a third party fund like the Canada Media Fund (CMF). Again, we firmly believe that it is the quantity and nature of the contribution to the production of Canadian programming that is important, rather than whether that money is being directed to a third party fund.

150. Historically, the regulatory framework for the Canadian broadcasting system has been developed on the basis of three distinct silos: production, broadcasting and distribution. Each silo had its own separate role and contribution to the system and was protected from competition. Today Canadian distributors are prohibited from directly investing in content or holding exclusive program rights and Canadian broadcasters are largely prohibited (or disincented) from producing any content other than local and sports programming. The independent production sector, on the other hand, has been given exclusive access to funding mechanisms like the CMF and guaranteed work through the regulatory commitments imposed on Canadian broadcasters. However, unlike Canadian distributors and broadcasters, the independent production sector is not regulated and has no formal requirement to advance Canada's broadcasting policy objectives. The independent production sector has no obligation to re-invest a portion of the revenues they derive from exploiting their works outside Canada or on non-Canadian platforms back into the Canadian broadcasting system.

151. In today's media environment, this siloed approach is no longer desirable or sustainable. OTT services like Netflix and Amazon Prime have blurred the once bright lines between distribution, broadcasting and production. These services are both distributors and aggregators of content and producers of original programming. A Canadian regulatory framework that seeks to maintain these silos will not keep pace with global trends and risks undermining the system we have built today. As advertising and subscription revenues continue to decline, Canadian broadcasters and distributors must have the opportunity to tap new revenue streams and monetize their own content both domestically and around the world.

152. The current situation where there are now only a handful of well-capitalized production companies creating television programming in Canada is not desirable. The vast majority of independent producers are too small to compete internationally. That is not something that we believe will benefit Canada in the

longer term as more and more global players, like Netflix and Amazon, are commissioning and producing programming that is being delivered on their own digital platforms in Canada and around the world. Most independent producers are too small to negotiate effectively with these global players and have limited financial resources to enter into co-production agreements with them. As such, they do not have the scale and leverage to ensure that their projects are widely marketed and that backend revenues are returned to Canada.

153. Canada's linear broadcasting companies are better positioned than independent producers to export Canadian content to other countries because of their business relationships with broadcasters and studios around the world. In the current environment where foreign digital media services are significantly increasing the amount of content they produce for their own services, it is becoming clear that to remain competitive, Canadian broadcasters will need to have the same opportunity to create and own their own content.

154. On top of that, the current rules remove almost any commercial incentive that a Canadian broadcaster might have to produce programming. The reason for that is because there are regulatory/financing restrictions related to intellectual property (IP) ownership that prevent Canadian broadcasters from financially participating in the international distribution of content created by independent producers (which are funded by broadcasters in the first place). This has resulted in a scenario where a Canadian broadcaster is largely responsible for financing a Canadian program through an independent production company that then sells it to Netflix on a worldwide basis. The Canadian broadcaster that assumed the majority of the risk in the project and was only able to derive advertising revenues from its broadcast in Canada, is completely shut out of any international distribution revenues. Clearly, if Canadian broadcasters are expected to continue to invest in Canadian content and create local news and information programming that is integral to the health of the system, this regime must change.

155. Our producer agnostic proposal would encourage the production of programming in Canada by Canadian and foreign broadcasting undertakings and by the Canadian production sector (including both affiliated and independent producers). As more foreign services seek to enter the Canadian broadcasting system directly, there is a huge risk that a separate Canadian rights market for programming acquired from foreign sources will be eliminated. Today, the vast majority of the revenue used to fund Canadian programming is derived from advertising and subscription revenues driven by popular foreign-acquired programming. Without access to these revenues, Canadian broadcasters will no longer be able to support their local news and information programming or make other programming investments. This will put greater emphasis on the need for scale via partnerships with non-Canadian program suppliers. While we acknowledge this Review is limited to the three communications statutes, we firmly believe that the Canadian Government needs to also consider relaxing (but not removing) Canadian ownership requirements for the production of

programming to encourage investment and scale in the Canadian programming market**.**

156. Under our producer agnostic proposal, Canadian private broadcasters would still be incented to work with independent producers who would continue to have access to the CMF. Moreover, the public broadcaster, which does not have any commercial requirements, should be required to source all of its programming from the independent production sector, which will ensure this sector continues to thrive. In the current environment, however, as private Canadian broadcasters transition to digital media business models, they are prevented from accessing new revenue sources. It is not clear to us how the public interest would be served by maintaining a funding framework for the production of Canadian programming that only benefits one segment of the production community, independent producers.

157. Canadian broadcasters play a critical role today in the production and exhibition of Canadian programming. Canada's independent production community not only relies on them to exhibit the programming they produce, but also needs them to fund the production of programming through licensing arrangements, Canadian program expenditures (CPE) and commitments to programs of national interest (PNI). If the support mechanisms that have been developed to encourage the production of Canadian programming continue to largely exclude Canadian broadcasters and continue to limit their ability to financially benefit from the Canadian programming they exhibit and financially support, the very existence of those broadcasters will be threatened. That would, in turn, threaten the survival of Canada's independent production community and the entire support system that has been put in place over the past decades.

158. If the Canadian Government wants Canadian broadcasters to continue to produce and broadcast news and other high-cost programming, those broadcasters must be given every opportunity to monetize the content they have invested in and for which they bear the vast majority of the financial risk. This is particularly important at a time when new revenue sources are needed to offset losses in advertising and subscriber revenues. Rogers fundamentally believes that we must modernize the regulatory framework to focus exclusively on the creation of important and high-quality Canadian programming, rather than on who finances the programming or who owns the intellectual property rights. The failure to do so in a timely fashion will undermine Canada's ability to sustain the level of production that currently exists in the system and it will inhibit the creation and production of programming that is relevant to Canadians and that tells Canadian stories from a Canadian point of view.

(iii) Content Agnostic

159. The third aspect of our equitable treatment principle relates to the types of programs that are eligible for funding under the current legislative framework. It is Rogers' view that all Canadian content should be given equitable treatment under the law, both in terms of being granted access to funding for the production

of that programming and in respect of the regulatory mechanisms that are imposed under the *Broadcasting Act* in regards to its broadcast.

160. We further believe that the *Broadcasting Act* should be amended to encourage the production and exhibition of all categories of programming and not just those categories that fall into the underrepresented categories like dramas and documentaries.

161. One category of programming that is in dire need of additional funding is news. The importance of ensuring that there continues to be multiple sources of news programming produced with high journalistic standards becomes more apparent every day, as false and inaccurate reporting become more and more prevalent on social media sites. A democracy cannot survive without professional and independent news organizations that adhere to journalistic standards and ethics. The Government of Canada recently acknowledged this when Finance Minister Bill Morneau announced that a new tax credit for media organizations would be implemented.[63] The tax credit for media organizations, worth nearly $600 million over five years, will support the labour costs of producing original news content.

162. Consistent with the Government's tax credit proposal, we believe that a similar mechanism should be adopted for the Canadian broadcasting system. By allowing broadcasters that produce news programming to access labour tax credits, which provide an objective and arm's length subsidy, we are confident that independent high quality news will continue to be produced in this country. Having said that, we do not believe it would be appropriate for a funding agency like the CMF, which incorporates subjective decision-making in its administration of funds, to be involved in the funding of news programming given the need for journalistic independence.

163. In order to encourage and adequately support the production of professional news in Canada, we are proposing that a new policy objective be added to subsection 3(1) of the *Broadcasting Act*. The new objective we propose would expressly recognize that the Canadian broadcasting system should include local, regional and national news and information programming produced in accordance with professional journalistic standards. See **Appendix B**.

164. All Canadian broadcasting undertakings would be required to contribute to the production of local, regional or national news in some fashion. Those non-Canadian digital media services that do not wish to make direct investments in Canadian news programming would contribute indirectly by helping to fund labour tax credits.

165. Finally, we believe it should be clearly stated in the *Broadcasting Act* that only certain genres of programming –programming reflective of Indigenous, third-language, OLMC communities and Canadians with disabilities – should be given

[63] https://www.theglobeandmail.com/politics/article-media-sector-gets-595-million-package-in-ottawas-fiscal-update/

any type of priority in accessing funding and any other support or regulatory mechanisms. Programming that serves these communities is underfunded today and must continue to be supported to ensure that Canada's rich diversity continues to be reflected in the Canadian broadcasting system.

(iv) Competitive Market Forces

166. The fundamental assumption underlying the principles of equitable treatment and our proposals for developing a platform, producer and content agnostic regulatory model is that competitive market forces should increasingly be relied upon as the means to regulate the Canadian broadcasting system. As noted above in section IV(b)(i), fostering an environment that will encourage the growth of strong, well-financed Canadian broadcasting undertakings that can compete effectively with the likes of Netflix, Amazon Prime Video, DAZN and CBS All Access has to be a core broadcasting and regulatory objective in a revised *Broadcasting Act*.

167. By adopting a more market driven approach, those non-Canadian digital media undertakings and groups of affiliated broadcasting undertakings that choose to operate in Canada pursuant to service agreements (rather than licensing) would be permitted to tailor their contributions to the Canadian broadcasting system based on their business strategy and role within the system. Rogers, for example, might focus its service agreement on providing access and discoverability to Canadian programming services and on investing in sports, local news and information and third-language programming. A digital media undertaking like Netflix, on the other hand, could focus on the creation of original scripted programming and enhancing the discoverability of Canadian programming internationally. The commitments that would be made under the service agreement model would not be the same for each entity, but they would be comparable in terms of the value they provide to the Canadian broadcasting system.

168. Consistent with this market-based approach, there are other changes that would need to be made to the current legislative and regulatory frameworks to ensure that competition and market forces would increasingly be relied upon to determine business strategies and outcomes, rather than the regulator.

169. Specifically, we believe the authority that has been given to the Commission to resolve disputes, set out in paragraph 10(1)(h) of the *Broadcasting Act*, should be amended to ensure that disputes between programming services and BDUs are resolved solely on commercial terms. Today, when a dispute arises, the overriding concerns considered by the Commission in the dispute resolution process appear to be the viability of the programming service and/or the need for every distributor to continue to offer that programming service to its customers at a reasonable rate. This has become a significant problem. For BDUs, it has meant that many of them have been required to pay inflated wholesale fees that get passed on to consumers and/or they have been required to continue to distribute programming services that their customers have indicated, through

their viewership, that they do not want to receive. As for Canadian broadcasters, it has meant that many of them are required accept below market rates for their services, while other less valued services receive a wholesale fee that often far exceeds fair market value.

170. The current dispute resolution process entrusted to the Commission under the Act does not give much weight to the actual value of the service to consumers and the price at which they would be willing to pay to receive it. Nor does it treat all parties the same. For example, since the Commission has removed access requirements, a BDU has the right in some circumstances to cease distributing a service that is performing poorly. There is no reciprocal right for a Canadian broadcaster to refuse to authorize a BDU to distribute its service in circumstances where a BDU has refused to pay market rates for the service or has failed to adequately market the service to its customers. Another significant example of unequal and discriminatory treatment relates to non-Canadian digital media undertakings, where no effort has been made to regulate the rates that they can charge Canadian consumers for access to their OTT services. Consistent with the platform agnostic principle noted above, if the rates charged by one type of broadcasting undertaking (in this case digital media services) are not subject to the Commission arbitration process, then linear broadcasters and BDUs should not be caught by those rules. All competitors should be treated equitably and should have comparable regulatory obligation, including in respect of dispute resolution.

171. In our view, the authority to arbitrate any dispute between a broadcaster and a BDU should be removed from the Commission's jurisdiction and the parties should be able to resolve the dispute in the same manner as Netflix or any other digital media undertaking would resolve a similar dispute today. With respect to linear services, provided that consumers are still able to access the content on each platform-- i.e. through one or more other BDUs and through ISPs and wireless carriers -- the Commission would give way to third-party commercial arbitrators, who would be tasked with determining the appropriate wholesale rate and related issues that should apply. That way, the parties to the dispute and Canadian consumers will be assured that they would be paying market-based rates for those programming services.

172. In this respect, the Commission's authority over disputes between programming undertakings and BDUs would be limited to ensuring that Canadian consumers are able to access the service on each available platform. There would be no ability for the Commission to require a particular BDU to distribute a fully discretionary programming service.[64] Nor would there be any requirement for a programming undertaking to make its service available to every BDU. Traditional access rights for programming services would therefore be eliminated for fully discretionary services, as would the current expectation that a programming

[64] Accordingly, the Commission would still have the ability to require distribution of certain programming services, such as priority over-the-air television stations and programming services that it deems to be "exceptional" under section 9(1)(h) of the *Broadcasting Act*.

undertaking must offer its service to all BDUs. This would level the playing field between broadcasters and BDUs because each type of undertaking would have a reciprocal right to terminate its relationship with the other party.

V. THEME 3 – RIGHTS OF THE DIGITAL CONSUMER

173. Many of the proposals that we outlined above in this submission have also been designed to address and enhance the rights of digital citizens and digital consumers. The importance of data and digital consumers are currently the subject of a national ISED consultation, with privacy and privacy reform being a significant pillar of that consultation process.

174. Specifically, our proposal to maintain separate communications statutes and to have distinct mandates apply under each framework should also be adopted with respect to concerns about privacy for digital consumers. Issues of privacy should not be allowed to become intertwined with, and perhaps even overridden by, policy objectives in these communications statutes. As well, the Canadian Government is already well down the path of contemplating privacy reform and modernizing the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

175. Rogers understands that consumer digital rights and questions of privacy will become even more important as the communications systems continues to evolve and allow for even greater trading in personal information. Digital media undertakings, like Google, Facebook, and others, are the entities that make their living trading in big data. We believe that this issue is too important to relegate to a few provisions in the *Broadcasting Act* or the *Telecommunications Act*, particularly given that privacy and access to data issues are concerns that would have implications for Canadian society that go well beyond the mandates espoused in either of those statutes.

176. In our view, it would be counter-productive and would not benefit Canadians if the Panel was to recommend incorporating privacy requirements into the either the *Broadcasting Act* or the *Telecommunications Act*. In our experience, PIPEDA has been effective in protecting Canadians. It has ensured that the principles governing each individual's privacy rights and requirements to obtain consent for the collection, use, disclosure and retention of personal information have been universally applied to all businesses operating in Canada, regardless of the industry. Any proposal to enshrine a separate set of privacy rules or policies in the communications statutes would create unnecessary duplication and an additional burden for only one industry. Not only would that result in inefficient regulation and confusion on the part of consumers, but the issue of privacy might even be treated with less importance because of the pursuit of other policy objectives mandated under those communications Acts.

177. Rogers is also fully aware that the free flow of news and information supports the democratic process and democratic institutions. We share the concerns of the

Panel with respect to the proliferation of false and misleading news on digital platforms. Our proposals outlined above in section IV are specifically designed to encourage and support the production and exhibition of professional news and information that is created with high journalistic standards.

178. In some jurisdictions, the democratic process and many of its democratic institutions are under attack through digital media. We believe the best way to address this in Canada is to give the Commission the mandate and power under the *Broadcasting Act* to develop a framework where independent, trusted, accurate, diverse, as well as local and national sources of news and information are available in the Canadian broadcasting system. We believe this is essential for ensuring we have an informed citizenry, civic participation and a democratic process with integrity.

VI. THEME 4 – REVIEWING THE INSTITUTIONAL FRAMEWORK FOR THE COMMUNICATION SECTOR

179. Rogers believes strongly that the current institutional framework governing the communications sector should be maintained. The allocation of regulatory responsibilities between the Canadian Government and the regulators as well as the mechanisms in place for legal oversight in the broadcasting and telecommunications systems remain appropriate and should endure.

180. The one change that we would propose is to remove the current double jeopardy that exists within the legislative framework, where approval is required from both ISED and the Competition Bureau for spectrum transfers. In our view, the current dual approval approach should be eliminated and the Competition Bureau should be the sole administrative body that decides whether such transfers would serve the public interest.

181. We also noted previously in section IV(b)(i) that Rogers supports the inclusion of new enforcement powers for the Commission under the *Broadcasting Act*. In bringing non-Canadian digital media undertakings under the purview of the *Broadcasting Act* through the advent of service agreements, the Commission will need additional regulatory tools to ensure that these global entities comply with their commitments. We have proposed amendments to section 12 of the *Broadcasting Act* that will provide the Commission with the authority to impose administrative monetary penalties on transgressors. By providing the Commission with this additional enforcement power, we believe the effectiveness and efficiency of the Canadian broadcasting system and the governance of the communications sector in the digital environment will be improved.

VII. CONCLUSION

182. In closing, Rogers believes that implementing the eight principles we have identified in this submission through amendments to the *Telecommunications Act* and the *Broadcasting Act* are vital to the continued growth and development of

Canada’s communication system. Implementing the changes we have proposed will ensure that Canada continues to have a vibrant domestic broadcasting system capable of supporting the creation, production and distribution of Canadian programming, in both official languages. It will also ensure that the Canada’s telecommunications networks contribute to the ongoing development of Canada’s leading edge digital economy.