



4 May 2015

John Traversy
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: *Call for comments on a Wholesale Code, Broadcasting Notice of Consultation 2015-97 (Ottawa, 19 March 2015)*

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian broadcasting system that serves the public interest.
- 2 We are pleased to participate in the process initiated by Broadcasting Notice of Consultation CRTC 2015-97, seeking comments about the draft code proposed by the CRTC to government commercial arrangements between broadcast distribution services, programming services, and exempt digital media services. Our comments are set out below, after a brief review of the current structure of the BDU sector in Canada.

Current structure of BDU 'market'

- 3 The proposed code will attempt to govern the commercial relationships between Canadian cable and satellite distribution services, and Canadian and non-Canadian discretionary programming services.
- 4 Canadian discretionary television services were originally licensed by the CRTC to provide more specialized programming in Canada's broadcasting system. The CRTC has in recent years permitted the service to widen their program offering, however. Most Canadian discretionary services support Canadian program production. In 2013, the most recent year for which data have been published by the CRTC, discretionary television programming services allocated 32% of their \$4.1 billion in revenues towards Canadian programming, while BDUs allocated 3.2% of their \$14.8 billion in revenues towards Canadian programming funding mechanisms such as the Canadian Media Fund and community channels.

- 5 A few companies control access to most BDU subscribers, and also take in most discretionary television revenues. FRPC estimates that in 2013 seven BDUs controlled access to 96% of all cable and satellite subscribers, and in their role as programming licensees, took in 83% of the total revenues earned by discretionary television programming services:

Company - 2013	Direct & indirect subscribers	Discretionary television services revenues (\$ millions)
Shaw / Corus	2,943,812	\$1,140.6
BCE	2,370,012	1,540.8
Rogers	2,162,951	\$504.1
Quebecor	1,691,168	\$157.6
Cogeco	834,771	\$19.7
Telus	626,767	\$26.7
Bragg	398,926	\$5.8
Total (7 companies)	11,028,407	\$3,395.3
Canada, total	11,506,832	\$4,091.0
7 companies' subscribers, as % of subscribers in Canada	95.8%	82.9%
Number of other companies operating in the sector	Unknown	62

Source: CRTC aggregated financial summaries, for 2013

- 6 We estimate that in 2013 Bell, Rogers and Shaw (including Corus) held 105 discretionary licences, with another 149 licences held by other parties. In 2013 category B discretionary programming services that were not owned by BDUs enjoyed profit-before-interest-and-taxes (PBIT) margins of 8.4%, while category B services owned by BDUs enjoyed PBIT margins of 41.9%. BDUs earned an overall PBIT margin of 18.2%.

CRTC's objectives for the proposed code do not accord with CRTC's legislated responsibilities

- 7 The CRTC's legislative authority to regulate BDUs flows from section 3(1)(t) of the *Broadcasting Act*. It states that distribution undertakings
- (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
 - (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
 - (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and
 - (iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.
- 8 Broadcasting Notice of Consultation CRTC 2015-97, by comparison, states the CRTC's position that "a vigorous wholesale market is essential to fostering an environment and

- a retail market that enhances greater subscriber choice” (para. 2). FRPC respectfully notes that it is difficult to discern the connection between Parliament’s objectives in section 3(1)(t), with the CRTC’s decisions to foster an environment, to foster a retail market and to enhance subscriber choice. To avoid the impression that the CRTC is simply straying beyond its legislated jurisdiction, more is needed to connect the dots between the purposes set out in Broadcasting Notice of Consultation CRTC 2015-97, and the CRTC’s legislated mandate.
- 9 FRPC also respectfully points out that the fact that a “vigorous wholesale market” does not now exist is the sole result of CRTC licensing decisions that permitted excessive concentration of ownership and vertical ownership, and withdrew most regulatory protection from the discretionary services it chose to license. It is not clear why the CRTC now believes that a code of conduct will remedy problems created by licensing decisions.
- 10 In particular we note that Broadcasting Notice of Consultation CRTC 2015-97 does not provide any evidence to show why the Commission believes that codes of conduct are at least as effective as licensing decisions and regulations in meeting Parliament’s broadcasting policy objectives. In our view, it is more efficient for the CRTC to evaluate programming services’ plans and to regulate their rates and programming commitments through conditions of licence, than to require dozens of individual, independent programming services to attempt to negotiate fair carriage terms from three or four large BDUs. Large BDUs have the financial capacity to continue without any change in their operations if they cannot agree on terms with a small, independent discretionary television service – the reverse is not the case.
- 11 In this legislative context it is also very puzzling that the code purports to require programming services to share the risks undertaken by BDUs, and “to conduct negotiations fairly.”¹ The *Broadcasting Act* does not address business risks at all, raising the question of why the CRTC believes it has the authority to regulate in this area.
- 12 Moreover, while fairness is desirable in any negotiation, Parliament’s concern in the *Broadcasting Act* was clearly to ensure that programming services were treated fairly by BDUs, not *vice versa*. Parliament may have assumed that the large BDUs that were already in existence then, could protect their interests in commercial negotiations without the umbrella of the CRTC. That is presumably why Parliament gave the CRTC the express authority to set the terms and conditions under which BDUs may carry specific programming services, under section 9(1)(h) of the *Act*. Continuing to require programming services to negotiate with BDUs that have significantly more bargaining power is, in our view, an inefficient use of the discretionary services’ time and financial

¹ At para. 3 Broadcasting Notice of Consultation CRTC 2015-97 states that “strengthening the Code and making it applicable by regulation to all licensed undertakings would provide parties with certainty and transparency to conduct negotiations fairly” [underlining added].

resources. These resources should be directed towards Canadian programming, not conflict resolution.

Code ignores Canadian programming commitments

13 FRPC is also concerned that the CRTC's proposed code is another step on a path towards 'de-Canadianizing' our country's broadcasting system. Broadcasting Notice of Consultation CRTC 2015-97 defines a "healthy and dynamic wholesale market" in terms of ten objectives:

1. "subscribers have access to a broad array of services and greater flexibility and control over the services they receive"
2. BDUs and programming services share risk
3. BDUs and programming services share reward
4. BDUs can give their subscribers more choice and flexibility
5. BDUs can package and price discretionary services to respond to their customer demands, and to their BDU competitors
6. Programming services have reasonable and predictable levels of revenue
7. Programming services are "discoverable"
8. Programming services can be made available on different media (platforms)
9. Making programming services available on different platforms will "foster continued diversity and innovation within the system"
10. BDUs and programming services negotiate appropriate wholesale fees and other terms of distribution based on the fair market value of the service, regardless of its ownership or other interests (para. 2)

14 Broadcasting Notice of Consultation CRTC 2015-97 does not explain how achieving these objectives will help the CRTC to meet its legislative mandate, which is to implement Parliament's broadcasting policy for Canada.

15 In particular, while the notice states the CRTC's concern that "[w]ithout some degree of protection, programming services, particularly those not owned by vertically integrated entities, may be unable to generate the stable revenues necessary to create, acquire, and present Canadian programming" (para. 24), the proposed code is entirely silent about the significance of Canadian programming contributions to BDU carriage.

16 Five of the seven factors mentioned in the code to weigh 'fair market value' refer to rates charged, but none refers to Canadian programming.² Yet Broadcasting Notice of

² Section 6 of the proposed code states that a "wholesale rate for a programming service based on fair market value shall take into consideration the following factors, where applicable:

1. historical rates;
2. penetration levels, volume discounts, and the packaging of the service;

- Consultation CRTC 2015-97 notes that “[w]ithout some degree of protection, programming services, particularly those not owned by vertically integrated entities, may be unable to generate the stable revenues necessary to create, acquire, and present Canadian programming” (para. 24)
- 17 In fact, Broadcasting Notice of Consultation CRTC 2015-97 actually appears to make the issue of Canadian programming commitments a purely discretionary matter: it states that the CRTC “may consider ... the impact on the ability of a programming service to contribute to the diversity of Canadian programming” (para. 29, underlining added) – not that the CRTC will consistently consider the issue. Ignoring the costs of Canadian programming and their role in the rates sought by discretionary programming services will have the counterintuitive result of disadvantaging Canadian programming services that offer high levels of more-expensive-to-produce Canadian content with respect to rates.
- 18 The indirect and negative effect of making Canadian content commitments a purely discretionary issue is to devalue and diminish Canadian content – even though it is, in reality, the *raison d’être* for Parliament’s entire legislative concern for broadcasting in Canada.
- 19 Rather than making Canadian content commitments and/or achievements a purely discretionary subject of attention in the code, FRPC urges the Commission to include a factor that recognizes a programming service’s contribution to original Canadian program production, and to accord this factor significant weight in considering whether proposed rates are ‘fair’.

Code continues trend towards secrecy

- 20 The code proposed by the CRTC for resolving conflicts between discretionary programming services and BDUs shifts the CRTC’s approach to regulating programming and distribution services further away from public scrutiny.
- 21 A growing reliance on closed-door decision-making – at bodies such as the Canadian Broadcast Standards Council, the Commissioner of Complaints for Telecommunications Services, and the CRTC-staff dispute resolution process – means that decisions affecting the degree to which Parliament’s objectives are being met cannot be evaluated.
- 22 In our view, transparency in regulation requires that the evidence on which decisions are based, and the reasons for which decisions are made, are fully available for public

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3. rates paid by unaffiliated BDUs for the programming service;
 4. rates paid for programming services of similar value to consumers, taking into consideration viewership;
 5. the number of subscribers that subscribe to a package in part or in whole due to the inclusion of the programming service in that package, taking into consideration viewership;
 6. the retail rate charged for the service on a stand-alone basis; and
 7. the retail rate for any packages in which the service is included.

scrutiny. Reliance on a code and a private dispute resolution system will make broadcast regulation less transparent than it already is.

Code's vague language discourages measurement

- 23 The objectives set by the CRTC's proposed code are laudable – but difficult to measure, making assessment of the code's achievements equally difficult, if not impossible. How, for example, does the CRTC intend to measure the degree to which the code has or has not succeeded in re-allocating business risk? In our view, the CRTC's policies should be developed to permit, if not encourage, policy evaluation – to do otherwise devotes resources to regulatory systems whose effectiveness cannot be evaluated.
- 24 FRPC respectfully urges the CRTC to state goals for the code that can be transformed in to valid and reliable measures, to enable the impact of the code to be evaluated empirically. We also strongly recommend that the Commission state the year in which it will evaluate the code – not only to enable the Commission itself to plan its activities, but to ensure that members of the affected industries are aware when evaluation is nigh. Finally, we recommend that the CRTC itself set out the measures on which it will rely to evaluate the impact of the code in the determinations resulting from this proceeding, and if necessary, advise affected parties of any data-keeping requirements.

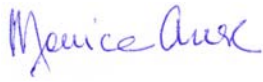
Concluding remarks

- 25 While FRPC welcomes the CRTC's recognition that programming services that are independent of BDU control face major challenges in obtaining fair and reasonable terms of carriage from BDUs, we do not believe that the code proposed by the CRTC will strengthen the programming services' bargaining capacity.
- 26 We believe that the evidence we presented at paragraphs 4 through 6, above, clearly demonstrates the need to establish an independent and impartial adjudicator to make decisions in the public interest about the programming services that will, or will not, be made available to Canadian audiences. It is our position that Parliament did this when it established the CRTC and delegated this adjudicative function to the Commission itself – rather than to the 'market', or to unknown staff adjudicators within the CRTC. It simply does not make sense, in our view, for the members of the CRTC to take the time to consider and license discretionary programming services if they are not also prepared to take the time to consider and set the terms of carriage that will enable the services to function as proposed in their applications.
- 27 Whatever may be said within Parliament's halls, the CRTC is bound to follow the course set by its legal mandate – not to shift its path in response to ideological winds blowing this way and that. If Parliament is truly committed to a system of regulation that relies entirely on the 'market' – *i.e.*, the three or four major companies that control most of Canadian broadcasting and telecommunications – it will say so through its laws. Until then, the CRTC bears a duty to respect the laws as they are currently written.

- 28 Notwithstanding the recommendations made above in our comment, therefore, we oppose the code in principle, and call on the CRTC to resume its regulatory functions as set out in the *Broadcasting Act* and *Telecommunications Act*, and in the interest.

We look forward to the opportunity of reviewing other comments submitted in this proceeding, and may submit a reply. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,



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