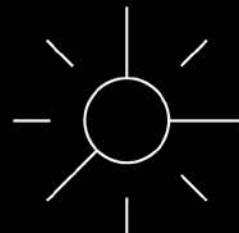




Canadian Radio-television and
Telecommunications Commission

Conseil de la radiodiffusion et des
télécommunications canadiennes

A WORLD OF CHOICE



CONNECT

Canada 



Broadcasting Regulatory Policy CRTC 2015-96

PDF version

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Ottawa, 19 March 2015

Let's Talk TV

A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market

This policy sets out a roadmap to give Canadians more choice when it comes to the selection and packaging of their TV services. It also seeks to ensure that Canadians have access to a diverse range of content through a healthy, dynamic TV market. The policy is a result of the process initiated by Let's Talk TV: A Conversation with Canadians and follows the Commission's policy decisions regarding [local over-the-air TV](#), [simultaneous substitution](#) and [content creation](#). The Commission's policy decision concerning consumer information and recourse will be published in the coming weeks.

A world of choice...

As illustrated in the appendix to this policy and on the Commission's website, a key aim of this policy is to provide Canadians with "[a world of choice](#)." This includes the ability to create their own value proposition based on the TV services they want to receive and pay for.

Once in place, this regime will allow Canadians to pick and pay for the channels they want. Canadians will also have the opportunity to benefit from a \$25 entry-level service offering. The roadmap includes a transition period that balances the objective of providing Canadians with pick-and-pay options as soon as possible with the practical reality that distributors will need time to fully implement the regime.

A roadmap to choice...

*The changes being made reflect the trend towards increasingly competitive and customizable on-demand options, while taking into account the need to bridge old and new approaches to allow for maximum flexibility in how content is distributed and consumed. Distributors will be required to **offer** more Canadian than non-Canadian services. Moreover, by **March 2016**, all discretionary services will have to be offered by licensed broadcasting distribution undertakings (BDUs) **either** on a pick-and-pay basis **or** in small, reasonably priced packages, which may either be created by the subscriber (for example, pick-5 or pick-10) or pre-assembled (for example, theme packs). Further, by **December 2016**, all discretionary services will have to be offered on **both** a pick-and-pay **and** a small package basis by all licensed BDUs. This will give distributors*

time to make the changes that are needed to roll out these new options to their subscribers.

As a result of these changes, subscribers will ultimately choose how many and what Canadian or non-Canadian discretionary channels they wish to receive beyond the entry-level service offering, which prioritizes Canadian TV services. Discretionary TV services will need to innovate and improve their programming if they are to continue to appeal and remain relevant to Canadian viewers. Some channels may not survive in an environment marked by greater subscriber choice, while others will adapt and thrive.

The Commission expects that a number of Canadians will choose to consume content on traditional platforms in the same ways and quantities as they have for years. However, at the core of the policy changes adopted as a result of the Let's Talk TV process is the idea that true innovation and high-quality programming must be fostered if Canadian broadcasters and creators are to successfully compete for Canadian and international audiences over the long term.

A healthy wholesale market...

A vigorous wholesale market is also essential to fostering a retail market that favors greater subscriber choice. Accordingly, another key aim of this policy is to ensure that agreements between TV service providers and programmers support consumer choice so that Canadians are able to choose the discretionary channels they want. A healthy wholesale market will also serve to support the creation of a diverse range of programming made by Canadians, including that provided by independently owned Canadian channels. To help achieve these objectives, the Commission is creating a strengthened Wholesale Code to frame the wholesale relationship between all distributors and programmers. The Wholesale Code will be applied to all licensed undertakings by way of regulation.

The Commission has also published today a notice of consultation to seek comment on the wording of the Wholesale Code with a view to implementing it by no later than September 2015.

Opening the market to more players...

Also, the Commission is broadening the exemption order for terrestrial BDUs with fewer than 20,000 subscribers to allow these BDUs to enter and compete in markets with licensed BDUs. This will allow more distributors to compete in larger markets without first having to get a licence, providing Canadians with a greater choice of TV service providers.

A diversity of voices to choose from...

*Current service-specific access privileges for independent discretionary programming services will be removed at their next licence renewal. To ensure that a diversity of voices is offered to Canadians, beginning **1 September 2018**, vertically integrated BDUs will be required to offer one English- and French-language independent service for every*

English- and French-language service of their own that they offer (1:1 ratio). This date aligns with the time when the first independent services are set to be renewed.

Also, the current rules for direct-to-home distributors will be modified so that one French-language service is distributed for every ten English-language services. BDUs may also apply to be authorized to add an out-of-province designated educational service in each official language to the entry-level service offering in provinces and territories where there are no such services. This means that Canadians living in official language minority communities will have access to television channels in their official language, including quality programming aimed at children and youth.

Like other discretionary services, all ethnic and third-language services will have to be offered on either a pick-and-pay or small package basis. This will make ethnic and third-language channels generally more accessible and affordable for Canadians. Further, a 1:1 ratio for the offer and packaging of non-Canadian versus Canadian third-language and ethnic services by BDUs will be put in place. As a result, Canadians will have greater access to Canadian ethnic and third-language programming in addition to having access to non-Canadian third-language programming.

Introduction

1. On 24 April 2014, the Commission launched a proceeding to conduct a formal review of its television policies (Broadcasting Notice of Consultation 2014-190). This review, which included a public hearing that began on 8 September 2014, represented Phase 3 of *Let's Talk TV: A Conversation with Canadians* (Let's Talk TV) and drew on issues and priorities identified by Canadians in the two earlier phases of that conversation.¹ The public record for this proceeding, including reports on the comments and input from Canadians received in Phases 1 and 2, can be found on the Commission's website at www.crtc.gc.ca.
2. In keeping with its mission of ensuring that Canadians have access to a world-class communication system, the Commission set out the following three intended outcomes for the Let's Talk TV process:
 - I. a Canadian television system that encourages the creation of compelling and diverse programming made by Canadians;
 - II. a Canadian television system that fosters choice and flexibility in selecting programming services; and
 - III. a Canadian television system that empowers Canadians to make informed choices and provides recourse mechanisms in the case of disputes.
3. In the notice of consultation, the Commission stated that this may be achieved without regulation, through the evolution of the marketplace or the changing technological

¹ In this regard, see Broadcasting Notice of Invitation 2013-563.

environment. Should regulatory intervention be warranted, it would only be used where specific outcomes or objectives would not be achievable without it. Further, such measures should be as simple as possible, proportionate, easily administered and adaptable to change.

4. The Commission has already addressed local over-the-air (OTA) television, simultaneous substitution and content creation in Broadcasting Regulatory Policies 2015-24, 2015-25 and 2015-86. The Commission's policy decision concerning consumer information and recourse will be published in the coming weeks.
5. In this policy, the Commission addresses the following issues from the Let's Talk TV process:
 - measures to foster a healthy and dynamic retail market that maximizes consumer choice and flexibility, including:
 - an affordable entry-level service offering that prioritizes Canadian television services,
 - pick-and-pay flexible package options and
 - preponderance of Canadian services;
 - measures to foster a healthy and dynamic wholesale market that ensures that Canadians are able to choose only the discretionary channels they want, while continuing to benefit from a diverse range of programming, including:
 - a strengthened Wholesale Code,
 - a more accessible and equitable framework to resolve disputes among programmers and distributors and
 - the phase-out of access privileges for former Category A services and introduction of a ratio between related and independent programming services; and
 - other measures to foster greater choice and ensure that Canadians continue to benefit from programming diversity and see themselves reflected in their programming, including measures to:
 - ensure that Canadians living in official language minority communities (OLMCs) have access to television services in their official language;
 - make all types of ethnic and third-language programming more accessible and affordable for Canadians;

- promote the unbundling of multiplexed services (i.e. services in which programming is spread across multiple “channels” offered together); and
- foster more competition among broadcasting distribution undertakings (BDUs) and thus provide greater choice of television providers for Canadians.

Choice and flexibility – A healthy and dynamic retail market

6. New developments in technology led by innovative Internet-based services and devices are both responding to pent-up consumer demand for content and leading to changes in consumption behaviour among many Canadians (e.g. mobile viewing, binge viewing and exposure to new, global sources of content). Canadians are increasingly accessing video content on demand, when they want and where they want. At the same time, many Canadians continue to be satisfied with consuming content on traditional TV platforms in the same ways and quantities as they have for decades. Experiences and expectations vary among Canadians. Given that there is no clear consensus, the challenge is to devise a regulatory framework that is responsive to the innovative ways in which content can and will be delivered, while recognising and valuing the more traditional ways of accessing content. This tension between the multiple approaches to delivering and consuming video content is likely to affect how and what content is developed and offered in the next five to ten years. There is a need to bridge old and new approaches to allow for maximum flexibility in how content is distributed and consumed.
7. In light of these significant technological changes and growing dissatisfaction with BDU packaging, the Commission’s response to Order in Council P.C 2013-1167² expressed its concern that the current packaging practices of most BDUs might not fully respond to the objective that cable and satellite operators provide efficient delivery of programming at affordable rates, as set out in subsection 3(1)(t)(ii) of the *Broadcasting Act* (the Act). Further, in Broadcasting Notice of Consultation 2014-190, the Commission stated that it considered that there may be risks to public policy objectives if its current overall approach to television remains unchanged.
8. In Broadcasting Notice of Consultation 2014-190-3 (the Working Document), the Commission proposed the following measures and options to address these concerns:

² On 7 November 2013, the Governor in Council published Order in Council P.C. 2013-1167 (the OIC). Noting that the Commission had announced a public consultation process on the future of Canadian television and pursuant to section 15 of the *Broadcasting Act* (the Act), the OIC requested that the Commission make a report as soon as feasible, but no later than April 30, 2014, on how the ability of Canadian consumers to subscribe to pay and specialty television services on a service-by-service basis can be maximized in a manner that most appropriately furthers the broadcasting policy for Canada set out in subsection 3(1) of the Act, while having regard to the objectives of the regulatory policy set out in subsection 5(2) of the Act.

I. Small entry-level service offering

- A. BDUs would be required to provide a small entry-level service offering at no set price that includes only local Canadian stations, all services designated by the Commission under section 9(1)(h) of the Act for mandatory distribution on the basic service, educational services and, if offered, the community channel and the provincial legislature; or
- B. BDUs would be required to provide an entry-level service offering comprised of the same mandatory services found under option A and any other services selected by the BDU at a set price between \$20 and \$30.

II. Pick-and-pay and build-your-own package options

- A. BDUs would be required to allow subscribers to select all discretionary services on a standalone (pick-and-pay) basis; and
- B. BDUs would be required to allow subscribers to build their own custom packages of discretionary programming services. BDUs could still offer pre-assembled packages.

III. Preponderance of Canadian services

- A. BDUs would be required to ensure that each subscriber *receives* a preponderance of Canadian services; or
- B. BDUs would be required to *offer* a preponderance of Canadian services.

A small entry-level service offering – Providing Canadians with the option of a smaller, more affordable basic service that prioritizes Canadian TV services

- 9. Currently, the Commission does not regulate the overall size or price of the basic service, but only sets out the services that must, at a minimum, be provided as part of that service. The current rules regarding the basic service generally provide that it must be comprised of local and regional television stations, as well as certain other Canadian services, such as provincial educational services and 9(1)(h) services. Further, community channels and the proceedings of the provincial legislature are also included on the basic service where licensed terrestrial distributors choose to distribute such services. Other than these specific requirements, cable and satellite operators are free to add, and often do add, certain other discretionary services to the basic service offered to their subscribers.

What Canadians said

- 10. Many Canadians who participated in Phase 1 of Let's Talk TV expressed the view that basic packages have become too large and too costly. Some objected to the need to purchase any form of basic service package before they can access the content they want, while others suggested various approaches to the basic service that would see

fewer channels offered at an affordable price (e.g. a Canadian-only package or a basic package that included news, educational and other channels such as TV5, the CBC/SRC, Télé-Québec, CTV, Global, TVA, Citytv and CPAC). Some participants went further, questioning why local television stations, which are available free over the air, should be sold to consumers by BDUs. Many argued that some sort of rate regulation was necessary in the current environment, where large players control most BDUs.

11. Similarly, Canadians who participated in the online discussion forum argued that the basic service should either be eliminated or be made available for free or at a very low cost. Some proposed \$5, while others agreed with the proposed \$20-\$30 price cap. Also two thirds (65%) of participants in the *Let's Talk TV: Choicebook* stated that they would prefer a basic service that was the lowest price possible.³ Finally, some participants proposed that more Canadian channels or certain sports channels should be included in the basic service, while others wanted to see the CBS, NBC, ABC and FOX commercial networks and the non-commercial PBS network (known as the U.S. 4+1 signals) or other non-Canadian services included.

Positions of parties

12. At the public hearing, a number of parties, including Access Communications Co-operative (Access), the Association québécoise de la production médiatique (AQPM), Bell, Eastlink, FreeHD and MTS, expressed support for option A of the Working Document. Other parties, such as the Independent Broadcast Group (IBG)⁴ and the Canadian Media Production Association (CMPA), supported option B.
13. Corus and Rogers, however, argued that BDUs should have the ability to choose option A or B, while Cogeco, Quebecor, SaskTel, Shaw, Stingray and TELUS supported neither option, stating that such measures were unnecessary and that BDUs should be allowed to continue to arrange the composition and price of their basic service according to the market. Some distributors added that a price cap (option B) would limit their packaging flexibility, including their ability to continue to offer certain discretionary services on basic (as a result of any future rate increases for these services), possibly resulting in changes to the basic package that could be disruptive for consumers. Further, many BDUs (e.g. Bell, Eastlink, MTS, Quebecor and Shaw) opposed the proposal to impose a price cap for the basic service on the basis that such a cap would prevent them from amortizing their fixed costs for consumers who only subscribe to the basic service and could also hamper their ability to invest in network development and new technology.
14. Parties also disagreed about the composition of the small basic service, with some parties, such as the IBG and CMPA, arguing that BDUs should be permitted to offer other services, including independent programming and children's services, in

³ *Let's Talk TV: Choicebook*, Hill+Knowlton Strategies, 1 May 2014.

⁴ This group includes the following members: Aboriginal Peoples Television Network, Channel Zero, Ethnic Channels Group, Fairchild Television, Stornoway and S-VOX Group of Companies.

addition to mandatory services. Stingray, the owner of Stingray Music (formerly Galaxie), and MTS submitted that BDUs should be permitted to include pay audio services in the small basic service, noting that Stingray Music is a popular service on basic.

15. Finally, Cogeco, Rogers and others noted that excluding a set of U.S. 4+1 signals from the basic service would disrupt basic service customers. In this regard, Rogers stated that “elimination of 4+1 in the small basic would harm the system perhaps irreparably” and that “any small basic service Rogers offers must include ABC, CBS, NBC, FOX and PBS.” In support of its position, Rogers submitted a Strategic Counsel survey that showed that 74% of all of its Ontario subscribers would oppose the removal of the U.S. 4+1 signals from the basic service and that three quarters of its subscribers would either cancel or downgrade their cable subscription if these signals were removed. Similarly, MTS noted that where the U.S. 4+1 signals are not available over the air, such as in Manitoba, removing such signals from the basic service would result in the disappearance of many popular American shows, likely creating consumer backlash.

Commission’s analysis and decisions

16. Currently, many Canadians must purchase a large “basic service” before selecting any additional discretionary package or service. Providing Canadians with the choice between a reasonably priced entry-level service offering and the television service provider’s first-tier offering would be consistent with the Commission’s objective of maximizing choice for Canadians in that they would not have to receive and pay for a large number of discretionary services that they may not want. It would also be consistent with the objective of the Act that distribution undertakings should provide efficient delivery of programming at affordable rates (section 3(1)(t)(ii)). Finally, requiring the distribution in the small entry-level service offering of the services proposed in the Working Document would contribute to the public interest and the achievement of the objective set out in section 3(1)(t)(i) of the Act by giving priority to the carriage of Canadian television services and in particular local Canadian stations. These services not only reflect Canadian attitudes, opinions, ideas, values and creativity but also, in the case of local stations, provide Canadians with up-to-the-minute news and information on local, regional, national and international matters.
17. Similarly, certain services are granted mandatory distribution on the basic service pursuant to section 9(1)(h) of the Act in light of their significant contribution to fulfilling the objectives of the Act.⁵ Such status is subject to periodic review. Accordingly, the Commission is of the view that these services should continue to benefit from such distribution in the entry-level service offering.

⁵ Currently, these services are APTN, CPAC, AMI-tv, AMI-tv français, TV5/UNIS in all markets; RDI, TVA, The Weather Network and AMI-audio in English-language markets; CBC News Network, Météomédia, Canal M and Avis de Recherche in French-language markets; and the Legislative Assemblies of Nunavut and the Northwest Territories for direct-to-home satellite distributors in Nunavut and the Northwest Territories.

18. Accordingly, to maximize consumer choice and ensure that Canadians who may wish to select only a small number of services have the option of purchasing a reasonably priced entry-level service package, the Commission considers that BDUs should be required to offer such a package. This package would prioritize Canadian services, including services that fulfill important policy objectives, such as local Canadian stations, services designated by the Commission under section 9(1)(h) of the Act for mandatory distribution on the basic service, educational services and, if offered, the community channel and the provincial legislature.
19. With respect to the remainder of the composition of the entry-level service offering, the Commission finds the following:
- *Additional, non-local/regional Canadian OTA stations* – While the stations provided as part of the entry-level service offering should be primarily local, not all communities are served by an equal number of local and regional OTA stations. For example, Toronto is served by 20 local and regional OTA stations, whereas Winnipeg is served by 6 such stations. Similarly, Calgary is served by 7 such stations, whereas St. John’s is served by 2 such stations. Therefore, restricting the composition of the entry-level service offering to local and regional services could have the unintended consequence of limiting terrestrial BDUs to offering a significantly smaller entry-level service offering to Canadians living in less populous communities compared to Canadians in larger cities. To avoid this situation, where fewer than 10 local and regional stations are available, terrestrial BDUs will be authorized to include other, non-local/regional Canadian OTA stations, for a maximum of 10 OTA stations. This maximum level for OTA stations represents the level of such services commonly available in many major markets. As noted later in this policy, terrestrial BDUs will also have the option to apply for a condition of licence authorizing them to distribute as part of the entry-level service offering one out-of-province educational service in each official language in provinces or territories where there is no designated educational service.
 - *U.S. 4+1 signals* – These services are already available for free over the air in most major Canadian markets near the border and should continue to be made available to BDU subscribers as part of the entry-level service offering. Subscribers in many markets have become accustomed to these services and have come to expect them as part of the entry-level service offering. Moreover, the inclusion of these services should not significantly increase the price of the entry-level service offering as there is no fee for the retransmission of these services separate from the single tariff set by the Copyright Board. Accordingly, BDUs may provide a set of these services as part of the entry-level service offering.
 - *Pay audio services and local AM and FM stations* – Given concerns over affordability, the Commission does not consider it appropriate to include pay audio services in the entry-level service offering. However, the Commission notes that BDUs currently provide some local radio stations as part of the entry-level

service offering and that it is unlikely that these would add any additional cost to the entry-level service offering as there is no fee for the retransmission of these services. Accordingly, it considers it appropriate to allow BDUs to include local AM and FM stations in the entry-level service offering.

20. With respect to the proposal to include discretionary children's programming services, the entry-level service offering proposed in the Working Document already contains services (e.g. provincial educational services such as TFO and TVO, Télé-Québec, CBC and SRC) that have committed to making children's programming available to Canadians or are required or expected to do so. Therefore, while recognizing the importance of this type of programming, the Commission does not believe that there is a need to include discretionary children's programming services in the entry-level service offering. As noted in Broadcasting Regulatory Policy 2015-86, the Commission will be initiating a follow-up process to revise the program category system to permit it to assess the state of children's programming in Canada.
21. Further, to address Canadians' concern over affordability, the Commission considers it appropriate to limit the price of the entry-level service offering described above to \$25 or less (not including equipment) per month. This maximum price corresponds to what the Commission estimates some BDUs' current first-tier offerings (priced at under \$40 per month, including in some cases a set-top box) would cost if the equipment and/or some of the higher cost discretionary services not included in the entry-level service offering were removed. In this respect, the Commission notes that in recent years some BDUs have been offering a smaller basic at a price comparable to the \$25 cap (or significantly lower, as a customer retention tool) and that between November 2011 and February 2012, Rogers conducted a market trial in London where it offered a \$19.99 digital basic package similar to the entry-level service offering.
22. Moreover, with the exception of 9(1)(h) services, the combined wholesale cost of which represents less than \$1.50 for each linguistic market (i.e. \$1.24 for the English-language market and \$1.45 for the French-language market), none of the services in the entry-level service offering described above requires that the BDU pay a wholesale rate. Consequently, aside from the cost of OTA services, which can be retransmitted pursuant to a tariff, the bulk of the cost of providing this service consists of network access costs (e.g. capital expenditures for network construction, maintenance overhead and back-office and customer service costs).
23. Accordingly, while acknowledging the value to Canadians of BDUs' first-tier offerings as currently packaged, the Commission is of the view that the \$25 maximum price for the small entry-level service offering would be appropriate and sufficient to allow BDUs to recoup their associated network access costs for those subscribers who choose to take the entry-level service offering and thus to continue to provide their services to Canadians on an efficient basis. The Commission also notes that from 1996 to 1999 (i.e. before the cost of the basic service was deregulated), the average monthly service rate charged by BDUs serving more than 6,000 subscribers was between \$18 and \$19. In today's dollars, this would result in a basic rate between \$25 and \$26. Moreover, at this maximum price, the Commission expects that the entry-level service

would include a set of the U.S. 4+1 signals Canadians have become accustomed to receiving.

24. The Commission does not consider that further regulatory intervention regarding the retail price of individual programming services or other packages is warranted to achieve the objective of affordability.
25. Finally, the Commission recognizes that some subscribers may find value in their current first-tier offering and may wish to retain this offering. As a result, in order to maximize consumer choice, the Commission considers that distributors should be allowed to continue to include additional services as part of their first-tier offering provided that (1) they also provide the entry-level service offering described above and (2) their first-tier offering includes all services that must be provided as part of the entry-level service offering.

Conclusion

26. Based on all of the above, the Commission will require all licensed terrestrial and direct-to-home (DTH) distributors to provide to their subscribers by **March 2016** an entry-level service offering that:
 - is priced at no more than \$25 (not including equipment) per month;
 - is promoted in a like manner to the distributor's first-tier offering so that customers are aware of its availability, price and content;
 - prioritizes Canadian television services by including:
 - all local and regional Canadian television stations and provincial or territorial educational services currently required under sections 17 and 46 of the *Broadcasting Distribution Regulations* (the Regulations) for terrestrial and DTH distributors respectively,
 - services designated by the Commission under section 9(1)(h) of the Act for mandatory distribution on the basic service and
 - in the case of terrestrial BDUs, the community channel and the proceedings of the provincial legislature in one or both official languages, if offered;
 - may also include:
 - in the case of terrestrial BDUs, other Canadian OTA stations where fewer than 10 local or regional stations are available over the air (to an overall maximum of 10 Canadian OTA stations),
 - local AM and FM stations,

- in the case of terrestrial BDUs, one out-of-province designated educational service in each official language in provinces and territories where no such services are designated and
 - one set of U.S. 4+1 signals; and
 - may not include any further services beyond those set out above.
27. For clarity, the Commission notes that BDUs will not be prevented from providing a first-tier offering that includes other discretionary services (e.g. children's services, pay audio services or mainstream sports services) as an alternative first-tier offering, provided that they also offer the entry-level service offering described above. However, BDUs will not be allowed to require subscribers to buy any services other than those in the entry-level service offering to access any other services or packaging options. In other words, a subscriber who opts for the entry-level service offering may not be prohibited from also subscribing to discretionary services either on a pick-and-pay or small package basis.
28. The entry-level service offering is meant to provide Canadians with a smaller, more affordable basic service alternative, while continuing to fulfill the important policy objective of prioritizing Canadian TV services. Accordingly, the Commission will observe the behaviour of BDUs closely to ensure that both the letter and spirit of this policy is respected in order to meet this objective.
29. Finally, the Commission notes that the requirement to offer a regulated entry-level service offering should not result in the nullification of existing affiliation agreements, but may impact contractual clauses that would prevent a BDU from providing such an entry-level service offering.

AFFORDABLE ENTRY-LEVEL

AS OF MARCH 2016

Television service providers **MUST** offer an entry-level service at **\$25 or less per month**

THIS ENTRY-LEVEL SERVICE...

MUST include	MAY include
All local and regional television stations	Other Canadian stations, where less than 10 local stations are available (up to a maximum of 10)
Provincial educational channels	Educational channels of another province or territory, in each official language, if no educational channel is offered
Community and provincial legislative assembly channels, if offered	Local AM and FM stations
Channels designated for mandatory distribution	Affiliates of U.S. networks (ABC, CBS, FOX, NBC and PBS)

Pick-and-pay and flexible package options – Putting choice and control in the hands of Canadian viewers

What Canadians said

30. Some Canadians who participated in Phase 1 of Let's Talk TV supported the current packaging of programming services on the basis that channel packages provide diverse content at a reasonable price, which meets their own needs or the needs of their

families. However, many participants wanted the ability to pick and pay for only the channels that they want. As a result, the current size of packages, their costs and their implementation by BDUs was the source of considerable discussion.

31. Most Canadians who commented during the online consultation were of the view that BDUs should be required to offer subscribers greater choice, including pick-and-pay and build-your-own-package options. Many, however, were concerned that these options would not be provided at affordable rates.
32. The record of the proceeding clearly indicates that Canadian viewers feel they are paying too much for BDU services and restricted by the way that discretionary programming services are currently packaged. For example, in the results of a report presented by Harris/Decima for the Let's Talk TV proceeding (the Harris/Decima report),⁶ 44% of respondents were not satisfied with the price of their television service and 71% of non-TV subscribers would consider subscribing to a television service provider if the prices were lower. As a result, Canadian viewers are looking for options that give them more choice and control as to how they consume programming, including cancelling their BDU subscriptions and relying on OTA reception and programming available over the Internet.

Positions of parties

33. With few exceptions, all parties at the hearing agreed with the objective that Canadian viewers should be provided with more choice and control as to how they subscribe to television services. They also agreed that Canadian viewers should be provided with the option to continue to subscribe to the packages that they subscribe to today so as to not disrupt consumers who are satisfied with their current packages. In that regard, Shaw submitted a study on the future of TV conducted by Abacus Data that showed that 79% of respondents were satisfied with their Shaw service and that 76% were satisfied with the variety of channels available to them.⁷
34. There were, however, differing views on what measures, if any, were needed to ensure consumers have more choice:
 - Some parties, such as Friends of Canadian Broadcasting and OUTtv, suggested that the record of the proceeding did not support the unbundling of television packages, arguing that it might make programming more costly, the system less diverse and the content creation sector much smaller and less profitable. Similarly, the Fédération des communautés francophones et acadienne (FCFA) opposed the Working Document proposals on the basis that the financial impact of pick-and-pay on consumers had not been clearly demonstrated, that the potential loss of subscription revenues for niche services (including those serving OLMCs) could endanger these services and that pre-assembled packages simplified access to a variety of programming services for OLMCs.

⁶ Harris/Decima, *Let's Talk TV: Quantitative Research Report*, 24 April 2014.

⁷ Abacus Data, *Future of TV Study*, 20 June 2014.

- Bell and SaskTel submitted that BDUs should be required to offer programming services only on a pick-and-pay basis, while Quebecor supported the build-your-own-package option (provided that the risks associated with this approach were equally shared by BDUs and programming services), but opposed the pick-and-pay option, arguing that it increased the risks for programmers and BDUs.
 - Many BDUs and programming services, including Rogers, Shaw and the CBC, submitted that the Commission should require BDUs to provide consumers with build-your-own-package options and either set a percentage (e.g. 50% + 1) of programming services that must be offered on a pick-and-pay basis, with the percentage increasing over time, or introduce a pick-and-pay option at a later date. This, in their view, would be less disruptive to the industry, while providing the flexibility and choice sought by Canadian viewers.
 - Corus and TELUS were of the view that the Commission need go no further than prohibiting programmers from preventing BDUs from offering programming services on a pick-and-pay or build-your-own-package basis.
 - Some BDUs, such as MTS, TELUS and SaskTel, noted that the small pre-assembled theme packages that they currently offer already maximize choice by providing flexible packaging options to their subscribers. However, some argued that popular programming services impose increasingly stringent restrictions and obligations on independent BDUs, limiting distributors' ability to offer such small packages.
 - U.S.-based discretionary programming services submitted that a requirement to unbundle programming services would be detrimental to the overall broadcasting system and would likely lead them to reconsider their distribution by Canadian BDUs. However, some BDUs, including Bell and MTS, indicated that it was unlikely that a service would exit the market on a point of principle over flexible packaging and re-enter the market via a video service delivered over the Internet.
35. Finally, many parties argued that the proposed changes would result in fewer jobs, affect the viability of certain services and result in higher wholesale and retail rates, thus leading to less diversity of programming and value for Canadian consumers. Parties submitted that independent services were likely to be most affected by the unbundling of programming services. Accordingly, most parties at the hearing suggested a measured or gradual roll-out of any changes to ensure that the transition to more consumer choice is carried out in a manner that reduces any negative outcomes.

Commission's analysis and decisions

36. The Commission has weighed the desire for more choice and flexibility expressed by many Canadians against parties' arguments that any changes to its approach must be implemented in a measured and gradual manner that reduces the potential for any undue negative outcomes. However, the Commission is ultimately of the view that it

must take positive steps to bring about greater choice and flexibility in the Canadian television system.

37. In this regard, while some parties argued that it would be sufficient to prohibit programmers from preventing BDUs from offering programming services on a pick-and-pay or build-your-own-package basis, this approach does not take into account the fact that vertically integrated BDUs have every incentive to ensure that their related programming services are insulated from the financial pressures that come with greater choice and packaging flexibility. As such, BDUs, and vertically integrated BDUs in particular, may not be sufficiently incented to make the necessary changes to their current offerings or might make these changes at a much slower pace than that desired by Canadian subscribers.
38. Moreover, the Commission considers that BDUs have not generally demonstrated that they would willingly move to more flexible packaging options on their own. For example, in Broadcasting Regulatory Policy 2011-601, the Commission clearly expressed the view that BDUs should be offering greater choice to consumers. However, as noted earlier, most Canadians who commented during the online consultation were still dissatisfied with their current offering and considered that BDUs should be required to offer subscribers greater choice, including pick-and-pay and build-your-own-package options. Moreover, according to the results of the Harris/Decima report, the percentage of satisfaction regarding flexibility in selecting channels remained below 50% in most regions of Canada, except for Quebec and the Atlantic region where build-your-own-package options are available.
39. Accordingly, relying purely on market forces may disadvantage subscribers in markets where there are no BDUs that are offering flexible packaging options and thus providing a competitive incentive to move toward more choice. This in turn would not meet Canadian viewers' expectations for maximum flexibility as expressed throughout this process, leading to more subscriber frustration with the licensed broadcasting system.
40. The reluctance of some BDUs to provide more flexible packaging options may be explained in part by certain studies that were submitted in this proceeding to forecast the potential economic impacts of introducing greater choice and flexibility for Canadians. These studies cast a negative light on the impacts of unbundling. For example, Environmental Scan author Peter Miller submitted that unbundling can be expected to have a worst-case impact of 10,674 losses in full-time employees and an annual \$1 billion loss in gross domestic product for the Canadian economy in 2020.⁸ However, the Commission considers that these projections are ultimately the results of highly subjective assumptions and estimates. For example, this worst-case scenario is based notably on a significant 40% failure rate for existing specialty services, combined with considerable losses in subscription and advertising revenues for the remaining services.
41. Such assumptions overstate the potential impacts of introducing more choice and flexibility and fail to fully recognize the ability of the Canadian broadcasting industry

⁸ Peter H. Miller, *Canadian Television – An Environmental Scan*, 25 June 2014.

to continue to adapt and innovate to meet the demands of Canadians. In addition, while models that attempt to forecast potential economic impacts provide useful insights regarding potential risks when exploring policy choices, the Commission is of the view that it must also consider the potential upsides of greater choice, including the retention of subscribers in the system, as well as the risks associated with maintaining the status quo in a context of increased demand for more choice.

42. Notwithstanding the above, some evidence provided as part of this proceeding also shows that some Canadians are satisfied with their current packages. Consumer advocacy groups who took part in the hearing also emphasized that subscribers who are satisfied with their current offering should not have to make any changes. Accordingly, the Commission agrees that BDUs should still have the ability to provide Canadian and non-Canadian discretionary programming services in pre-assembled packages, as well as offer more flexible and customizable options. This will give existing programming services and BDUs time to transition to a new regime characterized by greater consumer choice and flexibility.
43. Similarly, the Commission acknowledges the validity of the argument made by some BDUs that small pre-assembled theme packages represent an effective option to maximize consumer choice in that such small packages are generally popular with subscribers and do not require that Canadians subscribe to a large number of services that do not interest them to have access to the few services they want. The Commission considers that small theme packs have proven themselves to be a viable and interesting packaging option in the market as they provide Canadian subscribers with a simple pre-assembled package of programs that align with individual tastes and preferences. Theme packs such as those currently offered by MTS, TELUS and SaskTel are a positive example of successful and consumer-friendly theme packs. Accordingly, the Commission considers that smaller pre-assembled packages of this type represent a flexible packaging option that would, if combined with a pick-and-pay option, adequately respond to consumers' demand for increased choice.
44. Finally, with respect to implementation, the Commission notes that BDUs proposed different timetables regarding the possible roll-out of pick-and-pay or build-your-own-package options. Cogeco and Shaw proposed the quickest implementation, stating that build-your-own-package options could be offered to subscribers by the end of 2015, with longer times for the implementation of a pick-and pay option. Others proposed significantly longer roll-out periods. Different BDUs also expressed concern with different aspects of the proposals. For example, Bell urged the Commission not to require a build-your-own-package option, while Shaw, Rogers and Videotron were concerned about an immediate requirement for complete pick-and-pay, with Rogers urging the Commission to implement only a build-your-own-package option at first and then complete pick-and-pay at a later date.
45. Moreover, during the course of the public hearing, various BDUs identified changes they would need to make to offer flexible packaging options, such as pick-and-pay or build-your-own-package. These included upgrades to the system and platform that might entail hardware and software upgrades, changes to the billing system, the renegotiation of affiliation agreements that preclude or do not address the distribution of programming services on a standalone basis, the development of a new business

model, the training of customer representatives and changes to their websites and other promotional tools to reflect the new packaging options.

46. The Commission considers that the fact that most BDUs already offer a number of services either on a pick-and-pay basis, in small theme packs or on a build-your-own-package basis suggests that they have the technical means to offer such alternatives to subscribers and likely would have to make limited upgrades to their systems to offer either a pick-and-pay or small package option by March 2016. Further, providing BDUs with the initial flexibility to offer either one of these options before they transition to offering both options would allow them to concentrate their resources and efforts on other areas where changes are necessary, such as billing systems and customer service.

Conclusion

47. In light of all of the above and in order to maximize consumer choice and flexibility, the Commission considers that it would be appropriate to implement the following changes:
- by **March 2016**, all licensed BDUs will be required to offer all discretionary services either on a pick-and-pay basis **or** in small, reasonably priced packages, which can take the form of either a build-your-own-package option (including an option to buy a package of up to a maximum of 10 services) or small pre-assembled packages, such as theme packs; and
 - by **December 2016**, all licensed BDUs will be required to offer all discretionary services on both a pick-and-pay basis **and** in small, reasonably priced packages, as described above.
48. As noted earlier, under this new approach, BDUs will continue to be allowed to offer pre-assembled packages, but will not be allowed to require subscribers to buy any services other than those in the entry-level service offering to access any other service or package.
49. These requirements will not apply to analog and exempt BDUs as they may not have the means to offer services on this basis and such a requirement would likely be too financially and administratively burdensome for these legacy operators.
50. A key aim of this policy is to give Canadians the ability to create their own value proposition based on the TV services they want to receive and pay for. In this respect, the Commission acknowledges that the pick-and-pay option is a form of value proposition that might not be economically advantageous for all subscribers. While some Canadian viewers interested in a limited number of discretionary services might prefer the ultimate flexibility offered by such an option, others might continue to consider that different value propositions would allow them to benefit from a larger number of diverse services at a price they find reasonable.
51. With respect to non-Canadian services, as mentioned in the Working Document, the current approach to authorizing these services for distribution in Canada will be maintained. Specifically, all non-Canadian services must be authorized before they can

be distributed in Canada. For a service to be authorized, a Canadian sponsor (e.g. a distributor, programming service or industry organization) must make a formal request to the Commission. To help ensure that Canadian services have priority, the Commission will not authorize non-Canadian English- and French-language services if they compete with Canadian pay and specialty services. When the Commission decides to authorize a non-Canadian programming service for distribution, it adds the service to a list called the [*Revised list of non-Canadian programming services authorized for distribution*](#).

52. Further to the present policy, the Commission notes that a condition of the authorization of non-Canadian services for distribution in Canada will be that they allow their services to be offered on a pick-and-pay and small package basis as in the case of Canadian services. The Commission considers that the imposition of this condition on non-Canadian services is essential to ensuring a fair playing field between Canadian and non-Canadian services available to Canadians in the context of a competitive, consumer-driven environment. Accordingly, it expects non-Canadian services, as good corporate citizens, to continue to abide by the applicable rules established by the Commission if they wish to continue to have their programming services available in Canada.

PICK AND PAY/SMALL PACKAGES

STARTING MARCH 2016...

Depending on their service provider, Canadians must be able to subscribe to channels

- on a pick-and-pay basis **OR**
- in small, reasonably priced packages, which may either be created by the subscriber (for example, pick-5 or pick-10) or pre-assembled (for example, theme packs).

STARTING DECEMBER 2016...

Regardless of their service provider, Canadians must be able to subscribe to channels

- on a pick-and-pay basis **AND**
- in small, reasonably priced packages, which may either be created by the subscriber (for example, pick-5 or pick-10) or pre-assembled (for example, theme packs).

Preponderance of Canadian services – Making Canadian services available

53. Traditionally, the Commission has required that each subscriber **receives** a preponderance of Canadian programming services (the preponderance rule). However, in Broadcasting Notice of Consultation 2014-190, the Commission acknowledged that in an environment where subscribers expect more choice, mechanisms that would prevent them from selecting an unlimited number of non-Canadian services could be seen as limiting consumer choice and flexibility. Accordingly, it stated that it would explore whether there remains a need to maintain the preponderance rule or whether other measures might be more appropriate.
54. In the Working Document, the Commission proposed the following options:
- A. BDUs would be required to ensure that each subscriber *receives* a preponderance of Canadian services; or
 - B. BDUs would be required to *offer* a preponderance of Canadian services.

What Canadians said

55. Some Canadians who participated in the online consultation indicated that they preferred option B of the Working Document. These participants noted that this proposal would allow for more choice. One individual, however, was in favour of option A. To ensure greater balance, this individual suggested that a subscriber who wanted to choose CNN, for example, would also be required to take one of the Canadian all-news channels.

Positions of parties

56. Corus and the CMPA supported option A of the Working Document. Corus indicated that there is no practical or technical impediment to this requirement and indicated that preponderance is a fundamental principle of the Act and a way for Canada to retain a distinct rights market.
57. Rogers, Shaw and Viacom, however, supported option B on the basis that it would provide subscribers with greater choice. In light of its London market trial, where it offered the option to create packages of 15, 20 or 30 services from a list of over 125 services (including certain non-Canadian services), Rogers argued that this rule would be consumer-friendly. Shaw added that this approach should not be implemented until 15 December 2016 to minimize the impact on programming services.

Commission's analysis and decisions

58. Requiring BDUs to offer a preponderance of Canadian services would be consistent with an environment of greater choice and flexibility. Further, considering the number of Canadian services that will be distributed even in the entry-level service offering, including 9(1)(h) services and two CBC services, the Commission is confident that the

majority of English-language Canadians would continue to receive a preponderance of Canadian signals even without a specific requirement to this effect.

59. Further, the Commission considers that the risk is almost negligible in the French-language market due to the more limited appeal of non-Canadian English- and French-language services.
60. Accordingly, beginning **March 2016**, BDUs will be required to offer more Canadian than non-Canadian services. However, subscribers will ultimately choose how many and what Canadian or non-Canadian discretionary channels they wish to receive beyond the entry-level service offering.

BDU-programmer relationship – A healthy and dynamic wholesale market

61. A vigorous wholesale market is essential to fostering a retail market that favors greater subscriber choice. Throughout this proceeding, the Commission heard from some BDUs that one of the key obstacles to providing Canadians with more choice and flexibility are certain terms in their affiliation agreements with programmers. For their part, programmers, particularly independent services, called upon the Commission to ensure that independent programming services continue to have access to the system, are discoverable and are provided with fair terms and conditions of distribution. Accordingly, a key aim of this policy is to ensure that the affiliation agreements negotiated and entered into between BDUs and programmers reflect the Commission's new policies in support of consumer choice. A healthy wholesale market will also serve to support the creation of a diverse range of programming made by Canadians, including that provided by independent Canadian services.
62. In the Commission's view, a healthy and dynamic wholesale market is one in which:
 - risk and reward are shared between BDUs and programming services, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services;
 - BDUs have the flexibility to package and set retail prices for discretionary services in the manner that they consider will best respond to customer demand and enable them to compete on an equitable basis with other BDUs;
 - programming services are discoverable and able to make their programming available to Canadians on multiple platforms in order to foster continued diversity and innovation within the system; and
 - appropriate wholesale fees and other terms of distribution are negotiated based on the fair market value (FMV) of the service, regardless of the ownership or other interests of either the BDU or programming service.
63. In a world of greater subscriber choice, programming services have much more incentive to create high-quality, original content that is compelling and attractive to

audiences. Moreover, in this competitive environment, it becomes even more important to ensure a fair playing field in order to foster continued diversity and innovation within the system.

64. The fair conduct of negotiations is key to achieving this intended outcome. Specifically, the negotiation of fair and reasonable terms allows BDUs to compete more equitably in the retail market with other BDUs and online content providers. Programmers must also be able to negotiate fair and reasonable terms for their services in order for them to continue to create and show programming of high quality and value to Canadians.

Wholesale Code – Ensuring choice and programming diversity

Background

65. Since 2000, the Commission has approved a number of transactions that have increased consolidation and vertical integration within the Canadian broadcasting industry. In 2010, the Commission held a hearing to examine the issue of vertical integration and whether additional regulatory tools and measures were necessary to deal more effectively with vertical integration issues and to prevent anti-competitive behaviour, which can ultimately have a negative impact on the ability of Canadians to receive diverse high-quality programming.
66. The current Wholesale Code generally applies to licensed and exempt BDUs and programming undertakings, including digital media exempt undertakings. Since its creation, the Commission has referred to the principles set out in the Wholesale Code when making determinations based on complaints or other applications in cases where negotiations between parties have failed. The Commission has also typically referred to these principles while conducting dispute resolution processes, whether they are expedited hearings or relate to undue preference complaints.
67. Generally speaking, the Wholesale Code dissuades parties from requiring certain terms or conditions for the distribution of programming that are commercially unreasonable, including:
 - requiring an unreasonable rate for the distribution of a programming service;
 - requiring certain types of minimum penetration or revenue levels;
 - requiring the acquisition of a program or service in order to obtain another program or service;
 - requiring an excessive activation fee or minimum subscription guarantee; and
 - imposing on an independent party a most favoured nation (MFN) clause (i.e. a clause that seeks to ensure that provisions that apply to one party will be at least as favorable as those that apply to others).

68. The Wholesale Code also sets out certain parameters when negotiating wholesale rates to ensure that these are based on fair market value. Specifically, negotiations should take into consideration the following factors:

- historical rates;
- penetration levels and volume discounts;
- the packaging of the service;
- rates paid by unaffiliated BDUs for the programming service;
- rates paid for programming services of similar value to consumers;
- 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;
- the retail rate charged for the service on a stand-alone basis; and
- the retail rate for any packages in which the service is included.

69. Moreover, the Wholesale Code includes certain provisions to ensure that independent or non-related programming services can negotiate fair and reasonable terms for their services. For example, it encourages BDUs to include non-related programming services in relevant theme packages. It also encourages BDUs to include independent programming services in the best available package consistent with their genre and programming, as well as provides that comparable marketing support should be given to such services. Finally, the Wholesale Code generally provides that BDUs should offer to non-related programming services reasonable terms of access to its various platforms and that such access should be based on fair market value.

70. In addition to the Wholesale Code, the Commission has also imposed conditions of licence on vertically integrated entities, such as Bell, Corus and Rogers, in order to further ensure a fair balance in negotiating power between these entities and independent programming services and BDUs. For example, rather than acting as guidelines, these conditions of licence directly prohibit the imposition of unreasonable distribution terms and conditions. They also require that the negotiation of wholesale rates for programming services be based on fair market value. Although the conditions vary from one licensee to another, in general they ensure that these vertically integrated entities do not impose unreasonable conditions of distribution.

Working Document proposal

71. The Working Document proposed that the Wholesale Code be expanded and revised to:

- prohibit certain provisions that impede a BDU's ability to offer a pick-and-pay option on an affordable basis, such as unreasonable penetration-based rate

cards (PBRCs), requirements to distribute a service on the same terms as at a prior date and MFN provisions; and

- include provisions that would ensure access for non-vertically integrated services to the system (i.e. BDUs would have to facilitate and not impose unreasonable conditions on the ability of independent programming services to pursue multiplatform programming strategies).

72. The Working Document also proposed that all vertically integrated undertakings abide by the Wholesale Code as a regulatory requirement.

Positions of parties

73. Independent BDUs and programmers expressed concern that the current Wholesale Code was insufficient to address potential anti-competitive behaviour by vertically integrated entities. Specifically, smaller and independent BDUs argued that one of the biggest obstacles to providing Canadians with more choice and flexibility were certain terms imposed by programmers in affiliation agreements that serve to insulate programming services from any risk associated with increased subscriber choice (e.g. clauses preventing repackaging, imposing minimum penetration guarantees or demanding unreasonable rates). These BDUs asked that the Commission ensure that programmers “share the risk” of the move towards greater consumer choice and flexibility.

74. Conversely, independent programmers were concerned that eliminating access rules and genre protection and introducing pick-and-pay would fundamentally and disproportionately affect their business plans and ability to meet Canadian programming obligations. They argued that the Wholesale Code needed to be expanded to include specific packaging and marketing provisions designed to ensure the continued availability and discoverability of independent voices.

75. Independent BDUs and programmers therefore recommended that the Wholesale Code be directly imposed, as in the case of the conditions of licence currently imposed on vertically integrated entities. These parties also recommended that the Wholesale Code be expanded to ensure a fair playing field, better sharing of the risk of increased packaging flexibility and continued distribution and promotion of programming services on fair and reasonable terms. Among other things, several independent BDUs and programmers recommended that the Commission prohibit MFN clauses, arguing that they are unfair and anti-competitive.

76. Several smaller, independent BDUs and the Canadian Cable Systems Alliance (CCSA) also advocated against the use of volume-based rate cards (i.e. rate cards that offer discounts for BDUs that provide large numbers of subscribers). The CCSA noted that even when negotiating as a group, smaller BDUs typically fall at the bottom of such rate cards and therefore pay the highest rates, which are then passed on to their subscribers, unduly disadvantaging subscribers in smaller markets.

77. Certain vertically integrated entities such as Rogers and Shaw argued that the Wholesale Code need not be applied directly by regulation or condition of licence. They maintained that the current Wholesale Code was sufficient and still reasonably new and that consequently changes were unwarranted. However, they supported measures to prevent unreasonable or punitive rate cards to ensure that BDUs can respond to consumer demand for more choice. Shaw also proposed an expanded code to be applied as a guideline as in the case of the current Wholesale Code rather than by regulation.
78. With respect to the FMV factors set out in the Wholesale Code that help determine the commercial reasonableness of wholesale rates, TELUS proposed a new framework created by Nordicity. As part of its framework, Nordicity proposed that the test for determining the fair market value of programming services include a consideration of the public policy objectives of maximizing choice and preventing anti-competitive conduct and that it specifically include viewership as the best indicator of consumer choice. TELUS argued that this framework provides more structure and more emphasis on viewership, risk-sharing and the role of new platforms and non-linear content.
79. Finally, many independent BDUs supported the Nordicity framework and sought similar changes, such as the addition of viewership of the service as an explicit FMV factor. Independent programmers also proposed changes to the FMV factors to take into account historical and current commitments to Canadian or regional programming.

Commission's analysis and decisions

80. The Wholesale Code establishes a common set of principles upon which parties rely in their negotiations and which are applied in dispute resolution processes before the Commission. The Wholesale Code currently operates as a guideline for all Canadian services, including vertically integrated and independent entities, BDUs, licensed and exempt programmers and exempt digital media undertakings. In this context, the Wholesale Code applies indirectly as it is considered by the Commission on a case-by-case basis and in the context of a process regarding allegations of undue preference or any other dispute resolution process. However, as mentioned above, certain provisions of the Wholesale Code or versions of these provisions have been imposed on licensed undertakings through specific conditions of licence and are therefore directly enforceable. In this context, licensees are required to abide at all times by the requirements set out in those conditions of licence.
81. This approach has led to a regulatory framework at the wholesale level that is staggered in its application and difficult to navigate given that some obligations are found in the Wholesale Code, while others are specified in various conditions of licence. The Commission considers that making the Wholesale Code applicable to all licensed undertakings by regulation will provide all parties with the certainty and transparency required to conduct negotiations fairly and ultimately conclude them in the interest of providing subscribers with more choice and flexibility.

82. The Wholesale Code will continue to apply as a guideline for exempt BDUs, exempt programming undertakings and exempt digital media undertakings. The Wholesale Code shall serve as a basis for guiding commercial interactions between these and all other parties engaged in negotiating agreements in the Canadian market. To this end, the Commission expects that non-Canadian parties that have a presence in Canada conduct their negotiations and enter into agreements in a manner that is consistent with the intent and spirit of the Wholesale Code if they wish to continue to have their programming services available in Canada.
83. With respect to Wholesale Code's content, the Commission has also determined that it is appropriate to make a number of changes. In this regard, the Commission has stated in the past that both BDUs and programming undertakings have a role to play in the success of a programming service. However, the record of this proceeding demonstrates that the responsibility for the success of a programming service is rarely shared equally. Smaller undertakings, whether BDUs or programming services, are generally at a disadvantage when dealing with larger undertakings. This is further exacerbated where some parties are vertically integrated and operate both distribution and programming services.
84. Evidence provided by parties has illustrated that vertically integrated entities have insisted on provisions in affiliation agreements that preclude a BDU from being able to offer programming services on an individual basis or in small packages. As noted by the CCSA, its recent contract renewals with such entities have included restrictive packaging and pricing demands (e.g. requirements to maintain existing carriage and packaging of services under the new agreement, the imposition of minimum penetration requirements and "make-whole" revenue guarantees that often force packaging in large packages or on the basic service and guarantees that any loss of viewership-based advertising revenues will be made up by the BDU).
85. Given the new measures that the Commission is introducing to ensure that subscribers are free to choose, it becomes even more important to ensure that the affiliation agreements between programmers and distributors do not inhibit this choice. The Commission has adopted a series of measures to ensure that subscribers are free to choose how many and what discretionary channels they wish to receive beyond the entry-level service offering. At the same time, the record of this proceeding supports the view that where consumers are given more choice, penetration rates for certain programming services may diminish.
86. As a result, changes to the Wholesale Code are required to ensure that affiliation agreements cannot be used to insulate services from choice and flexibility within the retail market. Changes to the Wholesale Code are also required to ensure that all services, including independent services, are discoverable and able to make their programming available on fair terms, thus fostering greater diversity within the system and ultimately greater choice for Canadians.

87. In light of all of the above, the Commission will amend the Wholesale Code to:

- prohibit or preclude provisions in affiliation agreements which limit the ability of BDUs to offer their subscribers increased choice and flexibility, including:
 - terms that prevent the distribution of programming services on a pick-and-pay or build-your-own-package basis,
 - terms that impose packaging requirements on BDUs or prevent packaging changes, and
 - minimum penetration or revenue guarantees;
- ensure the continued availability and discoverability on multiple platforms of a diverse range of programming services, including independent programming services, by among other things:
 - requiring BDUs to offer independent services in at least one pre-assembled package, where available, in addition to offering them on a standalone basis,
 - requiring vertically integrated BDUs to ensure that independent programming services are given packaging and marketing support that is comparable to that given to their own services, and
 - ensuring that programming services are able to more fully exploit their programming rights on all platforms and that BDUs are able to develop and implement innovative multiplatform strategies;
- include new provisions to help ensure the fair negotiation of terms and conditions for the distribution of programming services, including provisions:
 - prohibiting MFN clauses,
 - precluding unreasonable volume-based rate cards (i.e. volume-based rate cards that cannot be justified on a commercial basis or that are anti-competitive),
 - prohibiting unreasonable PBRCs (i.e. PBRCs that cannot be justified on a commercial basis or that are anti-competitive, such as those that are more than make-whole for subscription revenue losses), and
 - making specific reference to viewership as a factor in assessing the fair market value of a programming service where it is a key consideration.

Conclusion

88. The Commission notes that parties have made a number of proposals regarding the specific provisions that should be included in the Wholesale Code. In this regard, while the Commission has generally identified the provisions that will be included in the Wholesale Code, it has also published today Broadcasting Notice of Consultation 2015-97, in which it seeks comment on the wording of the Wholesale Code with a view to implementing it by no later than September 2015.
89. The revised Wholesale Code will regulate the wholesale relationship between all distributors and programmers and will be enforceable on all licensed undertakings by way of regulation. In the interim, the Commission notes that any dispute resolution processes before it will take into account the above policy determinations regarding the Wholesale Code.

A more accessible and equitable framework to resolve disputes among programmers and distributors – Creating the winning conditions for increased choice and programming diversity for Canadians

90. In recent years, a number of factors have made the negotiation of affiliation agreements more challenging. These include greater consolidation and vertical integration, increased competition among BDUs and programmers and the need to negotiate multiplatform deals. As a result, parties frequently turn to the Commission for assistance, both informally and formally. The Commission's processes to resolve such disputes, including staff-assisted mediation and final offer arbitration, are set out in Broadcasting and Telecom Information Bulletin 2013-637.
91. In the proceeding relating to Bell's acquisition of Astral, the Commission heard that existing safeguards and dispute resolution mechanisms would not be sufficient to prevent Bell from abusing its market power. As one measure to address this concern, the Commission determined that a pre-expiry dispute resolution mechanism could reduce the risks for operators of smaller broadcasting undertakings by shortening delays in negotiations. It therefore imposed a requirement that Bell submit to dispute resolution 120 days before the expiry date of an affiliation agreement. The Commission imposed the same requirement on Corus and Rogers (as a programmer).
92. The Working Document proposed that a similar obligation apply to any vertically integrated entity that has not renewed an affiliation agreement with a non-vertically integrated service.

Positions of parties

93. Some parties raised concerns about the Commission's existing dispute resolution mechanisms, stating that they were too slow, too costly and too risky. Smaller BDUs and independent programmers argued that dispute resolution processes are disproportionately more expensive and time-consuming for small organizations as compared to vertically integrated companies. Many also raised concerns about the risks of dispute resolution since the onus currently rests on them to file a complaint

against parties on whom they rely for programming (in the case of BDUs) and distribution (in the case of programming services). They noted the fear of negatively impacting long-term relationships or even of retaliation. Finally, some argued that the disparity of bargaining power renders dispute resolution ineffective for independent players, particularly for those programmers without carriage rights, since BDUs decide whether or not to carry them. For the most part, these parties argued in favour of strengthening the Wholesale Code, making it directly enforceable and applying it to U.S. services.

94. TELUS proposed an “advanced rulings” framework to provide clarification on how the Commission would interpret and apply relevant provisions. Some parties, such as the CCSA, the Canadian Network Operators Consortium (CNOc), Eastlink, SaskTel and TekSavvy, recommended the establishment of a standard or reference affiliation agreement, including industry-standard wholesale rates (CCSA) and other terms and conditions that would serve as default conditions under which a programming service could be carried absent an agreement. CNOc argued that negotiations should not impede the launch of new BDUs.
95. Bell proposed that after a phase-in period to revise existing affiliation agreements in accordance with the new Wholesale Code, dispute resolution mechanisms and the standstill rule no longer apply to large BDUs (more than 500,000 subscribers) and vertically integrated services without carriage rights. Undue preference rules, however, would still apply.
96. Bell’s proposal was opposed by Cogeco, Corus, Eastlink, Quebecor and Rogers on the grounds that it was self-serving and discriminatory and that final offer arbitration, while imperfect, was better than no recourse at all.

Commission’s analysis and decisions

97. As noted later in this policy, the Commission will be phasing out access privileges for former Category A discretionary services in a staged manner, beginning with the large English- and French-language private broadcasting groups in 2017 and followed by various independent services in 2018. This means that there will be an increased reliance on market forces for the distribution and packaging of such services. Some services may not survive in an environment marked by greater subscriber choice, while others will adapt and thrive. However, the Commission is prepared to intervene where it finds that parties are acting in an anti-competitive manner. Such targeted intervention may be necessary to ensure a healthy, dynamic retail market that maximizes consumer choice and flexibility and provides Canadians with access to a diverse range of programming.
98. To help alleviate the fear of retaliation expressed by smaller BDUs and independent programming services in this proceeding and past proceedings and to facilitate its intervention where necessary, the Commission considers it appropriate to add a provision to the Wholesale Code requiring all licensees to submit to dispute resolution 120 days before the expiry of an affiliation agreement. As a result, the Commission

will be able to intervene without any need for a small undertaking to file a complaint, risking its relationship with a larger business partner. Similarly, the obligation currently applied to Bell and Corus to file all affiliation agreements with the Commission will be added to the Wholesale Code to provide the Commission with improved data that will ultimately inform it for the purposes of dispute resolution.

99. More generally, the Commission notes that the reverse onus provision will continue to apply in undue preference or disadvantage complaints. Under this provision, once a complainant has demonstrated the existence of a preference or disadvantage, the burden shifts to the respondent to demonstrate that the preference or disadvantage is not undue. This provision was put in place in recognition of the fact that most allegations regarding undue preference have been filed by programming undertakings against BDUs and that, in most cases, BDUs are in sole possession of key information without which complainants cannot fully argue their cases.
100. With respect to the argument made by certain independent programmers that dispute resolution is ineffective for those services without carriage rights, the Commission notes that it has the power to issue a remedial order under section 9(1)(h) of the Act requiring the distribution of a programming service under set terms (e.g. packaging, penetration or wholesale rates) for a specific period of time. Accordingly, in the future, following a finding of undue preference or a determination on a final offer arbitration or expedited hearing, the Commission may, if it deems such a measure necessary, issue a 9(1)(h) remedial order requiring the distribution of a service under specific terms. The Commission emphasizes that any such order would apply only to the parties to the dispute as a temporary remedial measure to ensure that the Commission's determinations following the dispute resolution process are effective.
101. Regarding the proposal by TELUS for advance rulings, the Commission notes that nothing prevents parties from seeking clarification on the interpretation and application of the Commission's policies. Commission staff may issue a non-binding staff opinion, except if the matter raised would effectively establish a new policy or change an existing policy or if it involves a larger number of issues or interested parties. In such cases, existing Commission procedures continue to be available to all parties.
102. Finally, the Commission has rejected a number of proposals for changes to its approach, including:
 - *Bell's proposal that dispute resolution and the standstill rule not apply to large BDUs and vertically integrated services without carriage rights* – Given that the underlying objective of the standstill rule is to ensure that consumers are not deprived of service during a dispute and given that dispute resolution has been a helpful recourse for parties when negotiations break down, the Commission is of the view that adopting this proposal would be inappropriate. However, the Commission notes that the standstill rule should not be invoked lightly, nor be relied upon to grant an effective access right. It is intended to ensure that Canadians do not lose access to their favourite programming services while BDUs

and programmers dispute the terms and conditions of carriage. It is not intended to protect or defend the particular interests of either party. The Commission will intervene if it suspects that parties are invoking the standstill rule in such a manner as to thwart good faith negotiations or to insulate a given service from the impacts of greater consumer choice.

- *the creation of a standard or reference affiliation agreement* – The Commission considers that implementing this proposal would represent unwarranted intrusion into commercial matters. The revised Wholesale Code should address most of the concerns raised by those that proposed this measure. In particular, the application of the Wholesale Code to all licensed undertakings and the removal of access privileges should help ensure that the negotiation of affiliation agreements does not unduly delay the entry of new BDUs into the market.
- *the establishment of industry-standard wholesale rates* – The Commission has moved away from wholesale rate regulation, except where mandating carriage on basic. This is due in part to the complexity of establishing a single regulated rate, but is also a reflection of the reality that retail rates have been unregulated. In addition, wholesale rates can be reflective of differentiated offers. Accordingly, the Commission is of the view that rates are best left to negotiation and to dispute resolution as a last resort.

103. The Commission is making no other changes to its existing dispute resolution mechanisms as set out in Broadcasting and Telecom Information Bulletin 2013-637. To assist parties to better understand and participate more effectively in the Commission's dispute resolution processes, the Commission will be posting shortly an online guide to dispute resolution.

Phase-out of access privileges and introduction of a ratio between related and independent discretionary programming services – Creating a fair playing field so that discretionary services can find new, innovative ways to serve Canadians

104. The Working Document proposed the following:

- Category A pay and specialty services would no longer have access privileges; and
- for every two related services⁹ that a vertically integrated BDU distributes, it would have to distribute at least one non-vertically integrated service in the same language (2:1 ratio).

⁹ The *Broadcasting Distribution Regulations* define a “related programming undertaking” as a programming undertaking of which a licensee or an affiliate of that licensee, or both, controls more than 10%.

Positions of parties

Access privileges

105. Most parties were in favour of the Working Document proposal as it relates to the English-language market. The IBG, Pelmorex and Stornoway, while not strictly opposed, argued that access privileges for English-language independent Category A services should be maintained at least until their next licence renewal to allow their obligations to be adjusted to the new reality.
106. However, Allarco, the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), Blue Ant and Odyssey Television Network (Odyssey) argued against the removal of access privileges for English-language Category A services, while Shaw was of the view that the elimination of access privileges should be carried out on a case-by-case basis so that services could argue for continued protections if they were necessary to allow them to make important contributions to the objectives of the Act. Shaw was also of the view that independent Category A services should automatically retain their must-carry status.
107. In the French-language market, most interveners advocated maintaining access privileges for French-language Category A services. These interveners, including the Alliance des producteurs francophones du Canada, the AQPM, Corus, the ministère de la Culture et des Communications du Québec, Pelmorex, the Union des artistes/Société des auteurs de radio, télévision et cinéma/Association des réalisateurs et réalisatrices du Québec and V Interactions, raised the specific circumstances of the French-language market, where there are fewer services and where Videotron dominates the distribution sector with some 55% of subscribers. In this respect, Bell argued that access privileges should be maintained until no distributor garnered more than 40% of subscribers in the Quebec market. The CBC also asked that access privileges be maintained and proposed that they be reviewed in three years, while the AQPM proposed that they be maintained and reviewed in five years.
108. The Union des consommateurs recommended that access privileges be removed for services owned by vertically integrated companies but maintained for independent services, while Quebecor and the Fédération nationale des communications supported the Working Document proposal. According to Quebecor, the services at issue have reached maturity and are characterized by a range of recognized and popular brands and thus consumer demand would be sufficient to guarantee their distribution.

Ratio between related and independent programming services

109. Bell and Rogers supported the Working Document's proposal for a 2:1 ratio between related and independent services as a way to mitigate the impact of the other proposed changes on independent discretionary services and thus ensure continued programming diversity. Quebecor, however, opposed any protective measures for independent broadcasters.

110. For their part, some independent broadcasters, such as Anthem Media Group, Blue Ant, the CBC and the IBG, were in favour of the 2:1 ratio on the condition that it be calculated based on the total number of services related to all vertically integrated entities rather than just those affiliated with a given BDU (i.e. for every two services owned by **any** vertically integrated BDU, one independent service must be carried). They stressed that the Working Document proposal would represent too great a reduction in the protection of independent services, especially in light of the other proposed changes to the distribution model.
111. V Interactions, however, argued that a 1:1 ratio would protect independent services better than the proposed 2:1 ratio, even if calculated on the basis proposed by the IBG and others, while Stornoway proposed to reverse the ratio by making it a 1:2 ratio (for every related service, the BDU must distribute two independent services).
112. Finally, ACTRA and Odyssey opposed the elimination of the current access rules and their replacement by a ratio, while Allarco was of the view that its pay service should not be subject to the ratio but rather should retain its current access protection.

Commission's analysis and decisions

113. In Broadcasting Regulatory Policy 2015-86, the Commission stated that it was eliminating genre protection for all English- and French-language discretionary services and that it would address access rules for such services in the present policy.
114. Nearly 80% of all English-language Category A services are owned by one of the three vertically integrated entities (Bell, Rogers and Shaw/Corus) operating in the English-language market. Similarly, in the French-language market, two thirds of French-language discretionary services are owned by vertically integrated entities (Quebecor, Bell and Shaw/Corus). These entities also account for the majority of the most viewed French-language services.
115. Given the influence of the above-noted entities, the popularity of many of the services, their increased flexibility to adapt to audience demand owing to the elimination of genre protection and the additional protections that will be offered by the strengthened Wholesale Code, the Commission has little doubt as to their ability to continue to contribute to the system and to the creation and presentation of Canadian programming even in the absence of access privileges or other distribution requirements.
116. However, with respect to independently owned discretionary services, the Commission considers that some measure of support is needed. Consistent with Broadcasting Regulatory Policy 2015-86, in which it harmonized exhibition and expenditures requirements for discretionary services, the Commission is of the view that a harmonized approach for independent services would be appropriate. Specifically, while the current access rules privilege Category A services, a ratio between related and independent programming services would create a fairer playing field for all independent services.

117. The Commission has taken note of parties' comments on the insufficient protection offered by the 2:1 ratio proposed in the Working Document. In the Commission's view, a 1:1 ratio between independent and related services (i.e. for each related discretionary service that a BDU distributes, it will be required to distribute at least one independent/non-vertically integrated discretionary service) would strike an appropriate balance between ensuring continued programming diversity and providing BDUs with flexibility. For example, as a result of this new rule, a BDU that distributes 12 related English-language discretionary services would need to offer 12 English-language independent (i.e. not owned by any other vertically integrated entity) discretionary services to its subscribers.
118. The Commission is of the view that independent services are an important source of diversity in the system as they often offer niche program targeted at narrower audiences. As such, this new rule would ensure that the diversity of voices is preserved through the protection of access for independent services as a group, although no one service would be guaranteed access.
119. Finally, as noted in Broadcasting Decision 2015-86, the Commission is of the view that news services play a vital role in the broadcasting system, which is why it decided that certain regulatory supports must remain in place to ensure that Canadians have access to high-quality news and information and are exposed to a diversity of views on matters of public concern. As such, Broadcasting Order 2013-735, which describes the special distribution regime for national news services, will remain in place.

Conclusion

120. In light of all of the above, the Commission will phase out access privileges for Category A discretionary services—including third-language services, as discussed below—in a staged manner as their licences are renewed. The access privileges of Category A discretionary services belonging to the large English- and French-language private broadcasting groups will be removed as of the beginning of their next licence period on 1 September 2017, followed by the various independent Category A discretionary services at the beginning of their next licence period. The licences for these independent services are set to be renewed starting in September 2018.
121. Further, beginning **1 September 2018**, when some independent services' access privileges will be removed, for every service owned by or related to itself that a vertically integrated BDU distributes, it will be required to offer an independent programming service in the same language, if available. This 1:1 ratio will only apply to discretionary television services whose access is not already guaranteed. Therefore, the Commission will exclude from its calculation services benefitting from mandatory distribution pursuant to section 9(1)(h) of the Act, including national news services. Conventional television stations, educational services, adult services and pay audio services, as well as exempt programming undertakings other than those operating pursuant to Broadcasting Order 2015-88, will also be excluded from this calculation.

Other measures to foster greater choice, programming diversity and reflection

Ensuring access to television channels in their official language for Canadians living in official language minority communities

122. The Working Document proposed to maintain the requirement that all licensed terrestrial BDUs distribute one licensed discretionary service in the language of the OLMC, where available, for every ten services in the language of the majority that they distribute, as well as to extend this rule to DTH providers.

Positions of parties

123. OLMC representatives stated that they were generally satisfied with the Commission's regulatory approach. This position was shared by BDUs.

124. Some educational television undertakings, such as Knowledge Network, Télé-Québec and TVO/TFO, asked that the Commission make their signals available across Canada. This proposal was supported by other interveners such as the FCFA.

Commission's analysis and decisions

125. The Canadian broadcasting policy set out in section 3(1) of the Act includes the following provisions:

- English- and French-language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements – section 3(1)(c);
- the Canadian broadcasting system should, through its programming and the employment opportunities arising out of its operations, serve the needs and interests and reflect the circumstances and aspirations of Canadian men, women and children, including equal privileges, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society – section 3(1)(d)(iii);
- each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming – section 3(1)(e); and
- a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available – section 3(1)(k).

126. Further, as a federal institution, the Commission has the duty under section 41 of the *Official Languages Act* to ensure that positive measures are taken to enhance the vitality of the English and French linguistic minority communities in Canada, support and assist their development and foster the full recognition and use of both English and French in Canadian society.

127. In order to achieve these objectives, the Commission has put in place regulatory measures that enhance OLMCs' access to and reflection in the Canadian television system. In terms of reflection, the Commission has imposed conditions of licence on many broadcasters to ensure that OLMCs see themselves reflected in the television they watch. The Commission has also issued mandatory distribution orders under section 9(1)(h) of the Act with respect to services that make an exceptional contribution in that regard (e.g. UNIS, RDI, CBC News Network, ARTV or TVA).¹⁰ In terms of access, the Commission has put in place rules for terrestrial and DTH providers to ensure that OLMCs are able to receive an equitable number of services in their language.
128. The public record of this proceeding suggests that the current regulatory measures meet OLMC needs across Canada. The record also shows that these measures are not cost-prohibitive and are generally supported by BDUs. Consequently, the Commission considers it appropriate to generally maintain the current regulatory requirements, while adapting them to reflect changes to the framework resulting from this process and to provide more flexibility to BDUs with respect to the television services they offer. Specifically, the Commission will put in place the following measures:
- Under the current Regulations, licensed terrestrial BDUs are required to distribute one Category A, B or C service in the language of the OLMC for every ten such services distributed in the language of the majority (1:10 rule). Given that the Commission has already stated its intention to consolidate Categories A, B and C into a single category of discretionary services (Broadcasting Regulatory Policy 2015-86), it also intends to modify the 1:10 rule so that it applies to all discretionary services, regardless of their current designation. As a result, terrestrial BDUs will be able continue to choose among discretionary services in the language of the OLMC those services that best meet the needs of the citizens who subscribe to their services.
 - Currently, DTH distributors must distribute all Category A services. This requirement will be replaced by the 1:10 rule in English-language markets (i.e. a requirement to distribute one French-language discretionary service, where available, for every ten English-language programming services distributed). This change will enable DTH distributors to choose the French-language discretionary services that best meet the needs of their customers, while ensuring that there are a reasonable number of French-language services available to all Canadians.
129. The above-noted changes will not have a significant effect on the overall number of discretionary services in the language of the minority being distributed by BDUs, but will allow various BDUs to differentiate themselves in the market.

¹⁰ With the exception of UNIS, the mandatory distribution orders issued for these services only apply in markets where their target audience is in a minority situation.

130. Moreover, as noted earlier in this policy, the Commission will also allow licensed terrestrial and DTH providers to apply for a condition of licence authorizing them to distribute as part of the entry-level service offering one out-of-province educational service in each official language in provinces or territories where there is no designated educational service.¹¹ This measure would ensure greater distribution of educational television services across the country without constraining BDUs' flexibility. It would also have a positive impact on OLMCs in both language markets as Canadians would have access to more quality programming in the language of their choice, including programming intended for children and youth.
131. Finally, the Commission notes that terrestrial BDUs have in the past offered a number of French-language services together in a package in French-language markets, as required under the current regulations. In order to further ensure that citizens in OLMCs across Canada see themselves reflected in their programming, the Commission strongly encourages BDUs to offer French-language packages, regardless of the market where they operate.

Making all types of ethnic and third-language programming more accessible and affordable for Canadians

132. The Working Document proposed the following:

- access and “buy-through” requirements for ethnic and third-language Category A services would be eliminated;
- BDUs would be required to offer one Canadian third-language service (if one exists) for each non-Canadian third-language service offered; and
- the licensing of ethnic and third-language services would be streamlined by creating of one type of licence for both Category A and B ethnic and third-language services and by harmonizing their requirements, including Canadian programming expenditure requirements.

What Canadians said

133. A number of Canadians who participated in Phases 1 and 2 expressed a desire to purchase ethnic and third-language services on a standalone basis. They stated that many of the ethnic and third-language services that are available are not accessible unless they purchase often expensive packages of services through a BDU. They also stressed that third-language communities were not well served as a whole and that with a continuing influx of new immigrants, there is a need and demand for services in other languages. One participant noted that an increase in choice and accessibility of

¹¹ Currently, distribution of educational services on the basic service is possible only for distributors operating in a province that has already designated a specific educational service (section 17(1)(b) of the *Broadcasting Distribution Regulations*).

Canadian third-language services would increase the probability that Canadians would subscribe to legal, domestic providers.

Positions of parties

134. Ethnic Category A service broadcasters Asian Television Network (ATN), Corus, Fairchild and Odyssey opposed the Commission's proposal to eliminate the buy-through rule. These parties also opposed the removal of access privileges for ethnic Category A services.
135. These parties argued that if these proposals were adopted, Canadian ethnic services could lose their distribution, leading to a reduction in contributions to the system and the closure of several of the services. More particularly, Fairchild expressed concerns regarding future negotiations with BDUs, arguing that they would have every incentive to replace its services with an exempt service with lesser obligations if the Commission proceeded with its proposals. Similarly, Odyssey argued that in a pick-and-pay environment, subscribers will be able to bypass all Canadian services for foreign services. Odyssey noted that these services have a pricing advantage because the costs of program production have already been covered in their home market and because they do not have Canadian programming and expenditure requirements and have greater resources.
136. Some licensees also made specific proposals:
 - ATN proposed that the Commission retain the requirement to distribute ethnic Category A services in areas where 10% or more of the population is of one or a combination of the ethnic origins to which the service is intended to appeal (section 18(2)(c) of the Regulations);
 - Corus and Festival Portuguese Television proposed that a subscriber be made to receive a preponderance of Canadian third-language services in the same language as the non-Canadian services received;
 - Fairchild proposed that the Commission redefine which third-language services have access to the buy-through requirement and mandatory carriage based on a percentage of Canadian content hours to be provided by condition of licence; and
 - Ethnic Channels Group recommended that if the Commission maintained the buy-through rule, it establish a maximum wholesale rate (about \$1.50/month) for ethnic Category A services as it does in the case of 9(1)(h) services.
137. Rogers and Shaw, on the other hand, supported the elimination of the buy-through rule. Rogers also supported the elimination of Category A protections for third-language services.

Commission's analysis and decisions

138. The buy-through rule stipulates that except as otherwise provided under a condition of its licence, a licensed BDU that distributes a general interest non-Canadian third-language service or a general interest third-language Category B service to subscribers shall also distribute an ethnic Category A service to them, if one is available in the same principal language. This requirement increases the cost to Canadians for third-language services, which already tend to be expensive. For example, currently a BDU that wishes to distribute RAI, the service of the Italian public broadcaster, would have to package this service along with the Category A Italian-language service Telelatino. As a result, Canadians are not able to subscribe to RAI on an individual basis or in any package without Telelatino and therefore must pay for both services in order to receive RAI.
139. The Commission notes that eliminating the buy-through rule and access privileges for ethnic and third-language Category A services would give Canadians more flexibility and choice by allowing them to subscribe only to the services they want. It would also provide BDUs with greater ability to respond to consumer needs and demands in light of the new pick-and-pay and other distribution rules and would make such services generally more accessible and affordable for Canadians.
140. The elimination of access privileges for ethnic and third-language Category A services would also be consistent with the elimination of such privileges for all other Category A specialty services, thus streamlining the Commission's licensing process (i.e. all discretionary services would be licensed under one broad category of licence) and providing greater incentive for innovation, including the opportunity for new entrants to serve growing ethnic and third-language communities.
141. The 1:1 rule proposed in the Working Document—i.e. for each non-Canadian third-language service a BDU offers, it would be required to offer one Canadian third-language service in the same language, where available—would ensure that Canadians have greater access to Canadian ethnic and third-language programming, while also having access to non-Canadian third-language programming. Unlike the buy-through rule, this 1:1 rule would also not limit the ability of Canadians to make their own choices as to which services they wish to receive and pay and would ensure greater access to the system for current Category B and exempt third-language services.
142. In addition, the Commission notes that under the packaging requirements set out in section 27(3) of the Regulations, a BDU licensee that distributes a non-Canadian third-language service must distribute it to its subscribers in a package with one or more Canadian third-language services in the same principal language. To provide some measure of support to Canadian ethnic and third-language services, the Commission considers it appropriate to provide a similar packaging requirement under the new distribution rules. Specifically, BDUs that offer pre-assembled packages of third-language services will be required to ensure that non-Canadian third-language services are offered in a package with Canadian third-language services in the same language, where available, in a ratio of one or more Canadian services to one non-Canadian

service. This requirement will not require Canadians to buy-through the Canadian service in all cases, but will apply only where BDUs have elected to place non-Canadian ethnic or third-language services in a pre-assembled package. Although this measure will not guarantee subscriptions to Canadian third-language services, it will provide some additional support for these services, thus mitigating any potentially negative impact that pick-and-pay and small package options may have on Canadian third-language services.

143. Finally, with the implementation of a streamlined licensing process and the elimination of access privileges for Category A services, the Commission considers that the requirement set out in section 18(2)(c) of the Regulations regarding the distribution of ethnic Category A services in certain communities is no longer relevant. The Commission is of the view that BDUs are likely to choose to continue to offer the services in question to meet the needs and demands of their subscribers from ethnic and third-language communities even without a specific requirement to this effect.

Conclusion

144. In light of the above, the Commission will implement the following changes:

- access and buy-through requirements for ethnic and third-language Category A services will be eliminated;
- for each non-Canadian third-language service a BDU offers, it will be required to offer one Canadian ethnic or third-language service in the same language, where available; and
- BDUs that offer pre-assembled packages of such services will be required to ensure that each non-Canadian third-language service is offered in a 1:1 ratio with a Canadian ethnic or third-language service operating in the same language, where available.

Promoting the unbundling of multiplexed services so that Canadians can choose only the channels they want

145. A multiplexed service is one in which programming is spread across multiple “channels” that are all offered together. The operator of the multiplexed service may choose to organize the programming on these channels in various ways, but the most common strategies are to program the channels thematically (drama, comedy, action), as in the case of the movie-based services The Movie Network and Movie Central, or regionally, as has been the case with some sports services (Rogers Sportsnet, TSN).
146. Currently, pay services and mainstream sports services are generally permitted to multiplex their services as they see fit with no limits placed on the number of multiplexes these services can offer, provided that each multiplex or channel meets all the requirements of the licence (e.g. exhibition requirements, nature of service, program categories). Moreover, Category A pay services are also currently subject to a

standard condition of licence that requires that multiplexed channels all be offered together in one package (see Broadcasting Regulatory Policy 2011-443). This rule prevents HBO Canada, for example, from being marketed and sold as an individual service. Mainstream sports services are not subject to this rule.

What Canadians said

147. Some Canadians who participated in the online consultation complained about the bundling and cost of services such as HBO, TMN, Super Écran, Super Channel, multicultural channels and sports packages. While acknowledging that bundling could result in discounts, these participants questioned why a customer cannot choose only one of the channels in a bundle instead of having to take all of them.

Positions of parties

148. Bell was of the view that it was not necessary or practical to extend the pick-and-pay model to every multiplex of an existing service and that doing so would not result in any consumer savings. Bell also expressed the view that participants in the proceeding generally recognized the benefits of multiplexes and acknowledged that splitting them apart would create confusion and needlessly increase costs.
149. MTS, however, identified multiplexing as a quirk in the system that would prevent every channel from being offered on a pick-and-pay basis, while TELUS noted that it had received many complaints from consumers about not being able to purchase HBO without also purchasing the associated movie services (TMN in Eastern Canada and Movie Central in Western Canada). TELUS noted that from a consumer's perspective, the multiplexed service is not just one service, but rather a suite of several distinct channels.

Commission's analysis and decisions

150. The rule that multiplexed channels of pay services must all be offered together in one package was put in place primarily to prevent individual multiplex channels from competing directly with genre-protected Category A services. Given that the Commission has eliminated genre protection in Broadcasting Regulatory Policy 2015-86, the underlying rationale for requiring that pay multiplexes be offered as a package no longer applies.
151. Accordingly, in order to remove a regulatory barrier to providing more flexibility to subscribers, the Commission is of the view that the above-noted restriction should be lifted, thus allowing pay services to offer their feeds individually to subscribers. The Commission will therefore remove the current requirement to offer multiplexed channels together in a package from the standard conditions of licence for these services when it updates these conditions following its determinations in this process.
152. With respect to new multiplexes, the Commission is concerned that further multiplexing of services may place limits on the ability of Canadians to pick and pay for the individual services they want and of BDUs to offer such pick-and-pay options

to Canadians. Accordingly, the Commission finds it appropriate to restrict future multiplexes by:

- modifying the standard conditions of licence applicable to pay services and mainstream sports services to prohibit them from adding further multiplexed channels, unless authorized to do so by condition of licence; and
- requiring other services that wish to offer multiplex channels to apply for explicit authorization to add new multiplexes. In applying for such an authorization, the service would need to demonstrate why it would not be more appropriate to licence a new service (or register an exempt service) rather than authorize a multiplex.

Fostering more competition among broadcasting distribution undertakings and providing greater choice of television providers for Canadians

153. The Working Document proposed that the exemption order for terrestrial BDUs with fewer than 20,000 subscribers (see Broadcasting Order 2014-445) be broadened to allow such BDUs to enter and compete in markets with licensed BDUs.

What Canadians said

154. During the online consultation, the Commission received a number of comments from Canadians that stressed the need for greater competition among BDUs. Participants complained about a lack of “healthy competition” when it comes to service providers, resulting in less overall choice and affordability.

Positions of parties

155. The CNOC noted that the Working Document proposal to broaden Broadcasting Order 2014-445 to allow exempt BDUs to compete in markets served by licensed BDUs would allow for greater competition and consumer choice. The CNOC and TekSavvy also raised concerns about the current application process for licensing as a barrier to entry, stating that the process was lengthy, costly and overly burdensome.

156. For its part, the CCSA noted that incumbent BDUs already have advantages over smaller competitive licensed BDUs, such as access to massive corporate marketing and sales resources, access to public capital for investment in networks and facilities and substantially lower wholesale programming and transport fees negotiated at the corporate level.

157. Access and the CCSA also proposed amending the exemption order to include not-for-profit community-owned cooperatives, regardless of their size or where they operate, in order to help ensure that they can continue to provide Canadians with greater choice of television providers.

158. Finally, TELUS proposed a streamlining measure with respect to adding terrestrial BDUs to a regional licence, which is currently done as a Part 1 process. TELUS

proposed that the Commission could instead simply request notification, thus addressing concerns that the application process is lengthy and burdensome on the Commission and the BDU.

Commission's analysis and decisions

159. In Broadcasting and Telecom Regulatory Policy 2014-576, the Commission determined that 30-day cancellation policies for local voice services, Internet services and BDUs would be prohibited. This prohibition makes it easier for consumers to switch service providers, especially for subscribers to bundles of telecommunications and broadcasting distribution services. It also contributes to a more dynamic marketplace and removes unnecessary barriers to consumer choice, such as double-billing when subscribers cancel their service and move to a different service provider.
160. Similarly, the Commission considers that amending the exemption order set out in Broadcasting Order 2014-445 to facilitate entry into markets already served by a licensed BDU may encourage more competition, resulting in additional options for consumers. The Commission also notes that this proposal would be consistent with section 5(2)(g) of the Act in that it would eliminate the administrative burden placed on new entrant BDUs by shortening the period to obtain the Commission's authorization to launch such services by approximately 8 to 10 months.
161. Accordingly, the Commission will initiate a follow-up process to broaden the exemption order for terrestrial BDUs to allow BDUs with fewer than 20,000 subscribers to enter and compete in markets with licensed BDUs. This follow-up process will also seek input from parties as to which regulatory requirements should apply to these BDUs and in what manner. Competitive undertakings that qualify for exemption will be required to notify the Commission by letter no later than three months prior to commencing operations in the new service area. The letter, which will be posted on the Commission's website upon launch of the service, will contain relevant information regarding the operation of the undertaking, including distribution grids.
162. With respect to the proposal by the CCSA and Access that not-for-profit cooperatives also be exempt from licensing, regardless of their number of subscribers, the Commission notes that Access is the only BDU that would benefit from this amendment to the order. The Commission also notes that Access reported well over 20,000 subscribers in the licensed area of Regina. The Commission considers that Access did not provide an adequate rationale as to why its not-for-profit status would justify treating it differently from other licensed BDUs serving more than 20,000 subscribers. Accordingly, it does not consider it appropriate to modify the exemption order to include not-for-profit cooperatives.
163. Further, the Commission does not expect to receive a significant number of applications for individual or regional broadcasting licences to operate new terrestrial BDUs following the expansion of the exemption order, other than in exceptional cases.

Therefore, the Commission does not consider it necessary to adopt a streamlined process to add a terrestrial BDU to a regional licence at this time. The Commission may reassess the value of this measure at a later date.

Secretary General

Related documents

- *Call for comments on a wholesale Code*, Broadcasting Notice of Consultation CRTC 2015-97, 19 March 2015
- *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*, Broadcasting Order CRTC 2015-88, 12 March 2015
- *Measures to address issues related to simultaneous substitution*, Broadcasting Regulatory Policy 2015-25, 29 January 2015
- *Over-the-air transmission of television signals and local programming*, Broadcasting Regulatory Policy 2015-24, 29 January 2015
- *Prohibition of 30-day cancellation policies*, Broadcasting and Telecom Regulatory Policy CRTC 2014-576, 6 November 2014
- *Let's Talk TV – Working document for discussion*, Broadcasting Notice of Consultation CRTC 2014-190-3, 21 August 2014
- *Let's Talk TV*, Broadcasting Notice of Consultation CRTC 2014-190, 24 April 2014
- *Maximizing the ability of Canadian consumers to subscribe to discretionary services on a service by service basis*, Response to Order in Council P.C 2013-1167, 24 April 2014
- *Distribution of Canadian Category C national news specialty services*, Broadcasting Order CRTC 2013-735, 19 December 2013
- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013
- *Let's Talk TV: A conversation with Canadians about the future of television*, Broadcasting Notice of Invitation CRTC 2013-563, 24 October 2013
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, as corrected by Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011
- *Standard conditions of licence, expectations and encouragements for specialty and pay television Category A services*, Broadcasting Regulatory Policy CRTC 2011-443, 27 July 2011

A World of Choice

