BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE REVIEW

APPENDIX 13

TO

SUBMISSION OF CANADIAN NETWORK OPERATORS CONSORTIUM INC. TO THE BROADCASTING AND TELECOMMUNICATIONS LEGISLATIVE REVIEW PANEL

11 JANUARY 2019

Summary of CNOC Answers to Questions Posed by the Panel

Telecommunications Act and Radiocommunication Act

1. Universal Access and Deployment

1.1 Are the right legislative tools in place to further the objective of affordable high-quality access for all Canadians, including those in rural, remote and Indigenous communities?

- Yes, but we recommend better coordination of such funding among governments and agencies.

- See proposed subsection 46.5(4) of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.9 of the main submission.

1.2 Given the importance of passive infrastructure for network deployment and the expected growth of 5G wireless, are the right provisions in place for governance of these assets?

- In order to address this issue, we have recommended enhancements to the regulation of passive infrastructure, such as public and private property, support structures, building risers, telecommunications equipment rooms and inside wire.

- See proposed amended sections 43 and 44 and new proposed section 43.1, as well as relevant definitions in proposed subsection 2(1) of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.5 of the main submission.

- Note also, that except for when it comes to Canadian ownership and control rules, which should remain as is, we are proposing that all of the other obligations presently imposed on Canadian carriers should apply to "telecommunications service providers, which we defines as "a person who provides telecommunications services, including by exempt transmission apparatus".

- See proposed subsection 2(1) of *Telecommunications Act* in Appendix 8 and the related narrative in section 10.1 of the main submission.

- Since the Commission's constitutional authority to order access to provincially-regulated infrastructure, such as utility poles, may be unclear, we are also recommending that a reference be directed as soon as possible to the Supreme Court of Canada on that issue.

2. Competition, Innovation, and Affordability

2.1 Are legislative changes warranted to better promote competition, innovation, and affordability?

- Such changes are required. For example, the current framework allows Incumbents to thwart competition by misusing the regulatory process in a manner that gives them head-starts measured in many years, allows them to charge inflated rates for wholesale services for years, and does not constraint their ability provide an inferior quality of service or incomplete technical or commercial information with respect to mandated wholesale services, relative to what they provide to their own retail operations. Incumbents are also

able to use information obtained from wholesale customers to compete with them on a retail level.

- In order to address these efficiencies, we are proposing a robust legislative regime for the mandated wholesale services that incorporate essential facilities, and is designed specifically to address the problems set out above.

- In situations where a telecommunications service provider launches a retail telecommunications service whose existence is dependent on the availability of one or more essential services, that telecommunications service provider would be required, at the same time as the launch, to file a proposed tariff and all other technical information and commercially relevant information with the Commission allowing service-based competitors to offer a retail service, which we have defined in its proposed legislation as a "wholesale competition service", using the same essential facilities.

- In order to prevent the telecommunications service providers from issuing tariffs with unworkable terms and conditions, we are proposing a new subsection 23.2(2) that would require that telecommunications service provider tariffs adhere strictly to the current rate methodology (including costing methodology, if applicable) adopted by the Commission and that the wholesale service be designed to deliver a quality of service that is as equivalent as possible to the quality of service levels that the Incumbent provides to its own retail service.

- A new proposed subsection 23.2(3) would require the Commission to act as expeditiously as possible in considering whether to approve these tariffs and any other conditions related to a wholesale competitor service in a further attempt to reduce the risk of unreasonable Incumbent head-starts.

- Importantly, fixed wireline and mobile wireless access facilities would be deemed essential facilities going into this regime based on experience to date.

- A failure to file a proposed tariff at the launch of a retail service, or to include in the proposed tariffs rates calculated in accordance with the applicable methodology established by the Commission, or to design the service in a manner that provides as equivalent as possible quality of service between the wholesale and retail services, would automatically be considered an instance of unjust discrimination in a new proposed subsection 27(2.1).

- Pursuant to new subsection 23.2(8), in any proceeding in which the failure of a telecommunications service provider to adhere to the requirements in subsections 23.2(1) or 23.2(2) is an issue, the Commission would be required to consider imposing administrative monetary penalties if the telecommunications service provider is found to have failed to adhere to the requirements.

- In order to ensure that the Commission's requirements for wholesale competition services remains current and reflects changing market conditions, subsection 23.2(5) provides that the Commission must review its classifications of classes of wholesale competition

services at least once every 5 years. As part of any review of wholesale competition services, the Commission may also, pursuant to subsection 23.2(6), consider whether any class of access or other essential facilities still constitute essential facilities or whether new classes of essential facilities needs to be created and translated into a class of wholesale competitor services. However, pursuant to proposed subsection 23.2(7), existing obligations under subsections 23.2(1), (2) or (3) are not to be affected as a result of any anticipated or ongoing review commenced under subsection 23.2(5).

- At the same time, the framework is sufficiently flexible that if some class of access facilities did become non-essential, the Commission could, in the course of reviewing competitor wholesale services generally, make a corresponding determination and then apply the forbearance test in section 34 of the *Telecommunications Act* to assess the degree of forbearance from regulation may be appropriate.

- See proposed sections 23.1 and 23.2 and relevant definitions in subsection 2(1) of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.3 of the main submission.

- We are also proposing that the current list of telecommunications policy objectives be reduced to a single objective, namely to make available reliable and affordable telecommunications services of high quality to Canadians in both urban and rural areas in all regions of Canada, but this objective would be guided by a number of principles including that:

    (a) regulatory measures shall be adopted and applied with a view to fostering, to the maximum extent possible, competition in the provision of telecommunications services;

    (b) every wholesale competition service shall be made available:

        (i) as promptly as possible to avoid the prevention or lessening of competition due to wholesale lag;

        (ii) at rates set at levels calculated by strict adherence to the current rate methodology (employed by the Commission);

        (iii) at quality of service levels that are as equivalent as possible to the quality of service levels that the provider of the wholesale competition service provides to its own downstream retail services whose existence are dependent on the availability of the same essential facilities incorporated in the wholesale competition service.

- See proposed sections 7 and 7.1 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.2 of the main submission.

- In the event that the Commission decides that the measures in subsections 23.2(1), (2), and (3), are not sufficient to prevent the undue lessening or prevention of competition in the

market for a class of retail services for which one or more corresponding wholesale competitor services exist, section 23.4 would empower the Commission to order other remedies, up to and including the functional or structural separation of an entity.

- See proposed section 23.4 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.3.4 of the main submission.

- We also recommend the adoption of a statutory requirement for the Commission (since it would be the party regulating spectrum under our proposal) to consider whether a set aside is appropriate in order to promote competition in the provision of radiocommunication services whenever the Commission conducts an auction to allocate spectrum.

- See proposed subsection 5(1.2.2) of the *Radiocommunication Act* in Appendix 10 and the related narrative in section 11.2.2 of the main submission.

- Finally, we are also proposing changes to the civil liability provisions of the *Telecommunications Act* so that the Commission will have concurrent jurisdiction with the courts to award damages in matters relating to telecommunication and radiocommunications. This is important as matter of efficiency and access to justice, especially since anti-competitive conduct by incumbents can result in damages suffered by their competitors/wholesale customers.

- To the extent that Parliament's constitutional authority to allow the Commission to exercise such concurrent jurisdiction in in doubt, we are recommending that a reference be directed as soon as possible to the Supreme Court of Canada on that issue.

- See the related narrative in section 10.8 of the main submission.

3. Net Neutrality

3.1 Are current legislative provisions well-positioned to protect net neutrality principles in the future?

- Section 36 of the *Telecommunications Act* would be sufficient to protect net neutrality in Canada if the words "Canadian carrier" were replaced by "telecommunications service provider" as the current definition of "Canadian carrier" does not capture all telecommunications service providers providing services to Canadians.

- See proposed section 36 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.11.5 of the main submission.

- The current language of section 36 is technologically neutral and also allows the Commission to make exceptions for critical Internet traffic such as traffic related to national security and public safety, where necessary. This flexibility should be maintained.

- Net neutrality is also protected in Canada by subsection 27(2) of the *Telecommunications Act*, which requires that Canadian carriers not engage in unjust discrimination or grant

undue preferences to any person. Subsection 27(2) codifies the common law principle of common carriage. It prevents, for example, vertically integrated entities such as Bell Canada or Rogers from favouring their own content, for example through the zero-rating of that content, over content provided by competitors. Any new legislation should ensure that subsection 27(2) is maintained in substantially similar form. However, as with section 36, in order to ensure that net neutrality obligations extend to all service providers, the words "Canadian carrier" should be replaced by "telecommunications service provider".

- See proposed section 27 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.3.8 of the main submission

- No regime, such as that proposed by Fairplay Canada, should be adopted for website blocking as that would compromise net neutrality in Canada. There are other reasons why such regime should not be implemented and they are discussed in response to question 8.20 below.

- See the related narrative in section 10.12.3 of the main submission.

4. Consumer Protection, Rights and Accessibility

4.1 Are further improvements pertaining to consumer protection, rights, and accessibility required in legislation?

- No. The CRTC has already created a comprehensive suite of consumer protections in the area of telecommunications, including through codes of conduct such as the *Wireless Code* and the *Television Service Provider Code* and is now in the process of instituting an *Internet Code*. Consumers also have access to the Commission for Complaints for Telecom-Television Services.

- See the related narrative in section 10.13 in the main submission.

- The best remedy for consumer dissatisfaction with telecommunications services is to enhance the level of competition in all telecommunications markets in Canada. In a marketplace with sufficient competition, telecommunications service providers will be compelled to offer sterling customer service in order to obtain and retain subscribers. CNOC members are able to help ensure that each telecommunications market in Canada has a sufficient level of competition, but only if they can access incumbent facilities on just and reasonable terms and conditions.

5. Safety, Security and Privacy

5.1 Keeping in mind the broader legislative framework, to what extent should the concepts of safety and security be included in the *Telecommunications Act/Radiocommunication Act*?

- The concepts of safety, security, and privacy are included as two of the principles in proposed section 7.1 of the *Telecommunications Act* as follows:

(d) public safety and security shall be maintained;

(e) the protection of personal privacy shall be pursued;

- See proposed section 7.1 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.2 of the main submission.

- We do not believe that there are other specific measures that need to be implemented in these areas at the present time. The Commission has sufficient powers within a framework that adopts the principles just cited to deal with such matters.

- We are also proposing that the Commission be give explicit authority to order telecommunications service providers to file tariffs for wholesale public good services, including those related to the safety and security and personal privacy objectives set out above.

- The Commission would also have the power, under proposed subsection 23.3(3), to review its classification of a service as a wholesale public good service, and would be required to conduct an analysis of its classifications at least once every five years. However, pursuant to proposed subsection 23.3(4), the Commission would not be able to revoke the classification of a service as a wholesale public good service if doing so would compromise the attainment of the policy objective or be inconsistent with the principles set out in section 7.1.[1]

- See proposed section 23.3 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.3.6 of the main submission.

6. Effective Spectrum Regulation

6.1 Are the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure devices can be used safely, securely, and free of interference?

- The current legislative tools do not appear to have impeded the deployment of wireless technologies in Canada and Canada is on par with the United States in terms of access to devices, security of networks, and quality of networks.

- However, ongoing sufficient lack of access to MVNO services from the National MNOs limits competition and Canadians have been much more than they should for mobile wireless services.

[1] Additional wholesale public good services include those relating to making emergency services available to the public, facilitating access to telecommunications by persons for disabilities, limiting public nuisance through telecommunications, providing access to support structures and facilitating interconnection among telecommunications networks. The first three of those areas are also covered by the principles enumerated in section 7.1. Other principles listed in section 7.1 are discussed above.

- The wholesale regime we described in proposed sections 23.1 and 23.2 of the *Telecommunications Act* would foster such competition.

- See proposed sections 23.1 and 23.2 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.3.2 of the main submission.

7. Governance and Effective Administration

7.1 Is the current allocation of responsibilities among the CRTC and other government departments appropriate in the modern context and able to support competition in the telecommunications market?

- We are of the view that many responsibilities now residing with the Minister of Industry should be transferred to the Commission to improve efficiency, reduce adminstrative costs, avoid duplication, allow for harmonized processes, and apply transparent regulatory processes that are free of political pressure, allow for the development of a high level of expertise able to deal with complex and increasingly interrelated issues, and strengthen the Commission's relationships with the international regulatory community and improve staff knowledge on global issues and trends.

- Since the Commission has been dealing with competitive issues for a few decades, to the extent that the there is a desire to promote competition, it makes sense for all regulatory functions to be performed by the Commission, so long as the underlying legislative framework strongly supports competition as we are proposing.

- More specifically, we propose to move the following areas of responsibility to the Commission:

    (a) Establishing standards in respect of the technical aspects of telecommunications under the *Telecommunications Act*;

    (b) Registration of telecommunications apparatus, issuance of technical acceptance certificates and related matters under the *Telecommunications Act*;

    (c) Forfeiture of telecommunications apparatus under the *Telecommunications Act*; and

    (d) All responsibilities presently allocated to the Minister under the *Radiocommunication Act*.

- See proposed sections 15, 69.1 through 69.3, 74.1 of the *Telecommunications Act* in Appendix 8 and the related narratives in sections 10.10.1, 10.10.12, and 10.10.14 of the main submission, as well as the proposed *Radiocommunication Act* in Appendix 10 and the related narrative in section 11.2.1 of the main submission.

7.2 Does the legislation strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

- We are of the view that the power of the Governor in Council to issue policy directions should be entirely rescinded, and thus section 8 repealed in its entirety.

- Policy directions of the type issued in 2006 serve no useful purpose other than to fetter the discretion of the Commission and its ability to make decisions aimed at advancing Canada's telecommunications policy objectives using the most economically efficient means. If the policy articulated by the legislation is sufficiently robust, clear and focused and promotes the achievement of the policy by promoting competition to the greatest extent feasible, there is no reason to add another layer of policy considerations on the Commission, which is an expert body in telecommunications matters. We are of the view that provisions of sections 7 and 7.1 that we have proposed are sufficiently robust, clear and focused and so there is no need for section 8 to be continued.

- In fact, we are also proposing as an interim measure, either the repeal of the current Policy Direction or its amendment to promote competition among service providers better, address the concerns that are cited in proposed subsection 7.1(b) of the *Telecommunications Act* and require that the Commission conduct a wireline wholesale review in 2019.

- See the Revised Policy Direction set out in Appendix 8 and the related narrative in section 12 of the main submission.

- At the same time, CNOC recognizes that democratically elected governments should have the right to have a say in defining the public interest when it comes to regulatory decisions. However, instead of issuing a blanket policy direction that fetters the Commission's discretion in all matters, it is preferable that governments exercise this right through the variation, rescission, or referral powers set out in section 12 of the *Telecommunications Act*. The crucial distinction is that in the latter case, the government would also be, quite properly, bound by the policy preferences articulated by Parliament in the legislation, instead of amending them on its own, when considering whether to interpret the public interest in a manner that deviates from a Commission determination. The use of the powers set out in section 12 is also a better means of protecting the Commission's independence relative to the policy direction power, since section 12 only applies to specific cases and, has, historically, been used very sparingly.

- However, the current section 12 powers do suffer from some procedural deficiencies in terms of timelines that are too long, an inability by the Governor in Council to stay Commission decisions pending consideration of petitions, and the absence of a complete process for processing petitions that is sufficiently well-defined. We have addressed these matters in our proposals.

- See proposed section 12 and repeal of section 8 of the *Telecommunications Act* in Appendix 8 and the related narrative in section 10.4 of the main submission.

Broadcasting Act

8. Broadcasting Definitions

8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?

- The concept of broadcasting remains relevant from a regulatory perspective, if for no other reason than there are a small number of vertically integrated broadcasting undertakings and other parties with market power that need to be prevented from engaging in anti-competitive conduct. The Commission has a vital role to play in this regard.

- It is for this reason that we have proposed the introduction of a number of statutory safeguards including:

    (a) A statutory prohibition on undue discrimination applicable to broadcasting undertakings;

    (b) During any dispute between a distribution undertaking and a programming undertaking, a requirement for the distribution undertaking to continue to distribute those programming services at the same rates and on the same terms and conditions as it did before the dispute, and upon the dispute arising, the applicable rates, terms and conditions of distribution shall be deemed to have received interim approval from the Commission, in case the Commission deems it fit to make any retractive adjustment to the rate as of the date when the dispute first arose;

    (c) A requirement for a programming undertaking that is ready to launch a new programming service to make a programming service available for distribution by all distribution undertakings, despite the absence of a commercial agreement, subject to certain other regulatory requirements;

    (d) A requirement for a distribution undertaking that distributes a new programming service with respect to which it has no commercial agreement to abide by the rates, terms and conditions established by the concerned programming undertaking until a commercial agreement is reached between the parties or the Commission renders a decision concerning any unresolved matter, and until such resolution, the applicable rates, terms and conditions of distribution are deemed to have received interim approval from the Commission, in case the Commission deems it fit to make any retractive adjustment to the rate as of the date when the distribution first started;

    (e) Removing impediments to access to the inside wire of a broadcasting undertaking available by its subscribers, other broadcasting undertakings or telecom-munications service providers, on terms and conditions, including rates that are just and reasonable, with the Commission empowered to determine such terms

and conditions, and with the broadcasting undertaking prohibited from removing inside wire when it is being used, or a request for its use has been made;

(f) A prohibition preventing any vertically integrated broadcasting undertaking from refusing to make available to an unaffiliated distribution undertaking, for distribution by the distribution undertaking, on terms and conditions, including rates, that are just and reasonable, programming that the vertically integrated broadcasting undertaking owns or controls, on any platform on which the vertically integrated broadcasting undertaking makes it available to its subscribers;

(g) A prohibition preventing a programming undertaking from offering a programming service for distribution as part of a package with other programming services unless it also makes its programming service available on a stand-alone basis;

- See proposed sections 34.15 through 34.21 of the *Broadcasting Act* in Appendix 8 and the related narrative in section 11.1.2 of the main submission.

- Introducing a measure that allows the Commission, where it concludes the measures set out in the Act are not sufficient to prevent the undue lessening or prevention of competition in a market for broadcasting services, to order other remedies, up to and including the functional or structural separation of an entity.

- See proposed section 34.22 of the *Broadcasting Act* in Appendix 8 and the related narrative in section 11.1.2 of the main submission.

8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?

- To the extent that the *Broadcasting Act* enables and promotes competition amongst broadcasting services, the cost of access will decrease, thus ensuring that more Canadians are able to access Canadian voices on the Internet, in both official languages, on all platforms.

- In addition, more and more Canadians are accessing broadcasting services, such as Netflix, Crave, Amazon Prime, YouTube, and others that require Internet connectivity. As a result, reducing the cost of that Internet connectivity, through measures that promote competition, will also make it easier for more Canadians to be able to afford to access Canadian voices on the Internet, in both official languages, and on all platforms.

- The Panel should not adopt any sort of scheme such as that proposed by FairPlay Canada that would see ISPs be responsible for blocking access to pirated content online. Such a scheme is impractical, does not work well in practice, can end up blocking unintended content contrary to the *Canadian Charter of Rights and Freedoms* and is costly to implement and maintain, and that cost would need to be passed on to consumers resulting in higher rates for Internet access. In addition, Canada has maintained an exemption for its

notice and notice regime in the recent USMCA negotiations, and thus the government has clearly taken a stand against more draconian measures such as notice and take down / website blocking.

9. Broadcasting Policy Objectives

9.1 How can the objectives of the *Broadcasting Act* be adapted to ensure that they are relevant in today's more open, global, and competitive environment?

- The objectives in the *Broadcasting Act* are very, numerous and convoluted. To provide clarity to the Commission and to the industry, it is important that they be consolidated and clarified.

- We propose the following more streamline approach in the following proposed statutory provisions:

  It is hereby declared as the broadcasting policy for Canada that the Canadian broadcasting system shall:

  (a) be effectively owned and controlled by Canadians;
  (b) safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
  (c) educate, entertain and inform;
  (d) promote the creation, presentation, distribution and discoverability of Canadian programming;
  (e) promote and rely on competition to the greatest extent possible to pursue the Canadian broadcasting policy;
  (f) reflect aboriginal cultures, as well as the multicultural and multiracial nature of Canada;
  (g) make high quality, accessible and affordable programming available throughout Canada in both English and French languages, that is reflective of both the common and the different conditions and requirements applicable to broadcasts in the two languages;
  (h) make programming accessible to disabled persons;
  (i) be readily adaptable to scientific and technological change; and
  (j) ensure that the Corporation, as the national public broadcaster, performs a leading role in the achievement of the broadcasting objectives in this subsection.

- See proposed subsection 3(1) of the *Broadcasting Act* in and the related narrative in section 11.1.1 of the main submission.

- In aid of further simplification, we are also proposing the repeal of subsections 5(1) through (3), and the enactment of a new subsection 3(2) that states that the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view the implementing the Canadian broadcasting policy articulated above.

- See proposed repeal of subsections 5(1) through (3) and proposed subsection 3(2) of the *Broadcasting Act* in and the related narrative in section 11.1.1 of the main submission.

9.2 Should certain objectives be prioritized? If so, which ones? What should be added?

- We believe that that many of the policy objectives can be achieved through the promotion of competitive markets. Given that government resources are not infinite, legislation should always seek to achieve its objectives in the most efficient manner possible. Competition among participants in the broadcasting sector is the most efficient way to achieving many of the *Broadcasting Act* policy objectives. Relying more on competition will also free up resources to be directed to those areas that are of national importance, but are not amenable to being resolved by reliance on competition alone.

- See proposed paragraph 3(1)(e) of the *Broadcasting Act* in and the related narrative in section 11.1.1 of the main submission.

9.3 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?

- See the answer to question 9.2. Given that government resources are not infinite, legislation should always seek to achieve its objectives in the most efficient manner possible. Competition between participants in the broadcasting sector is the most efficient way to achieving many of the *Broadcasting Act's* policy objectives. Relying more on competition will free up resources to be directed to those areas that are of national importance, but are not amenable to being resolved by reliance on competition alone.

10. Support for Canadian Content and Creative Industries

10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production, and distribution of Canadian content?

- Funding should come from general tax revenues, which is the most economically efficient method, or from broadcasting industry cross-subsidies, since they are all part of the broadcasting ecosystem.

- ISPs already contribute to the telecommunications ecosystem by mandatory contributions to the broadcasting funding mechanism, which builds out networks to rural, remote, and Indigenous communities, thus opening up new markets for Canadian content. Imposing further taxes on ISPs to fund Canadian content, which will ultimately need to be passed onto consumers, would be inconsistent with the objectives of the Panel, the government, and the CRTC to enhance the affordability of high-quality Internet access.

- There is no more rationale for having the telecommunications industry subsidize the content creation than there is for the broadcasting industry to fund the delivery of telecommunications to high-cost serving areas using the broadband fund.

- At the same time, we support an enforceable requirement for foreign broadcasting undertakings to collect and remit HST on their sales as Canadian broadcasting entities are required to do, to prevent tax revenue leakage, especially given that such general tax revenues could be used to subsidize the creation of Canadian content.

- See the related narrative in section 10.12.1 of the main submission.

10.2 How can the CRTC be empowered to implement and regulate according to a modernized *Broadcasting Act* in order to protect, support, and promote our culture in both official languages?

- As discussed in response to question 9.2, legislation should focus on striving to achieve broadcasting policy objective using by promoting competition as much a is feasible for that purpose and that also means that vertically integrated entities cannot act in anti-competitive ways.

- See the related narrative in section 11.1.2 of the main submission.

10.3 How should legislative tools ensure the availability of Canadian content on the different types of platforms and devices that Canadians use to access content?

- We only address this issue form a competitive standpoint.

- A prohibition is required preventing any vertically integrated broadcasting undertaking from refusing to make available to an unaffiliated distribution undertaking, for distribution by the distribution undertaking, on terms and conditions, including rates, that are just and reasonable programming that the vertically integrated broadcasting undertaking owns or controls, on any platform on which the vertically integrated broadcasting undertaking makes it available to its subscribers.

11. Democracy, News and Citizenship

11.1 Are current legislative provisions sufficient to ensure the provision of trusted, accurate, and quality news and information?

- We take no position on this issue.

11.2 Are there specific changes that should be made to legislation to ensure the continuing viability of local news?

- We take no position on this issue.

12. Cultural Diversity

12.1 How can the principle of cultural diversity be addressed in a modern legislative context?

- We take no position on this issue.

13. National Public Broadcaster

13.1 How should the mandate of the national public broadcaster be updated in light of the more open, global, and competitive communications environment?

- We take no position on this issue.

13.2 Through what mechanisms can government enhance the independence and stability of CBC/Radio-Canada?

- We take no position on this issue.

13.3 How can CBC/Radio-Canada play a role as a leader among cultural and news organizations and in showcasing Canadian content, including local news?

- We take no position on this issue.

13.4 How can CBC/Radio-Canada promote Canadian culture and voices to the world, including on the Internet?

- We take no position on this issue.

13.5 How can CBC/Radio-Canada contribute to reconciliation with Indigenous Peoples and the telling of Indigenous stories by Indigenous Peoples?

- We take no position on this issue.

13.6 How can CBC/Radio-Canada support and protect the vitality of Canada's official languages and official language minority communities?

- We take no position on this issue.

14. Governance and Effective Administration

14.1 Does the *Broadcasting Act* strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?

- We take no position on the issue of the desirability of a policy direction in broadcasting, recognizing the dealing with the need for shifting priorities in cultural industries may provide justification for a continuation of this power.

- We have no objection to the retention of the ability for the Governor in Council to review broadcasting decisions of the Commission. In fact, our proposed new sections 28 of the *Broadcasting Act*, which corresponds to section 12 of the *Telecommunications Act*, coupled with repeal of section 29 of the *Broadcasting Act*, would expand the power of the Governor in Council to vary, rescind, or send back for referral, decisions of the Commission made under the *Broadcasting Act* beyond just licensing decisions. These new subsections would also introduce the improvements to timelines and process for these circumstances that we are also proposing be introduced into section 12 of the *Telecommunications Act*.

- In fact, we are of the view that the power should be broadened. However, the current section 12 powers do suffer from some procedural deficiencies in terms of timelines that are too long, an inability by the Governor in Council to stay Commission decisions pending consideration of petitions, and the absence of a complete procedure for processing petitions that is sufficiently well-defined. We have addressed these matters in our proposals.

- See the proposed repeal of section 29 and proposed section 28 in Appendix 8 and the related narrative in section 11.1.3 of the main submission.

14.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?

- In an era of increasing competition and increased potential for anti-competitive conduct, we believe that the Commission should have strong oversight powers and remedies available to it, and that as much as possible the powers and language used to employ them should be harmonized with those that are found in the *Telecommunications Act*.

- We have therefore, proposed harmonization of a considerable number of statutory provisions of these type in the *Broadcasting Act* with those in the *Telecommunications Act* as they currently exist, or we propose to have them amended or enacted.

- See the related narrative in section 11.1.3 of the main submission for a discussion of this harmonization.

- We also believe that the Commission should have the power to award costs in broadcasting proceedings in order to enable the participation of segments of the public that may not otherwise be able to participate in such proceedings.

- See proposed section 34.10 in Appendix 9 and the related narrative in section 11.1.3 of the main submission.

- We also believe that the Commission should be given the ability to levy administrative penalties for breaches of the *Broadcasting Act*, a power which the Chair of the Commission is also seeking in order for the Commission to be in a better position to enforce compliance with that legislation.

- See section 34.14 in Appendix 9 and the related narrative in section 11.1.3 of the main submission.

- We also believe that the Commission's own power to review and vary its own decisions should be expanded to match those available to it in the *Telecommunications Act*.

- See proposed subsection 12(3) and in Appendix 9 and the related narrative in section 11.1.3 of the main submission.

- As in the case of the *Telecommunications Act*, we are similar civil liability provisions for the *Broadcasting Act* so that the Commission will have concurrent jurisdiction with the courts to award damages in matters relating to broadcasting. This is important as matter of efficiency and access to justice, especially since anti-competitive conduct by incumbents can result in damages suffered by their competitors/wholesale customers.

  To the extent that Parliament's constitutional authority to allow the Commission to exercise such concurrent jurisdiction in in doubt, we are recommending that a reference be directed as soon as possible to the Supreme Court of Canada on that issue.

- See the related narrative in section 11.1.3 of the main submission.

- We have proposed a number of other amendments to modernize the provisions of the statute.

- See the related narrative in section 11.1.3 of the main submission.

14.3 How can a modernized *Broadcasting Act* improve the functioning and efficiency of the CRTC and the regulatory framework?

- CNOC will not take a position.

14.4 Are there tools that the CRTC does not have in the *Broadcasting Act* that it should?

- See above regarding the ability of the CRTC to impose AMPs.

14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content?

- We take no position on this issue.

Other matters not specifically raised by the Panel:

- We are proposing a few amendments to the *Canadian Radio-television and Telecommunications Act* as well in the areas of notifications of reappointment, recruitment, ability to temporary expert staff and counsel, providing the Commission jurisdiction over radiocommunication and ensuring that names of deciding Commissioners are included in all determinations made by the Commission in any form.

- See proposed subsections 3(4) and (5), 8(1) through (4), 12(2) and proposed section 14.

- We have made a number of proposals for incidental amendments to the other various communications statutes already discussed to modernize and harmonize them.

- See Appendices 8, 9, 10, and 11, and the corresponding relative narratives in parts 10, 11.1, 11.2 and 11.3 of the main submission.

CONCLUSION

- In order to promote the policy objectives of Canada's communications statutes, amendments to Canada's communications must find a way to deal with the legacy of its monopoly and duopoly service providers in the telecommunications industry, who are also now dominant in markets for mobile wireless services, and vertically integrated entities in distribution and programming in the broadcasting industries.

- Absent provisions that enable anti-competitive conduct to be kept in check, Canada's objectives for affordable and universal telecommunications services and for a rich cultural mosaic will be stifled.

- Legislative changes must enable the Commission to create the conditions for competition where market forces are not sufficient to create those conditions. Our proposal is not about having the government picking winners or losers, but about recognizing that its objectives

are most efficiently achieved by reliance on competition to the maximum extent possible, and that, due to the unique way in which telecommunications markets evolved in Canada, absent regulatory intervention, competition is likely to continue diminishing.

- Our focus has been on a high-level and flexible legislative framework that is flexible and relevant for at least the next 20+ years.