APPENDIX A - ROGERS RESPONSES TO THE QUESTIONS SET OUT IN THE TERMS OF REFERENCE

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?

Rogers believes that the policy objectives in the current legislation should be amended to better reflect the goal of affordable access by Canadians to advanced telecommunications services in all regions of Canada, including urban, rural and remote areas.

Reference should also be made to facilitating access by persons with disabilities which is clearly within the Commission's mandate but which does not get specifically mentioned in the existing version of section 7.

In this regard, Rogers favours the wording proposed by the Telecommunications Policy Review Panel (TPRP) in its 2006 Report to the Minister of Industry. These amendments are set out in Appendix B to this submission.

While these changes to the policy objectives will enhance the guidance provided to the Commission on broad policy objectives, Rogers does not believe that further amendments to the Act are required to enable the Commission to carry out this mandate.

Subsection 46.5(1) currently permits the Commission to require any telecommunications service provider to contribute to a fund to support continuing access by Canadians to basic telecommunications services. Pursuant to this power, the Commission recently amended its definition of "basic service" to include high-speed broadband services[1] and has taken steps to establish a broadband subsidy fund to offset the cost of carriers extending high-speed broadband services to rural and remote areas of Canada that do not have access to services that meet the service standards established by the Commission.[2] All telecommunications service providers whose Canadian telecommunications revenues exceed the minimum level established by the Commission are required to contribute.

Pursuant to this same power, the Commission previously required Canadian carriers and telecommunications service providers to contribute to a fund to support access to Video Relay Services - a basic telecommunications service that enables people with

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[1] Telecom Regulatory Policy CRTC 2016-496, *Modern telecommunications services – The path forward for Canada's digital economy.*

[2] Telecom Regulatory Policy CRTC 2018-377, Development of the Commission's Broadband Fund.

hearing or speech disabilities who use sign language to communicate with voice telephone users.[3]

The Commission also has the power to impose conditions on the provision of services by telecommunications service providers and Canadian carriers. This provision has been used to impose an obligation on all telecommunications service providers who offer local telephone service, or VoIP service, to offer message relay service, for example.

These broad powers appear adequate to continue to meet the statutory requirements of the Act to enable new services to be offered to Canadians with disabilities.

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?

This is an area where the current provisions of the *Telecommunications Act* are wholly inadequate. Improved access to physical facilities is vital for wireline broadband deployment and wireless 5G deployment, which are in turn vital for a leading edge digital economy. As recently stated by the Chairman of the FCC,

> …all the spectrum in the world won't matter if we don't have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That's because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don't exist today.[4]

As discussed above in this submission, this realization has led Canada's major trading partners in the United States and the EU to take decisive action to make access to supporting structures for small cell sites more readily available at cost-based rates. Canada is already significantly behind. While we talk about 5G deployment, we do not have the building blocks in place to implement our strategy.

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

It is important that attachments to supporting structures not be left entirely to negotiation by the parties. These are essential facilities and owners of them cannot be permitted to

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[3] Telecom Regulatory Policy CRTC 2014-187, Video relay service.

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

exact a monopoly price for their use. Relying solely on negotiation would adversely affect Canadian consumers and the telecommunications service providers from which they will receive their 5G services. Past experience has demonstrated that Rogers and other carriers pay significantly more for access to support structures that are either unregulated or provincially-regulated than they do to access support structures that are subject to Commission oversight. Given the essential nature of these facilities, carriers can be forced to pay far more than is reasonable, which will inevitably be passed on to consumers or result in delays to or the absence of 5G implementation in some communities. Injecting the Commission as an arbiter of access and rates when the parties cannot agree on terms will help to ensure that excessive rates are not imposed on carriers by the owner of the supporting structures.

At the present time, section 43 of the *Telecommunications Act* appears to have an emphasis on wireline facilities, using the undefined term "transmission line" to describe the facility that is permitted to attach to a supporting structure. This is clearly outdated as the word "line" appears to exclude wireless services, including 5G wireless services. Since the initial passage of the Act in 1993, wireless communications have exploded, and wireless infrastructure makes up an integral part of Canada's telecom networks. For many Canadians, wireless is their primary means of communication and access to the Internet. Texting and email have become essential communications tools and rely, to a large extent, on wireless access. It must be clear that the statutory right of access under the *Telecommunications Act* includes wireless facilities. The term "transmission line" should therefore be changed to "telecommunications facilities" which is defined in section 2 of the Act as follows:

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

This amendment would make section 43, the dispute resolution provision, available for both wireline and wireless facilities.

At the present time, the Commission lacks the statutory authority to regulate access to support structures that are owned by a provincially-regulated electrical utility undertaking. This is a result of the Supreme Court of Canada decision in the case of *Barrie Public Utilities vs. Canadian Cable Television Association* [2003] 1 SCR 476 where the Court determined that the Commission's jurisdiction over supporting structures carrying "transmission lines" did not extend to electrical lines. This has left access to supporting structures owned by electrical utility undertakings either unregulated, or regulated by provincial electricity regulators who have no interest in ensuring that such access advances the objectives of the *Telecommunications Act*.

Under this regime, the rates for access to supporting structures of electrical utility undertakings have soared, making the provision of telecommunications services that utilize these structures more expensive. This is a direct result of the electricity utility undertakings and their regulators trying to maximize revenues derived from these facilities to offset electricity rates. Unfortunately, their interests and statutory mandates

are not aligned with the Canadian telecommunications policy objectives. For example, in Ontario, the rates set by the Ontario Energy Board (OEB) for attachments to hydro poles are several times the rate set by the Commission for access to identical poles owned by Canadian carriers.

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

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

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

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

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

> telecommunications space on or in support structures when the parties are unable to agree.[5]

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

The following proposed amendments in Appendix B will address all of the above concerns:

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

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

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

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

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

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

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

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

> After considering the above doctrines in detail, this opinion comes to the following three conclusions:
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> i. The proposed amendments are *intra vires* because of Parliament's legislative power over telecommunications.
>
> ii. Should the legislative amendments be adopted, any provincial measures that address the same subject matter would be inoperative pursuant to the federal paramountcy doctrine.
>
> iii. These provincial measures would also be inapplicable pursuant to the doctrine of "interjurisdictional immunity"[6]

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

2. Competition, Innovation, and Affordability

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

Rogers believes that legislative amendments are required to better promote competition in the Canadian telecom market.

There should be a presumption in the legislation that market forces will achieve the objectives of telecommunications policy in Canada, rather than the current default to regulation in the Act.

The *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives,* published in the Canada Gazette, Part I, on June 17, 2006, advanced the role of competition in the Canadian telecommunications market without amending the legislation. This was an important step in recognizing the importance of attaining policy objectives through competition, rather than regulation, whenever possible. Rogers believes that the current legislative review provides the opportunity to recast these principles in legislation.

Recommendation 2-3 of the TPRP called for the addition of section 7.1 to the Act, providing as follows:

> 7.1 All telecommunications policy measures and decisions of the Government of Canada, a minister of the Crown, the Commission and any other agency of the Government of Canada shall be made with a view to implementing the Canadian

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[6] Appendix E, Opinion of Michel Bastarache, section 1

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

Rogers recommends that these provisions be added to the *Telecommunications Act*.

In addition, Rogers believes that the concept of facilities-based competition should be added to the Act. ISED and the CRTC have recognized that facilities-based competition produces the greatest benefits to consumers and business users. Without competition at the facilities level, networks are unlikely to innovate and costs are unlikely to be driven down. Resale activity does not provide a replacement for facilities-based competition and, in some cases, it endangers network innovation and quality. The experience in the EU with mandated resale of mobile wireless services underscores the pitfalls of relying on the resale model. As related by a number of witnesses in the Commission's proceeding on wholesale wireless services[7], mandated resale in Europe discouraged investment by carriers and resulted in slower deployment of new technologies and much slower speeds than were experienced in North America under a facilities-based model. This has left Canada at or near the top of these metrics among G-7 countries plus Australia.[8] In Rogers' view, the concept of facilities-based competition should be added to the new regulatory guidelines proposed above as part of section 7.1 as follows:

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

This amendment to section 7.1 is found in Appendix B.

Rogers has addressed affordability in response to Question 1.1 above.

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

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

Fostering competition and investment will result in greater innovation. Adopting the changes proposed above will drive carriers to continually invest in developing new products and services in order to meet the needs of consumers. Moreover, innovation in telecommunications is not just an end goal in and of itself but will stimulate innovation across most other sectors of the economy. Creating a competitive environment is the best approach to improving innovation.

To help develop this environment, Rogers notes that the TPRP, in its 2006 Report, proposed that the following objective be added to its proposed new version of section 7 of the *Telecommunications Act*:

> (b) to enhance the efficiency of Canadian telecommunications markets and the productivity of the Canadian economy;

Rogers agrees with this proposal and recommends that this objective be added to the new version of section 7 proposed in Appendix B.

3. Net Neutrality

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

The Commission has already established an effective, yet flexible, regulatory regime to ensure net neutrality in Canada both for today and as new technologies and services are introduced in the future. It has used the common carriage principles in subsection 27(2) of the *Telecommunications Act* as the source of its power to enact forward-looking policies to implement its net neutrality regime.[9] It has also relied on its powers in section 24 to impose conditions of service on ISPs to ensure traffic management practices are followed that do not undermine the principles of net neutrality.[10]

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

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

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

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

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

This regulatory guideline, in conjunction with subsection 27(2) and section 24 of the Act, will enable the Commission to address net neutrality issues that arise in the future on a case-by-case basis, or to develop and implement additional net neutrality policies as the need arises.

4. Consumer Protection, Rights and Accessibility

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

The Commission has been active in the area of consumer protection and consumer rights. It has imposed consumer protection regimes on carriers through section 24 of the *Telecommunications Act* and on telecommunications service providers pursuant to section 24.1. This latter section was amended in 2014 to empower the Commission to impose these obligations directly on telecommunications service providers that are not carriers.

The Wireless Code is a good example of consumer protection regulation by the Commission.[11] This code applies to all wireless contracts. The Commission has recently proposed a new consumer code for customers of Internet Service Providers (ISPs), which is analogous to the Wireless Code.[12] The Commission has also recently concluded a public hearing on misleading or aggressive sales practices by the larger telecommunications carriers.[13] A new code of conduct is a likely result of that proceeding. A decision by the CRTC is pending.

Rogers does not believe that amendments to the *Telecommunications Act* are required to give effect to consumer protection or consumer rights. Existing provisions give the Commission the necessary powers to continue to address this topic.

Nor are amendments required to enhance the Commission's powers to address access by persons with disabilities. As mentioned in the response to question 1.1, the Commission has used subsection 46.5(1) of the *Telecommunications Act* to require Canadian carriers and telecommunications service providers to contribute to a fund to support access to Video Relay Services - a basic telecommunications service that

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[11] Telecom Regulatory Policy CRTC 2017-200, *Review of the Wireless Code*.

[12] Telecom Notice of Consultation CRTC 2018-422, *Call for comments – Proceeding to establish a mandatory code for Internet services.*

[13] Telecom and Broadcasting Notice of Consultation CRTC 2018-246, *Report regarding the retail sales practices of Canada's large telecommunications carriers.*

enables people with hearing or speech disabilities who use sign language to communicate with voice telephone users.

The Commission also has the power to impose conditions on the provision of services by telecommunications service providers and Canadian carriers pursuant to sections 24 and 24.1. This provision has been used to impose an obligation on all telecommunications service providers who offer local telephone service, or VoIP service, to offer message relay service, for example.

These broad powers appear adequate to continue to meet the statutory requirements of the Act to enable new services to be offered to Canadians with disabilities. They are augmented by Rogers' proposal to include in the following objective in section 7:

> (c) to enhance the social well-being of Canadians and the inclusiveness of Canadian Society by:
>
> (i) facilitating access to telecommunications by persons with disabilities;

Given that the measures required to give effect to this objective are technical in nature requiring a thorough understanding of the telecommunications system, and given that they are imposed solely on telecommunications carriers and service providers, it is entirely appropriate that the Commission retain the powers necessary to give effect to this important social objective.

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*?

Rogers believes that the *Telecommunications Act* and the *Radiocommunication Act* already address some aspects of safety and security. Examples include the carriers' general terms of service that protect confidential customer information, while permitting release of such information to law enforcement when acting pursuant to a search warrant or wiretap order issued by a court of law. Other examples include the requirement in the conditions of licence for mobile wireless spectrum which obligate licensees to comply with the Solicitor General's Enforcement Standards for Lawful Interception of Telecommunications. The *Radiocommunication Act* also contains prohibitions on importation or sale of radio equipment that is not properly certified for use or sale in Canada. ISED also administers the certification process for network addressing telecommunications equipment in Canada.

The CRTC administers the Do Not Call and the Anti-Spam legislation in Canada which protect users in Canada from unwanted communications. Most recently, the Commission has ruled that the authentication and verification of caller ID information for Internet Protocol (IP) voice calls should be implemented by Canadian telecommunications service providers to empower Canadians to better protect themselves against nuisance calls. The Commission also determined that the telecommunications industry should establish a Canadian administrator for the issuance

of certificates that would be required for authentication and verification of IP-based voice calls.[14]

Given the importance of the Commission's relatively recent ascension to this jurisdiction, Rogers proposes that an objective be added to section 7 of the *Telecommunications Act* as follows:

> To enhance the social well-being of Canadians by limiting public nuisance through telecommunications.

One short-coming of the existing legislation, which is discussed in Rogers' comments on broadcasting issues in this review process, is the inability of the Commission to currently order telecommunications carriers or service providers to undertake remedial activities under the *Broadcasting Act*. For example, the current Act does not permit an order to be made under the *Broadcasting* or *Telecommunications Acts* to require ISPs to block access to IP addresses that are known to engage in the piracy of broadcasting or other copyrighted material (i.e. program piracy). Rogers has addressed the amendment of the Acts to permit such action in our submission and in response to question 10.1 of this Appendix. As noted in that response, we recommend that these amendments be made immediately given the impact that program piracy is and will continue to have on the broadcasting system.

It should be recognized that other pieces of legislation are likely to play a role in advancing safety and security. The *Personal Information Protection and Electronic Document Act* (PIPEDA) has a large role to play, as does the Criminal Code of Canada and various pieces of security legislation. Rogers does not see the *Telecommunications* or *Radiocommunication Act* as impeding those efforts. The existing provisions appear adequate to permit the CRTC or ISED to take the necessary steps to intervene where it is appropriate.

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?

Rogers believes that ISED has the right legislative tools in place to balance the need for flexibility to rapidly introduce new wireless technologies with the need to ensure that devices can be used safely, securely, and free from interference. The *Radiocommunication Act* gives ISED broad discretion to carry out its role as spectrum manager and licensing authority.

Rogers believes that ISED adequately addresses interference issues. There has been no evidence of an increase in interference occasioned by the release of new wireless spectrum.

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[14] Compliance and Enforcement and Telecom Decision CRTC 2018-32, Measures to reduce caller identification spoofing and to determine the origins of nuisance calls.

As regards the safety of devices, Rogers believes that ISED's certification standards and testing requirements are adequate to ensure that devices can operate in a safe and interference-free manner.

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?

Rogers is generally satisfied that the current allocation of responsibilities among the CRTC and other government departments is appropriate in the modern context and is able to support competition in the telecommunications market.

As regards the possible transfer of ISED's role of spectrum management and spectrum and radio licensing to the CRTC, Rogers does not favour such a change. We believe that ISED has done a good job of spectrum management and we do not support a change for the sake of change.

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

ISED's role over the next few years in making important new spectrum available for 5G applications and services is an important one that should be allowed to proceed without the type of major disruption that the transfer of these responsibilities to the CRTC would involve. On balance therefore, Rogers believes that ISED should continue its current spectrum management and licensing role.

Rogers also believes that the separate roles of the Commissioner of Competition and the CRTC should be maintained. There is a fairly clear delineation of these separate roles, with the CRTC taking responsibility for regulation of telecommunications carriers and service providers in areas within its jurisdiction and the Commissioner of Competition administering its own Act. That Act focusses on misleading advertising and anti-competitive behaviour. While there is some cross-over, Rogers is not aware of any significant examples of instances where clear conflicts have arisen.

For these reasons, and with the exception of the approval of spectrum transfers, Rogers is not proposing any changes to the current divisions of powers between the CRTC, ISED and the Commissioner of Competition.

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?

Rogers believes that it is appropriate for the government to have the power to give directions of general application to the Commission on broad policy matters with respect to the Canadian telecommunications policy objectives, as it currently can do pursuant to

section 8. Policy development is an appropriate role for the government and does not undermine the Commission's independence.

Where Rogers believes that the current regime requires amendment is in respect of the ability of the Governor in Council to vary CRTC decisions either when a petition is filed in respect of such a decision, or on its own motion. This power, which is included in section 12 of the *Telecommunications Act*, undercuts the Commission's independence by allowing the government to essentially rewrite a decision of the Commission. This is the case notwithstanding the fact that the government did not convene the public hearing, did not hear all of the evidence, and has no obligation to base its variance on the record of the proceeding.

Rogers notes that this power is not included in section 28 of the *Broadcasting Act.* There, the Governor in Council has the power to set aside the decision or refer the decision back to the Commission for reconsideration and hearing of the matter by the Commission, if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1). Under section 28, the Governor in Council does not have the power to vary the decision itself. In Rogers view, section 28 of the *Broadcasting Act* better protects the Commission's independence and the integrity of the legislative process.

Rogers also notes that the timelines for the government to act under the *Telecommunications Act* are much longer than under the *Broadcasting Act*. Under the *Telecommunications Act*, the Governor in Council has a year from the date of the Commission's decision to rescind, vary or refer the decision back to the Commission for reconsideration while under the *Broadcasting Act*, the Governor in Council has 45 days to act. In Rogers' view, a period of one year is far too long for the government to wait to take action. Such a delay undermines the independence of the Commission and is unfair to the industry which must wait for this time period to pass in order to know with certainty whether they can rely on the Commission's decision.

Rogers therefore proposes that section 12 of the *Telecommunications Act* be amended to be more consistent with section 28 of the *Broadcasting Act*. Specific wording of the amendments required to give effect to this proposal is found in Appendix B to this 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” can remain relevant by ensuring that the definition of the term captures all transmissions of programs for reception by the public, including digital transmissions that take place over the public Internet.

The term “digital media undertaking” should be added to the definition of “broadcasting undertaking” and it should be defined as follows:

> ***digital media undertaking*** means an undertaking for the transmission of programs by digital communications that are either delivered and accessed over the public Internet or are delivered using point-to-point technology and received by way of mobile devices, and are intended for reception by the public by means of broadcasting receiving apparatus; *(entreprise de médias numériques)*

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

The *Broadcasting Act* can promote access to Canadian voices on the Internet, in both official languages, and on all platforms by requiring the Commission to regulate in a manner that is platform agnostic and by ensuring that all platforms that are used to distribute audiovisual programming are subject to a comparable set of regulatory rules and obligations. This means that the Act should capture any over-the-top (OTT) service provider, referred to as a “digital media undertaking”, that transmits audiovisual programming online to Canadian consumers.

Canadian and non-Canadian digital media undertakings that provide consumers in Canada with programming and are deriving revenues from those commercial activities are, today, materially and adversely impacting the Canadian broadcasting system. All of these entities should be required to contribute in an appropriate and equitable manner to the ongoing growth and development of the Canadian broadcasting system on all of their platforms.

In order to contribute to furthering the objectives of the *Broadcasting Act* and to foster an equitable competitive marketplace, each undertaking should be required to fund, exhibit and provide access to Canadian programming. These obligations would apply to digital media undertakings, like Netflix, Google, YouTube, Facebook, Amazon, DAZN and CBS, all of which are (or will soon be) using those platforms to deliver their programs to Canadian consumers.

These new requirements could be implemented immediately if the Governor in Council were to issue a policy direction to the Commission requiring it to update the Digital

Media Exemption Order or issue a new exemption order under subsection 9(4) of the *Broadcasting Act* that would require OTT services to make contributions to furthering Canada's broadcasting policy objectives. Using its authority under section 7 of the Act, the Governor in Council could direct the Commission with respect to the manner in which the policy objectives in subsection 3(1) and the regulatory objectives in subsection 5(2) should be achieved by establishing regulatory obligations for digital media undertakings that would be comparable to those imposed on linear Canadian broadcasting undertakings. We believe it is imperative for the Governor in Council to act on this quickly before the outcome of this Review given the adverse impact that Netflix and other OTT services are having on the Canadian broadcasting system.

Failing that, another way to incorporate non-Canadian digital media undertakings into the *Broadcasting Act* would be to amend the *Direction to the CRTC (Ineligibility of Non-Canadians)* (the Ownership Direction) by requiring non-Canadian digital media undertakings that solicit advertising in Canada or receive subscription fees from Canadian consumers to be licensed. The mechanism we propose is a "service agreement" model that would apply to all foreign and Canadian digital media undertakings that are engaged in a commercial business in Canada and could also be available to larger Canadian broadcasting groups that operate multiple types of broadcasting services in Canada.

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

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 broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* should be streamlined to focus on the creation, exhibition, access/discoverability, diversity and protection of Canadian programming and program rights. It should also be a foundational regulatory objective in subsection 5(2) of the Act for the Commission to foster an equitable competitive marketplace for the broadcasting undertakings regulated under the Act. This means that all regulatory obligations and funding mechanisms used to support the creation, production, exhibition and distribution of programming in Canada should be governed by the following three rules, which should be reflect in the broadcasting and regulatory policy objectives:

- platform agnostic – all platforms that are used to distribute television programming and operate in a like manner should be subject to a comparable set of regulatory rules and obligations;

- producer agnostic – all Canadian producers of television content should have access to funding mechanisms, whether they are independent producers or affiliates of Canadian broadcasters; and

- content agnostic – all Canadian content should be treated the same, both in terms of accessing funding to create it and in respect of Commission regulations.

With few exceptions, regulations established under the Act should be efficient and proportionate and should interfere with the operation of competitive market forces to the minimum extent necessary to achieve their purpose. Market forces and market-based competition should be relied upon to the maximum extent feasible to encourage broadcasting undertakings to create and monetize Canadian programming for domestic and international consumption.

There are two exceptions to the requirement to rely on market forces. The first involves the need to create, produce and support news and information programming. The second is the need to ensure that programming reflecting Canada's diversity is made available within the Canadian broadcasting system. With respect to news and information programming, the Commission should be required to foster and maintain a healthy and diverse environment for journalism of a high standard. As for diversity, the Commission would ensure that the Canadian broadcasting system includes a level of diversity that meets the programming needs of underrepresented groups, including Indigenous, third-language and official language minority communities and Canadians with disabilities.

Finally, the growing threat posed to the Canadian broadcasting system by program piracy must be addressed in the broadcasting and regulatory policy objectives. We propose adding a definition of "program piracy" to subsection 2(1) of the *Broadcasting Act* and including a new policy objective in subsection 3(1) and a new regulatory objective in subsection 5(2) of the Act. In doing so, we believe the Commission should be encouraged to take all steps necessary under the *Broadcasting Act* to combat program piracy.

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

Yes, certain objectives should be prioritized in the *Broadcasting Act*.

With respect to the regulatory objectives in subsection 5(2) of the Act, the Commission should be required to rely on market forces to the maximum extent feasible as the primary means to regulate the broadcasting industry. Any regulation adopted by the Commission should interfere with the operation of competitive market forces to the minimum extent necessary to meet its objective.

As for the broadcasting policy objectives in subsection 3(1) of the Act, these should be streamlined and an emphasis should be placed on the following three core objectives:

- ensuring that the Canadian broadcasting system fosters and maintains a healthy and diverse environment for journalism of a high standard;

- ensuring that the Canadian broadcasting system includes a level of diversity that meets the programming needs of underrepresented groups, including Indigenous, third-language and official language minority communities and Canadian with disabilities; and

- ensuring that the Canadian broadcasting system discourages, inhibits and prevents program piracy.

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

A new approach to achieving the *Broadcasting Act*'s policy objectives should be incorporated into the regulatory objectives set out in subsection 5(2). Specifically, the regulatory objectives should be amended and updated to require the Commission to regulate the Canadian broadcasting system in a manner that

- relies on market forces to the maximum extent feasible as the means to achieve the broadcasting policy set out in subsection 3(1);

- is efficient and proportionate to the purpose of the regulation or supervision and interferes with the operation of competitive market forces to the minimum extent necessary to meet its objectives;

- strives to ensure that all broadcasting undertakings are regulated in an equitable manner regardless of the nature of technology used to deliver the resultant services to Canadians; and

- facilitates the protection of copyrighted programs where the rights are held by broadcasting undertakings.

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?

The Canadian Government can ensure that Canadian and non-Canadian online OTT services play a role in supporting the creation, production, and distribution of Canadian content by specifically including these “digital media undertakings” in the *Broadcasting Act* and by giving the Commission the express authority and regulatory tools to require them to support the creation, production, and distribution of Canadian content.

This means that an entity known as a “digital media undertaking” should be included within the definition of “broadcasting undertaking” that currently appears in subsection 2(1) of the Act. In addition, the term “digital media undertaking” should be defined in a

manner that would capture all Canadian and non-Canadian OTT services that transmit audiovisual content online.

Rogers is proposing that the Commission be given the authority under section 9 of the Act to enter into a service agreement with each digital media undertaking. That service agreement would set out the terms and conditions under which the undertaking could continue to provide service in the Canadian market. Those terms and conditions would be determined by the parties, but would likely include obligations to support the production, creation, exhibition and distribution of Canadian programming through various means.

In addition, with respect to program piracy and the need to combat this growing threat to the Canada's broadcasting industry, we are aware that the issue cannot be addressed solely under the *Broadcasting Act*. The Commission's regulatory authority under that Act extends only to "broadcasting undertakings". The entities that actually have the ability to effectively and efficiently combat program piracy are telecommunications common carriers, which are regulated under the *Telecommunications Act*.

As a result, we are also proposing amendments to the *Telecommunications Act* that would expressly provide the Commission with the authority to establish a regime that would enable ISPs and wireless carriers to block IP addresses or to take other actions to prevent program piracy as a means to protect the integrity of the Canadian programming rights market. Specifically, we believe a provision should be added to the *Telecommunications Act* that would refer to the policy objectives in subsection 3(1) of the *Broadcasting Act*, and would require the Commission to have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* in determining whether Internet service providers or wireless carrier should block access to IP addresses that are determined by the Commission to be engaged in the piracy of copyrighted programming.

Given the urgency of these matters, Rogers proposes that these amendments to the *Telecommunications* and *Broadcasting Act*s be adopted immediately.

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?

In addition to amending the broadcasting policy and the regulatory objectives set out in the *Broadcasting Act* in the manner noted above and including in the Act the authority for the Commission to regulate "digital media undertakings", we believe that adding the concept of service agreements as a new mechanism to regulate certain types of broadcasting undertakings would be effective.

As noted, adding the concept of "service agreements" to section 9 of the Act and authorizing the Commission to enter into agreements with Canadian and non-Canadian digital media undertakings, as well as groups of affiliated Canadian broadcasting undertakings, would certainly empower the Commission to implement and regulate the

broadcasting industry in a manner that protects, supports and promotes Canadian culture in both official languages.

Another mechanism that we have proposed adding to section 12 of the *Broadcasting Act* is the authority for the Commission to impose administrative monetary penalties (AMPs) on broadcasting undertakings (including non-Canadian digital media undertakings) that fail to comply with the terms of a service agreement, a licence or an exemption order. This new power, coupled with the range of existing enforcement tools, should provide the Commission with the ability to enforce any commitments or requirements that might be established to protect, support, and promote our culture in both official languages.

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?

Again, authorizing the Commission under section 9 of the *Broadcasting Act* to enter into service agreements with digital media undertakings, to licence Canadian-owned and controlled broadcasting undertakings and to exempt smaller broadcasting undertakings from the requirements of the Act would provide it with the tools it needs to ensure the availability of Canadian programming on the different types of platforms and devices that Canadians use to access content.

The other legislative tool that will ensure the availability of Canadian content on multiple platforms and devices is to enshrine the concepts of market forces and competition, as well as the platform agnostic, producer agnostic and content agnostic principles, into subsection 5(2) of the *Broadcasting Act*. It is through subsection 5(2) of the Act that the Commission is informed as to how it must regulate and supervise the Canadian broadcasting system.

Incorporating these new provisions into the Act will ensure that the Commission has the legislative tools it needs to adopt regulatory frameworks that will ensure the availability of Canadian content on all platforms and devices.

11. Democracy, News and Citizenship

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

No, the current legislative provisions are not sufficient to ensure the ongoing provision of trusted, accurate, and quality news and information. One category of programming that is in dire need of additional funding is news and information programming. The importance of ensuring that there continues to be multiple sources of news programming produced with high journalistic standards becomes more apparent every day, as false and inaccurate reporting become more and more prevalent on social media sites. A democracy cannot survive without professional and independent news organizations that adhere to journalistic standards and ethics.

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

There are a number of legislative changes that need to be enacted to ensure that professional news and information programming continues to be produced in Canada in accordance with high journalistic standards.

First, a new broadcasting policy objective needs to be added to subsection 3(1) of the Act that requires the Canadian broadcasting system to include local, regional and national news and information programming produced in accordance with professional journalistic standards.

Second, in furtherance of that new broadcasting policy objective, the Commission should ensure – through service agreements and licensing – that all broadcasting undertakings contribute to the production of local, regional or national news in some fashion. Those non-Canadian digital media services that may not wish to invest directly in the production of Canadian news programming could contribute in other ways, such as through contributions to journalism (e.g. contribute funding to Canadian Press or to the new labour tax credit regime that was recently announced by the Government).

Third, news and information programming should be treated the same as other categories of "at risk" programming. If news programming is permitted to access labour tax credits, which provide an objective and arm's length subsidy, we are confident that independent high quality news will continue to be produced in this country. Having said that, we do not believe it would be appropriate for a funding agency like the CMF, which incorporates subjective decision-making in its administration of funds, to be involved in the funding of news programming given the need for journalistic independence.

12. Cultural Diversity

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

The principle of cultural diversity should be addressed in an amended *Broadcasting Act*. It should actually be a focus of the broadcasting policy in subsection 3(1) of the Act along with ensuring that the programming offered by the Canadian broadcasting system reflects Canada's official language minority communities (OLMCs), Indigenous Peoples and persons with disabilities.

Through its authority to enter into service agreements, to issue licences and to make regulations, the Commission will have the legislative tools to ensure that the Canadian broadcasting system as a whole creates, produces, exhibits and distributes programming that achieves the cultural diversity broadcasting policy objectives set out in subsection 3(1) of the Act.

In addition, Rogers believes that all Canadian content that is deemed to be vital to achieving the policy objectives of the *Broadcasting Act* and that is "at risk", which includes programming that reflects Canada's rich cultural diversity, should be given

equal treatment under the law, both in terms of being granted access to funding for the production of that programming and in respect of the regulatory mechanisms that are imposed under the *Broadcasting Act* with regards to its broadcast.

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?

The mandate of the CBC under the *Broadcasting Act* does need to be updated. It operates today with journalistic independence and has expanded its operations to include transmitting its programming online to Canadian and international audiences. We believe it should continue to do so.

However, there are two changes that should be made to its mandate in light of the more open, global, and competitive communications environment. The first is that the CBC should no longer be permitted to solicit advertising on any platforms for the services it operates. In our view, the CBC's presence in any market, but particularly in a local market, has the effect of distorting that market. Given that the CBC receives a parliamentary appropriation of over $1 billion annually, and access to other support mechanisms (including over 40% of the CMF's funding), we do not believe that it is fair or equitable for private broadcasters to have to compete with a subsidized public broadcaster for advertising revenues.

In addition, it should be a requirement for the CBC to devote the public funding that it receives to the creation, production and exhibition of programming that is underrepresented in the Canadian broadcasting system or that is otherwise culturally significant and is unlikely to be produced by the private sector.

While we acknowledge that the CBC's primary radio service (CBC Radio 1) does not solicit advertising and generally focuses on content that is culturally significant, that is not the case for its television network, CBC Radio 2 or its online services. Rogers, therefore, proposes that the CBC remove all advertising from all platforms. We do not believe that the CBC should be competing with Canada's private broadcasters for diminishing advertising dollars while it continues to be subsidized by Canadian taxpayers.

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

The key mechanism that the Canadian Government can use to enhance the independence and stability of the CBC is to ensure it has sufficient and consistent funding through its parliamentary appropriation to sustain all of its operations. Moreover, the Government must clarify the CBC's non-commercial mandate with clear direction on the role it should play in the system.

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?

The CBC can play a key role by focusing its mandate and attention on programming that is underrepresented in the Canadian broadcasting system, including culturally significant programming and local news. However, if the CBC continues to be allowed to compete with private broadcasters for local advertising, there may come a time when it is the only source of local news programming in many communities. We do not believe that Canadians would want a future broadcasting system where the CBC is the sole source of local or national news. By removing the CBC from advertising, the Canadian Government would help ensure that there will continue to be a diversity of editorial opinions among Canada's private and public sectors.

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

This is one of the things that the CBC appears to be doing well today. It has a strong presence online. We do not believe any new mechanisms are needed to enhance the CBC's efforts in this regard.

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

The CBC can contribute to reconciliation with Indigenous Peoples and the telling of Indigenous stories by Indigenous Peoples by devoting more of its revenues and its programming schedules to programming that reflects Indigenous Peoples. This is an example of the type or genre of programming that is culturally significant and underrepresented within the Canadian broadcasting system today. It is programming that the CBC is and should continue to be mandated to broadcast.

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

Similarly, with respect to Canada's OLMCs, the CBC's mandate should be amended to ensure that a significant portion of the programming it produces and broadcasts on all of its platforms should be specifically tailored towards OLMCs.

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?

Yes.

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

The authority currently provided to the Governor in Council to issue policy directions under section 7, to order the Commission to hold hearings and make reports under section 15, to issue directions on specific matters under section 26 and to set aside and

to refer decisions back to the Commission under section 28 are appropriate and provide sufficient oversight.

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

The key way that a modernized *Broadcasting Act* can improve the functioning and efficiency of the CRTC and the regulatory frameworks it establishes is to require the Commission to rely on market forces to the maximum extent feasible to implement its policy objectives and for any regulatory measures implemented to be efficient and proportionate to their purpose and interfere with the operation of competitive market forces to the minimum extent necessary.

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

As noted above, the tools the Commission needs to have to fulfill its mandate under the Act are the express authority to regulate Canadian and non-Canadian digital media undertakings and the authority to enforce compliance through the use of 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?

Accountability and transparency in the availability and discovery of digital cultural content can be enabled through the public proceedings that the Commission will use to establish the terms and conditions that would be incorporated into service agreements and licences. The commitments made by digital media undertakings, which will be reflected in the service agreements they enter into with the Commission, will be public and the process used to enter into those agreements will also be public.