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December 23, 2004

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Dear Ms. Galipeau:

Re: Consultations on the Information Bulletin on the Regulated Conduct Defence

1. The Canadian Cable Telecommunications Association (CCTA), formerly the Canadian Cable Television Association, is pleased to provide comments on the interim Information Bulletin on the Regulated Conduct Defence (Bulletin).

2. CCTA is the national organization representing 79 Canadian cable companies that provide advanced media in the home through a wide range of entertainment, information, internet and telecommunications services. The cable industry provides television services to 7.2 million subscribers and cable high-speed internet access to 2.3 million Canadians.

3. CCTA appreciates the efforts of the Competition Bureau (Bureau) to publish guidelines toward the objectives of increasing compliance and ensuring fairness, predictability and transparency. Consistent with these objectives, CCTA recommends a number of additions to the Bulletin that would further clarify the Bureau’s position with regard to the Regulated Conduct Defence (RCD).

Consistency with Jurisprudence and Bureau History

4. Footnote 1 of the Bulletin states that it is meant to "replace and supercede any other policy papers produced by the Bureau on the RCD." The Bulletin should, therefore, comprehensively restate the Bureau's previously articulated positions to the extent that they are consistent with current thinking and clarify those issues on which the Bureau's position has changed. Failure to do so will result in confusion and uncertainty.

5. In 1995 in a speech entitled *The Regulated Conduct Defence and the Telecommunications Industry*, Don Mercer (former Deputy Director of Investigation and Research, Criminal Matters) provided a detailed description of the four necessary elements of the RCD and cited and interpreted relevant jurisprudence. The Bulletin should, at the very least, provide an updated analysis of the Bureau's position with respect to the interpretation and analysis of these elements and the substantial case law. The Bulletin includes no references to the case law; CCTA considers this to be a significant deficit.

6. The Bureau also explained its approach in a news release, *Regulated Conduct Defence Applies to Issuance of Taxi Licenses - Allegations of Conspiracy Unsubstantiated*, May 2, 2000 (Taxi Licenses news release). CCTA submits that the language of this news release and the analysis provided in Don Mercer’s speech are more consistent with existing jurisprudence than is the Bulletin. CCTA cannot determine any reason for departing from the jurisprudence and Bureau history. An explanation for the departure – if in fact there has been a departure – is required.

7. CCTA notes that the National Competition Law Section of the Canadian Bar Association asked the Bureau to address these inconsistencies in their submission of October 2003. CCTA concurs with these recommendations of the CBA.

Forbearance from Regulatory Oversight

8. In her address at the CBA Annual Conference on September 23, 2004, the Commissioner of Competition stated that the "RCD raises a number of questions about the appropriate interface between sector specific regulation and competition law" and mentioned the fact that several potential approaches were outlined in her speech to the 2004 Telecom Summit. From the perspective of the CCTA, if the RCD raises questions in the telecommunications sector that are not already answered in the CRTC/Bureau Interface document (Interface), the Bulletin should clarify the Bureau's approach to sectors that are in a transition period from regulation to market forces.

9. In particular, CCTA is concerned with the potential for unjust discrimination and anticompetitive behaviour by Incumbent Local Exchange Carriers (ILECs) in forborne and non-forborne markets that will escape the scrutiny of both the CRTC and the Bureau. For example, remedial action may be necessary when an ILEC engages in anticompetitive or predatory pricing behaviour in a forborne market that has the effect of preventing or inhibiting the entry of a potential competitor in a non-forborne market. The CRTC's imputation tests and bundling restrictions are insufficient to address some of the broader implications of such conduct. CCTA submits that the Bureau should not interpret the Interface and RCD as limiting its ability to provide a remedy in a forborne market when an ILEC prevents entry into local telephony by engaging in a range of anti-competitive strategies involving complementary markets of which the ILEC may not have a dominant market share.

10. CCTA suggests that, with its expertise, the Bureau should play a more significant role in addressing the types of behaviour described above and consideration should be given to whether it is appropriate to define this role in the Bulletin. Importantly, CCTA is not suggesting any limits on the jurisdiction or role of the CRTC. The current imputation tests and bundling restrictions should be maintained or broadened and *ex ante* regulation should be preferred to Bureau involvement at a later stage. CCTA is simply seeking reassurance that both the CRTC and the Bureau will exercise their respective jurisdiction to prevent anti-competitive behaviour that delays the development of a competitive local telephony market.

Mergers

11. In the case of a forborne market, the CRTC no longer exercises its jurisdiction to authorize specific conduct or behaviour, i.e. tariff approval. Therefore, the Bureau can address specific pricing behaviour that has not been previously approved by the CRTC. In the case of mergers in the broadcasting sector, however, the CRTC retains the power to authorize specific conduct pursuant to the legislation. Therefore, the RCD should apply to CRTC-approved mergers.

12. The Bureau stated in the Taxi Licenses news release that the RCD "applies when a specific activity is authorized or carried out in keeping with valid regulation; such activity is deemed to be in the public interest and cannot be found to be in violation of the *Competition Act*." CCTA submits that this language is appropriate in the context of mergers. Although the Bulletin explicitly states that the RCD applies in merger cases, the language in other parts of the Bulletin indicates a very narrow application. The Bulletin states that "operational conflict" must be demonstrated and the RCD only applies "where a regulatee's conduct is mandated or required by the regulator." Since mergers are approved or "authorized" rather than required, the operational conflict standard is

inappropriate. CCTA prefers the language that appears in the Taxi Licenses news release, which more accurately reflects the existing case law.

13. The Bulletin should address the concerns that were raised in the proceedings involving the acquisition by Astral Media Inc. of certain radio stations owned by Telemedia Radio Inc. Because the parties reached a settlement with the Bureau, the question of the jurisdiction of the CRTC and the Commissioner to review mergers in the broadcasting sector remains unresolved.

14. CCTA submits that consideration should be given to providing an explicit exemption for mergers that other regulatory agencies, such as the CRTC, have determined to be in the public interest. In the case of the CRTC, transfers of licenses are not approved unless they are consistent with the objectives of the *Broadcasting Act*.

15. The uncertainty with overlapping regulation is a significant impediment to efficient commercial activity in regulated industries. This uncertainty would be minimized, to some degree, by additional clarity in the Bulletin.

Garland v. Consumer’s Gas

16. CCTA's final concern is with the potential impact of the Supreme Court’s decision in *Garland v. Consumer's Gas*. CCTA does not believe that this decision should change the application of the RCD in the context of the *Competition Act*. The jurisprudence with respect to the application of the RCD and the *Competition Act* is clear. In *Garland*, it was held that the RCD could not be applied to a section of the *Criminal Code*.

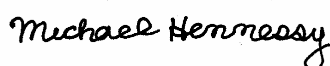
17. It would be perverse logic to use the ruling in *Garland* to narrow the application of the RCD in *Competition Act* matters since *Garland* involved the question of whether the RCD should "be broadened to apply to cases outside the area of competition law." The judgment does not reverse the case law involving the *Competition Act*. CCTA submits that *Garland* should not be read as narrowing the application of the RCD in *Competition Act* matters and the Bulletin should clearly indicate that the RCD remains available under the *Competition Act*. The only potential for narrowing the scope of the RCD to competition matters is through legislative amendments.

18. The Court in *Garland* placed considerable emphasis on the importance of whether the statute in question uses the word "unduly". CCTA suggests that the RCD applies to sections of the *Competition Act* that do not use the word unduly. However, CCTA cautions that if the word "unduly" is removed from s. 45, a specific amendment will be required to ensure continued application of the RCD to *per se* offences. Such an amendment may be required, even without an amendment to s. 45, to clarify the application of the RCD to all matters under the *Competition Act*.

Conclusion

19. CCTA submits that these suggested additions would help to clarify the appropriate position that should be taken by the Bureau with respect to the RCD. CCTA appreciates the opportunity to provide the Bureau with these comments and would be pleased to provide any further assistance the Bureau may consider useful.

Sincerely,



Michael Hennessy,
President