

Final Written Comments of CBC/Radio-Canada Notice of Public Hearing CRTC 2006-5: TV Policy Review

1. Introduction

1 This proceeding is important and timely given the changes occurring in conventional television broadcasting. It has provided the Commission with a rich assortment of often opposing views on a number of aspects of this industry.

2 However, on two key points, CBC/Radio-Canada's evidence before the Commission stands uncontested:

- Conventional television is the cornerstone of the Canadian broadcasting system; and,
- The traditional revenue model of conventional television is failing.

3 No party has disputed these points, and as further discussed below, taken together, these two facts mean that something must be done to prevent the Canadian broadcasting system from suffering significant harm.

4 Similarly, no party to this proceeding has suggested that this failing revenue model will correct itself, and that the Commission should therefore take a "wait and see" approach. Now is the time for the Commission to establish a new framework of subscriber fee eligibility for conventional television broadcasting that will enable the industry to continue to fulfil its role in the future.

5 As the Commission itself has indicated in its Report on the Future Environment facing the Canadian Broadcasting System: "Within the next three to seven years, public policy action will need to be taken if it is to have the desired effect. Corrective action taken beyond this time may be ineffective."

6 With the completion of this proceeding, the Commission now has before it all of the evidence and information necessary to permit it to establish, via a policy statement, an effective and fair framework of subscriber fee eligibility for the local signals of the conventional television industry.

7 Such a statement of eligibility would not guarantee conventional broadcasters access to subscriber revenues, but it would provide the Commission with the future tools – to the extent they are required and merited – to meet the objectives of the *Broadcasting Act*, in respect of conventional television.

8 In the following sections of these Final Written Comments, CBC/Radio-Canada provides an examination of certain key elements in this proceeding and responds to the allegations of other parties.

2. Conventional Television is the Cornerstone of the System

9 Conventional broadcasters play a unique and essential role in the Canadian broadcasting system. This was recognised by all parties. For example, at the public hearing, Shaw described conventional television as follows:

They are the largest best-known destination for the most popular Canadian and U.S. programming. Conventional TV is still the most watched service ...¹

10 Similarly, the CCAU stated: “The over-the-air licensees are the foundation of the financing of Canadian drama.”²

11 As pointed out by CBC/Radio-Canada in its submission, conventional broadcasters provide 75% of the total financing to original Canadian drama and comedy programming. They are responsible for the creation and first window airing of nearly all of the most popular Canadian series and specials shown in prime time. And, every week throughout the year, 90 per cent of Canadian TV viewers tune into a Canadian conventional television station.

12 There can be no doubt that conventional television is the cornerstone of the Canadian broadcasting system. And, it is essential for the health of Canadian broadcasting that conventional broadcasters continue to make their significant and critical contributions to the system. But they cannot do this without adequate financial resources.

3. The Traditional Revenue Model is Failing

13 The second key point is that the traditional advertising revenue model that has sustained conventional broadcasters in the past is now failing. All of the expert evidence and analyst reports filed with the Commission testify to this fact.³ At Page 1 of its Reference Material, CBC/Radio-Canada provided a graphic and uncontested representation of the future losses that await conventional broadcasters based on analysts’ revenue forecasts and assuming historical cost increases. And this picture is likely optimistic: it included one of the most generous revenue forecasts from industry analysts and did not include the future costs of moving to HD or of enhanced local programming.⁴

14 The Rogers panel was particularly frank on the failing revenue model:

...I don’t think they [conventional broadcasters] understand the threat that the system is facing. They are facing a challenge from the unregulated media, from the Internet, from cell phones, from other devices.⁵

Our company Media Buying Service Limited represents the interests of advertisers who spend about \$900 million a year buying advertising time

and space, and their faith, frankly, in the 30-second commercial has been somewhat diminished for many, many reasons ...⁶

... we really are staring down the barrel of a gun, and the gun is the PVR.⁷

15 While the evidence is clear in this regard,⁸ some parties have suggested that the Commission look at this issue more broadly. These parties have made two arguments: first, that as conglomerates, broadcasters are doing fine⁹; and, second, that new revenue streams are available.¹⁰

Conventional Broadcasting is a Distinct Activity

16 On the first point, some parties have argued that broadcasters are doing very well when all of their activities (i.e., including their specialty services) are taken into consideration. The primary example these parties cite is CTV Inc., and its recent acquisition of CHUM Ltd. for \$1.7 billion.

17 This argument has no merit. First, even if speciality services or other services could cross-subsidize conventional television, this is not a sustainable business model. As noted by CTV, if such an approach were taken it would create a disincentive to own conventional stations.¹¹ Moreover, as also noted by CTV, conventional television is the core business¹² and it cannot reasonably be expected that ancillary businesses would subsidize a core business for any extended period of time.

18 Second, as also emphasized by CTV, conventional television and specialty services are two distinct businesses.¹³ The conventional and specialty sectors are licensed and regulated separately. They have distinct regulatory obligations and make different contributions to the system. And, most importantly, they face radically different financial circumstances. The specialty services – with both advertising and subscriber revenues available to them - are enjoying huge growth and tremendous financial success. The conventional segment is not.

19 The plain fact is that conventional television must be a self-sustaining business if it is to continue to make an important contribution to the Canadian broadcasting system. The evidence is clear that this will not be the case in the near future unless something is done.

A Magic Bullet for Advertising?

20 While recognising the future difficulties of the traditional revenue model, some parties argued that the financial problems of conventional broadcasters would be solved if the advertising rules were loosened and if broadcasters took advantage of new advertising opportunities. In particular, they suggested that new revenues could be generated from targeted advertising opportunities that could be undertaken jointly with BDUs.¹⁴ They also pointed to possible revenue opportunities associated with Internet and mobile platforms.¹⁵

21 Conventional television broadcasters are rational economic entities and will take advantage of any reasonable revenue opportunities open to them. Broadcasters were clear in their evidence that relaxing the advertising rules would give them increased flexibility but would simply not generate new revenues. The same sized pie would just be distributed differently – and it is this overall pie that is being threatened by fragmentation and new technologies.¹⁶

22 On the question of joint targeted advertising and new platforms, the fact that these types of revenue opportunities have not yet emerged in any consistent way should demonstrate to the Commission the fallacy of this argument: the availability of such opportunities is at the complete discretion and control of BDUs and telcom carriers, and will only be offered to broadcasters when these distributors find it in their financial interests to do so, and only under terms and conditions favourable to them.

23 Moreover, even if distributors from time-to-time do create such opportunities for broadcasters, they involve new, unavoidable costs and only the possibility of new revenues. The business model for these activities is highly uncertain and it is speculative in the extreme to suggest that significant revenues will be available from these activities in the foreseeable future.¹⁷

24 Overall, the suggestions of other parties on this point are highly speculative and transparently self-interested. The overwhelming evidence before the Commission is that the advertising pie is not growing, and certainly not at a rate that could possibly solve the impending financial problem faced by conventional broadcasters.

25 There is no magic bullet for conventional television advertising revenues.

4. The Commission has the Power to Fix the Problem

26 Some parties have argued that the Commission lacks the jurisdiction under the *Broadcasting Act* to grant conventional broadcasters access to subscriber revenues. This is incorrect.

27 The Commission concluded in 1993 that it had the authority to impose a fee for carriage for over-the-air (OTA) signals. Two legal opinions have been filed with the Commission in this proceeding – one by McCarthy Tétrault from 1993 and one by Goodmans from 2006. Both of these legal opinions conclude that the Commission has the jurisdiction to impose a fee for carriage.

28 The McCarthy Tétrault opinion finds that the Commission's jurisdiction stems from sections 10(1)(g), (h) and (k), as well as sections 3(1)(e), (s), (t) and section 5(1). The Goodmans opinion cites sections 3(1)(d), (e), (f), (g), (i), (s), 5(1), 5(2)(g) and 9(1)(h). The McCarthy Tétrault and Goodmans opinions make it clear that the Commission's jurisdiction is broadly based in the *Broadcasting Act*. No party has refuted these views.

29 Some parties have argued that the *Copyright Act* precludes the Commission from exercising its powers under the *Broadcasting Act*. This is again incorrect.

30 BDUs collect subscription fees from their subscribers. These subscription revenues are one source of funding used to finance the Canadian broadcasting system. Providing conventional broadcasters with access to these subscription revenues has nothing to do with copyright law and everything to do with ensuring that funding sources are directed in a manner that ensures that the objectives of the *Broadcasting Act* are achieved.

31 Moreover, there is nothing in the *Copyright Act* that would override or otherwise prevent the Commission from exercising its jurisdiction under the *Broadcasting Act*. On the contrary, the *Copyright Act* establishes a copyright in broadcasters' over-the-air signals (section 21) and then establishes a specialized regime for the retransmission of those signals (section 31) that expressly requires, as a condition of the application of that regime, that a retransmission must "be lawful under the *Broadcasting Act*" (section 31(2)(b)). In other words, when enacting section 31 of the *Copyright Act*, Parliament expressly recognized the overriding importance of the *Broadcasting Act* and made the application of section 31 subject to the Commission's exercise of its jurisdiction under the *Broadcasting Act*.

32 There is nothing in section 31 or in any other provision of the *Copyright Act* that narrows or constrains the Commission's jurisdiction under the *Broadcasting Act*. In particular, there is nothing that precludes the Commission from exercising its authority to determine when, how and under what terms and conditions a BDU may carry the signal of a conventional broadcaster. Consequently, there can be no doubt that those terms and conditions may include an obligation on the BDU to pay a conventional broadcaster a fee when its service is distributed.

5. Access to Subscriber Fees is the Solution

33 Given that the current revenue model for conventional television is in decline there is a clear need to remedy this situation. The remedy proposed by a number of conventional broadcasters is to put them on the same economic footing as specialty services by providing them with access to subscriber revenues. Effectively, two key proposals have been put forward.

Fee Based on Local Signals and New Public-Policy-Driven Activities

34 Several parties, including CBC/Radio-Canada, have proposed that the Commission establish a rate for conventional broadcasters' local signals based on commitments made by the broadcaster – commitments related to specific policy goals of the Commission in regard to meeting the objectives of the

Broadcasting Act, and including technological and/or programming improvements.

35 This link between the quantum of the rate and the commitments of the broadcaster would ensure that access to subscriber revenues benefits the broadcasting system and does not merely provide a windfall to the shareholders of the conventional broadcaster. This is an important feature: not only is there no cash grab available under this approach¹⁸, but the direct link between the costs and benefits, whether they be HD programming, local programming, or other types of programming, are visible to all – the Commission, the industry, and even consumers, if BDUs choose to pass on the costs. Moreover, as discussed below, this approach would not be unduly burdensome to implement.

36 The proposed local signal eligibility approach would also promote a fair economic environment for Canadian broadcasting by putting conventional broadcasters on the same robust economic footing as specialty services.

Distant signals

37 In addition to its support for the above approach, CTV has suggested that conventional broadcasters should have the right to negotiate a fee-for-carriage for their distant signals and, if unable to reach an agreement with a BDU, to withdraw their signals. CBC/Radio-Canada agrees with this suggestion and believes that such an approach would complement the above more robust approach of eligibility for subscriber fees for the local signals of conventional broadcasters in exchange for meeting specific policy objectives.

38 Since distant signals appear to be valued by BDU subscribers,¹⁹ BDUs would have an incentive to negotiate a reasonable commercial arrangement with conventional broadcasters. Both sides, therefore, would face reasonable commercial pressures to conclude a mutually satisfactory agreement. And, if they were unable to do so, there would be no need for the Commission to become involved. Given the wealth of programming services now available to Canadians, it would not be a major policy concern if certain distant signals were no longer made available to some BDU subscribers.

39 However, the uncertain nature of the outcomes available under this approach limits its usefulness as a fundamental solution to supporting the key role of conventional broadcasters.

6. An Approach that is Easy to Implement

40 Contrary to the position taken by BDUs in this proceeding, the two mechanisms advocated in the preceding section – negotiated distant signal rates and Commission-established wholesale rates for local OTA signals – would be both simple to understand and easy to implement.

The Local Signal – Public Policy Approach

41 Under the CBC/Radio-Canada's local signal proposal the rate for a local OTA signal would be set by the Commission at the time of the broadcaster's licence renewal. The amount of the rate would be based on specific incremental benefits proposed by the broadcaster and approved by the Commission. The requirement to implement the proposals would be made a condition of licence and annual reporting by the broadcaster would be required in order to permit the Commission to monitor compliance.

42 Some BDUs have suggested that such an approach would require extraordinary accounting measures on the part of the Commission. This is simply untrue and a strange argument to be coming from regulated entities such as Rogers and Bell Canada. These companies routinely provide the Commission with similar financial information for their services as would be required in this case. For example, the information requirements of the CRTC's traditional approach to ensure the fulfilment of significant benefit commitments, or for the approval of wholesale rate increases for specialty services, are identical to what would be required for the local signal approach. To see the fallacy of the BDUs' argument on this matter the Commission simply needs ask itself the following: If the traditional approach is adequate for BDUs' services, why isn't it satisfactory for conventional broadcasters' services?

43 A condition of licence is the primary tool the Commission uses to impose regulatory obligations. It is an effective tool; one that is very familiar to both licensees and the Commission; and, one that is readily enforceable under the *Broadcasting Act*. Imposing this type of condition of licence on a conventional broadcaster would be no different from the many other situations where the Commission imposes conditions of licence on broadcasting undertakings.

The Distant Signal Mechanism

44 The distant signal mechanism would involve the Commission establishing a rule that requires a BDU to negotiate an agreement with a conventional broadcaster in order to distribute one of that broadcaster's OTA signals as a distant signal. In the absence of such an agreement the BDU would not be permitted to distribute the broadcaster's signal as a distant signal.²⁰

7. Is CBC/Radio-Canada Eligible?

45 Several parties to this proceeding have suggested that CBC/Radio-Canada's television services should not be eligible for access to subscriber fees. Parties' reasons for taking this view in all cases reduce to a single contention: CBC/Radio-Canada should be ineligible because it receives public funding.

46 In response, CBC/Radio-Canada would simply remind the Commission of two uncontested facts in this proceeding. First, like all other conventional

broadcasters, CBC/Radio-Canada's television services have a very heavy reliance on advertising revenues. Second, as demonstrated by the Nordicity study filed by CBC/Radio-Canada in this proceeding, CBC/Radio-Canada is not alone in receiving financial support from government: the value of annual government support for the Canadian conventional private broadcasting industry is valued in the hundreds of millions of dollars.²¹ This exceeds the amount of annual government support received by either CBC Television or Radio-Canada Television.

47 Finally, Commissioner French expressed concern that subscriber revenues for CBC/Radio-Canada would somehow conflict with the level of government appropriations deemed to be "adequate" by government.²² There is no conflict. CBC/Radio-Canada is already under a mixed financing model that includes advertising and other commercial revenues enjoyed by private broadcasters. CBC/Radio-Canada's eligibility to subscriber fees would not change, nor complicate, nor contradict the process under which the government provides funding. In fact, the *Broadcasting Act* explicitly recognises that CBC/Radio-Canada will supplement its government appropriations with commercial revenues, in order to advance the objectives of the Corporation.²³ The oversight of both the CRTC, via its licensing of the Corporation's television services including the associated advertising, and government, through its annual approval of CBC/Radio-Canada's Corporate Plan including financial statements that identify commercial revenues, reflect this aspect of the *Act*.

48 CBC/Radio-Canada is therefore exactly like all other Canadian conventional broadcasters, relying on a mix of public and private funding. A determination that CBC/Radio-Canada is ineligible for subscriber revenues because of its public broadcaster mandate and funding structure would be unduly discriminatory and contradict the language and intent of the *Broadcasting Act*.

8. No Evidence that Affordability is an Issue

49 A number of parties have suggested that BDU rates would necessarily rise if conventional broadcasters were granted access to subscriber revenues and that such rate increases would raise issues of affordability, among other things. Some parties have even suggested that subscribers would drop out of the system and move to the DTH black market to obtain their television signals. These arguments are nothing more than self-interested scare mongering.

50 First, the rates set by the Commission need not be large in order to provide a significant benefit to the system. CTV has proposed a fee of \$0.10. If CBC/Radio-Canada were to receive \$0.10 per subscriber per month for its CBC Television signal this would provide CBC Television with roughly \$12 million per year. This is a substantial amount of money that could produce important benefits in the way of increased local programming and/or technological improvements. A fee of \$0.25 per subscriber per month would still be quite

modest and yet would generate \$30 million per year – sufficient funds to provide significant benefits in the way of drama or other priority programming.

51 Second, there would be no justification for a BDU to mark-up a fee since the BDU is already carrying the OTA signal and recovering the associated costs (plus some profit) via its existing basic rate.²⁴ Consequently, the magnifying effect of a mark-up need not come into play and the only issue would be whether the BDU would choose to pass through to its subscribers the fee paid by the BDU to a broadcaster.

52 Third, it is an open question whether a BDU would feel the need to pass through a wholesale rate of a relatively low magnitude. The BDU would have to assess whether the combination of competitive pressures, subscriber reaction and the magnitude of the fee would justify absorbing the fee, in whole or part.

53 Fourth, while Canadians might not welcome a rate increase, the evidence presented by CTV indicates that a relatively small increase (i.e., less than \$0.50) would not be considered a significant irritant.²⁵ Moreover, BDUs have repeatedly raised their basic rates and yet subscriber levels have continued to grow. As pointed out by Global, from 2002 to 2005 BDU revenues increased by 21% while subscriptions rose by only 4.9%.²⁶ As indicated by CBC/Radio-Canada's panel, all available evidence suggests that subscribers are not being driven out of the system or to the black market by these rate increases, and that in fact the black market is in decline.²⁷

54 Fifth, the survey filed by a number of BDUs in this proceeding, purporting to examine public views on subscriber fees, is so flawed that it simply cannot be used to demonstrate affordability concerns. This survey is embarrassingly blatant in design, effectively forcing BDU subscribers to respond in the desired manner. The use of phrases such as "required to pay", "no choice", "unfair for customers like you to pay... when available free to others" makes this survey clearly worthless. Moreover, the specific question on support for a fee for local Canadian TV stations is completely biased by the fact that it focuses on an extremely high price - a fee of \$5 a month is mentioned three times – and does not identify any possible associated benefits such as HD or local programming. In fact, the survey removes all question of specific benefits for subscribers by telling respondents "you would get nothing for it."

55 Finally, it is entirely within the Commission's power to set subscriber fee rates for conventional broadcasters at levels that would ensure that meaningful benefits could be achieved while minimizing the rate effects for BDU subscribers. The suggestion that BDUs would raise their rates by \$19 per month and that the broadcasting system would collapse is transparent scare mongering.

9. Regulatory Obligations Remain

56 A number of parties have also suggested that BDUs should no longer maintain existing regulatory obligations if conventional broadcasters are granted

access to subscriber revenues on the basis that it would effectively break the “regulatory bargain” established with respect to BDU carriage of conventional television signals.

57 This argument is inconsistent with existing law and policies. There is no “regulatory bargain” and OTA broadcasters do not receive special privileges. The *Broadcasting Act* requires that “each element of the broadcasting system contribute in an appropriate manner to the creation and presentation of Canadian programming”. This is a statutory requirement established by Parliament.

58 Regulatory requirements such as priority carriage and simultaneous substitution are imposed on BDUs by the Commission in order to fulfill the objectives of the Broadcasting Act.

59 For example, priority carriage reflects the fundamental requirement set out in section 3(1)(t)(i) of the Act that distribution undertakings “should give priority to the carriage of Canadian programming services and, in particular the carriage of local Canadian stations”. This is an objective established by Parliament, not an arbitrary privilege granted to OTA broadcasters by the Commission.

60 Similarly, simultaneous substitution was established by the Commission to protect the programming investments of OTA broadcasters. In its present form, signal substitution requires BDUs to take steps to protect the programming investments of local OTA broadcasters and specialty services. It is a natural and necessary recognition of the programming rights of these broadcasters. It is not a privilege.

61 These aspects of the existing regime do not need to be and should not be changed, or considered as something to be exchanged for new measures such as a subscriber fee for conventional broadcasters.

10. Conclusion

62 The evidence in this proceeding makes it clear that the current conventional television revenue model is not sustainable. Given the importance of this sector to the broadcasting system something must be done. In CBC/Radio-Canada’s view the most reasonable and effective solution would be to make conventional television broadcasters eligible for access to BDU subscriber revenues.

END NOTES

¹ Transcript, 30 November 2006, paragraph 5996.

² Transcript, 4 December 2006, paragraph 9594.

³ CBC/Radio-Canada provided evidence from more than five financial analysts.

⁴ In the construction of this chart, CBC/Radio-Canada employed the revenue forecasts of PricewaterhouseCoopers who forecast some, albeit very modest, revenue growth for Canadian conventional television services. A number of other analysts, such as Kagan and TD Newcrest are less optimistic: they see revenue declines within the next year. No party disputed these forecasts or the reasonableness of forecasting future cost levels based on historical trends, particularly in view of the future costs associated with the transition to digital/HD.

⁵ Transcript, 29 November 2006, paragraph 5273.

⁶ Transcript, 29 November 2006, paragraph 5193.

⁷ Transcript, 29 November 2006, paragraph 5216.

⁸ Bell Canada captured the essence of the problem quite succinctly: *We have no reason to dispute the broadcasters' claim that growth in advertising spent on conventional channels is slowing, but we would note that these dollars are moving primarily to the specialty channels, where advertising revenues have increased 318 per cent since 1997.* (Transcript, 30 November 2006, paragraph 6274).

⁹ See, for example, Rogers (Transcript, 29 November 2006, paragraphs 4934 to 4943).

¹⁰ See, for example, Rogers (Transcript, 29 November 2006, paragraphs 4947 to 4951, 5180 to 5182, and 5324 to 5326).

¹¹ Transcript, 27 November 2006, paragraph 2057.

¹² Transcript, 27 November 2006, paragraph 2047.

¹³ Transcript, 27 November 2006, paragraph 2050.

¹⁴ See, for example, Rogers (Transcript, 29 November 2006, paragraph 4947).

¹⁵ See, for example, Bell Canada (Transcript, 30 November 2006, paras 6288 to 6293).

¹⁶ See, for example, CTV (Transcript, 27 November 2006, paragraph 2311).

¹⁷ See, for example, CTV (Transcript, 27 November 2006, paragraph 1785).

¹⁸ See, for example, Transcript, 27 November 2006, paragraphs 401 to 414.

¹⁹ See, for example, Rogers (Transcript, 29 November 2006, paragraph 5061), Shaw (Transcript, 30 November 2006, paragraph 6129, 6162) and Bell Canada (Transcript, 30 November 2006, paragraph 6446).

²⁰ The sole exception would be in respect of those distant signals that a BDU is required to distribute. Those signals would be subject to a rate established by the Commission since the mandatory carriage character of these signals would make it inappropriate for a negotiated approach to be adopted.

²¹ Nordicity estimates the value of government support for Canadian specialty channels arising from entry protections to be worth approximately \$900 million annually.

²² Transcript, 5 December 2006, paragraph 10880.

²³ See, for example, sections 46 and 10.

²⁴ No BDU in this hearing suggested that it would apply a mark-up and CTV noted that there would be no basis for such a mark-up (Transcript, 27 November 2006, para 2028).

²⁵ Transcript, 27 November 2006, paragraph 1966.

²⁶ Transcript, 27 November 2006, paragraph 1379.

²⁷ Transcript, 27 November 2006, paragraph 157.