eastlink

February 11, 2021

Via e-mail: CHPC@parl.gc.ca

Standing Committee on Canadian Heritage
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON
K1A 0A6

RE: Bill C-10 – An Act to amend the Broadcasting Act (the "Act")

1. Bragg Communications Inc., carrying on business as Eastlink ("Eastlink"), is pleased to provide its recommendations regarding Bill C-10: *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* ("Bill C-10").

Introduction

2. One of the primary goals of Bill C-10 is to address the impacts that large foreign companies such as Netflix are having on the Canadian broadcasting system. While that is certainly an important issue, Eastlink notes that the impact of large *domestic* companies is an equally (if not more) important issue that has not been addressed in Bill C-10.

3. The last major update to the Act was in 1991. Since that time, there has been unprecedented vertical integration and consolidation within the Canadian broadcasting industry. As a result, four large, vertically-integrated companies now dominate the industry: Bell, Rogers, Shaw/Corus, and Quebecor (collectively, the "VI entities"). In addition to being the largest retail communications service providers in Canada, the VI entities now own the vast majority of Canada's mainstream TV channels. Among the 90+ TV channels owned by the VI entities are popular channels such as CTV, Global, Citytv, TSN, Sportsnet, HGTV, History, Discovery, YTV, and Treehouse.

4. The TV channels owned by the VI entities are key inputs for Eastlink and other small TV service providers ("TVSPs"), and the carriage fees associated therewith are one of the largest expenses for our TVSP business. The fact that we must obtain those TV channels from our direct competitors creates a significant conflict of interest for the VI entities, who earn the vast majority of their revenues by competing against us in the retail communications services market.[1] As a result, they have every incentive to leverage their ownership of popular TV channels to impede our ability to compete effectively against them (either by denying us the right to carry their TV channels, or, charging unreasonably high carriage fees for the channels).

5. As discussed below, while the CRTC has attempted to address this issue via regulatory measures designed to limit anti-competitive conduct by the VI entities, those entities have consistently challenged the CRTC's authority to do so. Accordingly, Eastlink proposes that Bill C-10 be amended to clarify the CRTC's authority to regulate the wholesale agreements between broadcasting undertakings. This is critical to ensuring fair competition in the TVSP market which, in turn, will help achieve the Government's objectives of consumer choice and affordability.

VI entities' challenges to the CRTC's authority

6. In 2010, the CRTC held a hearing to address the issue of vertical integration within the Canadian broadcasting industry. At that time, the CRTC determined that VI entities have both the incentive and ability to use their dominant market position to harm smaller companies like Eastlink.[2] Accordingly, the CRTC introduced a code of conduct that eventually became the *Wholesale Code* (the "Code")[3]. The Code sets out guidelines for the negotiation of wholesale agreements that are designed to ensure that large companies cannot use their market power to impose anti-competitive rates and terms on their smaller competitors. For example, the Code prohibits Bell from charging Eastlink unreasonably high wholesale rates for its TV channels (TSN, HBO, etc.) in the hopes of driving up Eastlink's retail prices or creating a harmful margin squeeze for Eastlink's business. The Code also contains various provisions

[1] For example, BCE's 2019 annual report indicates that Bell's retail communications services brought in 7 times more revenue than Bell Media. Similarly, Rogers' 2019 annual report indicates that Rogers' retail communications services brought in 5 times more revenue than Rogers Media.
[2] Broadcasting Regulatory Policy CRTC 2011-601.
[3] Appendix to Broadcasting Regulatory Policy CRTC 2015-438.

designed to protect consumers (e.g., provisions ensuring TV channels cannot deny TVSPs the flexibility to sell channels on a stand-alone or pick-a-pack basis).

7. Within weeks of the Code's creation, Bell filed an appeal with the Federal Court of Appeal seeking to have the Code struck down on the basis that the CRTC does not have the authority to regulate the wholesale agreements between TV channels and TVSPs. The Court determined that the CRTC did not have the authority to impose the Code under s. 9(1)(h) of the Act [4], however, the Code temporarily remains in effect due to its inclusion in the VI entities' conditions of licence. We expect the VI entities to challenge the re-imposition of those conditions of licence when they expire in a few years. Accordingly, it is critical that the Act be amended to provide the CRTC with clear authority to impose adherence to the Code as a regulatory requirement for the VI entities.

8. This is only one example of the VI entities' efforts to challenge the CRTC's authority to implement measures designed to prevent them from abusing their market dominance. Other recent examples include:

   - In 2017, the CRTC proposed creating a dispute resolution mechanism covering wholesale agreements between TV channels and TVSPs' video-on-demand services.[5] Like the Code, such a mechanism would have ensured that the VI entities could not exploit their market dominance to charge small TVSPs anti-competitive rates for popular on-demand programming. However, Bell, Rogers and Corus successfully argued the Act did not grant the CRTC the authority to regulate such agreements. As a result, the CRTC did not proceed with its proposal.

   - In 2015, the CRTC created the "standstill rule", which prohibits TV channels from withholding their signals from TVSPs in an effort to pressure them into accepting unreasonable rates and terms.[6] The standstill rule is an important regulatory measure that protects smaller TVSPs and also ensures consumers do not become collateral damage when large companies attempt to leverage their market power to impose an unfair deal. In 2019, the CRTC found that Quebecor violated the standstill rule when it withheld

[4] 2018 FCA 174
[5] Broadcasting Notice of Consultation CRTC 2017-280
[6] The standstill rule similarly prohibits TVSPs from dropping signals during negotiations to leverage unreasonable rates.

its TVA Sports signal from Bell at the start of the NHL playoffs, denying thousands of Canadian consumers access to NHL playoff games.[7] Quebecor responded to the CRTC's efforts to enforce the standstill rule by asking the Federal Court of Appeal to rule that the Act does not grant the CRTC authority to implement the standstill rule, and Bell filed a brief supporting Quebecor's position. The Court has not yet issued a decision but, in accepting the appeal, the Court stated that Quebecor had presented "solid arguments and a defendable case" with respect to whether the CRTC had the required authority.[8]

9. In sum, for the last five years, the VI entities have been waging a consistent campaign to eliminate CRTC measures designed to prevent them from abusing their market dominance. This creates considerable risk for Eastlink and the other small TVSPs who rely on the *Wholesale Code* and other CRTC measures to protect us from anti-competitive conduct by the dominant VI entities. It also poses a risk to consumers because, if the VI entities are successful in impeding competition in the retail TVSP market, it will lead to decreased consumer choice and service affordability. Accordingly, it is critical that the Act be amended to provide the CRTC with clear authority to regulate the wholesale agreements between broadcasting entities.

Proposed amendments to Bill C-10

10. For the CRTC to have clear authority to implement measures such as the *Wholesale Code*, the Act must explicitly state that the CRTC has the authority to issue orders imposing conditions respecting the wholesale agreements between broadcasting undertakings. Accordingly, Eastlink proposes that clause 7 of Bill C-10 be amended to add the following text as an additional item under s. 9.1(1) of the Act: "terms and conditions of service in contracts between broadcasting undertakings".

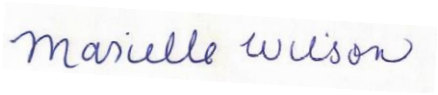
11. To ensure the CRTC has clear authority to create dispute resolution mechanisms covering all aspects of the wholesale relationship between TV channels and TVSPs (including the provision of video-on-demand programs), Eastlink proposes that clause 8 of Bill C-10 be amended to include the following revised wording for s. 10(1)(h) of the Act (revised wording shown in bold):

[7] Broadcasting Decision CRTC 2019-109
[8] Montreal Gazette, *Court of Appeal to hear Quebecor case over TVA Sports/Bell dispute*, June 19, 2019

> "…for resolving, by way of mediation or otherwise, any disputes arising between **broadcasting undertakings** concerning the carriage of programming originated by the **broadcasting** undertakings."

12. Eastlink thanks the Committee for the opportunity to submit our proposals for this important update to the Act. We are a family-owned business that provides TV, Internet, telephone, mobile, and home security & automation services to primarily rural markets in Atlantic Canada, Ontario, Alberta and British Columbia.

Sincerely,



Marielle Wilson
Vice President, Regulatory