Bill C-10: *An Act to amend the Broadcasting Act*

Written Brief of TELUS Communications Inc.

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Introduction

1. TELUS Communications Inc. ("TELUS") thanks the Standing Committee on Canadian Heritage for the opportunity to provide these comments and 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").

2. TELUS is Canada's largest independent broadcasting distribution undertaking ("BDU"). It offers an IPTV service to Canadians in areas of Alberta, British Columbia, and Quebec. Unlike its major competitors in the broadcasting distribution market, TELUS does not own commercial programming undertakings, and is not a vertically integrated distributor of content services.

3. In the 30 years since the *Broadcasting Act* ("Act") last underwent a comprehensive update, the broadcasting sector in Canada has experienced dramatic changes. One of the most significant changes has been the exceptionally high level of vertical integration that has taken place within the Canadian broadcasting industry. The CRTC's 2020 Communications Monitoring Report found that just three ownership groups – Bell, Rogers, and Shaw/Corus – are now responsible for nearly two thirds (64%) of total broadcasting revenues in Canada.[1]

4. This level of vertical integration is not just high in relation to historical standards, but also in relation to international markets.[2] It has also created anti-competitive incentives that distort the natural incentives that programming services have to pursue commercial success by seeking the broadest distribution possible for their programming. Instead, vertically integrated entities are incented to use their media assets to favour their more lucrative distribution and network access operations.

5. The CRTC recognized these dangers to the health of the broadcasting sector and took action to safeguard against such anti-competitive conduct. However, vertically integrated entities have consistently challenged the CRTC's authority to implement those safeguards.

6. While the domestic broadcasting sector was undergoing significant consolidation, the competitive landscape in television distribution expanded to include large foreign digital platforms that distribute content to Canadians over the Internet, such as Netflix, Amazon, Apple, or Facebook. Technological developments enabled these foreign content distributors to bypass the regulated system and deliver programming directly to Canadian consumers. This led to dramatic shifts in consumer behaviours and expectations, yet the regulatory framework has hindered traditional broadcasters and distributors from adapting to these changing consumer preferences.

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1 CRTC Communications Monitoring Report 2020, section 3 ii) at p. 69 <available online at: https://crtc.gc.ca/pubs/cmr2020-en.pdf> ["CRTC CMR 2020"].

2 For example, in the 2020 report from the Canadian Media Concentration Research Project, *Media and Internet Concentration in Canada, 1984– 2019*, at p. 21, it was noted that "In the most comprehensive and recent review of media ownership and concentration…Canada had the third highest level of vertical integration out of the 28 countries examined".

7. Given the developments described above, most stakeholders agree that modernization of the Act is needed to address the fundamental shifts in the Canadian marketplace for television broadcasting and distribution. In TELUS' view, modernization of the Act needs to address both the exceptionally high levels of concentration within the domestic broadcasting sector, and the significant asymmetry in the regulatory burdens faced by Canadian and foreign companies.

8. Bill C-10 takes a necessary step forward by clarifying that the legislative framework applies to online undertakings – including foreign online undertakings – that operate within the Canadian broadcasting sector, and by empowering the CRTC to regulate those online undertakings to a certain extent, such as by ensuring that they are required to support the creation and exhibition of Canadian content.

9. However, in its present form Bill C-10 fails to address the efforts of vertically integrated entities to undermine the CRTC's jurisdiction to regulate certain aspects of the commercial relationship between broadcasting undertakings. Bill C-10 also leaves significant asymmetries in place between Canadian and foreign undertakings, that will only serve to disadvantage traditional undertakings.

10. To help address these issues, TELUS recommends the following reasonable and focused amendments to Bill C-10:

    - amend Clause 7 to explicitly give the CRTC the power to impose conditions respecting the wholesale relationship between broadcasting undertakings (domestic and foreign);
    - amend Clause 8 to clarify the CRTC's power to apply dispute resolution processes to all broadcasting undertakings;
    - amend Clause 9(8) to restrict the CRTC's ability to impose fees that do not relate to the recovery of its regulatory costs.

Bill C-10 must reinforce the CRTC's authority to regulate the wholesale relationship between broadcasting undertakings

The importance of the CRTC's safeguards against anti-competitive conduct

11. TELUS launched its BDU service around 2005. While there was already a moderate degree of vertical integration in the broadcasting sector at that time, shortly following Optik TV's launch the broadcasting sector experienced an unprecedented wave of additional vertical integration. For example, between 2008 and 2013, vertically integrated companies' share of the network media economy in Canada more than doubled.[3]

12. As a result, TELUS grew its BDU business in a television distribution market dominated by large vertically integrated distribution undertakings. Through their ownership of commercial

[3] *Id.*

programming undertakings, these domestic competitors controlled the vast majority of popular television programming that was broadcast in Canada, and they still do today. Consolidation within the Canadian broadcasting sector has only increased in the intervening years, with the most recent example being the proposed acquisition of Shaw Communications Inc. by Rogers Communications Inc.

13. To compete with these vertically integrated companies, TELUS sought to offer consumers a combination of excellence in customer service, along with greater choice and flexibility than incumbent operators were offering. That strategy allowed TELUS to provide viable competition to the incumbent cable companies, and grow its subscriber base to approximately 1.2 million subscribers over the past decade. However, it would not have been possible without the existence of CRTC policies and regulations that protect independent broadcasters and distributors, and Canadian consumers, from the potential for anti-competitive conduct by vertically integrated companies.

14. For example, the CRTC permits programming undertakings to acquire exclusive rights to broadcast programs, but in exchange it requires that programming services be made available to Canadians by ensuring each service is offered to all BDUs. This policy prevents a vertically integrated entity from withholding popular programming controlled by its media arm from a BDU that competes with its distribution arm. This important safeguard is primarily for the benefit of consumers, as it ensures that all Canadians have access to a wide range of programming regardless of which broadcaster controls it. In the CRTC's words:

> …the Commission requires through its regulations that programming services be offered to all BDUs (e.g. cable and DTH services). In this way, most Canadians have access to broadcast programs that have been acquired on an exclusive basis. This serves to implement the objectives set out in section 3(1)(d) of the Act.[4]

15. Without the assurance that BDUs will have access to programming services, and therefore all the programming held exclusively by those services, Canadians could be forced to subscribe to multiple services, over multiple platforms, to ensure they can access the programming they want.

16. Broadcasting undertakings are also subject to a general scheme of regulation which includes, for example, a prohibition on the granting of undue preferences or advantages by licensees to themselves or others. Nevertheless, as vertical integration levels rose in the broadcasting sector over the past decade, the CRTC recognized the need to create additional safeguards to specifically address the resulting distortion of normal market incentives.

17. These safeguards are contained in a regulatory policy known as the Wholesale Code.[5] The Wholesale Code prohibits certain commercially unreasonable practices by programming services, such as tied-selling or placing restrictions on a BDU's ability to offer consumers

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[4] Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration*, 21 September 2011, at para. 10.

[5] Broadcasting Regulatory Policy CRTC 2015-438, *The Wholesale Code*, 24 September 2015.

greater choice. It also requires certain commercially reasonable practices, such as requiring a vertically integrated programming service that offers non-linear multiplatform rights to a related BDU to offer those same rights, on reasonable terms and on a timely basis, to unrelated BDUs.

Vertically integrated entities are challenging the CRTC's jurisdiction to impose anti-competitive safeguards

18. The CRTC's safeguards have been critical to ensuring competition in the broadcasting sector, and to allowing new entrants, like TELUS' Optik TV, to offer credible alternatives to Canadians. However, in recent years the CRTC's jurisdiction to enact and enforce such regulations has consistently been attacked by large vertically integrated companies.

19. For example, not long after the CRTC issued the order requiring licensees to abide by the Wholesale Code, Bell Canada and its subsidiary Bell Media (collectively "Bell") appealed the order to the Federal Court of Appeal, where it asserted that the mandate vested in the CRTC by section 3 of the *Broadcasting Act* to implement the Broadcasting Policy for Canada did not authorize the CRTC to interfere in the economic relationship between BDUs and programming undertakings.[6]

20. Although Bell's appeal was successful in invalidating the CRTC order, fortunately the CRTC had also made the provisions contained in the Wholesale Code applicable to licensees through their conditions of licence. It therefore continues to operate today as a safeguard against anti-competitive conduct, at least until those licences are up for renewal in a few years.

21. Other challenges to the CRTC's jurisdiction by vertically integrated companies remain pending before the courts today. In 2019, Quebecor Media Inc. ("Quebecor") appealed a mandatory order issued by the CRTC that required Quebecor's subsidiary, Groupe TVA Inc. ("TVA"), to comply with the "standstill rule".[7] The standstill rule is a part of the CRTC's dispute resolution framework that was implemented in response to rising levels of vertical integration. It requires that both programming undertakings and BDUs continue providing services to Canadians during an ongoing dispute. This rule serves to level the playing field during the negotiation process by eliminating the threat of loss of service during a dispute, but above all, it ensures that consumers are protected from loss of service, consistent with the objective in section 5(2)(d) of the Act to facilitate the provision of broadcasting to Canadians.[8]

22. The circumstances giving rise to the CRTC's mandatory order illustrate how important it is for the CRTC to have ironclad jurisdiction to regulate disputes between parties. Quebecor, through its subsidiary TVA, owns the channel TVA Sports. In 2019, during a dispute with Bell's distribution arm over the rate to be paid by Bell for carriage of TVA Sports, TVA violated the standstill rule by pulling its signal from Bell just prior to the broadcast of the first NHL playoff game, affecting over 425,000 Bell subscribers and the subscribers of several smaller

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6 *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 at para. 4.

7 Broadcasting Decision CRTC 2019-109 and Broadcasting Order CRTC 2019-110, *TVA Group Inc. – Non-compliance*, 18 April 2019.

8 *Id.*, at para. 12.

BDUs that depend on Bell for signal transport. In total, approximately 1 million viewers in the province of Quebec were adversely affected.

23. The CRTC reacted swiftly – the day after TVA Sports pulled its signal, the CRTC called Quebecor and TVA to a public hearing, where Quebecor's CEO defended TVA's actions, mainly by asserting that the CRTC had no jurisdiction to impose the standstill rule because it amounted to regulation of the contractual relationship between the parties.[9] Bell took the position that the CRTC's authority was clear, and requested, among other things, that the Commission issue a mandatory order requiring TVA to continue providing the signal.[10] Following the hearing the CRTC issued a mandatory order requiring TVA to continue providing TVA Sports to Bell until their dispute was resolved, and to further comply at all times with the applicable regulations.

24. Quebecor's appeal of that mandatory order is still pending before the Federal Court of Appeal. Unsurprisingly, Quebecor maintains that the CRTC has no jurisdiction to implement the standstill rule. However, in its responding submissions Bell agreed with Quebecor. Bell argued that the CRTC lacks the jurisdiction to impose the standstill rule, but that until the provision was invalidated by the courts, Quebecor was required to continue complying with it.

25. While it is unusual for a respondent to an appeal to agree with the opposing party's legal stance, Bell's position was not entirely unexpected since as a vertically integrated company it would stand to benefit more from elimination of the standstill rule than it would by winning the appeal. Independent BDUs, including TELUS, anticipated that Bell might not provide a full throated defence of the Commission's jurisdiction to safeguard against anti-competitive conduct, and successfully sought leave to intervene in the appeal. Nevertheless, the outcome of any court proceeding is uncertain, and uncertainty about the CRTC's authority in such an important area of regulation undermines the healthy functioning of the broadcasting market.

26. If the CRTC is unable to implement a regulatory framework that protects against the negative effects of vertical integration, the result will be less competition in the broadcasting market, fewer choices available to consumers, and higher prices. It is therefore vitally important that Parliament take the opportunity provided by Bill C-10 to reaffirm the CRTC's jurisdiction in this essential area of regulation.

Proposed amendments to Bill C-10

Clause 7

27. In light of the above, TELUS recommends that clause 7 of Bill C-10 be amended by adding a new subsection at section 9.1(1) to explicitly provide the CRTC with the power to regulate the wholesale relationship between broadcasting undertakings.

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9 *Id.*, at para. 7.

10 *Id.*, at paras. 8 and 24.

28. Specifically, the new subsection under section 9.1(1) would empower the CRTC to make orders imposing conditions on the carrying on of broadcasting undertakings respecting:

> …terms and conditions of service in contracts between broadcasting undertakings.

Clause 8

29. TELUS also recommends that Parliament ensure the CRTC's regulatory authority clearly includes the ability to safeguard against anti-competitive abuses by the foreign digital platforms that deliver programming to Canadians, and have become *de facto* stakeholders in the Canadian broadcasting market. The size and market power of those foreign companies rivals, or in many cases dwarfs, that of the large vertically integrated Canadian companies.

30. As the broadcasting market evolves, it is important that the CRTC has the authority to regulate relationships between all of its stakeholders if the need arises. This is essential to ensuring that Canadian broadcasting undertakings are able to survive and adapt to the online distribution environment.

31. Accordingly, TELUS further recommends that clause 8 of Bill C-10 be amended by adding new language that would provide the CRTC with clear authority under section 10 of the Act to resolve disputes between broadcasting undertakings. This can be accomplished by expanding the scope of section 10(1)(h) of the Act as follows:

> 10(1) The Commission may, in furtherance of its objects, make regulations
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> > (h) for resolving, by way of mediation or otherwise, any disputes arising between ~~programming undertakings and distribution undertakings~~ broadcasting undertakings concerning the carriage of programming originated by any of the ~~programming~~ broadcasting undertakings;

Bill C-10 should eliminate unnecessary regulatory asymmetry between traditional broadcasting undertakings and online undertakings

Regulatory asymmetry undermines the achievement of the Act's policy objectives

32. The CRTC imposes a variety of regulatory obligations on broadcasting undertakings to help ensure the achievement of the policy objectives of the Act. Historically, these regulatory obligations have not applied to foreign online platforms that distribute programming to Canadians – a regulatory asymmetry that has provided those online platforms with a major competitive advantage over the past decade, to the detriment of traditional broadcasting undertakings.

33. Bill C-10 takes a step forward in leveling the playing field between traditional broadcasting undertakings and foreign online platforms, by clarifying that all "online undertakings" are subject to the Act and by empowering the CRTC to impose conditions of service on them. However, it also leaves many existing regulatory asymmetries in place.

34. Given the important role that traditional broadcasting services play in achieving Canada's cultural policies, it is important to minimize their regulatory burden wherever possible to allow them to compete effectively.

35. Traditional broadcasting undertakings serve Canadians not just through competition to offer the best television services, but also through the fulfillment of the Act's broadcasting policy objectives. For example, in the case of BDUs, the following non-exhaustive list of regulatory responsibilities illustrates the important role that BDUs play in achieving Canada's broadcasting policy objectives:

- **Mandatory distribution** – Certain programming services, determined by the CRTC to be of national interest, are mandated by the CRTC to be distributed as part of a BDU's service offering, at rates set by the CRTC. For example, BDUs are required to distribute, on the basic tier, accessibility services (e.g. AMI-tv), multicultural and multi-lingual programming services (e.g. OMNI), news programming services in minority language markets (e.g. CBC News/Ici RDI), Indigenous peoples programming (e.g. APTN), services that provide coverage of public and government affairs (e.g. CPAC), weather and public safety services (e.g. The Weather Network and MétéoMédia), and others. Mandated distribution serves to fulfill cultural policies that the market cannot otherwise fulfill on a commercial basis.

- **Mandatory provision of a "skinny basic" package** – BDUs are required to offer an entry level service package to Canadians for a maximum price of $25. This package must include all mandatory services, CBC English- and SRC French-language channels, local and regional over-the-air television stations, the provincial legislative channel, the provincial/territorial education channel, and the BDU's community channel service.

- **Packaging requirements for discretionary channels** – To ensure Canadians have greater choice in the way they receive programming services, the CRTC requires that BDUs offer all discretionary channels on both an individual basis, as well as in small theme packs of no more than 10 channels.

- **Promotion of Canadian programs on advertising availabilities** – U.S. specialty services make available two minutes per broadcast hour for a BDU to use for advertising. Regulations require that BDUs devote at least 75% of these availabilities for the promotion of Canadian programming services, the community channel, or public service announcements.

- **Supporting Canadian advertising markets by performing simultaneous substitution** – At the request of Canadian broadcasters, BDUs are required to perform simultaneous substitution, a process that temporarily replaces the signal of one television programming service (usually an American signal) with that of a Canadian service broadcasting the same program at the same time. This protects the advertising revenues of the local Canadian broadcaster, and in the words of the CRTC, "…allows Canadian broadcasters to earn a reasonable return on their

investment in acquiring non-Canadian programming so that they have the financial resources to contribute to the Canadian broadcasting system in the form of the production of Canadian programming".[11]

- **Linkage and distribution requirements for Canadian ethnic and third-language services** – The CRTC requires the carriage and packaging of at least one Canadian third-language service for every non-Canadian third-language service a BDU offers in the same principal language.

- **Contributing 5% of gross revenues to support the production of Canadian programming** – Each broadcast year, BDUs contribute 5% of their gross revenues from broadcasting activities to the creation of Canadian programming. Where a BDU also operates an on-demand undertaking, the contribution level on revenues generated by that undertaking is 7.5%. This disadvantages licensed on-demand services that compete with online undertakings.

- **Community television** – Section 3(1)(b) of the Act sets out that the Canadian broadcasting system is comprised of public, private and community elements. Since its inception in the 1970s, Canada's community television framework has largely been realised through BDUs in the communities they serve. BDUs are able to support and contribute to local expression by offering an outlet for citizen access to the broadcasting system and for community reflection through the public interest programming offered on the channel.

36. Maintaining unnecessary regulatory asymmetries undermines the achievement of Canada's cultural policies by undermining the ability of traditional broadcasting undertakings to attract and retain subscribers within the new competitive landscape in which they must operate. Lowering the regulatory burden shouldered by traditional broadcasting undertakings is therefore essential to ensuring they are able to continue contributing to the achievement of Canada's cultural policies.

<u>Eliminating Part II licence fees would help reduce regulatory asymmetry without compromising the attainment of the policy objectives of the Act</u>

37. A straightforward way to lower the regulatory burden on broadcasting undertakings, without compromising the attainment of the policy objectives of the Act, would be to eliminate the imposition of licence fees that do not relate to recovery of the CRTC's regulatory costs.

38. There are currently two categories of fees payable by broadcasting licensees. Part I licence fees are based on the total regulatory costs of the CRTC in a given fiscal year. Part II licence fees, however, are paid by broadcasting undertakings directly to the government's Consolidated Revenue Fund.

[11] Broadcasting Notice of Consultation CRTC 2014-190, *Let's Talk TV*, 8 September 2014, at para. 54.

39. Surprisingly, Bill C-10 expressly restricts the CRTC's ability to impose Part II licence fees on online undertakings,[12] despite the fact that this regulatory burden is purely financial in nature (i.e. unrelated to the achievement of any policy objectives of the Act) and would not unduly restrict the way online undertakings provide their services to Canadians.

40. At the same time, Bill C-10 would continue to allow the CRTC to continue to impose these fees on traditional broadcasting undertakings. This unnecessarily perpetuates a significant competitive imbalance that disadvantages traditional broadcasting undertakings, without furthering Canada's cultural policies.

Proposed amendment

41. Given that online undertakings will not be subject to a requirement to pay Part II licence fees, Parliament should treat traditional broadcasting undertakings equally by eliminating the CRTC's authority to impose such fees altogether. This is not only a matter of simple fairness – it would also be a straightforward way to help level the competitive landscape with online undertakings without undermining the achievement of the Act's policy objectives.

42. This recommendation could be accomplished by amending clause 9(8) of Bill C-10 as follows:

> Restriction ~~— non-licensees~~
>
> (3.1) The only fees that may be established with respect to a broadcasting undertaking ~~that may be carried on without a licence~~ shall be fees that relate to the recovery of the costs of the Commission's activities under this Act.

Conclusion

43. TELUS believes that the reasonable and focused amendments it has proposed in this brief are important to ensuring the continued health of the Canadian broadcasting system.

44. It is essential that the modernization of the *Broadcasting Act* address the competitive inequities present in the broadcasting sector today, whether it is between the domestic vertically integrated undertakings and independent undertakings, or between domestic undertakings and online undertakings that largely consist of deep-pocketed foreign companies.

45. Addressing these imbalances is the best way to ensure that Canada's domestic broadcasting sector remains healthy and competitive, to the benefit of consumers, and that Canada's domestic broadcasting sector is capable of supporting Canada's cultural policy objectives well into the future.

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[12] Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 2nd Sess, 43rd Parl, 2020, at cl. 9.1(8).