



Via GC Key

June 12th, 2023

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

Re: Comments of the Canadian Association of Broadcasters with respect to:
Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations,
Broadcasting Notice of Consultation CRTC 2023-139 (“BNC 2023-139”)
Review of exemption orders and transition from conditions of service for broadcasting online undertakings,
Broadcasting Notice of Consultation CRTC 2023-140 (“BNC 2023-140”)

1. These comments are filed by the Canadian Association of Broadcasters (CAB) in response to the above-referenced Notices of Consultation (collectively, the “Notices”)¹.
2. The Notices, along with Broadcasting Notice of Consultation CRTC 2023-138² (“BNC 2023-138”), which was issued at the same time, begin the process of formally integrating online undertakings into the regulatory framework for broadcasting in Canada following the passage of the *Online Streaming Act*³.
3. The CAB commends the Canadian Radio-television and Telecommunications Commission (the “Commission” or “CRTC”) for moving expeditiously to require contributions from Internet streaming services, specifically those operated by large, foreign interests. For

¹ Broadcasting Notice of Consultation CRTC 2023-139, Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations (May 12th, 2023) and Broadcasting Notice of Consultation CRTC 2023-140, Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings (May 12th, 2023).

² Broadcasting Notice of Consultation CRTC 2023-138, The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content (May 12th, 2023).

³ An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, S.C. 2023, c.8.

years, Canada's broadcasters have been forced to operate under the weight of significant regulatory obligations while services available over the Internet that target the same viewers, listeners, and advertisers and compete for and offer the same programming were subject to virtually no requirements.

4. A rationalization of the contributions made by the various players in the Canadian broadcasting system is long overdue. The CAB notes that the draft *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)* addresses this point expressly, mandating that requirements imposed on broadcasting undertakings must be "equitable as between foreign online undertakings and Canadian broadcasting undertakings."⁴
5. As the Commission has noted, BNC 2023-139 and BNC 2023-140 are separate proceedings, but share "common elements". Consequently, the CAB has chosen to prepare one combined submission relating to both Notices and is filing it on the record of both proceedings.

Executive summary

6. In this submission, the CAB advocates the following revisions to the proposed framework outlined in the Notices:
 - Requirements concerning undue preference and programming exclusives should apply to all online undertakings (as they do now) and these provisions need to be implemented by regulation and not through a condition of service order given the recent amendments to the *Broadcasting Act* (the "Act");
 - The revenue threshold for registration by online undertakings should apply on an undertaking specific basis, regardless of whether or not the undertakings is part of broadcast ownership group;
 - The threshold for registration should be increased from the \$10 million proposed by the Commission to \$20 million to better reflect the Canadian online broadcasting landscape;
 - Transactional VOD, regardless of whether it is distributed by a BDU over a managed network or delivered over the Internet, should either be regulated or not regulated. There is no rationale for treating transactional VOD differently for regulatory purposes based on how it is delivered to the end consumer; and
 - Online sites that provide text and video-based news content should be exempt from registration requirements.

⁴ Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework), Canada Gazette, Part 1, Volume 157, Number 23 (June 10th, 2023), paragraph 4. Available at: <https://www.gazette.gc.ca/rp-pr/p1/2023/2023-06-10/html/reg1-eng.html>.

The Commission's proposed regulatory framework

8. At present, online undertakings available in Canada, regardless of their size, operate pursuant to the Digital Media Exemption Order⁵ (“DMEO”) and are subject to very limited regulatory requirements.
9. In the Notices, the Commission notes that given the amendments the *Online Streaming Act* has made to the *Act*, the DMEO is no longer the appropriate tool for regulating online undertakings.⁶ Instead, the Commission has proposed a regulatory regime whereby online undertakings of various types would be required by regulation to register with and provide particular information to the Commission. In addition, they would be subject to very basic conditions of service prohibiting an online undertaking from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage and requiring online undertakings to make content available over the Internet; to respond to request for certain types of information from the Commission; and to file a fee return with the Commission until such time as the *Broadcasting Licence Fee Regulations* are amended to incorporate a regime for online undertakings. Under the proposed framework, online undertakings that are not required to register would not be subject the proposed conditions of service or any other requirements (including any potential contribution requirements established pursuant to BNC 2023-138) and the Commission will effectively have no oversight pertaining to their operations.
10. In these comments, the CAB addresses the following issues raised by the Notices:
 - The appropriateness of the Commission's proposed approach to the registration and regulation of online undertakings, including why it may be prudent to retain certain provisions of the DMEO;
 - Which online undertakings, both in terms of type and size, should be required to register under the proposed *Regulations for the Registration of Online Undertakings* (the “Registration Regulations”). More specifically:
 - why the threshold for registration should be both higher than \$10 million and assessed at the undertaking level regardless of whether an online undertaking operates on a standalone basis or is affiliated with a traditional broadcaster;
 - that the Commission must be consistent in terms of how it regulates transactional video-on-demand (“VOD”) services whether offered by traditional BDUs or online; and
 - that online sites that provide text and video-based news should not be subject to the Registration Regulations; and
 - Suggested wording changes to the proposed regulations and exemption order.

⁵ Appendix to Broadcasting Order CRTC 2012-409, Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings) (July 26th, 2012).

⁶ Broadcasting Notice of Consultation CRTC 2023-140, Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings (May 12th, 2023) at paragraph 5.

11. In addition, answers to the specific questions posed by the Commission in BNC 2023-140 and a proposed markup of the Registration Regulations, exemption order and conditions of service reflecting the CAB's proposals are attached as Appendix 1 and Appendix 2, respectively.

Provisions under the new Act

12. As noted above, the Commission is proposing to take certain of the provisions from the DMEQ – more specifically, those pertaining to undue preference and making content available broadly – and incorporate them into conditions of service that would apply to certain online undertakings. Other online undertakings, those of a certain type or with revenues below a certain threshold, would not be subject to requirements of this nature and the Commission would repeal the DMEQ.
13. The CAB supports the ongoing application of undue preference prohibitions and requirements to make content available broadly over the Internet for online undertakings. However, these requirements should apply to all online undertakings as they do today, not just to certain online undertakings.
14. While it is appropriate to limit requirements to fund Canadian programming to online undertakings of a certain size or with revenues over a certain threshold (and, arguably, a much higher threshold than what is being proposed for the purposes of the *Registration Regulations*), many online streaming services that are available in Canada have revenues well below \$10 million, and from an equity standpoint should be subject to the same rules regarding undue preference as entities that exceed the threshold (the requirement to make content available over the Internet, for example, is not one that is necessarily tied to the size of the undertaking). For example, foreign third-language services may not have broad appeal, but they compete directly with and take subscribers and revenues from Canadian ethnic services. Under the current Commission proposal, if such a service were to engage in discriminatory conduct, there would be no regulatory recourse, such as where a complaint is made to the Commission. The CAB also notes all television and discretionary services, regardless of size or whether exempt or not, are subject to a prohibition relating to conferring an undue preference or subjecting a person to a disadvantage.
15. In addition, while the *Act* is clear that the Commission has the jurisdiction to impose prohibitions relating to unjust discrimination and undue preference or disadvantage, it may not be able to do so by a condition of service.
16. Section 10(1)(h.1) of the *Act* provides that the Commission can make regulations “respecting unjust discrimination by a person carrying on a broadcasting undertaking and undue or reasonable disadvantage imposed, by such a person”. This section is part of the amendments made by the *Online Streaming Act*. However, no such authority has been granted related to the issuance of an order, which is how conditions of service are imposed, under Section 9.1 of the *Act* or elsewhere in the statute.

17. Although the CAB does not oppose what the Commission is trying to accomplish from a policy perspective, imposing requirements of this nature by order instead of regulation, could result in certain online undertakings simply ignoring them on the basis that the Commission has not technically exercised its authority correctly.
18. Therefore, the CAB proposes the following changes to the structure of the Commission's proposed registration and exemption framework:
- Incorporate clauses 1, 2, and 3 of the *Proposed conditions for carrying on certain online undertakings* (the "Conditions of Service") contained in the Appendix to BNC 2023-140 into an exemption order for online undertakings (a "New DMEO"). It could be the same exemption order being proposed relating to the *Registration Regulations*;
 - Remove clauses 2 and 3 from the Conditions of Service and incorporate them into the *Registration Regulations*; and
 - By reference, require compliance with the conditions in the *Registration Regulations* relating to undue preference and making content available as a condition of exemption in the *New DMEO*.
19. The CAB submits that the approach outlined above is consistent with the spirit of what the Commission has proposed in the Notices. It will ensure some degree of supervision over smaller online undertakings operating in a manner that could impact certain stakeholders in the system and consistency with how the Commission applies rules of this nature to other industry players.

The threshold for registration should be higher and consistently applied as between standalone online undertakings and those operated by traditional broadcasters

20. In the Notices, the Commission is proposing that online undertakings that operate on a standalone basis with less than \$10 million in annual revenue from the Canadian broadcasting system would be exempt from the *Registration Regulations*. However, online undertakings operated by Canadian broadcasting undertakings would only be exempt from the *Registration Regulations* if annual revenues for the entire broadcasting ownership group are below \$10 million. The CAB has several concerns with the Commission's proposal.
21. In BNC 2023-139, the Commission offers the following rationale for creating a public registry of online streaming services:

Currently, the Commission has only limited information on online undertakings operating in Canada. Requiring online undertakings to be registered with the Commission would allow it to (1) keep track of online undertakings operating in Canada, and (2) collect the most basic information from these undertakings. Having such information would also help to better understand the Canadian online broadcasting landscape more generally.

22. However, this regime is not only about information gathering. Registration also subjects online undertakings to the obligations in the Conditions of Service, including the requirement to file a fee return and potentially to pay Part 1 Licence Fees. Requiring traditional broadcasting licensees to register their online undertakings when group revenues exceed \$10 million will result in the vast majority of online undertakings operated by Canadian broadcasters being registered, even where they earn very little revenue. For example, a Canadian broadcaster with \$15 million in total revenue, but only \$100,000 in revenue from online undertakings would need to register. In contrast, an operator of a standalone online undertaking with \$9.9 million in revenue would not need to register.
23. At a time when the regulation of the Canadian broadcasting system needs to be moving toward leveling the playing field between Canadian broadcasters and foreign online streaming services, this proposal further entrenches the asymmetrical treatment of these two groups that exists today. Moreover, it adds a further administrative burden to the traditional broadcasters while doing little to provide useful information to the Commission or advance the policy objectives in the *Act*. Consequently, CAB is proposing that, for the purposes of registration, the revenue threshold for online undertakings should be assessed at the undertaking level, regardless of whether the online undertaking operates on a standalone basis. The CAB notes that this approach would be consistent with how the Commission currently treats other types of exempt broadcasting undertakings.⁷
24. Moreover, the CAB submits that the current threshold for registration of \$10 million is too low. The online undertakings that occupy a prominent place in the Canadian broadcasting system – Netflix, Disney+, Spotify – all have revenues exponentially higher than this amount. As a result, the Commission is likely to catch a handful of services that do not make a material contribution to the system by setting the registration threshold at \$10 million. As revenues to online undertakings grow, \$10 million will quickly seem out of date. Consequently, the CAB is proposing a threshold of \$20 million at the undertaking level for registration purposes only.
25. Any assessment relating to what revenue level would require an undertaking to make contributions to the system and in what manner should be assessed in the context of call for comments on the proposed contribution framework, BNC 2023-138.

⁷ For example, terrestrial BDUs below 20,000 subscribers are exempt from licensing even if owned by a BDU with licensed systems in other market. The same is true of discretionary services under 200,000 subscribers. See: Broadcasting Order CRTC 2017-320, *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers* (August 31st, 2017); Broadcasting Order CRTC 2015-88, *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers* (March 12th, 2015).

Transactional VOD on traditional broadcast platforms and online should either both be regulated or both be unregulated

26. In addition to exempting online undertakings with less than \$10 million in annual revenues, the Commission is also proposing to exempt from the *Registration Regulations* those online undertakings whose single activity and purpose consists of providing unique transactions. It would appear that the objective in excluding such undertakings is to exempt entities that behave like a store from regulatory requirements. However, this has not been the Commission's historical approach relating to traditional broadcasting undertakings. For example, most major broadcasting distribution undertakings ("BDUs") hold VOD licences that cover both subscription and transactional VOD and those licences require a certain percentage of the programs in a VOD service's library to be Canadian and for the VOD service to pay a percentage of its revenue into programming funds.
27. Under the Commission's proposal, it would appear that services like Apple's iTunes would not be required to register even though they constitute a direct substitute for a regulated VOD service. From the CAB's perspective, like undertakings need to be regulated in a like manner. As a result, transactional VOD, regardless of whether it is distributed by a BDU over a managed network or delivered over the Internet, should either be regulated or not regulated. The mode of delivery is not a distinguishing factor. The CAB does recognize that there is no parallel in the broadcasting system for online undertakings that sell music on a transactional basis (like a record store) and, consequently, it would be appropriate to exempt services such as these from regulation.

The Commission should exempt online sites that provide text and video-based news content from the requirements of the *Registration Regulations*

28. Prior to the advent of the Internet, news media neatly fell into one of two categories – broadcast news or print journalism. However, in an online world, such distinctions are no longer as straightforward. Most news providers offer apps with a mix of text and video elements – some with more text than video and vice versa – and compete directly with one another.
29. In Broadcasting Public Notice CRTC 1999-84, the Commission clarified that for the purposes of its approach to broadcasting on the Internet, much of the content consisted predominantly of alphanumeric text and was, therefore, outside the scope of the *Act*, as the definition of "program" in the *Act* excludes such content.⁸ As the current approach to regulating online services has been to exempt all such undertakings, the Commission has never had to consider whether a site that consisted of mainly textual elements with some video formally fell under the exemption order.

⁸ Public Notice CRTC 1999-84, *New Media* (May 17th, 1999) at paragraph 35.

30. We note that this issue was canvassed in the context of the recent licence renewal for the Canadian Broadcasting Corporation (“CBC”), with the Commission noting that its web sites fell outside the scope of the *Act* given that they consisted predominantly of alphanumeric text.⁹
31. Given that the Commission now proposes to subject certain online undertakings to registration (and, potentially, contribution requirements), the CAB proposes that the Commission explicitly exempt online news services. Otherwise, certain online news providers (those with services that consist predominantly of alphanumeric text) will not be required to register as they would not be engaged in broadcasting given the definition of “program” in the *Act*¹⁰, while others (those with equal amounts of or more video than text) will be subject to registration requirements, providing an incomplete picture of the market. Moreover, some operators may be encouraged to tailor their offering to put a greater emphasis on text versus video solely to avoid registration – a result that would see CRTC regulations unnecessarily distorting the Canadian online news market.
32. Canadian news sites (regardless of how much video they contain) will continue to provide Canadian news on their websites without additional regulatory requirements. It is also important to note that the Commission will still maintain oversight of news being offered by Canadian broadcasters, whether online or on their traditional broadcast properties. This is because much of the broadcast news Canadian broadcasters make available online is repurposed from their existing news operations.

Wording issues

33. With respect to the wording of the *Registration Regulations*, the CAB proposes the following amendments to clarify ambiguity and/or to implement the proposals outlined above:
- Amend Section 2 as follows: “An operator must register their online undertaking by submitting to the Commission, within 30 days after the day on which they become subject to the requirement to register ~~they begin to carry on~~, a registration return that contains the following information . . .” When an online undertaking starts operating or even at launch, its revenues are unlikely to exceed the threshold set by the Commission. This change addresses that issue by requiring registration within 30 days of an undertaking becoming subject to the registration requirement; and

⁹ Broadcasting Decision CRTC 2022-165 and Broadcasting Order CRTC 2022-166 and 2022-167, *Canadian Broadcasting Corporation – Various audio and audiovisual services – Licence renewal* (June 22, 2022), at paragraph 75.

¹⁰ The *Broadcasting Act* defines a “program” as: “sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.”

- Amend Section 5(1) as follows: “An operator must submit a request to deregister their online undertaking within 30 days after the day on which they cease to carry on the undertaking or the end of the broadcast year in which the undertaking falls under a class listed in the *Exemption order respecting classes of online undertakings in relation to the Online Undertakings Registration Regulations*.” This would allow an online undertaking that no longer has revenue exceeding the threshold set by the Commission for registration to deregister.

34. For the Exemption order respecting classes of online undertakings in relation to the Online Undertakings Registration Regulations and/or the Proposed conditions for carrying on certain online undertakings, the CAB proposes the following revised language:


- Amend the definition of “Annual revenues” to read: “**Annual gross revenues** means total revenues collected from broadcasting activities of attributable to an online undertaking the person or that person’s subsidiaries and/or associates, if any, collected from the Canadian broadcasting system ~~across all services~~ during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year within for which the revenue calculation is being filed), ~~whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings.~~ This includes online undertakings that operate in whole or in part in Canada and those that collect revenue from other online undertakings by offering bundled services on a subscription basis. The Commission will accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years”;
- Delete the definition of “broadcasting ownership group” as it is no longer relevant;
- Remove the reference to online activities whose single activity and purpose consists of providing unique transactions unless the Commission also exempts VOD services from regulatory requirements;
- Add the following under the classes of undertakings: “online undertakings operating news services”; and
- Combine iii. and iv. to read: “online undertakings if they have, after deducting any excluded revenue, annual gross revenues from broadcasting activities of less than \$20 million.”

35. Finally, with respect to the Commission’s proposed language relating to requiring online undertakings to make programming available broadly over the Internet, the CAB submits that it is overly broad and may have an unintended effect. The language reads as follows:

All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific broadcasting distribution undertaking, or mobile service, or retail Internet access service.

36. It is clear that the intent of this restriction is to prohibit an online undertaking from entering into an exclusive arrangement with an Internet service provider, mobile provider or BDU such that one would need to be a customer to one of those services to access exclusive content. However, most BDUs offer their subscribers the ability to watch the channels they subscribe to outside of the home as part of a TV Everywhere (“TVE”) product through an app available on a phone or tablet. While the TVE app can generally be used with any Internet provider, one must have a subscription to the BDU who provides the app as it is directly connected to customer’s BDU subscription (i.e., the content is linked to what programming services the subscriber takes as part of their traditional BDU package).
37. None of the content on the TVE app is exclusive to the BDU – it is accessible to all BDUs across Canada. However, under the Commission’s proposed language related to content exclusives, BDUs might have to make these apps available to competing BDUs (even though they could develop their own such product). This was never the intent of this section. As a result, the CAB has proposed alternate language in Appendix 2 that would resolve this issue.
38. The CAB would like to thank the Commission for providing the opportunity to file these comments.
39. All of which is respectfully submitted.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'K. Desjardins', with a stylized flourish at the end.

Kevin Desjardins
President
Canadian Association of Broadcasters

Appendix 1 – CAB Responses to the Questions in BNC 2023-140

Q1. Why should the DMEO be repealed or not be repealed? Please explain.

A1. As noted above, the CAB supports maintaining undue preference prohibitions and requirements to make content available broadly over the Internet and to ensure that such provisions apply to all online undertakings. While it is appropriate to limit requirements to fund Canadian programming to online undertakings of a certain size or with revenues over a certain threshold, many online streaming services are available in Canada that have revenues well below \$10 million, and from an equity standpoint should be subject to the same rules regarding undue preference as entities that exceed the threshold (the requirement to make content available over the Internet, for example, is not one that is necessarily tied to the size of the undertaking). Under the current Commission proposal, if such a service were to engage in discriminatory conduct, there would be no regulatory recourse, such as where a complaint is made to the Commission.

Q2. If the DMEO should not be repealed, how should it be amended?

A2. Please refer to A1 above and paragraph 17 of the CAB's submission.

Q3. Are there broadcasting undertakings, other than online undertakings, using (or intending to use) technologies or other means of telecommunication that are still covered, or could be covered, by the DMEO? Is there an ongoing need to include such undertakings in this or another exemption order? Why?

A3. The CAB is not aware of any broadcasting undertakings delivering services using point-to-point technology and received by way of mobile devices.

Q4. Should paragraphs 12 through 15 of the VODEO be repealed, insofar as they apply to online undertakings? If yes, why? If no, why not?

A4. The CAB does not put forward a position on this issue.

Q5. If the above paragraphs in the VODEO are repealed, should HVOD undertakings be treated in the same manner as other online undertakings? If yes, what impact will such measures have on existing licensed or exempt on-demand or other linear broadcasting services? What are your suggestions for addressing those impacts?

A5. The CAB does not put forward a position on this issue.

Q6. Is the approach of exempting certain online undertakings from the application of conditions of service appropriate? Why or why not? If yes, are the above-mentioned classes of online undertakings appropriate to exempt from the conditions of service being contemplated by this proceeding? Should other classes be considered?

A6. The CAB supports exempting certain classes of undertakings from the application of conditions of service and registration requirements, specifically: video game services and online sites that provide text and video-based news content. The CAB does not oppose the exemption of online undertakings that whose single activity and purpose consists of providing unique transactions. However, the Commission's approach to such undertakings must align with how it treats transactional VOD on regulated BDUs. Finally, the CAB supports exempting online undertakings with less than \$20 million in annual revenues, regardless of whether they operate on a standalone basis or are affiliated with a traditional broadcaster.

Q7. Is a broadcasting ownership group's gross revenues from broadcasting activities the appropriate metric for establishing exemption thresholds?

A7. As noted, the CAB does not support asymmetrical treatment of online undertakings that operate on a standalone basis and those affiliated with a traditional broadcaster. Under the Commission's proposal, the vast majority of online undertakings operated by Canadian broadcasters would need to be registered, even where they earn very little revenue. For example, a Canadian broadcaster with \$15 million in total revenue, but only \$100,000 in revenue from online activities would need to register. In contrast, an operator of a standalone online undertaking with \$9.9 million in revenue would not need to register. This proposal also adds a further administrative burden to the traditional broadcasters while doing little to advance the policy objectives in the *Act*. Consequently, the CAB is proposing that, for the purposes of registration, the revenue threshold for online undertakings should be assessed at the undertaking level, regardless of whether the online undertaking operates on a standalone basis.

Q8. Is a threshold of at least \$10 million in total gross annual Canadian broadcasting revenues an appropriate threshold to apply to online undertakings in regard to the application of conditions of service on such undertakings? If no, what threshold (in terms of type and the amount) would be appropriate to apply, and why?

A8. The CAB submits that the current proposed threshold for registration of \$10 million is too low. The online undertakings that occupy a prominent place in the Canadian broadcasting all have revenues exponentially higher than this amount. As a result, the Commission is likely to catch a handful of services that do not make a material contribution to the system by setting the registration threshold at \$10 million. As revenues to online undertakings grow, \$10 million will quickly seem out of date. As a result, the CAB is proposing a threshold of \$20 million at the undertaking level for registration purposes only.

Q9. If the proposed exemptions are adopted by the Commission, how should the Commission address situations where an undertaking's total gross annual Canadian broadcasting revenues moves above or below the threshold from year to year? And, in such cases, at which moment should the proposed exemptions begin or cease to apply?

A9. Under certain existing exemption orders, the Commission typically allows for services to operate above a threshold for a period of time (*i.e.*, three months) before being required to apply for a licence. However, in those situations, the threshold is a subscriber metric. In the case of a revenue threshold applied annually, it would seem appropriate to require a service to register and comply with condition of service requirements in any year where their revenues exceed the established threshold and at such time as they do (for an initial registration). In years where revenues fall short, they could seek to deregister, and Section 5(1) of the *Registration Regulations* should be amended to allow for such a situation. However, consistent with the Commission's approach under other exemption orders, undertakings hovering around the \$20 million threshold, should not be required to register if their revenues exceed the threshold by 5 per cent (\$1 million) for a period of two consecutive years.

Q10. Should a condition of service in regard to information gathering be imposed as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, what changes would be appropriate?

A10. The CAB does not have concerns with the Commission's approach in this regard.

Q11. Should the condition of exemption specified above in regard to undue preference/undue disadvantage be continued as a condition of service for online undertakings as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, why not?

A11. As noted, while the *Act* is clear that the Commission has the jurisdiction to impose prohibitions relating to unjust discrimination and undue preference or disadvantage, it may not be able to do so by a condition of service. Section 10(1)(h.1) of the *Act* provides that the Commission can make regulations to "respecting unjust discrimination by a person carrying on a broadcasting undertaking and undue or reasonable disadvantage imposed, by such a person." However, no such authority has been granted related to the issuance of an order, which is how conditions of service are imposed, under Section 9.1 of the *Act* or elsewhere in the statute. Although the CAB does not oppose what the Commission is trying to accomplish from a policy perspective, imposing requirements of this nature by order, in first instance, instead of regulation could result in certain online undertakings simply ignoring them on the basis that the Commission has not technically exercised its authority correctly. As a result, the CAB is proposing these conditions be imposed by regulation.

Q12. Should the condition of exemption specified above in regard to offering content over the Internet be continued as a condition of service for online undertakings as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, why not?

A12. Please refer to A11 above. Issues relating to content exclusives and availability are related to undue preference and the same logic would apply.

Q13. Should a condition of service for online undertakings in regard to filing financial information be imposed as proposed in the draft order, which is appended to this notice of consultation? If yes, why? If no, what changes would be appropriate?

A13. The CAB submits that the Commission's proposal in this regard seems reasonable.

Q14. Should the condition of exemption related to the anti-competitive head start rule be continued as a condition of service for online undertakings? If yes, why? If no, why not?

A14. The CAB does not put forward a position on this issue.

Q15. In light of the Commission's limited dispute resolution powers, should the Commission discontinue the conditions of exemption related to dispute resolution?

A15. While the CAB recognizes that the *Act* restricts the Commission's power to resolve disputes by way of mediation (or otherwise) to those between distribution undertakings and programming undertakings pertaining to carriage, the *Act* also envisions the Commission playing a role in facilitating good faith negotiation between online undertaking and broadcasting undertakings that they have been ordered to distributed pursuant to an order under Section 9.1(1)(i) of the *Act*. As a result, it may be appropriate to include in any exemption order or condition of service relating to online undertakings, a requirement to participate in good faith negotiations facilitated by the Commission where the Commission has issued an order requiring the online undertaking to carry a particular service.

Appendix 2

Online Undertakings ~~Registration~~ Regulations

Interpretation

Definition of *operator*

1 In these Regulations, *operator* means a person who carries on an online undertaking to which the *Broadcasting Act* applies.

Registration

Registration return

2 An operator must register their online undertaking by submitting to the Commission, within 30 days after the day on which they become subject to the requirement to register ~~begin to carry on the undertaking~~, a registration return that contains the following information:

the online undertaking's name;

the operator's name, mailing address, phone number and email address;

if different than the contact information filed under paragraph (b), contact information for a contact person for the operator, such as their name, title, mailing address, phone number and email address;

the place where the online undertaking is incorporated or otherwise formed, if any, and the location of its head office; and

the broadcasting services offered by the online undertaking.

Request for additional information

3 (1) If it appears to the Commission that a registration return is incorrect or incomplete, the Commission may request that the operator submit any information that is necessary to correct or complete the registration return.

Submission of additional information

(2) The operator must submit the requested information to the Commission as soon as feasible.

Updates to registration return

4 An operator must notify the Commission of any change to information previously submitted by submitting the updated information with 30 days after the day on which the change occurs.

Request for deregistration

5 (1) An operator must submit a request to deregister their online undertaking within 30 days after the day on which they cease to carry on the undertaking or the end of the broadcast year in which the undertaking falls under a class listed in the *Exemption order respecting classes of online undertakings in relation to the Online Undertakings Registration Regulations*.

Deregistration

(2) An online undertaking must be deregistered if, after an attempt to contact the operator using the information on file, the Commission is unable to verify that the operator continues to carry on the undertaking.

Electronic submission

6 All information that is submitted under these Regulations must be submitted electronically in the format specified by the Commission.

Transitional Provision

Registration deadline – existing undertaking

7 If an operator began carrying on an online undertaking before the day on which these Regulations come into force, the operator must register the undertaking by submitting to the Commission, within 60 days after that day, a registration return that contains the information referred to in section 2.

Undue preference

8 The online undertaking shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

Availability of content

9 All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific broadcasting distribution undertaking, or mobile service, or retail Internet access service, unless the online undertaking offers a service designed to duplicate what is available through a related broadcasting distribution undertaking.

Coming into Force

Registration

10-8 These Regulations come into force on the day on which they are registered.

Exemption order respecting classes of online undertakings in relation to the *Online Undertakings Registration Regulations*

Interpretation

The following definitions apply in this exemption order.

Annual gross revenues means total revenues collected from the broadcasting activities of an online undertaking attributable to the person or that person's subsidiaries and/or associates, if any, collected from the Canadian broadcasting system across all services during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year within for which the revenue calculation is being filed), whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings. This includes online undertakings that operate in whole or in part in Canada and those that collect revenue not otherwise accounted for from other online undertakings by offering bundled services on a subscription basis. The Commission will accommodate permit requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

Broadcast year means the period beginning on September 1 and ending on August 31.

Broadcasting ownership group means a person that controls one or more persons that carry on one or more affiliated broadcasting undertakings to which the *Broadcasting Act* applies and includes all persons that carry on those broadcasting undertakings.

Excluded revenue means revenue that originates from providing video games services or services providing text and video-based news content ~~unique transactions.~~

~~**Unique transaction** means a one-time rental or purchase of an individual program transmitted or retransmitted over the Internet.~~

Video game means an electronic game which involves the interaction of a user by means of an Internet connected device, where the user is primarily engaged in active interaction with, as opposed to the passive reception of, sounds or visual images, or a combination of sounds and visual images.

Video games service means the transmission or retransmission of video games over the Internet to enable users to select and play video games.

Description

The Commission, pursuant to subsection 9(4) of the *Broadcasting Act*, by this order, exempts from all the requirements of the *Online Undertakings Registration Regulations*, as amended from time to time, except for clauses 8 and 9, persons carrying on, in whole or in part in Canada, broadcasting undertakings defined by any of the following three ~~four~~ classes:

- i. online undertakings whose single activity and purpose consists of providing video game services;
- ii. online undertakings whose purpose is to provide text and video-based news content ~~single activity and purpose consists of providing unique transactions; or~~
- iii. online undertakings ~~affiliated with a broadcasting ownership group that~~ have ~~has~~, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than ~~\$2010~~ \$2010 million.; ~~or~~
- iv. ~~online undertakings that have no affiliation whatsoever with a broadcasting ownership group, if they have, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than \$10 million.~~

With respect to the class of online undertakings referenced in clause iii, this order will continue to apply in situation where annual Canadian gross revenues exceed \$20 million by no more than \$1 million and for a period of no longer than two consecutive broadcast years.

The undertakings listed above must provide, in such form and at such time as requested by the Commission:

- a) information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;
- b) information regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations, subscribership or financial affairs in Canada;
- c) information regarding the undertaking's adherence to the conditions of service, the Act, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and
- d) a response to a complaint filed by a person.

Proposed conditions for carrying on certain online undertakings

The Commission hereby proposes, pursuant to subsections 9.1(1) and (4) of the *Broadcasting Act* (the Act), to impose the following conditions on certain persons carrying on online undertakings, as defined in the Act.

Interpretation

The following definitions apply in this order.

Annual gross revenues means total revenues collected from the broadcasting activities of an online undertaking attributable to the person or that person's subsidiaries and/or associates, if any, collected from the Canadian broadcasting system across all services during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year within for which the revenue calculation is being filed), whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings. This includes online undertakings that operate in whole or in part in Canada and those that collect revenue not otherwise accounted for from other online undertakings by offering bundled services on a subscription basis. The Commission will ~~accommodate~~ permit requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

Broadcast year means the period beginning on September 1 and ending on August 31.

~~**Broadcasting ownership group** means a person that controls one or more persons that carry on one or more affiliated broadcasting undertakings to which the *Broadcasting Act* applies and includes all persons that carry on those broadcasting undertakings.~~

Excluded revenue means revenue that originates from providing video games services or services providing text and video-based news content ~~unique transactions.~~

~~**Unique transaction** means a one-time rental or purchase of an individual program transmitted or retransmitted over the Internet.~~

Video game means an electronic game which involves the interaction of a user by means of an Internet connected device, where the user is primarily engaged in active interaction with, as opposed to the passive reception of, sounds or visual images, or a combination of sounds and visual images.

Video games service means the transmission or retransmission of video games over the Internet to enable users to select and play video games.

Application

This Order does not apply to persons carrying on broadcasting undertakings defined by any of the following four classes:

- i. online undertakings whose single activity and purpose consists of providing video games services;

- ii. ~~online undertakings whose purpose is to provide text and video-based news content single activity and purpose consists of providing unique transactions; or~~
- iii. ~~online undertakings affiliated with a broadcasting ownership group that have has, after deducting any excluded revenue, annual Canadian gross revenues from broadcasting activities of less than \$2010 million.~~
- iv. ~~online undertakings that have no affiliation whatsoever with a broadcasting ownership group and have, after deducting any excluded revenue, annual revenues of less than \$10 million.~~

Condition of Service – Information Gathering

An online undertaking shall provide, in such form and at such time as requested by the Commission: information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting; information regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations, subscribership or financial affairs in Canada; information regarding the undertaking's adherence to the conditions of service, the Act, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and a response to a complaint filed by a person.

Condition of Service – Undue Preference

The online undertaking shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

Condition of Service – Availability of Content

All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent on a subscription to a specific broadcasting distribution undertaking, or mobile service, or retail Internet access service.

Condition of Service – Fee Return

(a) An online undertaking shall, on or before 30 November each year, file a fee return, on the form provided by the Commission and containing the information required in the form for the broadcast year, for the one-year period beginning 1 September of the year preceding the calendar year in which the return is required to be filed.

(b) For the purposes of paragraph (a), fee revenue, in respect of an online undertaking, means the gross revenue derived during a broadcast year from the Canadian broadcasting activity of the online undertaking, or by an affiliate, and, without limiting the generality of the foregoing, includes

- i. the gross annual Canadian broadcasting revenue, as reported by the online undertaking and validated by the Commission, where the undertaking has not filed a fee return covering 12 months of the most recently completed return year; or,
- ii. if such information is not available, the gross annual Canadian broadcasting revenue that, based on the trends of the market in which the undertaking operates, its business plan and its previous financial performance, the Commission considers to be related to its broadcasting activity.

This definition does not include any amount received by an online undertaking from another broadcasting undertaking to which the *Broadcasting Licence Fee Regulations, 1997* apply, other than the amounts received from the Canadian Broadcasting Corporation for the sale of airtime.

(c) This condition will be of no force or effect 30 days after any amendments to the *Broadcasting Licence Fee Regulations, 1997*, or new regulations, come into effect.

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