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Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services

(Broadcasting Notice of Public Hearing CRTC 2007-10)



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ITAC is the voice of the Canadian information and communication technologies industry in all sectors, including telecommunication and internet services, consulting services, hardware, microelectronics, software and electronic content. ITAC's network of companies accounts for more than 70 per cent of the 579,000 jobs, \$137.6 billion in revenue, \$5.2 billion in R&D investment, \$22.6 billion in exports and \$11.5 billion in capital expenditures that the industry contributes annually to the Canadian economy.

Reviewing the Regulatory Framework for Broadcasting Distribution Undertakings

1. The Information Technology Association of Canada (ITAC) commends the CRTC for conducting a review of the regulatory regime for broadcasting distribution undertakings (BDUs), which has been in place since 1997. As the Commission noted in the public notice for this review:

[I]t is time to move away from the current detailed regulation, and to take a revitalised approach to both distribution and discretionary programming undertakings that aims at reducing regulation to the minimum essential to achieve the objectives of the *Broadcasting Act*, relying instead on market forces wherever possible.¹

2. ITAC's submission focuses on the broad theme of the need for the Commission to employ the principles of "smart regulation" to foster a Canadian broadcasting system that encourages and supports technical innovation and competition, that recognises the convergence between telecommunication and broadcasting distribution services, and that enables service providers to respond to the realities of increased consumer choice and consumer empowerment over their entertainment options.

The Need for Smart Regulation to Encourage Innovation and Competition

3. ITAC supports application of the disciplined principles of smart regulation to the task at hand.² In particular, ITAC submits that, in establishing the new regulatory framework to govern the distribution and discretionary service sector, the Commission's goal should be to "limit the cumulative administrative burden and impose the least possible cost on Canadians and businesses that is necessary to achieve the intended policy objectives", as set out in the federal government's April 2007 *Cabinet Directive on Streamlining Regulation*.³ Also, rather than regulation, the Commission should wherever possible pursue alternative instruments – such as exemptions – for meeting its policy objectives.

4. The *Cabinet Directive* also states that regulation, among other things, should "promote a fair and competitive market economy that encourages entrepreneurship, investment, and innovation". As the Commission recognises in its public notice, distribution and discretionary services will find themselves increasingly obliged to adapt to significant changes within the communication environment. Indeed, many significant changes have already taken place due – in large part, if not entirely – to the innovation opportunities created by the internet and the creativity and drive of internet entrepreneurs. Thus, timing is critical: distributors and discretionary services must be relieved of unnecessary and burdensome regulatory obligations *now* so that they are as

¹ Broadcasting Notice of Public Hearing CRTC 2007-10, paragraph 12.

² See Dunbar and Leblanc, *Review of the Regulatory Framework for Broadcasting Services in Canada*, August 2007.

³ http://www.regulation.gc.ca/cdsr-dcrr_e.pdf.

free as internet companies to exploit available technologies and develop innovative, consumer-friendly service ideas and options.

5. Moreover, in order to compete in this new communication environment and best fulfil the objectives of the *Broadcasting Act*, Canadian companies must be afforded an opportunity to pursue new revenue-generating opportunities. To this end, ITAC submits that distributors and pay-TV and video-on-demand (VoD) operators should not be hamstrung in their efforts to invest in their systems by legacy measures that grant content providers reserved access to advertising revenues. As the rapid growth in online advertising revenues demonstrates, there remains a great deal of room to grow the available advertising “pie”; opening greater access to this pie should serve to benefit all players in the Canadian system, putting them in a better position to make the necessary investments to meet the competitive challenges presented by their large, well-heeled global internet counterparts.

Recognising Convergence between Telecom and Content Distribution Services

6. ITAC recognises that the historical business distinctions between telecommunication service providers (TSPs) and broadcasting distribution undertakings (BDUs) are rapidly disappearing as traditional telephone companies are now offering competitive video services and cable companies are offering competitive voice services. Although the distinctions between lines of business are fading, the regulatory distinctions are not.

7. In the rapidly evolving world of digital media, Canada’s BDUs can ill afford to have the industry bogged down by red tape. To the extent that regulatory oversight is needed to achieve the objectives of the *Broadcasting Act*, the regulator must be able to quickly respond to changes occurring in the market.

8. ITAC appreciates the Commission’s initiative to streamline the current broadcasting regulatory regime and its recognition of the positive impact of market forces. As it stands, the objectives of the *Broadcasting Act* are currently achieved through a complicated regulatory framework constructed of bits and pieces of regulations, policy decisions, exemption orders and licensing decisions. The latter are used most extensively to define authorisations, to specify additional obligations and to provide relief from obligations set out in regulations. This results in piecemeal, case-by-case regulation that is not only inefficient but often asymmetrical in terms of competitive neutrality. It also breeds uncertainty in the market, and ultimately can stifle innovation and the launch of new products and services.

9. The Commission’s public notice states that:

In general, the Commission will expect parties arguing for continued regulatory intervention to provide a full rationale for that intervention, with

supporting evidence, to establish that such intervention is essential to the objectives of the Act.⁴

10. ITAC's view is that the burden of proof of the need for regulation should rest upon the party that wants to see regulation retained or put in place. The association submits that many of the current regulatory requirements no longer serve a purpose in today's broadcasting environment, and that their elimination would go a long way toward ensuring that Canada continues to play a leading role in the digital environment and achieves its cultural objectives.

Responding to Increased Consumer Choice and Consumer Empowerment

11. ITAC is not alone in recognising the increased power that consumers have gained over their entertainment options, primarily as a result of the internet but also because of other offline distribution systems (e.g., a TV series on DVD) that have developed since the Commission last reviewed its framework for distribution undertakings. Indeed, as the Commission notes in the public notice, "More and more in Canadian broadcasting, the consumer is in charge. BDUs and programmers must be able to respond to the evolving expectations and demographics of Canadian viewers".⁵

12. Canadian service providers within the regulated broadcasting system must make special efforts to keep consumers within the system. Consumers are able to leave it to satisfy their programming interests; they are no longer at the mercy of any regulator, broadcaster or broadcasting distributor regarding what they can watch, when they can watch it or, increasingly, where they can watch it. This is not to say that aggregators are unnecessary or will automatically be rejected. However, aggregators, whether of individual programs (i.e., broadcasters) or of signals and services (i.e., distributors), must be able to offer products that appeal to consumers because of the value they add, not because they are the only options available.

13. ITAC submits that the Commission should encourage rather than restrict efforts to meet consumer demand for control over their program choices. For example, the Commission should remove current restrictions on subscription video-on-demand (SVoD) that limit the means by which consumers can access VoD programs. SVoD gives consumers the opportunity to tailor their program choices and select their program options in a convenient and reasonably priced manner. Artificial restrictions that are imposed on licensed VoD operators but that do not exist for internet VoD providers – like the Commission's current one-week rule – are not only difficult to police but are counter-productive, serving as yet another reason for consumers to find the internet more attractive than the regulated broadcasting system.

⁴ BNPH CRTC 207-10, paragraph 16.

⁵ Broadcasting Notice of Public Hearing CRTC 2007-10, paragraph 11.

14. In an on-demand world, establishing regulatory incentives to create “shelf-space” for Canadian programmers to make their video content available on demand seems a more promising approach than trying to restrict consumers’ access to other choices available elsewhere. ITAC’s view is that Canadian consumers should be able to choose from large menus of attractive Canadian and foreign VoD program options from within the regulated system, as well as from outside it – all with the same ease. ITAC is confident that both kinds of programming can co-exist successfully within the Canadian broadcasting system.

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