

**SUBMISSION TO THE BROADCASTING AND TELECOMMUNICATIONS
LEGISLATIVE REVIEW PANEL**

BY

THE INTERIM COMMISSIONER OF COMPETITION

January 11, 2019

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1. Executive Summary

1. Pursuant to section 125 of the *Competition Act*,¹ the Interim Commissioner of Competition (“Commissioner”) is pleased to offer the Competition Bureau’s (the “Bureau”) views² in response to the Broadcasting and Telecommunications Legislative Review Panel’s (the “Review Panel”) [Call for Comments](#) of September 24, 2018.
2. Broadcasting and telecommunications services play an essential role both in Canadians’ social and cultural lives, as well as in their ability to participate in the digital economy domestically and abroad. The Bureau applauds the Review Panel’s work to review the sector’s legislation to ensure it can support rather than impede the changes in the technology and business models that are fueling Canada’s economy.
3. Applying a competition lens, reliance on market forces and competition should be preferred whenever feasible. Where market forces alone are insufficient to achieve certain policy objectives, regulation may be appropriate. Regulation may also be appropriate to address market failures, such as information asymmetries.
4. The Bureau’s specific recommendations are that the Review Panel:
 - A. consider the four principles set out in the Bureau’s [framework](#) for balancing competition and regulation in examining possible changes to Canada’s communications regulations. These principles are:
 - i. regulation should only address legitimate policy objectives;
 - ii. regulation should be based on the best available evidence;
 - iii. regulation should be proportionate to associated harm; and
 - iv. regulation should be regularly reviewed to reflect market conditions.
 - B. ensure that:
 - i. each layer in communications networks benefits from tailored regulation that fits the issues and challenges associated with that layer, including appropriate objectives and regulatory tools; and
 - ii. reliance on market forces is maintained as one of the key objectives of telecommunications regulation.

¹ Section 125 of the Competition Act, R.S.C., 1985, c. C-34.

² This submission is based on public information, and is made in the context of the legislative framework applicable to this consultation. Accordingly, these submissions will not predetermine the Commissioner’s position in any current or future investigation pursuant to the *Competition Act*.

- C. consider regulatory measures to ensure that telecommunications carriers can obtain access to bottleneck facilities owned by third parties as a means of promoting access and competition in telecommunications markets.
- D. adapt broadcasting regulations to level the playing field between all market participants in a way that is neutral to the technologies and business models used.
- E. take measures to ensure that Canadian consumers are provided with accurate and clear information regarding promotional offers and terms of service by communications service providers and/or their representatives, before entering into agreements with service providers, to facilitate informed purchase decisions.

2. Introduction

- 5. Most, if not all, Canadians subscribe to one or more communications services, with more than 99% of households subscribing to a landline and/or mobile service and 98% having access to fixed broadband internet access.³ These services play a major role in Canadians' everyday lives, from work, to entertainment, to cultural activities. At the same time, the sector is in a constant state of innovation and technological change. From abandoning traditional landline phones in favour of wireless devices,⁴ to "cutting the cord" on traditional television services,⁵ Canadians are responding to changes in the communications sector. The legislative framework needs to adapt to new opportunities and challenges offered by emerging communications paradigms, while remaining flexible to future developments.
- 6. The Bureau has a continuing interest in the regulation of the communications sector in Canada, including both the telecommunications industry and the broadcasting industry, due to the central role that these industries play in the day-to-day lives of Canadians. The Bureau has significant enforcement experience in matters relating to both industries, as described in more detail in **Annex A**. In addition, the Bureau has frequently engaged in advocacy efforts relating to telecommunications and broadcasting, including our ongoing market study on the broadband sector in Canada,⁶ interventions before the Canadian Radio-television and Telecommunications Commission ("CRTC") concerning the regulation of these industries,⁷ and participation in past

³ CRTC, "[2018 Communications Monitoring Report](#)" at Infographic 1.2.

⁴ *Ibid.* at Infographic 1.1.

⁵ CRTC, "[Harnessing Change: The Future of Programming Distribution in Canada](#)" (May 31, 2018).

⁶ Bureau, "[Broadband Market Study](#)" (May 10, 2018).

⁷ For recent examples, see Bureau, "[Competition Bureau supports CRTC's public inquiry into telecom sales practices](#)" (August 30, 2018), "[Competition Bureau supports increased choice in the Canadian wireless industry](#)" (June 14, 2018), "[Competition Bureau supports CRTC's proposal on video-on-demand](#)" (April 27, 2015).

policy reviews touching on competition issues in telecommunications.⁸ The Review offers the Bureau an opportunity to provide a broader perspective on the importance of competition in Canada's communications sector, and on potential changes to the legislative framework that will promote competition in the sector.

7. The Bureau advocates that regulation should be used only where market forces will not achieve legitimate policy objectives, and even then, only to the extent necessary to address those objectives. Regulation can impede competition, while reliance on competition can result in lower prices, greater innovation, and improved choice for all Canadians.⁹
8. The Bureau will focus the majority of its comments on the Review Panel's first theme - reducing barriers to accessing telecommunications networks. As part of this discussion, the submission:
 - A. presents a four-layer model of communications services to explain the differing objectives of telecommunications and broadcasting regulation, and the importance of maintaining reliance on market forces as a crucial part of telecommunications regulation; and
 - B. proposes measures to facilitate access by carriers to bottleneck facilities and services owned by third parties.
9. The Review Panel's second theme - supporting the creation, production and discoverability of Canadian content - generally involves social and cultural objectives rather than economic objectives. Having said that, the Bureau notes that measures, such as subsidies and requirements to carry or promote certain content, may distort competitive forces if they apply to certain competitors in the industry and not to others. In the absence of legitimate policy reasons for differential treatment, frameworks should be as neutral as possible as between competitors.
10. The Bureau will also offer its perspective on the third theme, improving the rights of the digital consumer. Consumers should receive accurate and clear information concerning communications products and services to ensure that they can make informed purchase decisions. Enshrining such principles in legislation would help reduce the occurrence of deceptive marketing practices in this important sector of the Canadian economy.
11. The fourth and final theme of the Review Panel's Call for Comments concerns a review of the institutional framework for the communications sector, including the allocation of regulatory responsibilities. To facilitate this review, **Annex B** to this submission provides a brief overview of

⁸ See Bureau, "[Submission to the Competition Policy Review Panel](#)" (January 11, 2008), and "[Telecommunications Policy Review Panel Comments of the Commissioner of Competition](#)" (August 15, 2005).

⁹ See Bureau, "[Competition Advocate Balancing Regulation and Competition](#)", and Bureau, "[Submission to the Canada Transportation Act Review Panel](#)" (February 27, 2015).

the Bureau's role and activities in relation to the telecommunications and broadcasting industries.

3. Balancing Competition and Regulation

12. The telecommunications and broadcasting industries involve policy objectives that may be difficult for regulators to achieve solely through reliance on market forces. The Bureau advocates that where regulation may be necessary to achieve legitimate policy objectives, care should be taken to ensure that such regulation is no broader than necessary to address those objectives. Leaving room for competition to operate in the market can result in lower prices, greater innovation, and improved choice for all Canadians.
13. Telecommunications regulators have developed regulations aimed at achieving their policy objectives by removing barriers to entry or expansion by potential competitors, including network effects¹⁰ and access to passive infrastructure and rights-of-way. In addition, considerable regulation has been put in place concerning the allocation of limited resources in the form of radio spectrum to wireless carriers.¹¹
14. In the case of the broadcasting industry, policy-makers have identified Canadian content¹² as beneficial to the Canadian society as a whole by strengthening Canadian identity and civic engagement.¹³ As such, policy-makers may decide that more Canadian content is needed than what the market would produce if left to its own devices. Regulation may thus be necessary to ensure content producers and distributors have appropriate incentives to ensure the creation, production and discoverability of sufficient Canadian content.
15. To help regulators balance regulations and competition, the Bureau has developed a framework of four principles, based on international best practices.¹⁴ If the Review Panel determines that

¹⁰ Network effects describe situations where the value of a service to a user increases in relation to the number of others who are also using that service. For example, having a telephone is more useful if there are many other people who also have telephones, and are thus available for you to call. See Jeffrey Church & Roger Ware, *Industrial Organization A Strategic Approach*, 2000 McGraw-Hill at page 637. For an example of a regulatory response, see Telecom Regulatory Policy CRTC 2012-24, "[Network interconnection for voice services](#)" (January 19, 2012).

¹¹ See e.g. Government of Canada, Innovation Science and Economic Development ("ISED"), "[Technical, Policy and Licensing Framework for Spectrum in the 600 MHz Band](#)" (March 2018, revised July 9, 2018).

¹² For the purposes of this submission, "Canadian content" should be understood to also include content aimed at disadvantaged and vulnerable groups, such as indigenous communities and Canadians with disabilities.

¹³ See Government of Canada, Department of Canadian Heritage, "[Mandate and Role](#)"; "[Report](#) of the Royal Commission on National Development in the Arts, Letters and Sciences 1949-1951" (the "Massey Commission")(1951). See also Lawson Hunter, Kenneth G. Engelhart and Peter Miller, "Strengthening Canadian Television Content: Creation, Discovery and Export in a Digital World" (December 2017), C. D. Howe Institute Commentary No. 498 at page 6.

¹⁴ Similar principles were set out by the OECD in its "[Competition Assessment Toolkit](#)" (revised 2010).

new or existing regulatory measures are necessary to achieve the policy objectives set out in its Terms of Reference, the four principles outlined below may assist in building a framework:

- A. **Regulation should only address legitimate policy objectives:** Regulation that affects the prices, output or quality of products should be limited to circumstances when market forces cannot satisfy policy concerns. Regulation should not be designed to meet other objectives, such as ensuring that industry participants earn a certain level of income, or that consumers can purchase products at fixed prices. Market forces are the best way to determine how products should be provided, and should be deviated from only in exceptional circumstances where there is documented evidence that market based competition would run counter to a regulator's legitimate policy objectives.
- B. **Regulation should be based on the best available evidence:** While industry experience can be necessary to frame the relevant issues for regulation, empirical evidence can provide an objective measure of what is occurring on a broad scale across various communications services and consumer groups. A key component of the Review should be the collection and preservation of marketplace data in order to ensure that the best possible evidence is available to the Panel to inform its recommendations.
- C. **Regulation should be proportionate to harm:** Regulation should be cast narrowly to preserve the greatest possible amount of market-based competition. Regulation that goes too far can have negative and unexpected results on the industry. Minimal regulation allows policy objectives to be fulfilled, and provides maximum scope for beneficial market forces in regulated markets. When deciding whether regulation would be in the public interest, regulators should consider using the "market failure test" proposed by Jeffrey Church and Roger Ware.¹⁵ In short, the test asks regulators to first identify and attempt to quantify the problems that would occur in the market if the proposed regulation is not enacted, then second to ask whether the proposed regulation will feasibly address these problems in such a way that the benefits of the regulation will outweigh the costs. The test also proposes that the burden of showing that regulation is preferable to leaving things as-is should rest on the proponents of that regulation.
- D. **Regulation should be regularly reviewed to reflect market conditions:** As the Canadian communications sector continues to innovate and change, its legislative and regulatory frameworks will need to be reviewed and updated to ensure that they remain effective and relevant. The Bureau notes that Canada's communications regulators, such as the

¹⁵ In more technical language, the market failure test is intended to help determine whether regulation in the public interest is justified on the basis of market failure. It has three elements: 1) a determination of the existence and magnitude of the inefficiencies if the market is not regulated; 2) a determination of the feasibility of intervention to correct market inefficiencies, and 3) the onus is on the proponents of regulation to show that the benefits of regulation outweigh the cost. See Church and Ware, *supra* note 10 at 752.

CRTC, periodically review their policies and codes of conduct to ensure that they still serve their intended purposes. Certain statutes, such as the *Canada Transportation Act*, go further by explicitly requiring comprehensive statutory reviews to assess the operation of the legislation as a whole.¹⁶ As part of ensuring that Canadian telecommunications and broadcasting regulations are subject to periodic review, the Review Panel may also wish to consider the use of “sunset clauses”, whereby regulations or decisions would expire on a set date unless further action is taken by policy-makers.

Recommendation A: The Bureau recommends that the Review Panel consider the four principles outlined in the Bureau’s framework for balancing competition and regulation when examining possible regulatory changes to Canada’s communications regulations. These principles are:

- i. regulation should only address legitimate policy objectives;
- ii. regulation should be based on the best available evidence;
- iii. regulation should be proportionate to associated harm; and
- iv. regulation should be regularly reviewed to reflect market conditions.

4. Making competition a key objective of telecommunications regulation

16. In its Call for Comments, the Review Panel discusses the need to ensure that all Canadians are able to benefit from innovation and investment in infrastructure that enables access to safe, secure and high-quality telecommunications services at affordable prices. As previously discussed, reliance on competition should be preferred whenever feasible. Competition among suppliers is widely recognized as an important means of bringing innovative products to consumers at low prices.¹⁷

17. The importance of competition is reflected in the Canadian Telecommunications Policy found at section 7 of the *Telecommunications Act*, which counts among its objectives “foster[ing] increased reliance on market forces for the provision of telecommunications services and ensur[ing] that regulation, where required, is efficient and effective.”¹⁸ In addition, CRTC decisions relating to telecommunications regulations often feature a competition dimension, including recent decisions relating to the agency’s regulatory framework for wholesale wireless and wholesale wireline access.¹⁹

¹⁶ See section 53 of the *Canada Transportation Act*, S.C. 1996, c. 10.

¹⁷ OECD, *Competition Assessment Toolkit*, *supra* note 14 at page 23.

¹⁸ *Telecommunications Act*, section 7(f).

¹⁹ See Telecom Regulatory Policy CRTC 2015-326, “[Review of wholesale wireline services and associated policies](#)” (July 22, 2015); Telecom Regulatory Policy CRTC 2015-177, “[Regulatory framework for wholesale mobile wireless services](#)” (May 5, 2017).

18. In contrast, broadcasting regulation generally places less emphasis on fostering competition as a means of achieving its policy objectives. While telecommunications regulation has traditionally focused on economic objectives such as price and efficiency, broadcasting regulation is primarily concerned with ensuring that Canadians can choose from a wide range of programming that reflects Canadian attitudes, opinions, and creativity.²⁰ To ensure the provision of such programming, the *Broadcasting Act* sets out both requirements and incentives to favour the production and delivery of certain content.²¹

19. While both statutes deal with Canadian communications networks, they concern different aspects of these networks, each with their own objectives and challenges.²² To better understand these differences, it may be useful to divide communications networks into four hierarchal layers.²³ Each layer relies on the services offered by the layer below it.

Layer #	Name	Description
4	Content	The information delivered to and from users through applications such as a particular TV show, the text of an email, a blog post.
3	Application	The various programs and functions used by end-users, such as web browsers, video streaming services, voice services, and email clients.
2	Logical	The logical infrastructure that keeps information flowing smoothly within and across networks such as TCP/IP protocols used to interconnect network devices on the Internet.
1	Physical	The physical infrastructure used in the underlying network that makes communication possible such as copper and fibre cables, satellites, etc.

20. Physical infrastructure (Layer 1) is the underlying networks used to provide both wireline and wireless communications, including both switching and transport. This includes cables, wireless masts and antennae, satellites, radio spectrum, and the passive infrastructure referred to by the Review Panel in its [Terms of Reference](#), comprising of poles, ducts, and rights-of-way.

21. Logical infrastructure (Layer 2) is comprised of the management and routing functions that keep information flowing smoothly within and across networks. This includes protocols to assign addresses and deliver packets on the network, such as the TCP/IP protocols that enable the Internet. Certain provisions of the *Telecommunications Act*²⁴ and net neutrality rules operate at

²⁰ *Broadcasting Act*, subsection 3(1)(d).

²¹ *Broadcasting Act*, section 3(1). In past decisions, the CRTC has discussed how its regulatory approach to broadcasting has generally been to protect services from some forms of direct competition in cases where higher obligations relating to Canadian content cannot be met without that protection. See Broadcasting Notice of Consultation [CRTC 2014-190](#), *Let's Talk TV* (April 24, 2014) at paragraphs 21-22.

²² See Philip Palmer, "[Why Broadcasting and Telecoms belong in Different Legislation](#)" (January 23, 2015).

²³ The International Standards Organization (ISO)'s Open System Interconnection (OSI) Model sets out seven layers for the implementation of telecommunications protocols, as described by the United States Department of Transportation in its "[Telecommunications Handbook](#)". This submission uses the simplified four-layer model proposed by Kevin Werbach for the purposes of telecommunications regulation; see Werbach, "A Layered Model for Internet Policy" (2002), *Journal of Telecommunications and High-Tech Law* 37 (2002).

²⁴ *Telecommunications Act*, section 36.

this layer to prevent carriers from using their infrastructure at Layer 2 to control or influence the applications or content carried using their networks.

22. Applications (Layer 3) are the various software systems that allow users to perform tasks using the network, such as voice services, web browsers, online games, and email clients. Broadcasting, that is to say the distribution of audio or video information, can be considered a category of the applications accessed by consumers using communications networks.
23. Content (Layer 4) involves the actual information that is delivered using the applications running over the communications network. Examples of content include particular television shows, the text in an email, or the content of a webpage loaded into a web browser. The *Broadcasting Act* regulates the content that is transmitted by means of the lower layers (Layers 1-3), and includes provisions aimed at promoting the creation and distribution of Canadian content.
24. Participants in the communications sector may offer products and services involving one or more of the listed layers. For example, traditional Internet Service Providers (“ISPs”) offer telecommunications services such as broadband Internet access to its customers, but do not generally sell applications or programming. Their product and service offerings are centred at Layers 1 and 2. Online video streaming companies offer a variety of programming through their applications, but rely on the networks of ISPs to deliver its services to its consumers. Their product and service offerings involve Layers 3 and 4. Vertically integrated communications firms offer not only video-streaming applications and content, but also the underlying networks needed to deliver them to consumers. Their product and service offerings encompass all four layers.
25. Telecommunications regulation is generally concerned with the first two layers, that is to say, with the physical and logical infrastructure of communications networks.²⁵ The physical networks used to provide communications services can constitute barriers to entry, particularly where they involve high investment costs and bottleneck facilities that carriers must have reasonable access to in order to compete in the market (e.g. poles and ducts, wireless masts, and radio spectrum). As such, telecommunications regulation often centers on facilitating access by competitors to existing facilities and services as a means of promoting entry and expansion by competitors.

²⁵ It is worth noting however that certain elements of telecommunications regulation also serve as a bridge to objectives generally associated with the applications and content layers. For example, net neutrality rules impose requirements on the logical infrastructure layer to ensure that applications and content are treated equally by carriers’ networks.

26. Broadcasting regulation, in comparison, is focused on the production and distribution of certain programming, and as such generally concerns the fourth layer.²⁶ These policy objectives are based around cultural and social objectives rather than economic objectives.
27. Regulation should be tailored to each layer of service. Introducing policy objectives and approaches to one layer that are designed for another layer risks diluting their effectiveness and interfering with the efficient regulation of the first layer.

Recommendation B

The Bureau recommends that:

- i. each layer in communications networks has tailored regulation that fits the issues and challenges associated with that layer, including appropriate objectives and regulatory tools; and
- ii. reliance on market forces is maintained as one of the key objectives of telecommunications regulation.

5. Promoting competition by enabling access to bottleneck facilities

28. Competition can be further fostered in the telecommunications sector by enabling access to bottleneck facilities owned by third parties. Examples of such bottleneck facilities include the last-mile portion of wireline networks, placement of equipment on poles or masts in locations where competitors cannot easily build their own structures, and access to the necessary radio spectrum to offer wireless services.²⁷
29. Telecommunications regulators have implemented a number of regulatory measures designed to ensure that telecommunications carriers can obtain reasonable access to bottleneck facilities.²⁸ However, carriers may still experience difficulties in obtaining access in situations

²⁶ Broadcasting regulation may however also involve regulation of the lower layers as a means of achieving objectives associated with production and distribution of content.

²⁷ Some commentators have proposed that bottlenecks may also exist in broadcasting markets, in the form of access to premium copyrighted content. For example, in a 2013 Policy Roundtable on competition issues in broadcasting and telecommunications, the OECD Secretariat noted: "Access to premium content is a serious bottleneck and a source of market power. In particular, premium sport events (e.g. Olympic Games or football matches) and new releases of movies, which have no substitutes, are essential to the successful functioning of pay TV providers. Barriers to accessing content can arise from the integration of content owners and broadcasters, exclusive contractual arrangements or from vertical foreclosures by a dominant firm." See OECD, "[Policy Roundtables Competition issues in television and broadcasting](#)" (2013) at page 7.

²⁸ See Telecom Decision CRTC 2008-17, "[Revised regulatory framework for wholesale services and definition of essential service](#)" (March 3, 2008); Telecom Regulatory Policy CRTC 2015-326, *supra* note 19, and Telecom Regulatory Policy CRTC 2015-177, *supra* note 19. See also the Conditions of License set out by ISED pursuant to the *Radiocommunication Act*, as described in "[Industry Canada's Arbitration Rules and Procedures](#)" (CPC-2-0-18 Issue 2, March 2013).

where bottleneck facilities are not owned by incumbent carriers, but by third parties that do not themselves compete in telecommunications markets, such as municipalities, utility companies or building owners.²⁹

30. Telecommunications carriers make extensive use of poles and ducts to support telecommunications transmission lines for wireline services. Similarly, access to towers, tall buildings, and other support structures is necessary for carriers to deploy the antennae and equipment needed for wireless services. Where third parties choose not to allow carriers access to this infrastructure, or choose to provide access exclusively to certain carriers, this can create a barrier to entry in the region.
31. The CRTC has the authority under sections 43 and 67 of the *Telecommunications Act* to grant Canadian carriers access to public rights-of-way in order to construct transmission lines. While the CRTC has jurisdiction to order access where support structures are owned by other telecommunications carriers, Canadian courts have ruled that the regulator lacks such jurisdiction where support structures are owned by third parties that are not themselves telecommunications carriers.³⁰ In practice, there may be little to prevent such third parties from slowing or even blocking network deployments by refusing access to their infrastructure, or demanding exorbitant payments for such access.
32. With the advent of 5G services and the need to install more equipment in local communities than ever before,³¹ such “hold-up” by third party owners may create a barrier to the development of next generation networks in Canada in a manner contrary to policy-makers’ objectives. Similar concerns recently led the United States Federal Communications Commission to issue an order that addresses the policies of certain state and local regulatory authorities, on the basis that local regulations in certain jurisdictions were materially impeding 5G deployment in various ways.³²
33. This problem was noted by the Telecommunications Policy Review Panel, which recommended amending certain provisions of the *Telecommunications Act* to give a central decision maker the authority to resolve such cases.³³ The Review Panel may wish to consider the introduction of a regulatory mechanism to facilitate access to bottleneck infrastructure on reasonable commercial terms to ensure the deployment of telecommunications networks in line with regulators’ legitimate policy objectives.

²⁹ See Telecommunications Policy Review Panel [Final Report](#) (2006) at 5-5.

³⁰ See *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476.

³¹ Deployment of 5G is expected to require cell bases every 100-200 metres, necessitating thousands of new supporting structures for antennae and transmitters in communities that are already hostile to their erection. See See Yardley et al., “[Lowering Barriers to 5G Deployment](#)” (July 2018), Analysys Mason, and Alex Silverman, “[FCC Commissioners Butt Heads on Small-Cell Deployment](#)” (September 14, 2017), Cablefax.

³² Federal Communications Commission, “[Declaratory Ruling and Third Report and Order](#)” (September 27, 2018) at paragraph 25.

³³ See Telecommunications Policy Review Panel Final Report, *supra* note 29, Recommendation 5-1 at 5-8.

Recommendation C: The Bureau recommends that the Review Panel consider regulatory measures to ensure that telecommunications carriers can obtain access to bottleneck facilities owned by third parties as a means of promoting competition in telecommunications markets.

6. Ensuring a level playing field between competitors

34. The production and promotion of Canadian expression and programming is a core objective of the *Broadcasting Act*, as set out in the Broadcasting Policy for Canada.³⁴ Canadian content is advanced through a combination of subsidies,³⁵ both from general revenues and through contributions from broadcasters, and by requiring broadcasters to carry a certain amount of Canadian content as part of their offerings. These regulatory measures may be needed because market forces alone are unlikely to produce the amounts of Canadian content that policy-makers determine are socially and culturally optimal.

35. While traditional broadcasters remain strongly represented in the Canadian market, consumers are increasingly replacing or supplementing their information and entertainment choices with exclusively online content.³⁶ Currently, traditional broadcasters are subject to a different regulatory scheme than domestic and foreign over-the-top (“OTT”)³⁷ service providers, including a requirement to contribute to the funding and delivery of Canadian content.³⁸ This has created a challenge for broadcasting policy-makers, who must determine how to adapt their frameworks to ensure that Canadian content continues to be created, produced and discovered in this rapidly changing environment.³⁹

36. Regulations should strive to maintain competitive neutrality between service providers; that is, firms should compete on the merits and should not benefit from undue advantages due to their

³⁴ *Broadcasting Act*, section 3.

³⁵ For example, the Canada Media Fund provides subsidies to Canadian producers, particularly for drama programming. Another source of subsidy is government funding for the Canadian Broadcasting Corporation.

³⁶ See CRTC, “Harnessing Change: The Future of Programming Distribution in Canada”, *supra* note 5 at Part 2.

³⁷ Over-the-top refers to service providers that use applications running over the Internet to provide their programming (generally streaming radio or streaming television) to customers. They differ from traditional broadcasters, which generally provide their content over radio airwaves or by other means of telecommunications, such as cables running to their customers’ premises. See *Broadcasting Act*, section 2(1).

³⁸ Pursuant to [Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order CRTC 2015-356](#) (August 6, 2015), Canadian video-on-demand (VOD) services are exempt from Canadian content requirements on the condition that they allow themselves to be carried by any ISP, rather than tied to the services offered by a vertically integrated firm. See also Broadcasting Order [CRTC 2012-409](#) (July 26, 2012), “Digital Media Exemption Order.”

³⁹ The CRTC’s recent digital-only report, “Harnessing Change: The Future of Programming Distribution in Canada”, *supra* note 5, provides an extensive overview of the issues involved.

business model,⁴⁰ ownership, nationality, or other factors not related to performance. Subjecting OTTs to a different set of regulatory requirements than traditional broadcasters may lead to distortions in how these companies compete in the market.

37. The Bureau recommends that the Review Panel consider updates to the broadcasting framework that would level the playing field between traditional broadcasters and new business models. The Review Panel should also consider whether rules on traditional broadcasters could be updated as a means of allowing competition on a more level playing field.⁴¹

Recommendation D: The Bureau recommends that the Review Panel adapt broadcasting regulations to level the playing field between all market participants in a way that is neutral to the technologies and business models used.

7. Providing consumers with clear information

38. Consumers are not always provided with sufficient information, or information that is explained in an adequately clear manner, to make informed purchase decisions about their communications services.⁴² This can make it more difficult and time-consuming for consumers to search for a provider and compare what are often complex service offerings.
39. The pressure on service providers to offer better prices or innovate is a function of consumer mobility. The number of customers who are willing or able to switch service providers has to be large enough to make a competitive strategy of lowering prices and innovating profitable. Making it harder for consumers to switch providers softens competition by diminishing that pool of contestable customers. This makes it more difficult for consumers to effectively benefit from the rapid emergence of new offerings in the communications sector.
40. In a recent submission to the CRTC, the Commission for Complaints for Telecom-television Services (“CCTS”) noted that the main sales practice-related issue facing customers that have reached out to CCTS appears to be a mismatch between what the customer was expecting when

⁴⁰ In a 2013 Policy Roundtable, the OECD stated that one implication of convergence in communications networks was the need to ensure a technology neutral approach in the design of regulation. See OECD, “Policy Roundtables Competition in Television and Broadcasting”, *supra* note 27 at page 5.

⁴¹ The Bureau similarly proposed that regulators greet disruptive changes in the taxi industry not only by regulating new business models, but also by relaxing unnecessarily strict regulation on existing competitors. See Bureau, “[Modernizing Regulation in the Canadian taxi industry](#)” (November 26, 2015).

⁴² See Bureau, “[Submission by the Interim Commissioner of Competition — Telecom Notice of Consultation CRTC 2018-422 — Proceeding to establish a mandatory code for Internet services](#)” (December 20, 2018).

they subscribed to a service, and their subsequent experience with the service.⁴³ The CRTC has introduced a number of codes of conduct for communications service providers aimed at, among other objectives, ensuring that Canadians receive sufficient information in plain language to allow them to make informed purchase decisions.⁴⁴

41. The Bureau's mandate to administer and enforce the provisions of the *Competition Act* relating to false or misleading representations and deceptive marketing practices has given it considerable expertise in considering the impact of false or misleading representations. In light of the experiences of telecommunications regulators and the Bureau's own enforcement activities and experience in the telecommunications industry over the last few years,⁴⁵ the Bureau submits that the Review Panel should consider how Canada's communications framework could be updated to improve disclosure of information to consumers. In order to reduce switching costs and allow informed purchase decisions, consumers should be provided with accurate and easy to understand information regarding promotional offers and terms of service by communications service providers and/or their representatives. The information should be succinct, in plain language, and presented to consumers both before they enter into service agreements with communications service providers, and on an ongoing basis.

42. Whether this principle should be enshrined directly in communications legislation, or instead left to the discretion of regulatory agencies through the use of regulations and codes of conduct, is an issue that could be explored further during the course of the Review. However, given the complexity of the terms found in these contracts, including items relating to product offerings, prices, contract duration, and promotional offers, the Bureau proposes that the onus should be on service providers to ensure that consumers understand what services they are purchasing, and under what terms and conditions.

⁴³ See CCTS, Intervention of CCTS, Telecom and Broadcasting Notice of Consultation CRTC 2018-246, "[Report regarding the retail sales practices of Canada's large telecommunications carriers](#)" (August 30, 2018) at paragraph 4.

⁴⁴ These codes of conduct, enacted by the CRTC and administered by the CRTC, include the [Wireless Code](#), the [Television Service Provider Code](#), and the [Deposit and Disconnection Code](#) for home telephone services. The CRTC has also recently launched a proceeding (Telecom Notice of Consultation [CRTC 2018-422](#)) to establish a mandatory code for Internet services.

⁴⁵ The Bureau has also made a number of representations to the CRTC concerning various codes of conduct enacted by the regulator to address issues in telecommunications and broadcasting customer contracts. See Bureau, "[Competition Bureau provides comments on wireless code of conduct](#)" (February 6, 2013), "[Competition Bureau supports CRTC's changes to wholesale code](#)" (May 4, 2015), Bureau, "[A code for Internet services is good for competition and Canadians](#)" (December 20, 2018).

Recommendation E: The Bureau recommends that the Review Panel take measures to ensure that Canadian consumers are provided with accurate and clear information regarding promotional offers and terms of service by communications service providers and/or their representatives, before entering into agreements with service providers, to facilitate informed purchase decisions.

8. Conclusion

43. The Bureau believes that reliance on market forces and competition should be preferred to achieve regulators' legitimate policy objectives. Where market forces alone are insufficient to achieve certain policy objectives, regulation may be appropriate. As the digital revolution continues to shape Canada's communications and broadcasting industries, ensuring that the regulatory framework governing communications networks and services promotes competition is of critical importance.
44. The Bureau presents the recommendations set out in this submission in order to help the Review Panel consider competition as part of its consultation in relation to the established themes of the Review. At the Review Panel's request, the Bureau would also be pleased to provide its perspective on the potential competitive effects of various proposals that the Review Panel may receive in the course of its consultations.