

175 Bloor Street East
South Tower, Suite 501,
Toronto, Ontario M4W 3R8
Telephone (416) 314-6858
Fax (416) 314-6876

175 rue Bloor est
Edifice sud, bureau 501,
Toronto, Ontario M4W 3R8
Téléphone (416) 314-6858
Télécopieur (416) 314-6876



Ontario

**Ontario Media
Development
Corporation**

**Société de
développement
de l'industrie
des médias
de l'Ontario**

19 October 2007

Robert Morin
Secretary General
Canadian Radio-television and Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

**Re: Broadcasting Notice of Public Hearing CRTC 2007-10
Call for Comments
Review of the regulatory frameworks for broadcasting distribution undertakings
and discretionary programming services**

Ontario Media Development Corporation (OMDC) is pleased to file the following comments in connection with Broadcasting Notice of Public Hearing CRTC 2007-10 calling for comments on the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services.

OMDC is an agency of the Ontario Ministry of Culture that facilitates economic development opportunities for Ontario's cultural media industries. As the central catalyst for Ontario's cultural media cluster, OMDC promotes, enhances and leverages investment, jobs and original content creation through a variety of initiatives.

OMDC requests the opportunity to appear at the hearings to discuss with the Commission in more detail the issues raised in this submission.

We now proceed to the substance of our submission and comments on the issues raised by the Commission in the Public Notice.

Sincerely,

Karen Thorne-Stone
President and Chief Executive Officer
Ontario Media Development Corporation

Introduction

1. Ontario Media Development Corporation (OMDC) is pleased to file the following comments in connection with Broadcasting Notice of Public Hearing CRTC 2007-10 calling for comments on the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services.
2. OMDC is an agency of the Ontario Ministry of Culture with a mandate to build the capacity and competitiveness of Ontario's cultural industries. Through tax credits, programs and services for the film and television, book and magazine publishing, music and interactive digital media industries, OMDC maximizes opportunities for growth and innovation in Ontario and abroad.
3. The government of Ontario's media tax credits, co-administered by OMDC, are an important source of financing for foreign and domestic content creation. In fiscal 2006-07, OMDC issued over 1,000 tax certificates valued at almost \$200 million to support content creation in Ontario's cultural media industries, including television production.
4. OMDC supports Ontario creators to market their products around the world. Last fiscal year the agency supported 120 companies to attend 43 international markets.
5. The agency also operates an innovative online Digital Locations Library that offers virtual scouting to domestic and international producers from anywhere in the world, 24 hours a day. Producers are able to view over 7,400 digital locations, consisting of more than 140,000 individual digital images.
6. OMDC also invests directly in screen-based domestic content through the OMDC Film Fund and the OMDC Interactive Digital Media Fund. In 2006-07 thirty-one projects received either production or development support through these programs.
7. Given our role as supporters of the creation of Canadian content, OMDC is pleased to have this opportunity on the matters before the Commission.
8. Specialty and Pay services have become a critical element of the Canadian broadcasting system, in the last two decades moving from a marginal place to, in 2006, being responsible for \$2.5 billion in English service revenues, and contributing \$880.6 million to Canadian programming, of which nearly \$300 million goes directly to independent producers.¹
9. As a centre of excellence for television production, Ontario is a major, if not principal beneficiary of this economic and cultural activity. The vast majority of English-language discretionary services base their operations here, and the majority of independent production activity occurs here. Thus decisions in this proceeding could have a direct bearing on this economic activity, generally, and support for Ontario independent producers, in particular.
10. At its most basic level, therefore, support for discretionary services means support for Ontario production (and broadcasting). While modernization of current regulatory framework may well be appropriate, OMDC does not believe that any such modernization should come at the expense of support for Canadian content.

¹ CRTC news release, *Canadian specialty, pay and pay-per-view television and on-demand services – a profitable industry*, May 2, 2007.

11. OMDC requests the opportunity to appear at the hearings to discuss with the Commission in more detail the many important issues raised in this submission.

Executive Summary

12. The current proceeding postulates changes to virtually all aspects of the current BDU and discretionary service regulatory regime, including genre exclusivity, entry of foreign services, tiering and linkage, access rules and expenditure and exhibition requirements. This “current detailed regulation” would be replaced by a “greater reliance on market forces” and more minimalist regulation such as overall Canadian predominance requirements and strengthened dispute resolution mechanisms.
13. OMDC believes that before the Commission can reasonably embark on such fundamental changes, it must satisfy itself that such greater reliance on market forces will indeed further the objectives of the Broadcasting Act, and in particular, what appears to OMDC to be the primary and overriding objective of “maximum and no less than predominant use” of Canadian content.
14. Accordingly, OMDC believes that the onus should be on those who seek removal of current regulations to clearly demonstrate need and no harm to Canadian content objectives (or that any such harm is minimal and outweighed by overall system benefits) -- not the onus on those to maintain the regulations to demonstrate that they are required.
15. OMDC suggests that there are three key issues the Commission should consider in pursuing its statutory mandate to maximize “the use of Canadian creative and other resources in the creation and presentation of programming.” The following issues are fundamental to the discussion:
 1. Maintenance of the current discretionary service exhibition and expenditure requirements as an effective tool in stimulating the production and exhibition of Canadian programming on these services and consideration of reductions on a case by case basis only if justified by a licensee demonstrating that the nature of its service, including operating environment, now renders current levels impracticable.
 2. Consideration of increasing the Canadian content expenditure levels and exhibition or “shelf space” requirements of VOD and PPV and Category 2 services, and the introduction of expenditure incentives for New Media undertakings, to maximize their use of Canadian creative and other resources in the creation and presentation of programming.
 3. Protection of the existing operating environment for discretionary services in order to maintain their current ability to contribute to Canadian programming objectives, unless BDUs demonstrate with current, clear and unequivocal factual evidence that their operating environment now renders current regulatory measures impracticable.
16. OMDC has no comments at this time on proposed regulatory changes that do not appear to have a direct or clear indirect bearing on the exhibition and financing of Canadian programming. OMDC reserves the right to comment on such matters at later stages in this proceeding.

Will Greater Reliance on Market Forces Further the Objectives of the Broadcasting Act?

17. The Public Notice postulates a significant move away from the current regulatory frameworks governing BDU and discretionary services towards a much greater reliance on market forces.

18. In particular, the Commission suggests that in light of consumer and technological trends “... it is time to move away from the current detailed regulation, and to take a revitalized approach to both distribution and discretionary programming undertakings that aims at reducing regulation to the minimum essential to achieve the objectives of the Act, relying instead on market forces wherever possible.”
19. The Public Notice goes on to outline proposed or potential changes to virtually all aspects of the current regulatory regime, including genre exclusivity, entry of foreign services, tiering and linkage, access rules and expenditure and exhibition requirements. This “current detailed regulation” would be replaced by such new regulations as overall Canadian predominance requirements and strengthened dispute resolution mechanisms.
20. OMDC notes at the outset that the proposed or potential changes to the current regulatory frameworks governing BDU and discretionary services can only be described as “major”. Moreover, given that in the last couple of years the Commission has already addressed issues such as digital migration, HDTV and basic mandatory carriage,² the current proceeding appears to be driven more by a “philosophical” shift than any particular economic, consumer or technological need.
21. Such a general philosophical desire to adopt smart regulatory models, eliminate unnecessary regulation and let market forces operate where they can is obviously an appropriate, even admirable, goal for the Commission. All agencies of all levels of government, including OMDC, must continually strive to be as efficient and effective as possible, and only intervene where such interventions are consistent with their mandates and in the public interest.
22. Given however that the principal raison d’être of broadcasting regulation is to correct market failure - be it a failure to provide Canadian content or a failure to provide access -- unwinding core elements of the current intertwined set of BDU and discretionary service regulatory measures on the basis of a “philosophical shift” alone would seem exceedingly unwise.
23. As a general matter, therefore, OMDC believes that the kinds of fundamental shifts in BDU and discretionary service regulation contemplated by the Public Notice should only be implemented if there is clear and substantial evidence of both need and a positive impact, or at least neutral overall impact, on Canadian content.
24. OMDC notes that at this point in the proceeding, we are unaware of any clear or detailed economic analysis of the consequences or impact of the proposed measures, or of the negative impact on BDUs and/or discretionary services of maintaining the status quo.

² See Broadcasting Public Notice 2006-23, Broadcasting Public Notice 2006-74, and Broadcasting Decision CRTC 2007-246.

Does the Funding and Exhibition of Canadian Content Take Precedence Over the Other Objectives of This Proceeding?

25. In a recent speech, the Chairman of the CRTC stated that:

It's our job as the regulator to see that the Canadian broadcasting system fulfills the aims of the *Broadcasting Act*. As I see it, the Act has two overriding objectives:

- Canadian content, and
- access to the system.

[...]

I believe that all the other goals set down in the *Broadcasting Act* are subsets of these two overriding principles: Canadian content and access to the system.³

26. The Chairman also stated that:

... given that the *Broadcasting Act* promotes cultural and social goals, it's my view that there always will be regulation. We cannot rely solely on market forces, as they recognize only economic goals.⁴

27. OMDC agrees with these sentiments, but would go further.

28. Section 3(1)(f) of the *Broadcasting Act* requires the Commission to ensure that

each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

29. This provision in the *Broadcasting Act* is arguably the most specific one relating to Canadian content. A number of its aspects are noteworthy. It is imperative (using "shall"). It applies at the undertaking or service level. It sets a "maximum and no less than predominant" standard for Canadian content. And it is subject only to "nature of the service" provided by the undertaking "rendering that use impracticable".

30. Parties to CRTC proceedings are known to typically cite only those objectives of the Broadcasting Act favourable to their cause. OMDC acknowledges therefore that other objectives do in fact call for such things as a Broadcasting System "regulated and supervised in a flexible manner" and "readily adaptable to scientific and technological change", and for BDUs to have "efficient delivery of programming at affordable rates". These are presumably the legislative bases for the Commission's philosophical shift to "greater reliance on market forces", which is not otherwise identified as an objective of the Broadcasting Act. It is important to note, however, that all such potentially "competing" objectives are neither imperative (they are "should" not "shall"), nor inconsistent with the full and complete application of Section 3(1)(f).

³ Speech by Konrad von Finckenstein, Chairman, Canadian Radio-television and Telecommunications Commission, to the Banff World Television Festival, June 11, 2007. <http://www.crtc.gc.ca/eng/NEWS/SPEECHES/2007/s070611.htm>

⁴ Ibid.

31. Barring amendments to the Broadcasting Act, therefore, it appears that the furtherance of the Canadian content objectives of the Act, and in particular, section 3(1)(f), must take precedence over any desire for “greater reliance on market forces”. Indeed, any less than current levels of Canadian content support must by definition be seen to *prima facie* infringe section 3(1)(f) of the Act, and can therefore only be warranted if the current climate in which BDUs and discretionary services operate now “renders that impracticable”.
32. Thus, in the circumstances, it would appear appropriate that the onus be on those who seek removal of current regulations to clearly demonstrate need and no harm to Canadian content objectives (or that any such harm is minimal and outweighed by overall system benefits) -- not the onus on those to maintain the regulations to demonstrate that they are required.

Specific Observations

33. At this stage in the proceeding, and in particular given that OMDC does not possess specialized expertise in broadcast regulation, OMDC will not comment on all the specific proposals made in the Public Notice. OMDC does, however, have more general comments in the following three areas:
 1. Measures that directly support the funding and exhibition of Canadian content
 2. Measures that ensure the priority and preponderance of Canadian services
 3. Measures that address issues of inequality of bargaining power

Funding and Exhibition of Canadian Content

34. At paragraph 47 of the Public Notice, the Commission appropriately notes that “under the existing framework, obligations regarding the level of contribution to Canadian programming are closely tied to the level of regulatory support that the programming service receives, particularly in terms of distribution and genre”.
35. The Commission goes on at paragraph 49 to seek comment on:
 - How programming obligations of pay and specialty services should be balanced with providing greater competition among programmers and more flexibility for BDUs with respect to the distribution of programming services. For example, if the Commission were to eliminate genre requirements and/or access rights for analog and Category 1 services, what factors or criteria should be taken into account to determine what appropriate contribution levels should be? How would the obligations of such services relate to those of Category 2 services?
 - Whether both exhibition and expenditure requirements for analog and Category 1 pay and specialty services are still relevant to ensure appropriate levels of support for Canadian programming while providing maximum flexibility for such services to compete and to take advantage of on-demand and new platforms to extend their programming?
36. OMDC finds two things somewhat disconcerting about the nature and positioning of these comments. First, that by not even raising the issue of funding and exhibition of Canadian programming until halfway through the Public Notice, the Commission, perhaps inadvertently, leaves the impression that this Broadcasting Act objective is no longer that important. Second, by specifically asking whether “exhibition and expenditure requirements ... are still relevant”, the Commission appears to be calling into question the two principal regulatory measures used to further this objective, or at minimum be

conceding that the regulatory changes proposed elsewhere in the Public Notice will inevitably compromise its achievement.

37. The CRTC's questioning of the level and relevance of discretionary service expenditure requirements is particularly troublesome in light of the CRTC's all too devastating 1999 TV policy "experiment" with what today we would call a "greater reliance on market forces" in support of Canadian programming.⁵
38. As stated in our submission in the CRTC's 2006 review of the regulatory framework for over-the-air television, OMDC shares the views of its stakeholders in the firm belief that the 1999 TV Policy removal of spending requirements was detrimental to overall production spending and was particularly harmful to dramatic production.⁶
39. 2006 financial data has even further confirmed this increasingly grim picture, with the CRTC's 2007 *Broadcasting Monitoring Report* revealing that conventional television English-language drama and comedy spending continues to wallow at levels significantly lower than those achieved prior to the introduction of the 1999 TV policy. In 1998, total English-language revenues of private conventional television services were \$1.496 billion and Category 7 (drama and comedy) spending on English-language programming only was \$85.211 million.⁷ In 2006, the total revenues of English-language private conventional television services were \$1.756 billion dollars, and total Category 7 spending for both English- and French-language programming was \$73.857 million,⁸ less than the amount spent on English-language programming only in Category 7 for 1998.⁹ Had Category 7 spending stayed at 1998 levels, English-language Canadian drama and comedy would be well over \$25 million richer today.
40. OMDC therefore believes strongly that OTA licensees should be made subject to specific expenditure requirements for Canadian programming in upcoming license renewals, and that no such similar "experiments" on removing expenditure requirements should be conducted by the CRTC on pay and specialty services.
41. This is even more critical given the relative significance of discretionary service Canadian programming spending. As noted in the recently released Dunbar/Leblanc Report:

Although OTA television services are typically considered to be the preminent contributors to Canadian content development and exhibition, it is significant that total expenditures by Canadian pay and specialty services on Canadian programming now exceed, by a significant amount, total expenditures by private conventional OTA television services on Canadian programming. In

⁵ Public Notice CRTC 1999-97.

⁶ OMDC Submission, Broadcasting Public Notice of Hearing CRTC 2006-5, September, 2006.

⁷ *Broadcasting Policy Monitoring Report, 2002*. Canadian Radio-television and Telecommunications Commission, 14 November 2002, Chart 22, p. 58 and Table 5, p. 63.

⁸ *Broadcasting Policy Monitoring Report, 2007*, Canadian Radio-television and Telecommunications Commission, July 2007, Chart 3.12, p. 66 and Table 3.11, p. 80. NOTE: Figures for spending on Category 7 English-language programs only are not available for 2006.

⁹ Figures for English-language Category 7 spending in 2006 are not available. We do know that spending on English-language drama in 2006 was \$40 million (*Broadcasting Public Notice CRTC 2007-53, Determinations regarding certain aspects of the regulatory framework for over-the-air television*, May 17, 2007, paragraph 89).

2006, for example, private conventional OTA licensees spent \$623.7 million on Canadian programming, while specialty and pay services spent in excess of \$890 million. Specialty and pay services are also spending considerably more on drama programming than private conventional OTA television services.

42. In light of OMDC's comments above on the pre-eminence of Canadian content exhibition and funding objectives, OMDC believes that not only should the CRTC decline suggestions that it eliminate discretionary service exhibition and/or expenditure requirements, but that in pursuit of its statutory obligation to maximize "the use of Canadian creative and other resources in the creation and presentation of programming", also:

1. Decline to entertain general reductions in current pay and specialty service expenditure requirements, and only consider reductions, on a case by case basis, if justified by a licensee demonstrating that its nature of the service, including operating environment, now renders current levels impracticable.
2. Consider increasing the Canadian content expenditure and exhibition or "shelf space" requirements of VOD and PPV and Cat 2 services, and introducing expenditure incentives for New Media undertakings, to maximize their use of Canadian creative and other resources in the creation and presentation of programming.
3. Decline to implement regulatory changes that will have the effect of compromising the operating environment of discretionary services and their current ability to contribute to Canadian programming objectives, unless BDUs demonstrate with clear and unequivocal factual evidence, (rather than just speculative) basis that their operating environment now renders current regulatory measures impracticable.

43. In support of its second recommendation, above, OMDC notes the following.

- VOD and PPV services have evolved significantly from their introduction as "electronic video stores". They now are used to exhibit a range of television programming (rather than just feature film), and, as consumers gravitate more and more to "on demand" television, are poised to take a much greater share of broadcast viewing and revenues in the future. Today, contribution and exhibition (or shelf space) requirements for such services remain based on the historic low expectations of Canadian relative to foreign feature film -- with expenditure requirements at a remarkably low 5% level. It is essential that the Commission immediately increase these levels, and continue to do so consistent with increased use for traditional television programming.
- Category 2 services were introduced with no Canadian programming expenditure (CPE) requirements, and relatively low, but escalating exhibition requirements. The renewal, after six or seven years of operation, of these services provides an appropriate opportunity to gauge whether these current minimal levels of contribution remain appropriate. While OMDC appreciates that these services have no access rights or genre protection, it is also clear that those that have become successfully established in a clearly defined niche (services like Showcase Diva and Action, Drive-in Classics and TVLand) are unlikely to suddenly lose their access to BDUs or morph away from these successful niches. Accordingly, on a case by case basis, it is both appropriate, and in OMDC's view required under the Broadcasting Act, that the CRTC seek now to maximize their contributions to Canadian programming.

- While the CRTC has announced future processes specific to New Media, OMDC believes that this proceeding may provide an appropriate opportunity to introduce a few simple measures that encourage and support Canadian New Media activity. OMDC understands that the Commission has approved certain broadcaster New Media initiatives as part of tangible benefits packages. OMDC also notes that in another proceeding several parties have raised the notion of broadcasters being able to use CPE requirements for New Media initiatives. Given the increasing importance of New Media to Canadians, OMDC is generally supportive of the Commission approving such incentives, as long as safeguards are introduced to ensure expenditures are incremental, benefit independent producers and do not result in overall declines in traditional TV production support.

44. The remainder of this submission will address issues raised in the Public Notice that concern OMDC's third recommendation above, that is the need for the Commission to avoid, perhaps "inadvertently", establishing a regulatory framework that has the effect of reducing BDU support for discretionary services and hence their ability to support Canadian programming and, to a somewhat lesser degree, access to the system.

Priority and Preponderance of Canadian Services

45. The current BDU regulatory environment includes 3 key measures that ensure the "maximum use, and in no case less than predominant use, of Canadian creative and other resources":

- genre exclusivity;
- barring of entry of competitive foreign services; and
- tiering and linkage.

46. The Public Notice contemplates that this "current detailed regulation" be eliminated and replaced by overall Canadian predominance requirements at the service level, and perhaps, the affiliation payment level.

47. Leaving aside the magnitude and risk that would be associated with such a change, OMDC is extremely troubled by the Commission's apparent willingness to exchange its clear statutory mandate, if not obligation, to require "maximum use" of Canadian creative and other resources, for the minimal expectation of "predominant use". While OMDC accepts that the Courts have left it largely to the discretion of the Commission to interpret its statutory mandate as it sees fit, and does not wish to rest its submissions on legal arguments, it is unclear to OMDC why the Commission would choose to abandon its historic pursuit of "greater than" predominant use of Canadian creative and other resources, without clear and compelling evidence of need.

48. First, as it stands, OMDC sees no evidence of need on the part of BDUs. As the CRTC statistics reveal, despite phenomenal growth of competing entertainment and information choices over the last decade, including personal entertainment devices such as game stations and DVDs, the Internet and Mobile networks, BDUs continue to experience healthy growth, with basic and non-basic revenues increasing from \$3.5 billion to \$3.9 billion from 2005 to 2006.¹⁰ Moreover, despite a policy of competition between BDUs, corporate entities with BDU holdings have seen even greater growth given their ownership of these same Internet and Mobile platforms. While OMDC is prepared to be open to concrete and substantive arguments, backed up by real evidence, of BDUs alleged need for regulatory change, in the absence of compelling evidence of *overall* harm to their *overall* regulated

¹⁰ CRTC *Broadcast Distribution Statistical and Financial Summaries, 2002-2006*; See also *2007 CRTC Telecom Monitoring Report*

interests (telecom and broadcasting), OMDC urges the Commission to reject these arguments. These companies have benefited greatly from CRTC regulation in the past. Their arguments for de-regulation today should not simply be accepted on faith or principle.

49. Second, it is OMDC's understanding that current levels of BDU "use of Canadian creative and other resources" well exceed mere predominance, both at the Canadian service subscription level and at the Canadian service affiliation payment level. Thus a move to "simple predominance" could reasonably be expected to significantly reduce the level of carriage and financial support for Canadian services, and in turn their direct support for Canadian programming, over time.
50. For example, the 1996 licensing and subsequent launch of the predominantly Canadian analog service "Tier 3", combined with the 2000 digital service licensing round and subsequent launch of almost 100 Canadian digital Category 1 and Category 2 services, is widely understood to have "tipped" the balance in favour of consumers having far more than merely 50% Canadian services. Similarly, and logically in turn, OMDC understands that current BDU affiliation payment levels are much greater than 50% in favour of Canadian services.
51. Assuming, for the sake of argument, that subscription and payment levels to Canadian services are currently greater than 50%, it follows that any adoption of mere predominance could, over time, result in a significant drop in affiliation and subscription levels.
52. OMDC concedes that the above is only a theoretical construct, but urges the CRTC to seriously consider the likelihood and implications of such a possibility.
53. First, should the CRTC not have the information at its disposal to make a determination of current BDU carriage levels for Canadian and foreign services, it should immediately seek such information from BDUs (if necessary, in confidence) to allow such a determination to be made.
54. Second, *We've been here before.*
55. The 1999 TV Policy sought to rely on market forces to a greater extent, accepting arguments from broadcasters that they a) could not maintain prime time viewing without investing in quality Canadian programming, including Canadian drama; b) would increase viewing to Canadian drama if given flexibility, such as airing "priority programming" entertainment magazines; and, c) would never cancel core shows like local news. The result, now abundantly clear eight years later, has been greater spending on foreign, less on Canadian drama, and even cancellations of local news.
56. *Let's not go there again.*
57. No doubt BDUs will argue that they will be fair, Canadian consumers will demand Canadian services etc etc. The reality is that these same BDUs continue to seek greater carriage of US services at every opportunity, recently even adding services like American Movie Classics and Turner Classic Movies to analog packages (a privilege denied to Canadian digital services) and bemoaning the Commission's refusal to allow the entry of clearly competitive services such as USA Network.
58. In sum, OMDC believes that not enough thought has been given to the consequences, unintended or otherwise, of unraveling such key current elements of the regulatory system as genre exclusivity, the rules barring entry of competitive foreign services, and tiering and linkage rules. Even obvious and critical consequences appear not to have been contemplated by the Public Notice. For example, on genre protection:

- If we remove it, what is the consequence for specialty service conditions of license (COLs)?
- What would be the justification for different expenditure or exhibition levels if services are allowed to air the same genres of programming?
- If no specialty obligations have a specific mandate to do Canadian drama, and COLs appropriate to that, who will do it? Like conventional, will such services not gravitate to the programming that gives biggest return; first U.S., then cheaper Canadian?
- Wouldn't this again lead to more money going south of the border, more bidding up of U.S. shows?
- Would the net result be a requirement to re-impose obligations to do underrepresented types of programming, such as Drama, either generally, or perhaps if services carry U.S. programming in the same genre? Could this not end up meaning as much regulation as we started with, only different?
- How is the Canadian consumer, or even BDU, better served? Wouldn't this mean less distinction between services, less diversity, fewer Canadian services overall?

59. Finally, and notwithstanding our own submissions to the contrary, OMDC believes that should the Commission ultimately conclude that changing technology, consumer and market needs necessitate the kinds of amendments contemplated in the Public Notice, the Commission should introduce countervailing measures to limit the anticipatable harm to Canadian content funding and exhibition. Such measures could include an increase in the current 5% BDU contribution to Canadian content, or perhaps the introduction of a mandatory ISP contribution for Canadian content, set relative to levels of "broadcasting like" content access by Canadians on the Internet.

Issues of Inequality of Bargaining Power

60. The current BDU regulatory environment includes a number of measures that seek to address issues of inequality of bargaining power between BDUs and discretionary services. These measures include:

- Access rules;
- The undue preference provision of the BDU Regulations;
- Dispute resolution procedures;
- The ability to mandate 9(1)(h) "basic service" carriage; and
- The 5:1 linkage rule for unaffiliated: affiliated Category 2 digital services.

61. Such measures were originally introduced to protect service providers from the virtual "monopoly power" of BDUs. As the system has evolved over the last couple of decades, with the introduction of competitive BDUs, vertical integration, and consolidation of large discretionary service providers, these measures have been increasingly employed to address issues of fair treatment of "unaffiliated" service providers, and to some extent, protection of smaller BDUs from unfair commercial practices of large service provider groups.

62. The Public Notice contemplates the removal of the 5:1 rule and access requirements, in favour of preponderance plus enhanced undue preference and dispute resolution. Interestingly, the Public Notice does not directly raise the possibility of eliminating current "must offer" obligations of discretionary services, which arguably would at least mean a greater "equality" of bargaining power between like sized BDUs and discretionary service providers. (BDUs would not have to carry a service; but neither would a service provider have to offer all its services to all BDUs.)

63. In principle, OMDC agrees that issues that can be left to the marketplace, are best left with the marketplace. What is evident in the case of the relationship between BDUs and discretionary service providers is that “free market” does not and really cannot exist.
64. Given the overriding objective of Canadian content in the *Broadcasting Act*, the first test the Commission should apply in assessing the proposed changes, is whether they will advance Canadian content.
65. As the Chairman has stated, the other important objective of the *Broadcasting Act*, is access, in the broadest sense of the word. How can the Commission be sure that the proposed changes will not compromise that objective? In OMDC’s view, “access” must be seen to include broad principles of diversity of choice, ownership, editorial, programming and the like. While OMDC did not make submissions in the Commission’s recent Diversity of Voices proceeding where many of these issues were addressed, it is not indifferent to these issues and their importance to both its direct stakeholders and the lives of Ontarians, generally.
66. As an advocate of independent producers in Ontario, OMDC is well aware of the issues they have with access to broadcasters, and the need for the system to make sure that such access is real and fair. It is both in the interests of independent producers to have access to a multiplicity of commissioning broadcasters, and only fair that if the Commission is prepared to help protect smaller or independent cable or telecom providers, it should also be prepared to protect smaller or independent broadcasters and producers.
67. OMDC, therefore, believes that it is important to maintain and support independent discretionary services voices and not allow set conditions that only permit BDU affiliated or large consolidated discretionary services to survive and prosper.
68. In closing, the three main issues that OMDC feels are of most importance in the current review are:
1. Maintenance of the current discretionary service exhibition and expenditure requirements as an effective tool in stimulating the production and exhibition of Canadian programming on these services and consideration of reductions on a case by case basis only if justified by a licensee demonstrating that the nature of its service, including operating environment, now renders current levels impracticable.
 2. Consideration of increasing the Canadian content expenditure levels and exhibition or “shelf space” requirements of VOD and PPV and Category 2 services, and the introduction of expenditure incentives for New Media undertakings, to maximize their use of Canadian creative and other resources in the creation and presentation of programming.
 3. Protection of the existing operating environment for discretionary services in order to maintain their current ability to contribute to Canadian programming objectives, unless BDUs demonstrate with current, clear and unequivocal factual evidence that their operating environment now renders current regulatory measures impracticable.
69. All of which is respectfully submitted.

*** end of document ***