CCSA

*****ABRIDGED FOR PUBLIC*****

Regulatory

June 17, 2020

VIA GC Key

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

Dear Mr. Doucet,

Subject: **Application by Rogers Media Inc. for dispute resolution regarding the distribution of its distant signals by TELUS Communications Inc.**

Ref: **CRTC File 2020-0111-3**

1. The Canadian Communication Systems Alliance ("CCSA") speaks for independent communications distributors – smaller broadcasting distribution companies, telephone companies and ISPs – across Canada. CCSA represents more than 110 companies operating from sea to sea to sea, including across the North.

2. CCSA has reviewed the subject application by Rogers Media Inc. ("RMI") and TELUS' responses. CCSA submits this intervention in opposition to RMI's application and recommends that RMI's application be denied in full.

3. Pursuant to ss. 31(1) and 31(2) of the *CRTC Rules of Procedure*, CCSA hereby designates certain information in this submission as confidential. Specifically, CCSA requests confidential treatment of the information in paragraph 40 of this intervention (the "Confidential Information").

4. CCSA designates the Confidential Information as confidential because that information meets the following criteria set out as s. 39 of the *Telecommunications Act* in that such information is "financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it".

5. Specifically, the Confidential Information describes provisions of the 2006 CCSA / CAB agreement for compensation in exchange for relief from non-simultaneous substitution obligations, which agreement expressly requires that its provisions are confidential and are not to be disclosed.

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Dispute Resolution is Not Appropriate

6. CCSA agrees with TELUS that RMI's application "mischaracterizes the nature of the present dispute" and that "[t]he real issue in dispute is the validity of section 21 of the BDRs".[1]

7. CCSA agrees with TELUS that RMI's application fails to meet the criteria for Final Offer Arbitration, as set out at section 4 of the Commission's *Practices and Procedures for Dispute Resolution.*[2]

8. Specifically, because it seeks to invoke the distant signal consent regime at s. 21 of the *Broadcasting Distribution Regulations*, the dispute is not bilateral but, rather, as TELUS states, "is an issue that affects *all* licensees".[3]

9. More importantly, in light of the fact that since the Supreme Court of Canada's 2012 Value for Signal Decision,[4] as TELUS puts it, "[t]he Distant Signal Consent Regime has generally been viewed within the industry as invalid".[5]

10. Under that circumstance, resolution of the present dispute must engage a fundamental policy determination which would "require the establishment of a new policy or a change to an existing policy".[6]

11. For those reasons, CCSA submits that RMI's application for dispute resolution in this matter should be denied.

History of Section 21 of the *Broadcasting Distribution Regulations*

12. Subsection 21(1) of the *Broadcasting Distribution Regulations* provides that:

> Except as otherwise provided in a condition of its licence, which condition takes effect on or after September 1, 2011, a licensee shall obtain the consent of the operator of a distant television station to distribute its signal before the licensee makes the signal available to its subscribers.

[1] TELUS letter to CRTC, July 2, 2019 at para. 2.
[2] Broadcasting and Telecom Information Bulletin CRTC 2019-184.
[3] TELUS letter to CRTC, July 2, 2019 at para. 6.
[4] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68.
[5] TELUS letter to CRTC, July 2, 2019 at para. 19.
[6] Broadcasting and Telecom Information Bulletin CRTC 2019-184 at para. 4.

13. Section 21 came about as a result of the Commission's findings in Broadcasting Public Notice CRTC 2008-100, "Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services".

14. In BPN 2008-100, the Commission noted that broadcasters had "requested the ability to consent to and be paid for any retransmission of their OTA signals outside the priority carriage market".[7]

15. In response to that request, the Commission determined that:

> . . . the Commission's policy with respect to Canadian distant signals will be to require all licensed BDUs to obtain the consent of OTA licensees prior to distributing their local stations in a distant market. OTA licensees will be permitted to negotiate payment from BDUs for the retransmission of their local stations as distant signals.[8]

16. The Commission advised that the above change to policy would "be implemented ultimately through amendments to the BDU Regulations".[9]

17. In BNC 2009-411,[10] the Commission sought comment on regulatory measures needed to implement a "Value for Signal" consent regime.

18. In BRP CRTC 2010-167, the Commission found that:

> . . . the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. The system should be such that privately-owned broadcasters that own programs or have paid for the exclusive right to disseminate programs can negotiate for payment with BDUs, which, in turn, further disseminate those programs.[11]

19. However, recognizing that some intervenors had presented a position that "BDUs have a continuing right to disseminate the broadcaster's over-the-air signal without negotiation or remuneration by virtue of the provisions of the Copyright Act", [12] the Commission announced that it would refer the following question to the Federal Court of Appeal:

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[7] BPN CRTC 2008-100 at para. 296.
[8] BPN CRTC 2008-100 at para. 307.
[9] BPN CRTC 2008-100 at para. 312.
[10] Broadcasting Notice of Consultation CRTC 2009-411, "Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television".
[11] Broadcasting Regulatory Policy CRTC 2010-167, "A group-based approach to the licensing of private television services", at para. 163.
[12] BRP 2010-167 at para. 165.

> Is the Commission empowered, pursuant to its mandate under the Broadcasting Act, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?[13]

20. In 2011, the Federal Court of Appeal answered that question in the affirmative.[14]

21. Section 21 was implemented in the *Broadcasting Distribution Regulations* by SOR/2011-148, as announced in Broadcasting Regulatory Policy CRTC 2011-455.

22. On further appeal, the Supreme Court of Canada overturned the FCA decision[15] and found that, because the *Copyright Act* created a complete and balanced scheme for compensation to broadcasters for the use of their OTA signals by BDUs – a regime with which a negotiated "Value for Signal" construct would interfere – the Commission lacked the jurisdiction to implement a VFS regime.

23. However, the Commission took no action, in light of the SCC decision, to repeal the newly introduced s. 21. As a result, despite its repugnance to the law as settled by the Supreme Court, s. 21 remains in the *Broadcasting Distribution Regulations*.

Section 21 of the *Broadcasting Distribution Regulations* is Inoperative

Copyright in Signals

24. Subsection 21(1)(c) of the *Copyright Act* provides that

> *. . . a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:*
>
> *(c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast*

25. The Supreme Court of Canada decision was very clear in its finding that:

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[13] BRP 2010-167 at para. 167.
[14] 2011 FCA 64.
[15] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 [hereinafter *2012 SCC 68*].

> BDUs are not a "broadcaster" within the meaning of the *Copyright Act* because their primary activity in relation communication signals is their retransmission. Thus, the broadcaster's s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster's exclusive right does not include a right to authorize or prohibit a BDU from retransmitting its communication signals.[16]

26. The Court concluded that:

> . . . s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime.[17]

27. It follows that s. 21(1) of the *Broadcasting Distribution Regulations* was made *ultra vires* the Commission's authority and, with respect to its requirement for a BDU licensee to obtain the consent of the operator of a distant television station "before the licencee makes the signal available", is inoperative. Broadcasters have no legal right of consent with respect to use of their signals as distant signals.

Copyright in Works

28. The Supreme Court of Canada decision is also crystal clear on the point of whether a broadcaster has the right to prohibit simultaneous retransmission of works contained in its signal:

> It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss. 76(1) and 76(3) of the *Copyright Act*).[18]

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[16] *2012 SCC 68*at para. 50 [emphasis added].
[17] 2012 SCC 68 at para. 67
[18] 2012 SCC 68 at para. 58 [emphasis in original].

29. The decision then refers to the carve-out created by s. 31(2) of the *Copyright Act* "which effectively grants to a specific class of retransmitters two transmission rights".

30. The second of those rights permits retransmitters to "simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d))".[19]

31. More generally, the Court found that the Commission lacks the authority to create subordinate legislation which conflicts with the copyright regime expressed, in part, by s. 31(2) of the *Copyright Act*.

32. The imposition, by s. 21 of the *Broadcasting Distribution Regulations*, of a consent requirement on BDUs in relation to distribution of a broadcaster's distant signals necessarily implies that a broadcaster has a right to prohibit the simultaneous retransmission of works contained in its signals.

33. However, as a result of the Supreme Court's decision, it is now settled law that a broadcaster has no such right.

34. Therefore, with respect to a BDU's retransmission of works contained in a broadcaster's signal implementation of s. 21 was, again, *ultra vires* the Commission's authority and that section of the regulations is inoperative.

35. A failure to repeal that provision cannot somehow render it effective now.

Compensation for Relief from Non-Simultaneous Substitution Obligation

36. Like TELUS, CCSA is a signatory, on behalf of its members, to a CAB Agreement concerning compensation to be paid to CAB in exchange for relief from the former non-simultaneous substitution obligation.

37. CCSA agrees with TELUS' statement that, "[t]he CAB Agreement provided for compensation to be paid in lieu of performing non-simultaneous program deletion when requested by broadcasters. It did not purport to provide consent for the carriage of distant Canadian signals or U.S. 4+1 signals."[20]

[19] *Ibid.*
[20] TELUS letter to CRTC, July 2, 2019 at para. 27.

38. CCSA agrees, further, that, contrary to RMI's assertion, the CAB Agreement is completely irrelevant to any question regarding a broadcaster's right to consent to a BDU's retransmission of the works in its signal.

39. However, RMI's assertion raises an important point concerning the use to which the broadcasters have put their baseless "consent to retransmission" right.

40. CCSA entered into its CAB Agreement in 2006. ########## ## ## ##.

41. As TELUS rightly points out, "in 2011, the Commission repealed former section 43 of the BDRs, thus putting an end to the non-simultaneous program deletion regime."[21]

42. In 2012, based on that regulatory change, CCSA proposed to CAB that it would cease making payments under the agreement and terminate the agreement.

43. On March 6th, 2012, CAB responded that, if CCSA member payments under the agreement ceased, CAB members would be entitled to withdraw their consent to use of their signals with the effect that those members could lose their ability to carry distant Canadian signals and, by operation of s. 22 of the *Regulations*, their time-shifted US 4+1 signals.

44. Specifically, CAB Stated:

> Should the CCSA consider terminating the existing agreement, however, it should be aware that doing so could jeopardize the continued carriage of distant Canadian signals and the 2nd set of US 4+1 signals by its member companies. This is because, in the absence of the CAB-CCSA master agreement, the carriage of these signals would now be governed by the provisions of the Commission's new distant signals regime.[22]

45. CAB continued:

> Accordingly, in the event the existing master agreement was terminated, <u>every CCSA member company would be required to obtain the consent of the licensee of each distant Canadian signal that it wished to distribute</u>, pursuant to section 21 of the BD Regulations. In addition, the continued distribution of the 2nd set of US 4+1 signals, in the event of termination of the existing master agreement, would become subject to the new requirements set out in the

[21] TELUS letter to CRTC, July 2, 2019 at para. 28.
[22] CAB letter to CCSA, "Re: CCSA member payments to the CAB, March 6, 2012 at page 2.

> section 22 of the BD Regulations. This section requires that a package of US 4+1 signals originating from outside the time zone in which the BDU's local head end is located may only be distributed if the BDU also distributes at least one television station from each English major ownership group that originates in the same time zone as the US 4+1 signals. Thus, the BDU would have to obtain the consent of each English major ownership group to carry at least one of its stations from the same time zone as the 2nd set of US 4+1 signals, in order to continue carrying those US signals. If it failed to secure the consent of even one of the major ownership groups, then the BDU would not be able to carry the 2nd set of US 4+1 signals.[23]

46. That notice pre-dated the Supreme Court's December 2012 decision in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168.*

47. In June 2015, some two and one half years after the Supreme Court decided that broadcasters do not have a right to prohibit the retransmission of their signals or the works contained in those signals, CAB again wrote to CCSA, this time in response to a question about the continuing obligation to pay compensation raised by a CCSA member, Access Communications.

48. In that letter, CAB said that its agreement with CCSA:

> . . . was initially put in place so that BDUs would not have to implement non-simultaneous deletion (blackouts). Furthermore, since the agreement was entered into, the distant signal regime has changed and is now premised around consent. The CAB continues to accept these payments and distribute them to its members in lieu of such consent.[24]

49. Again, CAB painted a picture of the consequences of failing to make compensation payments under a long-since deleted non-simultaneous substitution regime:

> Should Access consider terminating the existing agreement, however, it should be aware that in order for it to continue the carriage of distant Canadian signals it must first obtain the consent of the distant television station whose signal it wishes to carry. Furthermore, should Access wish to continue the carriage of a 2nd set of US 4+1 signals they must first carry at least one signal, originating from the same time zone as the U.S. signals, of each multi-station broadcast

[23] *Ibid* [emphasis added].
[24] CAB letter to CCSA, "Re: CCSA member payments to the CAB, June 12, 2015 at page 1[emphasis added].

group (i.e. Bell, Shaw and Rogers) This framework is set out in Broadcasting Public Notice CRTC 200-100 paragraphs 302-31.[25]

50. CAB's threats were effective. No CCSA member has been in a position to risk the loss of distant Canadian or US 4+1 signals.

51. Importantly, no Canadians viewers should be subjected to the loss of those signals, especially on the basis of a purported consent regime that, legally, does not exist.

52. For those reasons, CCSA reluctantly capitulated to CAB's threats and substantial monthly payments continue to be made, to this day, to CAB under CCSA's CAB Agreement.

53. In short:

- notwithstanding that the CAB Agreement for non-simultaneous substitution compensation has nothing whatsoever to do with the purported consent regime at ss. 21 and 22 of the *Broadcasting Distribution Regulations*; and

- notwithstanding the fact that the Supreme Court decision has rendered s. 21(1) inoperative;

the CAB has nonetheless continued to extract illegitimate rents from CCSA members using, as a lever, a purported consent requirement at s. 21(1) of the *Regulations* which the Court has long since declared the Commission had no authority to impose on BDUs.

54. As is always the case, such illegitimate rents are reflected in the retail prices Canadian BDU customers pay for video services they choose to purchase within the regulated broadcasting system.

55. The continued existence of s. 21 is contrary to settled law, to the credibility of the broadcasting system and to the interests of Canadian BDU customers.

56. Those factors underline the importance of repealing s. 21 of the *Broadcasting Distribution Regulations* as soon as possible. For so long as the broadcasters, as represented by CAB are permitted to use s. 21 as a lever to extract illegitimate compensation payments from BDUs and their customers, the continued existence of that provision represents a continuing cost and risk to BDUs and the Canadian viewers they serve.

[25] CAB letter to CCSA, "Re: CCSA member payments to the CAB, June 12, 2015 at page 2 [emphasis added].

Conclusion

57. RMI's application raises policy matters that are fundamentally important to BDUs and Canadian consumers.

58. In the context of the current Dispute Resolution proceeding, CCSA strenuously objects to RMI's contention that a retransmission consent regime somehow exists under the *Broadcasting Act* despite the Supreme Court of Canada's clear, direct and unambiguous settlement of the law to the contrary.

59. RMI's application should be denied in its entirety with a strong message to broadcasters that:

- the broadcasters have no right to compensation for the retransmission by BDUs of their OTA signals other than through operation of the *Copyright Act*; and that

- no retransmission consent regime exists or can exist under the *Broadcasting Act* unless and until Parliament expressly provides otherwise.

60. CCSA thanks the Commission for the opportunity to provide these comments.

Sincerely,

Christopher J. Edwards
Vice-President, Regulatory Affairs

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