Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Regulatory Policy CRTC 2024-65

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Broadcasting Fees Regulations

Summary

The new *Broadcasting Act* came into force on 27 April 2023 and expanded the Commission's regulatory oversight of online undertakings, like online streaming services. As a result of this expansion, the Commission must make significant changes to its regulatory regimes.

The Commission's operations are financed by fees collected from the industry that it regulates. The collection of those fees is enabled through the Commission's *Broadcasting Fees Regulations*.

Under the new Act, the Commission's regulatory activity deals with traditional broadcasters and online streaming services. As a result, the Commission must reassess how and from whom it collects fees.

In August 2023, the Commission launched a public proceeding to gather comments on its proposed new *Broadcasting Fees Regulations*. During the proceeding, the Commission provided a draft of its proposed regulations for comment. Following that proceeding, and with Treasury Board approval, the Commission has created new *Broadcasting Fees Regulations*.

Proposals and comments on the public record have been reflected in the *Broadcasting Fees Regulations* to help ensure that there is a fair balance between the fees paid by traditional broadcasters and online streaming services; that fees charged are associated with the costs of regulatory activity; and that fees are not collected for activities that are not regulated.

The *Broadcasting Fees Regulations* require that traditional broadcasters and online streaming services pay fees on an annual basis. The fees are calculated and based on the broadcasting revenues feepayers make in Canada and generally relate to broadcasting activities that are expected to generate a significant level of regulatory activity.

In making these regulations, the Commission was mindful to minimize the regulatory burden on the Canadian broadcasting system in order to support flexibility and adaptability in its regulatory framework. The *Broadcasting Fees Regulations* allow traditional broadcasters and online streaming services to continue to benefit from exemption thresholds: large broadcasting ownership groups will not pay fees on the first

$25 million in revenue and individual broadcasters will not pay fees on the first $2 million in revenue.

Under the new *Broadcasting Fees Regulations*, traditional broadcasters will pay a lower percentage of total fees. This is in addition to the substantial benefits these broadcasters are gaining under the new fees regime. In particular, holders of broadcasting licences were previously charged two separate fees: a Part I fee that financed the Commission's regulatory activities, and a separate Part II fee that was charged for holding a licence. Under the new *Broadcasting Act*, Part II fees were abolished, and, under the new *Broadcasting Fees Regulations*, broadcasters will pay a single fee.

The *Broadcasting Fees Regulations* will be published in the *Canada Gazette*, Part II, and will come into force on **1 April 2024**. A copy of the regulations is set out in the appendix. Accordingly, the *Broadcasting Licence Fee Regulations, 1997* are repealed as of that date.

Introduction

1. On 27 April 2023, the *Online Streaming Act* came into force.[1] This Act includes, among other things, amendments to the *Broadcasting Act* to account for the impact that Internet audio and video[2] services have had on the Canadian broadcasting system. The amended *Broadcasting Act* provides the Commission the powers to regulate certain online undertakings operating in whole or in part in Canada, regardless of their country of origin, when they are operating as "broadcasting undertakings". As set out in the *Broadcasting Act*, "online undertaking" means "an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus." Pursuant to subsection 2(1) of the *Broadcasting Act*, the definition of "broadcasting undertaking" includes an online undertaking.

2. Under the previous version of the *Broadcasting Act*, in order to legally operate in whole or in part in Canada, a broadcasting undertaking was required to either be licensed by the Commission or be exempted from the obligation to hold a licence by way of an applicable exemption order. Under the amended *Broadcasting Act*, a person may carry on a broadcasting undertaking online (referred to as an "online undertaking") without a licence and without being so exempted. Also under the amended *Broadcasting Act*, the Commission may impose obligations on online undertakings via regulations or via new order-making powers.

3. The *Broadcasting Act* allows the Commission to make regulations, with Treasury Board approval, regarding the charging and payment of broadcasting fees. Broadcasting fees are important because they finance the Commission's operations to regulate the broadcasting industry. The current *Broadcasting Licence Fee*

[1] *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, SC 2023, c 8.
[2] The term "video" is used in this regulatory policy, whereas the term "audio-visual" is used in the *Broadcasting Act*.

Regulations, 1997 (the Licence Fee Regulations) impose broadcasting fees on licensed undertakings, not on online undertakings. Part I of those regulations, which has remained in force under the amended *Broadcasting Act*,[3] recovers the Commission's costs of regulating the broadcasting industry. Part II licence fees, charged for holding a broadcasting licence, were abolished when the amendments to the *Broadcasting Act* came into force. These fees were collected by the Commission and remitted to the Government of Canada. The fact that fees are currently assessed against and charged to each licensed broadcasting undertaking has led to many fee invoices being sent to a single broadcasting ownership group.[4]

4. Part I licence fees currently represent a licensee's proportional share of the total regulatory costs incurred by the Commission with respect to broadcasting in a given year.[5] This is accomplished through the fee formula "(A ÷ B) x C" set out in the Licence Fee Regulations. "A" represents the feepayer's fee revenues, "B" represents the aggregate fee revenues of all feepayers, and "C" represents the amount that the Commission needs to recover in a year to finance its broadcasting regulatory activities.

5. The Commission's mandate has been broadened under the amended *Broadcasting Act* to capture all broadcasters in Canada, both online and traditional. This broadened mandate, and the additional regulatory activities expected for online undertakings specifically, require that the Commission make new broadcasting fees regulations to finance its operations.

6. In light of the above, on 23 August 2023, the Commission issued Broadcasting Notice of Consultation 2023-280 (the Notice), in which it called for comments on proposed new *Broadcasting Fees Regulations*, which would replace the Licence Fee Regulations. The deadline for comments was 22 September 2023.

7. In the Notice, the Commission stated that the approach taken for new *Broadcasting Fees Regulations* has been to adapt the current Licence Fee Regulations as much as possible to incorporate the changes brought about by the amended *Broadcasting Act*, in order to ensure equity overall among feepayers.

8. The comments received during the consultation were mostly about the differences between the proposed new *Broadcasting Fees Regulations* and the Licence Fee Regulations. In addressing those comments, the Commission therefore focussed primarily on the major differences raised by interveners between the two sets of regulations, while also addressing certain points raised on "wording" in the proposed new *Broadcasting Fees Regulations*.

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[3] Part 1 of the Licence Fee Regulations will be repealed once the new *Broadcasting Fees Regulations* come into force on 1 April 2024.

[4] "Broadcasting ownership group" means a group of all operators that are affiliates of one another or, in the case of an operator that is not an affiliate of any other operator, that operator.

[5] See paragraph 58 of Broadcasting Decision 2021-276.

9. On 10 June 2023, the Government of Canada published for comment in the *Canada Gazette* an *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, a proposed policy direction (the proposed Direction) that, once finalized, would guide the Commission in its implementation of the amended *Broadcasting Act*. The proposed Direction was finalized on 9 November 2023 (the final Direction). The final Direction contains several elements that are relevant to the decisions set out in this regulatory policy, including minimizing the regulatory burden on the broadcasting system.

Interventions

10. Various parties, including the Canadian Association of Broadcasters (CAB), the Independent Broadcasters Group (IBG), the National Campus and Community Radio Association (NCRA), Rogers Communications Inc. (Rogers), Saskatchewan Telecommunications (SaskTel), Sirius XM Canada Inc. (Sirius XM), TELUS Communications Inc. (TELUS) and two individuals, generally expressed support for the application of the proposed new *Broadcasting Fees Regulations* to broadcasting undertakings, including both licensed and online undertakings. In general, these parties supported the view that the proposed new *Broadcasting Fees Regulations* should ensure an equitable recovery of the costs associated with regulating the broadcasting industry and meeting the objectives of the *Broadcasting Act*.

11. Other parties were opposed to certain aspects, including the Commission's proposal to apply the new regulations to "broadcasting ownership group". These interventions will be addressed further in this regulatory policy.

Issues

12. In the sections that follow, the Commission addresses the following issues:

- the Commission's proposal to apply the new *Broadcasting Fees Regulations* to a "broadcasting ownership group";
- the exemption threshold levels regarding the requirement to pay broadcasting fees;
- the proposed upper fee limit;
- revenue to be excluded from the calculation of broadcasting fees;
- the provision against the double imposition of the same revenue;
- fee revenue and the anti-avoidance provision;
- confidentiality;
- timelines;
- various potential amendments to the proposed new *Broadcasting Fees Regulations*;

- transitional provisions; and
- procedural issues.

13. The Commission wishes to thank all those who participated in this proceeding. The thoughtfulness and clarity reflected in the written submissions greatly assisted the Commission in its deliberations.

Proposal to apply the new *Broadcasting Fees Regulations* to a "broadcasting ownership group"

14. In the Notice, the Commission indicated that the proposed new *Broadcasting Fees Regulations* would apply to online undertakings and licensed undertakings. The Commission also acknowledged the predominant role of broadcasting ownership groups, which are composed of persons that carry on broadcasting undertakings (defined as "operator" in the *Broadcasting Fees Regulations*), in paying the greatest portion of broadcasting fees. The Commission also indicated that it would require broadcasting ownership groups, rather than individual broadcasting undertakings, to pay broadcasting fees, which would vastly reduce the number of feepayers. The proposed approach would set a threshold exemption level of $10 million (Canadian) for the broadcasting ownership groups, and provide for an upper limit to the amount of fees.

15. The Commission stated that this approach combines the revenues of all the undertakings in the group and avoids the issue of allocating revenues to a chosen undertaking in order to minimize fees. The proposed new *Broadcasting Fees Regulations* also include a provision requiring the person who controls a broadcasting ownership group to designate the undertaking with the highest fee revenue within that group responsible for fee return and payment compliance for the group.

16. Below, the Commission addresses issues relating to the following:

    - the appropriateness of the group-based approach as proposed in the Notice;
    - the operation, by owners of online undertakings, of different undertakings as distinct businesses; and
    - the group-based approach as a means of avoiding the practice of allocating revenues to a chosen undertaking in order to minimize fees.

Appropriateness of the group-based approach as proposed in the Notice

17. The NCRA expressed support for the Commission's proposal to place the obligation to pay fees under the new *Broadcasting Fees Regulations* on broadcasting groups. The Public Interest Advocacy Centre and OpenMedia (PIAC-OpenMedia) noted the potential benefits of adopting the group-based approach, such as deterring creative accounting.

18. Most parties, however, submitted that broadcasting fees should apply to individual broadcasting undertakings, not broadcasting ownership groups, and that several provisions in the proposed new *Broadcasting Fees Regulations* should be amended to reflect this.

19. In the sections that follow, the Commission addresses issues relating to the consistency of the Commission's proposal with the *Broadcasting Act* and with the Licence Fee Regulations, and to the potential impact of that proposal on smaller undertakings and licensed undertakings.

Consistency with the Broadcasting Act *and the Licence Fee Regulations*

20. Amazon.com.ca ULC (Amazon), Cogeco Inc. (Cogeco), the Digital Media Association (DiMA), and the Forum for Research and Policy in Communications (FRPC) submitted that the focus on ownership groups does not align with the *Broadcasting Act*, since that Act refers to individual broadcasting undertakings and makes no reference to a broadcasting ownership group.

21. The DiMA proposed revising the definitions under section 1 of the proposed new *Broadcasting Fees Regulations* to focus on broadcasting undertakings rather than on broadcasting ownership groups. It further proposed to delete section 3, which, as worded in the Notice, would make the highest fee revenue undertaking within a broadcasting ownership group responsible for fee return and payment compliance for the group.

22. Tubi, Inc. (Tubi) submitted that assessing revenue at the level of broadcasting ownership groups would be inappropriate since services operate under different business models, running counter to the flexible approach the Commission is mandated to use under subsection 5(2) of the *Broadcasting Act*.

23. BCE Inc. (BCE) submitted that the Commission's current proposal ignores twenty-six years of historical practice without explanation or justification. Similarly, the DiMA proposed that the Commission follow the model of the Licence Fee Regulations, which apply obligations, set out in sections 4 through 10, relating to fee reporting, calculation and payment to individual undertakings rather than to broadcasting ownership groups.

24. According to Rogers, eliminating the group-based exemption level proposed in the Notice would ensure that the revenues earned by affiliated and unaffiliated online undertakings are subject to the same treatment under the new *Broadcasting Fees Regulations*, and would "equally reflect each undertaking's proportion of industry revenues." Rogers also considered, however, that maintaining the current exemption threshold levels would be consistent with the Commission's objective that the fees to be paid under the new *Broadcasting Fees Regulations* reflect the costs of the Commission's regulatory activities.

Impact on smaller undertakings and licensed undertakings

25. Interveners including the CAB and Golden West Broadcasting Ltd. (Golden West) expressed concern over the potential impact of the proposed group-based approach on smaller broadcasting undertakings, specifically those earning revenues that are less than the current exemption levels set out in the Licence Fee Regulations. Blue Ant Media Inc. (Blue Ant) submitted that removing the current revenue exemption thresholds and replacing them with a single group revenue threshold, and adding online undertakings to the group, may result in some of the smaller traditional licensed broadcasters paying higher overall fees.

26. Cogeco, PIAC-OpenMedia, and Quebecor Media Inc. (Quebecor) submitted that the group-based approach would disadvantage small Canadian undertakings affiliated with groups that are currently exempt from paying licence fees, and would endanger the viability of those undertakings by imposing a financial burden on them. Quebecor noted that such burden would not apply to unaffiliated undertakings of similar size.

27. According to Corus Entertainment Inc. (Corus), while the group-based approach may reduce the administrative burden related to the invoicing process, it may also increase the fee amounts to be paid by existing feepayers under Part I of the Licence Fee Regulations. It argued that the best approach would therefore be to continue assessing Part I fees at an undertaking level and preserving existing exemptions.

28. The IBG, echoed by Blue Ant, submitted that if the Commission nevertheless decides to implement a group-based approach, it should adopt a modified group-based approach for purposes of fee revenue calculation. Under such an approach, the Commission would maintain its existing fee and revenue exemption levels and apply them on an individual undertaking basis, and include a comparable fee revenue threshold for individual online undertakings, while otherwise adopting the other elements of the group-based approach as proposed in the Notice.

29. The Ontario Association of Broadcasters (OAB) submitted that the proposed group exemption threshold level fails to consider the financial condition of small, individual stations that make up each group and that are currently exempt from the requirement to pay licence fees since some fall below existing revenue exemption levels. It proposed that stations within each group having revenues less than the current radio station exemption level of $2 million should be excluded from the calculation.

30. BCE, Golden West and Rogers submitted that the current exemption threshold levels for television, radio, and distribution services should continue to apply to licensed broadcasting undertakings under the new *Broadcasting Fees Regulations*.

Commission's decisions

31. Under the *Broadcasting Act*, the Commission has broad powers to make regulations respecting broadcasting fees. In particular, the *Broadcasting Act* sets out that the Commission may make regulations

    - with the approval of the Treasury Board, establishing schedules of fees to be paid by persons carrying on broadcasting undertakings of any class (paragraph 11(1)(a));
    - providing for the payment of any fees payable by a person carrying on a broadcasting undertaking, including the time and manner of payment (paragraph 11(1)(c)); and
    - respecting such other matters as it deems necessary for the purposes of [section 11 of the *Broadcasting Act*] (paragraph 11(1)(e)).

32. Moreover, the Commission has significant discretion when making such regulations. In this regard, subsection 11(2) of the *Broadcasting Act* sets out that regulations made under paragraph 11(1)(a) may provide for fees to be calculated by reference to any criteria that the Commission considers appropriate, including, but not limited to, (a) the revenues of the persons carrying on broadcasting undertakings; (b) the performance of the persons carrying on broadcasting undertakings in relation to objectives established by the Commission; and (c) the market served by the persons carrying on broadcasting undertakings.

33. Although the *Broadcasting Act* does not explicitly refer to "broadcasting ownership groups", the Commission considers that the *Broadcasting Act* authorizes the Commission to make persons carrying on broadcasting undertakings[6] that form part of a group responsible for fees and to calculate those fees by reference to the revenue derived from the broadcasting activity of the broadcasting undertakings that form part of a group. The Commission also considers that the *Broadcasting Act* authorizes the Commission to make one person from that group responsible for meeting the fees obligations on behalf of that group.

34. The *Broadcasting Act* prescribes that the Canadian broadcasting system should be regulated and supervised in a flexible manner that is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings (paragraph 5(2)(g)). It further prescribes that the Canadian broadcasting system should be regulated and supervised in a flexible manner that takes into account the variety of broadcasting undertakings to which the *Broadcasting Act* applies and avoids imposing obligations on any class of broadcasting undertakings if that imposition will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of that Act (paragraph 5(2)(h)).

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[6] This latter expression describes the "operator", a term used in the new *Broadcasting Fees Regulations* that links persons carrying on broadcasting undertakings with broadcasting ownership groups.

35. Many broadcasting ownership groups benefit from important synergies associated with operating both traditional and online undertakings, while generating significant levels of regulatory activity. Further, several broadcasting ownership groups play a predominant role in the Canadian broadcasting system. In the Commission's view, it would be appropriate to assess a given group's fee revenues based on the revenues derived from the broadcasting activities of the broadcasting undertakings that form part of the group.

36. In this regard, the Commission notes that it has already implemented a group-based approach for licensing undertakings of large television ownership groups,[7] and has issued various licensing decisions based on that approach. Further, the Commission implemented a group-based approach for the thresholds associated with the Annual Digital Media Survey (the Digital Media Survey) (see Broadcasting Regulatory Policy 2022-47).[8] Moreover, in Broadcasting Notice of Consultation 2023-139, the Commission proposed a group-based approach in regard to the requirement for various online undertakings to register with the Commission, which was eventually implemented in Broadcasting Regulatory Policy 2023-329/Broadcasting Order 2023-330. These policies recognize the manner in which many broadcasting undertakings operating in Canada have decided to structure themselves.

37. Finally, the Commission notes that the largest ownership groups currently pay the vast majority of broadcasting fees. The design of the new *Broadcasting Fees Regulations* with new exemption levels as described below continues to recognize the predominant role played by certain broadcasting ownership groups in this regard, and results in some undertakings no longer having to pay fees. This, coupled with the fact that the group-based approach will result in broadcasting undertakings receiving far fewer licence fee invoices, will contribute to the reduction of overall administrative burden on operators.

38. Accordingly, the Commission considers that it would be appropriate to make broadcasting ownership groups, which are composed of persons that carry on broadcasting undertakings (defined as "operator" in the *Broadcasting Fees Regulations*), responsible for fees. Along with this conclusion, it is necessary to designate the undertaking with the greatest fee revenue within a group as the one responsible for fulfilling the obligations of the new *Broadcasting Fees Regulations*.

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[7] In Broadcasting Regulatory Policy 2010-167, the Commission adopted a group-based licensing approach for large private television ownership groups. As noted in Broadcasting Decision 2011-441, the group-based approach was first applied to Bell Media Inc., Shaw Media Inc. and Corus Entertainment Inc. when their licences were renewed in 2011. It was then applied to Astral Media inc. and Rogers Media Inc. in Broadcasting Decisions 2012-241 and 2014-399, respectively. In Broadcasting Decision 2013-465, the Commission approved a modified group-based licensing approach for the discretionary services addressed in that decision and operated by Blue Ant Television Ltd. and Blue Ant Media Partnership.

[8] Persons with total annual revenues exceeding $25 million and $50 million collected from the Canadian broadcasting system across all services during the previous broadcast year, for audio and audiovisual services, respectively.

39. The Commission is persuaded by the arguments put forward by parties on this issue and therefore finds that smaller broadcasting undertakings should benefit from a base exemption threshold level, regardless of whether they form part of a broadcasting ownership group or not. The Commission has therefore modified its proposal in order to introduce a base exemption threshold level per individual undertaking, which will be in addition to the group-based exemption level, and replaces the exemption levels set out in the Licence Fee Regulations.

40. Introducing an exemption threshold level applicable to each individual broadcasting undertaking regardless of its class, in addition to the group exemption level, will ensure more equitable treatment for all broadcasting undertakings subject to the new *Broadcasting Fees Regulations*. Further, it will be sensitive to the administrative and financial burden that broadcasting fees may bring to persons carrying on smaller broadcasting undertakings, while taking into account the variety of broadcasting undertakings to which the *Broadcasting Act* applies. It also recognizes technological change, in accordance with paragraph 5(2)(c),[9] as well as with the objectives set out in paragraphs 5(2)(g) and (h), of the *Broadcasting Act*.

41. Moreover, implementing a modified group-based approach recognizes that the Commission exercises its mandate in a rapidly changing broadcasting landscape, where broadcasting ownership groups (which may be composed of a single broadcasting undertaking) play a significant role and where several traditional undertakings are moving certain operations online (or supplementing existing operations with online versions).

42. The Commission has incorporated into the final *Broadcasting Fees Regulations* a modified group-based approach that sets out an exemption threshold level for each broadcasting ownership group, as well as an exemption threshold level for each individual undertaking that forms part of a group. The Commission's determinations in regard to the specific exemption threshold levels to be applied, including examples of how the exemption levels are to be calculated, are set out below at paragraphs 78 and 79 in the section entitled "Exemption threshold levels regarding the requirement to pay broadcasting fees".

The operation, by owners of online undertakings, of different undertakings as distinct businesses

Positions of parties

43. The DiMA stated that owners of online undertakings, unlike traditional broadcasting ownership groups, typically operate different undertakings as distinct businesses, particularly in the case of companies that operate both audio and video online undertakings.

[9] According to paragraph 5(2)(c), the Canadian broadcasting system should be regulated and supervised in a flexible manner that promotes innovation and is readily adaptable to scientific and technological change.

44. BCE submitted that group-based broadcasting fees exemptions obscure competitive realities by conflating individual markets into one indistinguishable "broadcasting" market, thereby ignoring the competition that takes place within individual markets. It argued that if broadcasting fees exemptions are not established for each business segment, foreign online undertakings will benefit unfairly, given that they do not operate within the traditional broadcasting system.

45. According to the CAB and Cogeco, if the Commission proceeds with the application of broadcasting fees to ownership groups, which the CAB opposed, the exemption level for the payment of fees should be applied by type of undertaking (i.e., to groups of radio stations and groups of television stations, etc.) separately. Google LLC (Google) submitted that the exemption threshold levels should be applied on an individual service-by-service basis, rather than on a broadcasting ownership group basis.

46. The OAB submitted that the proposed calculation of the exemption level does not represent a level playing field, to the detriment of licensed broadcasters. It proposed that exemption levels be applied, and fees calculated, differently to online and traditional undertakings.

47. TikTok Technology Canada Inc. (TikTok) submitted that the Commission should retain its approach of implementing different exemption threshold levels in respect of different classes of undertaking, such as registered online and licensed undertakings.[10] It argued that online undertakings, when compared to traditional undertakings, operate in a vastly different economic, competitive and regulatory environment, where the level of regulatory activity generated by licensed undertakings is higher than that generated by online undertakings.

48. Spotify AB (Spotify) submitted that the Commission should implement a staggered approach to exemption threshold levels. It considered that a uniform exemption level of $10 million for all undertakings "does not take into account the diversity of business models and profitability of differing broadcasting undertakings." It argued that the Commission should establish new exemption levels for different types of online undertakings being integrated into the fees regime. Spotify further submitted that a specific class should be created for music streaming services. In its view, given the significant economic challenges unique to music streaming, such a class should be subject to an exemption threshold level that is higher than that for other, more profitable broadcasting undertakings operating in Canada.

49. Apple Canada Inc. (Apple) submitted that the new *Broadcasting Fees Regulations* should contain a formula reflecting the fact that licensed undertakings require a disproportionately higher level of regulatory oversight and therefore drive a higher proportion of the Commission's costs than online undertakings, relative to their respective revenues.

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[10] This relates to the proposal to make the *Online Undertakings Registration Regulations* (see Broadcasting Notice of Consultation 2023-139), which were recently implemented in Broadcasting Regulatory Policy 2023-329, and are discussed in greater detail below.

50. The Motion Picture Association of Canada (MPAC) considered that higher revenues may not necessarily result in a higher level of regulatory activity. It argued that the costs of regulating licensed broadcasting undertakings will be proportionally higher than the costs of regulating online undertakings given that certain regulatory matters apply exclusively to licensed broadcasting undertakings.

Commission's decision

51. A key principle in making the new *Broadcasting Fees Regulations* is that the fees continue to bear a relation to the costs associated with the level of regulatory activity that the Commission performs with respect to each feepaying undertaking or group of undertakings. This objective is based on the notion that the level of revenue of each undertaking or group of undertakings is indicative of the level of regulatory activity that it generates. This is true whether these undertakings are licensed or online, affiliated or unaffiliated, or broadcast audio or video programs.

52. It is not necessarily the case that licensed undertakings require a disproportionately higher level of regulatory oversight than do online undertakings. While licensed undertakings have generated more regulatory activity than online undertakings until recently,[11] the Commission's intention is to regulate online and licensed undertakings equitably. Moreover, the implementation of recent amendments to the *Broadcasting Act*, which include provisions regarding online undertakings, have generated, and will continue to generate, significant regulatory costs for the Commission. These costs should be shared equitably between online and licensed undertakings.

53. Further, as noted above, broadcasting ownership groups play a predominant role in the Canadian broadcasting system.[12] With the shift towards an increasingly digital environment, some large online undertakings are also playing a significant role in the system. Where persons carrying on licensed undertakings are also carrying on online undertakings, the distinction between different lines of business is not always clear, making the distinctions for the purpose of calculating fee revenue not feasible.

54. Moreover, persons carrying on online undertakings may do so without a licence or without being exempt from the requirement to hold a licence.[13] They may also have more flexibility to arrange and rearrange their business structures than persons

[11] As noted in Broadcasting Regulatory Policy 2023-331, prior to the coming into force of the amended *Broadcasting Act*, online undertakings operated in accordance with the Exemption order for digital media broadcasting undertakings, set out in the appendix to Broadcasting Order 2012-409, which replaced obligations set out in Part II of the *Broadcasting Act* with conditions of exemption. Thus, digital media broadcasting undertakings, operating in the broadcasting system, did not hold broadcasting licences and were not required to pay fees.

[12] A broadcasting ownership group, as noted above, may be composed of a single undertaking, and may itself generate a significant amount of revenue.

[13] Pursuant to subsection 31.1(2) of the *Broadcasting Act*.

carrying on licensed undertakings,[14] since online undertakings generally do not require approval from the Commission to do so. Given that many groups are formed by different types of broadcasting undertakings, calculating the fee revenue according to different types of undertakings would insufficiently address the ability of large groups to make shifts and generate revenues through different business lines.

55. In sum, amending the proposed new *Broadcasting Fees Regulations* to apply differently to distinct types of undertakings or markets would be cumbersome, and would unduly increase the administrative burden on feepayers, which would run counter to paragraph 5(2)(g) of the *Broadcasting Act*. Accordingly, the Commission finds that the final *Broadcasting Fees Regulations* should not apply differently to distinct lines of business.

Allocating revenues to a chosen undertaking in order to minimize fees

Positions of parties

56. In the Notice, the Commission stated that because the group-based approach for the payment of broadcasting fees combines the revenues of all the undertakings in the group, it avoids the issue of a group allocating revenues to a chosen undertaking in order to minimize fees.

57. In Apple's view, the Commission's proposed group-based approach does not avoid the issue as it will still be necessary for each ownership group to allocate revenues between fee-paying and non-fee-paying undertakings.

58. In regard to the Commission's concern over groups allocating revenues to a chosen undertaking in order to minimize fees, the IBG stated that broadcasters currently adopt reasonable reporting and accounting standards in their dealings with the Commission and other government agencies. It also noted that it is not permissible to arbitrarily move revenue from source to source for government reporting purposes.

Commission's decision

59. In the Commission's view, a group-based approach will reduce the incentive to use accounting practices through which the revenues of broadcasting ownership groups would be allocated inappropriately between several broadcasting undertakings, while retaining the advantages of greater flexibility and equity towards smaller undertakings. The Commission should be able to identify, through the broadcasting fee return, which online undertakings form part of a broadcasting ownership group.

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[14] In particular, considering that the *Direction to the CRTC (Ineligibility of Non-Canadians)* prescribes that no broadcasting licence may be issued, and no amendments or renewals thereof may be granted, to an applicant that is a non-Canadian.

60. The Commission notes, however, that should it appear that revenues are allocated to a chosen undertaking in order to minimize fees, the Commission may consider taking any corrective measures available under the new *Broadcasting Fees Regulations* and the *Broadcasting Act*.

Exemption threshold levels regarding the requirement to pay broadcasting fees

61. In the Notice, the Commission proposed to align the exemption level regarding the payment of broadcasting fees with the proposed exemption level for registration (i.e., $10 million in annual broadcasting revenues in Canada). To do so, it proposed that the new *Broadcasting Fees Regulations* incorporate by reference both the *Online Undertakings Registration Regulations* (Registration Regulations) and the exemption order proposed in Broadcasting Notice of Consultation 2023-139.

Positions of parties

Comments regarding desired outcomes

62. Certain parties commented on desired outcomes of an exemption threshold for the payment of broadcasting fees. The IBG and Sirius XM submitted that an objective for the new broadcasting fees regime should be to decrease the amount of fees that traditional broadcasting undertakings have been paying under Part I of the Licence Fee Regulations. Corus expressed concern that the Commission's proposal would eliminate existing exemptions, which could in turn leave some existing feepaying undertakings with liability that exceeds their current obligations in real dollar terms. It noted that this may be the case even if the broadcasting ownership groups to which the undertakings belong pay no more in percentage terms of total Part I fees.

63. According to Quebecor, it is essential that the formula and the methods retained by the Commission for calculating broadcasting fees allow for a considerable reduction in the financial and administrative burden placed on traditional broadcasting undertakings.

64. BCE stated that, given that online undertakings have revenues in the billions of dollars that would be eligible under the new broadcasting fees regime, it expects that its own fee contributions will decrease significantly once the new *Broadcasting Fees Regulations* are implemented. BCE added that changes in revenue exemption levels should not shift incremental broadcasting fees costs onto traditional broadcasting distribution undertakings (BDU) and broadcasters, which would be unjust given that it already disproportionately funds the Commission's operating activities.

Comments regarding exemption thresholds

65. Certain parties, including Bragg Communications Incorporated, operating as Eastlink (Eastlink), and the NCRA, supported the $10 million exemption level set out in the Notice. According to Eastlink, the proposed level would result in a more equitable allocation of the regulatory burden associated with the payment of

broadcasting fees than the exemptions provided for in the Licence Fee Regulations, which allow a much larger exemption level applicable to programming services ($1,500,000) as compared to BDUs ($175,000). The FRPC maintained that the Commission did not explain in the Notice its rationale for proposing the $10 million threshold and did not provide any clarity regarding the impact of this exemption threshold on fee payments.

66. Apple proposed that only those undertakings that are required to register with the Commission should be required to pay broadcasting fees. Sirius XM submitted that online undertakings that become subject to the Registration Regulations should have feepaying obligations that are no less onerous than the feepaying obligations of traditional licensed broadcasting undertakings.

67. Other interveners, such as the OAB, proposed exemption levels higher than that proposed in the Notice. Further, the OAB proposed that fees be calculated only on revenues above established thresholds, thus removing a significant disincentive towards growth.

68. The MPAC submitted that the Commission should apply a threshold for regulatory obligations such as broadcasting fees that is higher than that applied for the purposes of registration. It also considered that the exemption level should ensure that undertakings that do not contribute in a material manner to the broadcasting policy objectives are exempted from paying fees.

69. Roku Inc. (Roku) submitted that the exemption threshold should be increased and should not be pre-determined by the $10 million thresholds for the regulatory requirements proposed in Broadcasting Notice of Consultation 2023-139, or in any other consultation. It submitted that setting the threshold this low would therefore impose a regulatory burden on smaller services and harm Canadian consumers without any material benefit in cost recovery for the Commission.

70. PIAC-OpenMedia submitted that the Commission must consider a higher exemption threshold and/or other exemptions for smaller niche undertakings or broadcasting ownership groups. It stated that it would support a $50 million exemption threshold, which matches that implemented in the Digital Media Survey for video services. It also expressed concern that the new broadcasting fees regime may negatively impact consumers.

71. Apple, Google and TikTok recommended that the Commission align the exemption threshold levels applicable to online undertakings with those already established by the Commission for its Digital Media Survey, that is, $25 million for audio services and $50 million for video services. Google submitted that such an approach would help to achieve consistency across various regulatory obligations. TikTok argued that the Commission should retain the materiality threshold set out in the Digital Media Survey in respect of the regulatory obligations of online undertakings, including as it applies to the requirement to file fee returns and to the calculation of fees.

72. Finally, Tubi submitted that the business and financial models for ad-supported video-on-demand (AVOD) services are not structured to accommodate additional costs, and that definition of "exemption level" under the new *Broadcasting Fees Regulations* should be $100 million.

Commission's decisions

73. As noted above, the Commission has found that it would be appropriate to modify the group-based approach as initially proposed in the Notice in order to set different exemption levels on broadcasting ownership groups and on the individual undertakings that form part of those groups.

74. In determining the appropriate exemption thresholds to be implemented, the Commission has relied on paragraphs 5(2)(g) and (h) of the *Broadcasting Act*, which prescribe how the Canadian broadcasting system should be regulated. This approach is consistent with Section 8(a) of the final Direction, which directs the Commission to minimize the regulatory burden on the Canadian broadcasting system, to support flexibility and adaptability in its regulatory framework.

75. The Commission indicated in the Notice that the proposed new *Broadcasting Fees Regulations* were designed to achieve several objectives, including that all existing feepaying groups of undertakings end up paying no more, in percentage terms, than the totality of all Part I licence fees that they currently pay. Further, the fees should continue to bear a relation to the costs associated with the level of regulatory activity that the Commission undertakes with respect to each feepaying undertaking or group of undertakings, yet at the same time be flexible and equitable.

76. In the Commission's view, based on the evidence on the record of this proceeding, there is merit in the concern that applying a $10 million group exemption while counting all the revenues of the individual undertakings that form part of a broadcasting group would unduly burden both smaller broadcasting ownership groups and smaller broadcasting undertakings. As such, the Commission finds that the exemption threshold for broadcasting fees for broadcasting ownership groups should not be the same as the exemption threshold implemented in the Registration Regulations.

77. Instead of the exemption threshold level proposed in the Notice, the Commission finds that the exemption threshold for broadcasting fees for broadcasting ownership groups should be set at a higher amount. Not only is the burden associated with the obligation to pay fees higher than that associated with registering undertakings with the Commission, collecting broadcasting fees and registration information are measures with different objectives that should not necessarily target the exact same groups of undertakings.

78. As discussed below, under the modified group-based approach, the Commission finds that the most appropriate exemption threshold for a broadcasting undertaking that forms part of a broadcasting ownership group would be up to $2 million in annual broadcasting revenues in Canada, along with an exemption threshold of

$25 million for the broadcasting ownership group. This means that a broadcasting ownership group's fee revenue is to be calculated by aggregating the total annual broadcasting revenues in Canada of each individual broadcasting undertaking with an annual revenue of more than $2 million. Further, in addition to any exemptions at the undertaking level for those undertakings that have $2 million or less in annual broadcasting revenues in Canada, the group itself benefits from a $25 million exemption.

79. The following three examples illustrate the above.

- A broadcasting ownership group formed by only one broadcasting undertaking[15] with $2 million in annual broadcasting revenues in Canada would benefit from the $25 million exemption threshold. Consequently, the fee revenue of that single-undertaking group would be zero.

- Similarly, a broadcasting ownership group formed by only one broadcasting undertaking with $40 million in annual broadcasting revenues in Canada would benefit from a total exemption level of $25 million. The fee revenue of that group would be calculated on the non-exempt revenue of $15 million (total revenues of $40 million minus exemption level of $25 million).

- A broadcasting ownership group formed by three broadcasting undertakings with $500,000, $7 million and $100 million, respectively, in annual broadcasting revenues in Canada (for total revenues of $107.5 million), would benefit from a total exemption level of $25.5 million ($500,000 for the individual undertaking that has $2 million or less in annual broadcasting revenues in Canada, and $25 million for the group). The fee revenue of that group would be calculated on the non-exempt revenue of $82 million (total revenue of $107.5 million minus exemption level of $25.5 million).[16]

80. The above approach is meant to ensure that smaller Canadian independent broadcasting undertakings are not subjected to unnecessary administrative burden and can continue to play a vital role within the Canadian broadcasting system. Such a broadcasting ownership group formed by a single independent broadcasting undertaking will benefit from the group exemption level of $25 million and would therefore not be burdened with paying broadcasting fees when making revenues of that amount or less. The Commission finds the $25 million exemption threshold level appropriate for broadcasting ownership groups as it mirrors the $25 million

[15] In line with the definition of the term as set out in the new *Broadcasting Fees Regulations*, a "broadcasting ownership group" may refer to a group that includes a single broadcasting undertaking not affiliated with other broadcasting undertakings.

[16] In this case, the fee revenue could also be calculated by adding the revenues of the two undertakings that are above the $2 million exemption amount (i.e., $7 million + $100 million) and then subtracting the $25 million exemption amount for the broadcasting group of which they form part (to give $82 million), given that the undertaking with $500,000 in revenues (which is below the exemption threshold for individual undertakings) would not see its revenues included in the gross revenues amount.

threshold for audio services set out in the Digital Media Survey, which several parties considered to be an adequate benchmark.

81. In the Commission's view, the approach outlined above is also sensitive to the administrative burden that may be imposed on persons carrying on smaller broadcasting undertakings, since it will allow all individual broadcasting undertakings to benefit from a basic exemption level of up to $2 million. This is meant to replicate the exemption levels for licensed radio undertakings in the Licence Fee Regulations while expanding their application to online undertakings.

82. As set out in section 8 of the *Broadcasting Fees Regulations*, the Commission will be making the relevant calculations. Further, its staff will make any necessary verification(s) with feepayers and will send one invoice per broadcasting group, based on the information gathered on the fee returns.

83. The administration of the *Broadcasting Fees Regulations* may be accompanied by some challenges. It is expected that feepayers will structure their operations and the number of services they provide to Canadians in a way that aligns with their respective brands and that responds to market demand, and that their fee returns will reflect such structuring. The Commission notes that operators are bound to provide, every year, "a complete list of all affiliate undertakings" that form part of a "broadcasting group", as specified this year in Form 1080 ("Licence Fee Return – Billing Contact") for traditional licensed broadcasting undertakings, and in Form 1081 ("Broadcasting Fee Return – Billing Contact") for online undertakings. Such information can be verified in some cases via the registration forms required for online undertakings through Broadcasting Regulatory Policy 2023-329 and Broadcasting Order 2023-330.

84. The combination of fee return forms and registration forms, along with the anti-avoidance provision built into the *Broadcasting Fees Regulations* (which are discussed in detail below) should assist in addressing any challenges associated with identifying which undertakings belong to which broadcasting groups.

85. The $25 million exemption level captures the key broadcasting ownership groups that generate a significant level of broadcasting regulatory activity. It also eliminates some small broadcasting ownership groups from liability for fees, and reapportions the remainder of fees to be collected among the groups of undertakings that remain in the fee formulas. The $2 million individual undertaking exemption reduces the number of undertakings whose revenues are included in gross revenues.

86. These exemption levels result in fewer individual undertakings and broadcasting ownership groups that will be subject to the requirement to pay broadcasting fees, while capturing the broadcasting ownership groups that generate a significant level of regulatory activity.

87. Under the *Broadcasting Fees Regulations*, traditional broadcasters will pay a lower percentage of total fees. This is in addition to the substantial benefits these broadcasters are gaining under the new fees regime. In particular, holders of broadcasting licences were previously charged two separate fees: a Part I fee that financed the Commission's regulatory activities, and a separate Part II fee[17] that was charged for holding a licence. Under the new *Broadcasting Act*, Part II fees were abolished and, under the new Regulations, broadcasters will pay a single fee.

88. In light of all of the above, the Commission has implemented in the final *Broadcasting Fees Regulations* an exemption threshold level of up to $2 million for a broadcasting undertaking that forms part of a broadcasting ownership group with more than one broadcasting undertaking, and an exemption threshold level of $25 million for each broadcasting ownership group.

The proposed upper fee limit

89. In the Notice, the Commission proposed an "upper limit mechanism", that is, an upper fee limit of 35% of the Commission's total regulatory costs for the year that any one ownership group would be required to pay. Once the upper fee limit is reached, the fees to be paid by other feepayers would increase, as the differential excess amount would be spread proportionately among other feepaying undertakings. The objectives of the proposed upper limit mechanism were to balance the loss of individual threshold levels for a broadcasting group, to ensure that no one group was disproportionately responsible for paying broadcasting fees, and that no one broadcasting group dominated the new fees regime.

Positions of parties

90. Certain interveners supported an upper limit mechanism. BCE expressed support for the Commission's plan to ensure that no single group be required to contribute disproportionately to funding its broadcasting activities. It noted that there are obvious economies of scale involved in the regulatory oversight of large groups. BCE considered, however, that the 35% upper fee limit proposed by the Commission is too high, given that a large number of online undertakings will soon be required to pay broadcasting fees, making that limit irrelevant in practice. It proposed that the upper fee limit be set at 30%.

91. According to the MPAC, there should be an automatic correlation between the revenues of a broadcasting undertaking and the fees levied on that undertaking. Accordingly, it did not oppose the Commission establishing some kind of weighting mechanism in the fees formulas, or an upper fee limit, to ensure that one broadcasting undertaking is not disproportionately responsible for paying fees.

[17] In Broadcasting Order 2022-295, the Commission announced the total amount of Part II licence fees to be assessed by the Commission in 2022 was $123,709,535. Each feepaying undertaking paid about three times its Part I licence fees, when it paid Part II licence fees.

92. Most interveners, including Amazon, the DiMA, Eastlink, the FRPC, the IBG and TELUS, explicitly opposed the proposed 35% upper fee limit.

93. Apple submitted that the new *Broadcasting Fees Regulations* should not favour any type of broadcasting undertaking, which would result by the imposition of a 35% fee limit on any undertaking or ownership group. Cogeco stated that the Notice did not provide any study or comparative analysis results leading to the choice of establishing a fee payment limit and setting it at 35% of the Commission's total regulatory costs. For the IBG, it is unclear why a very large group should pay proportionally less, while other groups with less revenue should pay proportionally more. Spotify argued that the proposed 35% fee limit disproportionately benefits the largest undertakings without any clear or pressing rationale.

94. Amazon, the FRPC and Google submitted that the Commission's proposal is at odds with the statement in the Notice that the proposed regulations have been designed with a view to ensuring that there continues to be a relationship between the fees charged and the costs associated with the level of regulatory activity that the Commission performs with respect to each feepaying undertaking or group of undertakings. In Amazon's view, regulatory costs should as closely as possible be borne by the undertaking(s) that causes them. It added that the implementation of the proposed mechanism would unduly favour, without justifiable basis, one or two Canadian broadcasting undertakings to the detriment of other undertakings that generate significantly less regulatory activity in Canada.

95. The DiMA, the FRPC, Eastlink, TELUS, PIAC-OpenMedia and Spotify all made similar arguments to the effect that a 35% limit places a disproportionate burden towards smaller participants, to the benefit of the largest broadcasting groups operating in Canada.

96. Rogers submitted that the proposed 35% upper limit mechanism, together with the group-based exemption level, compound the burden that would be imposed on a small number of feepayers under the new fees regime, through the redistribution of the broadcasting fees. In its view, the new *Broadcasting Fees Regulations* should be designed in a manner that captures a sufficiently broad pool of feepayers, such that it is not possible for a single ownership group to account for 35% of the total actual regulatory costs.

97. Quebecor submitted that the Commission's proposal, in addition to being profoundly inequitable, would prove harmful to competition and innovation.

98. Finally, Corus expressed concern that the proposed upper limit mechanism would provide an insufficient buffer for all existing feepayers within a group-based model, as some existing feepayers who currently pay less than the 35% upper fee limit could theoretically be required to pay more if other broadcasting groups reach that limit and their "differential excess amount" is spread to other groups.

Commission's decision

99. In the Commission's view, interveners have put forward compelling arguments that the 35% upper limit mechanism may result in a disproportionate burden on smaller broadcasting ownership groups to the benefit of one, or at most two, dominant groups. It considers that the final *Broadcasting Fees Regulations* must ensure that feepayers are treated equitably and proportionally. The comments received reveal that the proposed mechanism could hinder achieving this objective.

100. The Commission reaffirms its objective of ensuring that there continues to be a relationship between the fees charged and the costs associated with the Commission's level of regulatory activity. As stated earlier, fee revenues that apply to licensed and online undertakings on the same basis are an objective and reliable indicator of the regulatory activity that broadcasting ownership groups generate. The Commission agrees that introducing a 35% upper limit could unduly distort that indicator.

101. Further, as noted by BCE, the Commission considers that the 35% upper fee limit may be irrelevant in practice. As stated in the Notice, while fee revenue figures for online undertakings cannot always be predicted, it is expected that a significant amount will be added to the denominator ("B") of the fee calculation formula "(A ÷ B) x C", such that the proportionate share of total fees paid by existing feepayers is anticipated to decline. Nevertheless, even if one broadcasting ownership group reached a 35% share, it could lead to the above-noted negative consequences if the *Broadcasting Fees Regulations* included this limit.

102. With the adoption of a modified group-based approach and the making of amendments to the initially proposed exemption levels, the Commission has designed the final *Broadcasting Fees Regulations* to capture a sufficiently broad pool of feepayers, such that it is unlikely that a single ownership group could account for 35% or more of the total actual regulatory costs.

103. In light of the above, the Commission finds that the calculation of fees should not be subject to an upper fee limit. Accordingly, the Commission has not included in the final *Broadcasting Fees Regulations* the 35% upper limit mechanism proposed in the Notice.

Revenue to be excluded from the calculation of broadcasting fees

104. In the proposed new *Broadcasting Fees Regulations*, the Commission proposed to define "excluded revenue" the same way as in Appendix 2 to Broadcasting Notice of Consultation 2023-139. In addition, the Commission proposed that the new *Broadcasting Fees Regulations* would apply to all broadcasting undertakings other

than those that are not required to register with the Commission under the Registration Regulations or an associated exemption order.[18]

105. It is apparent from the Commission's decisions set out above that it is no longer aligning the exemptions established in the Registration Regulations to those established for the purposes of the *Broadcasting Fees Regulations*. Thus, the Commission must amend its proposed definition of "excluded revenue", as well as the "Application" section of the proposed *Broadcasting Fees Regulations*, to eliminate the references to the Registration Regulations as well as to any associated exemption order related to those regulations.

106. While the references to those regulatory documents must be eliminated, the proposed definition of "excluded revenue" established in those documents continues to be a valid starting point for the Commission. Notably, when the Commission rendered its decision on the Registration Regulations in Broadcasting Regulatory Policy 2023-329, it also issued Broadcasting Order 2023-330, which contained the following definition of "excluded revenue":

> **Excluded revenue** means revenue that is derived from providing video game services or audiobook services as well as revenue derived from broadcasting activities by broadcasting undertakings that are exempted from licensing requirements, or all regulations made under Part II of the *Broadcasting Act* unless, in either case, otherwise specified in the exemption order.

107. In the following sections, the Commission sets out its determinations on the issues relating to both the exclusion and inclusion of revenues derived from certain types of broadcasting activities when calculating the fee revenue of a broadcasting ownership group.

Items to be included within the definition of "excluded revenue"

Audiobook services

Positions of parties

108. Apple submitted that audiobooks should be exempt from the requirement to pay regulatory fees. Spotify submitted that audiobooks, as an audio presentation of alphanumeric text, should be excluded from the definition of "broadcasting". It argued there is no sound legal or policy basis to treat audiobooks differently from their text-based counterparts, over which the Commission has no authority to regulate. Spotify considered that it would be inappropriate for the Commission to capture revenues associated with audiobooks for the purpose of funding its

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[18] The exemption order power (subsection 9(4) of the *Broadcasting Act*) states the following: "The Commission shall, by order, on the terms and conditions that it considers appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part, of an order made under section 9.1 or of a regulation made under this Part if the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)."

broadcasting regulatory activities when audiobooks fall outside the scope of the broadcasting regulatory scheme.

Commission's decision

109. In Broadcasting Order 2023-330, the Commission defined "audiobook" as "an audio program that reproduces a text, published in print or digital format, and that has an International Standard Book Number." Further, it defined "audiobook service" as "the transmission or retransmission of audiobooks over the Internet for reception by the public by means of broadcasting receiving apparatus."

110. Under the *Broadcasting Act*, audiobooks are considered audio programs, and their transmission by means of the Internet for reception by the public by means of broadcasting receiving apparatus (such as computers, tablets or phones) constitutes broadcasting. Accordingly, the transmission or retransmission of audiobook services over the Internet could be considered an online undertaking.

111. Nevertheless, audiobooks are generally reproductions, in audio form, of works that have been published in print or digital format and that have an International Standard Book Number. Services offering books, in any format, have never been regulated by the Commission. Further, unlike for transactional video content discussed below, there is no parallel for such a service within the traditional broadcasting system. As such, the Commission considers that requiring online undertakings that provide audiobook services to pay broadcasting fees based on that activity would not contribute in a material manner to the implementation of the broadcasting regulatory policy set out under the *Broadcasting Act*.

112. Further, in Broadcasting Order 2023-330, the Commission set out that, pursuant to subsection 9(4) of the *Broadcasting Act*, online undertakings whose single activity and purpose consists of providing audiobook services would be exempt from all of the requirements of the Registration Regulations.

113. With these considerations in mind, and consistent with Broadcasting Regulatory Policy 2023-329, the Commission finds that revenue derived from providing audiobook services should be excluded from the calculation of fee revenue for the purpose of determining whether an online undertaking should pay broadcasting fees. This determination is reflected in the definition of "excluded revenue" set out in the new *Broadcasting Fees Regulations*.[19]

Podcast services

Positions of parties

114. Apple submitted that podcast services should be exempt from the requirement to pay regulatory fees. Spotify submitted that there are strong legal and policy reasons

[19] Excluded revenue from audiobook services excludes revenues from all undertakings from this type of service, whether this is the sole activity of such undertakings, or is an activity carried on in conjunction with some broadcasting activities.

to avoid bringing podcasts under the ambit of the modern broadcasting regulatory framework. More specifically, it stated that revenues from podcast services should not be counted in the fee revenue calculation, and that podcasts should fall within the classes of undertakings exempt from regulation under the modern broadcasting framework. Spotify added that counting any revenues associated with podcasts for the purpose of the fee revenue calculation would risk capturing revenues from user-generated podcasts, and would impose additional strain on a fragile industry, both of which run counter to the *Broadcasting Act* and the proposed Direction.

Commission's decision

115. The issue to be addressed is whether the revenues from podcast services should be excluded from the calculation of fee revenues for the purposes of the new *Broadcasting Fees Regulations.*

116. A podcast generally refers to a digital audio file, containing, for example, news or radio-type programming created by a user or a broadcaster that can be downloaded to a personal media device for subsequent listening. Podcasts can be produced by social media users or professionals, and delivered on different types of platforms, each having a different business model.

117. A "podcast service" is described herein as the transmission or retransmission of podcasts over the Internet for reception by the public by means of broadcasting receiving apparatus.

118. To the extent that podcasts are uploaded by social media users, section 4.1 of the *Broadcasting Act* specifically excludes such programs from the application of that Act.[20] The final Direction similarly states that the Commission is not to impose regulatory requirements on online undertakings in respect of the programs of social media creators, including podcasts.

119. While there could be some revenues derived from providing podcast services that would be eligible broadcasting activities for fee revenues,[21] the Commission considers that any such activities are not currently expected to generate a significant level of regulatory activity for the Commission. The Commission has therefore adopted a straightforward regulatory approach of excluding all podcast revenues, irrespective of where or by whom those podcasts are transmitted.

120. In light of the above, the Commission finds that revenues derived from providing podcast services should be excluded from the calculation of fee revenue for the purpose of determining whether a broadcasting undertaking should pay broadcasting fees. This determination is reflected in the definition of "excluded revenue" set out in the new *Broadcasting Fees Regulations*.

[20] Limited exceptions are set out in subsection 4.1(2) of the *Broadcasting Act*.
[21] As set out in Broadcasting Regulatory Policy 2023-329, a broadcasting undertaking that hosts or distributes podcasts is carrying on an online undertaking.

Video game services

Positions of parties

121. The Commission did not receive any interventions in regard to video game services.

Commission's decision

122. The Commission has historically held the view that the transmission of video games does not generally constitute broadcasting.[22] The Commission reaffirmed this view in Broadcasting Regulatory Policy 2023-329. To ensure clarity of this position going forward, in Broadcasting Order 2023-330, set out in Appendix 2 to that regulatory policy, the Commission specified that online undertakings whose single activity and purpose consists of providing video game services[23] would be exempt from all of the requirements of the Registration Regulations.

123. In Broadcasting Regulatory Policy 2023-329, the Commission expressed the view that online undertakings that provide video game services that may include some broadcasting activity currently have a relatively marginal place in the Canadian broadcasting system. Further, the Commission noted that exempting online undertakings that provide video game services from registration requirements would be consistent with the proposed Direction, which directs the Commission not to impose regulatory requirements on broadcasting undertakings in respect of the transmission of video game services. This approach is also consistent with the final Direction.

124. With these considerations in mind, and consistent with Broadcasting Regulatory Policy 2023-329, the Commission finds that revenues derived from providing video game services should be excluded from the calculation of fee revenue for the purpose of determining whether an online undertaking should pay broadcasting fees.[24] This determination is reflected in the definition of "excluded revenue" set out in the new *Broadcasting Fees Regulations*.

Undertakings exempted by an order pursuant to subsection 9(4) of the Broadcasting Act

125. At paragraph 16 of the Notice, the Commission proposed that broadcasting undertakings that are exempted from licensing requirements under existing subsection 9(4) exemption orders would continue to be exempted from the

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[22] In Broadcasting Order 2023-330, the Commission defined "video game" as "an electronic game that involves the interaction of a user by means of an Internet connected device, where the user is primarily engaged in active interaction with, as opposed to the passive reception of, sounds or visual images, or a combination of sounds and visual images."

[23] In Broadcasting Order 2023-330, the Commission defined "video game service" as "the transmission or retransmission of video games over the Internet for reception by the public by means of broadcasting receiving apparatus."

[24] Excluded revenue from video game services excludes revenues from all undertakings from this type of service, whether this is the sole activity of such undertakings, or is an activity carried on in conjunction with some broadcasting activities.

requirement to pay fees. This is because such exemption orders are very broad in their scope, exempting these undertakings from any regulations made by the Commission under the *Broadcasting Act*.[25]

126. The issue to be addressed is whether the revenues from such exempt services should be excluded from the calculation of fee revenues for the purposes of the new *Broadcasting Fees Regulations*.

Positions of parties

127. Eastlink, the NCRA, Rogers and TELUS supported the Commission's proposal to continue excluding revenues from broadcasting undertakings that are exempt from licensing requirements under subsection 9(4) of the *Broadcasting Act* from the calculation of broadcasting fees.

128. Rogers stated, however, that the way this proposal is reflected in the proposed new *Broadcasting Fees Regulations* is ambiguous and should be clarified. In this regard, it proposed amending the definition of "excluded revenue" and section 2 of the proposed regulations to expressly exclude from the application of the new *Broadcasting Fees Regulations* those revenues and broadcasting undertakings that are exempt from licensing requirements under a broadcasting order made under subsection 9(4) of the *Broadcasting Act*.

129. The Canadian Communications Systems Alliance (CCSA) expressed concern that the Commission's proposal to apply the proposed new *Broadcasting Fees Regulations* to broadcasting ownership groups could serve to indirectly subject currently exempt undertakings to the payment of such fees, and sought further assurance from the Commission that this would not be the case.

Commission's decision

130. The Commission considers that broadcasting undertakings that are exempted from licensing requirements under existing subsection 9(4) exemption orders should continue being exempted from the requirement to pay fees. It also considers that future exemption orders that will exempt broadcasting undertakings from licensing requirements or from all regulations should exempt broadcasting undertakings from the obligation to pay fees, unless, in either case, otherwise specified in an exemption order. The Commission has made these determinations explicit in the definition of "excluded revenue".

Conclusion

131. In light of all of the above, the Commission has adopted the following definition of "excluded revenue", which has been added to the final *Broadcasting Fees Regulations*:

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[25] A list of exemption orders is available on the Commission's website under "Broadcasting Exemption Orders".

excluded revenue means revenue derived from providing audiobook services, podcast services or video game services, as well as revenue derived from broadcasting activities that are carried out by broadcasting undertakings that are, by order, exempted from licensing requirements or exempted from all regulations made under Part II of the Act, unless, in either case, otherwise specified in an exemption order.

Items not included within the definition of "excluded revenue"

Thematic services

Positions of parties

132. The MPAC introduced the concept of "thematic service", which it defined as a service that "due to [its] nature or theme […] would not contribute in a material manner to the implementation of the broadcasting policy objectives set out in subsection 3(1) of the [*Broadcasting Act*]." It submitted that the Commission should consider exempting certain thematic services where it is satisfied that doing so is warranted under subsection 9(4) of the *Broadcasting Act*. Apple stated that fitness services should be exempt from the requirement to pay regulatory fees.

Commission's decision

133. The Commission notes that exercising its power pursuant to subsection 9(4) of the *Broadcasting Act* in order to exclude classes of undertakings from regulation based on the theme of their content was not within the scope of this proceeding. In regard to whether the revenue derived from broadcasting activity based on the thematic content (such as the content provided by fitness services) should be considered excluded revenue, this approach would require assessing such content, which involves a certain level of subjectivity. Further, revenue exclusions based on thematic content would provide some uncertainty to broadcasters, as well as utilize significant resources from both broadcasters and the Commission to process.

134. Accordingly, revenue derived from broadcasting activities based on thematic content is to be included in the calculation of fee revenues.

Online news undertakings

Positions of parties

135. Apple submitted that online news undertakings should be exempt from the requirement to pay regulatory fees.

Commission's decision

136. The Commission notes that there are a variety of news services that are not covered by the *Broadcasting Act* or are otherwise exempted by the Commission. For example, print-media undertakings fall outside the scope of the *Broadcasting Act* as the Commission's authority under that Act extends only to broadcasting

undertakings. Further, online news services that do not broadcast programs and only provide content that consists predominantly of alphanumeric text are excluded.[26] Finally, subsection 4(5) of the *Broadcasting Act* specifies that the Act does not apply to the operator of a digital news intermediary[27] in respect of which the *Online News Act* applies when the operator acts solely in that capacity. These types of news services would not be required to pay broadcasting fees given that they fall outside the scope of the *Broadcasting Act* (and thus would not subject to the new *Broadcasting Fees Regulations*).

137. Broadcasting undertakings, including online undertakings that provide audio and video news services subject to the *Broadcasting Act*, are of primary concern for the Commission. In fact, the *Broadcasting Act* sets out specific policy objectives regarding news (see, for example, subparagraphs 3(1)(i)(ii.1)[28] and (iv)).[29]

138. The Commission notes, however, that online undertakings that have no affiliates are exempted from paying broadcasting fees when they have annual broadcasting revenues in Canada within the $25 million exemption level. To the extent that online news undertakings also provide content that consists predominantly of alphanumeric text (which is not broadcasting), only their broadcasting revenues are to be included in the annual revenue calculation.

139. In light of the above, and given the relatively small number of online news undertakings that would be subject to the *Broadcasting Fees Regulations*, the revenue derived from broadcasting activities by online news undertakings, apart from those such undertakings identified above, is to be included when calculating the fee revenue of a broadcasting ownership group.

Unique transaction services

Positions of parties

140. TELUS submitted that the "new fee regime should ensure parity in its treatment of exempt undertakings in the online and traditional systems." It specified that "the Commission's proposal set out in Broadcasting Notice of Consultation 2023-139 to

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[26] This is because the definition of "program" in the *Broadcasting Act* excludes visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

[27] As set out in the *Online News Act*, "digital news intermediary" means "an online communications platform, including a search engine or social media service, that is subject to the legislative authority of Parliament and that makes news content produced by news outlets available to persons in Canada. It does not include an online communications platform that is a messaging service the primary purpose of which is to allow persons to communicate with each other privately."

[28] The programming provided by the Canadian broadcasting system should include programs produced by Canadians that cover news and current events – from the local and regional to the national and international – and that reflect the viewpoints of Canadians, including the viewpoints of Indigenous persons and of Canadians from Black or other racialized communities and diverse ethnocultural backgrounds.

[29] The programming provided by the Canadian broadcasting system provides a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern and to directly participate in public dialogue on those matters including through the community element.

exempt online undertakings that provide ‘unique transactions’ should apply equally to traditional on-demand undertakings.”

141. Amazon supported exempting from regulation collections of titles and components of undertakings that provide unique transactions, in line with the Commission’s proposed exemption for transaction-based services. It stated that online content storefronts should also be exempted, recognizing that these low-margin services effectively act as places for third-party content providers to sell their products, with a substantial portion of revenues passed through to those third parties.

142. Eastlink submitted that if the Commission chooses to exempt online transactional video-on-demand (TVOD) services from a regulatory measure, the principle of regulatory symmetry requires that it also exempt traditional TVOD services from the same measure. In this regard, it noted that the revenue of its video-on-demand (VOD) service, as for revenues of iTunes and other online TVOD services, stems from transactional purchases such as movie rentals and programming purchases. Eastlink argued that, accordingly, if online TVOD services like iTunes are exempt from the new *Broadcasting Fees Regulations*, fairness demands that Eastlink’s VOD service also be exempt.

Commission’s decision

143. The Commission considers that a “unique transaction service” has the characteristics of transmitting or retransmitting programs over the Internet for reception by the public by means of broadcasting receiving apparatus, to the extent that the programs are “rented” for a one-time viewing or “purchased” once to allow for access on an ongoing basis.

144. For this reason, the Commission considers that a unique transaction service falls within the definition of “broadcasting”. Moreover, given that this transmission occurs over the Internet, a service provider offering the unique transaction service falls within the definition of an “online undertaking”, rendering these services subject to the Commission’s jurisdiction.

145. As a result of the present proceeding (as well as the proceedings initiated by Broadcasting Notices of Consultation 2023-139 and 2023-140), the Commission is of the view that the overall market in Canada for unique transaction services provided by online undertakings, while divided among a number of players, can be considered significant. Although unique transaction services were initially proposed for exclusion, the Commission ultimately determined in Broadcasting Regulatory Policies 2023-329 and 2023-331, respectively, that it was not appropriate to do so.

146. Business models for broadcasting, along with the technology, have continuously evolved over the course of the history of broadcasting. A service may provide programming that is scheduled only or on demand; the service may be advertising- or subscription-based, VOD or pay-per-view (PPV), or require payment for ongoing access to the program. However, it is neither the payment method nor the moment at which the public can access (or re-access) a program that makes the

services significant from the perspective of the broadcasting policy for Canada. What makes them significant is the fact that these services all involve the transmission of programs by means of telecommunications for reception by the public by means of broadcasting receiving apparatus, and that they collectively occupy a significant place in the market.

147. The *Broadcasting Act* does not distinguish between scheduled and on-demand broadcasting, or between subscription- or transaction-based services. Indeed, the Commission is tasked with exercising its powers in a manner that, among many other things, is readily adaptable to technological change and takes into account the diversity of the services provided by broadcasting undertakings.

148. The Commission recognizes that unique transaction services are provided under circumstances that are different for online undertakings (over the Internet) and for BDUs (over managed networks), and that these undertakings differ in regard to the nature of the relationship with their customers. Further, a BDU may provide one-time transactions by using specific hardware and software provided by the BDU as part of the subscription service offered to the customer. Nevertheless, it is the similarities of the services that are important from the perspective of implementing the policy objectives set out in the *Broadcasting Act*.

149. The unique transaction services offered by BDUs and online undertakings offer a catalogue of programs available to customers: both types of undertakings exercise control over programming as they decide which content is offered, and may set the price charged to the customer for accessing the content. Moreover, services provided by online undertakings that involve “renting” the program for one-time viewing are akin, in particular, to the VOD and PPV services offered by BDUs.

150. In the Commission’s view, excluding the revenue derived from providing unique transaction services only for online undertakings merely because they transmit or retransmit the programs by means of the Internet would result in unjustifiable regulatory asymmetry between traditional and online services. Further, traditional broadcasting undertakings providing unique transaction services already generate regulatory activity for the Commission, and many online undertakings providing such services will similarly increase regulatory activity. Accordingly, the Commission considers that including the revenue derived from providing unique transaction services in the calculation of fee revenue is appropriate.

151. In light of the above, the revenue derived from providing unique transaction services is to be included in the calculation of fee revenue.

Social media services

Positions of parties

152. TikTok submitted that the Commission should ensure that revenue from social media services and social media content is clearly excluded from the calculation of revenues for the purposes of paying broadcasting fees, including the calculation of

revenue from broadcasting activities. More specifically, the intervener submitted that in order to meaningfully carry out the Government's directions to the Commission, social media services should be excluded from the application of the new *Broadcasting Fees Regulations*. For TikTok, this exclusion should be implemented by exempting social media services from the scope of the registration requirement, as TikTok submitted in response to Broadcasting Notice of Consultation 2023-139. It proposed that the determinative factor should be whether the primary function of the social media service is to provide access to social media content. TikTok also argued that revenue generated from social media content and related activities should be excluded from counting towards fee revenue, and that fee revenues should further be limited to only those that are generated in Canada.

153. Google proposed a revised exclusion criterion that would recognize undertakings whose primary function is to serve as a platform for the dissemination of user-generated content, by adding a new category, under section 2 of the proposed new *Broadcasting Fees Regulations*, that would exclude online undertakings of which the primary purpose consists of providing user uploaded content on their platform. According to Google, such an amendment would clarify that revenues from activities outside the scope of the *Broadcasting Act* will not inadvertently be included in the calculation of revenues in deriving the fees payable by a broadcasting undertaking, and would accord with the approach taken by the Government in the proposed Direction to clarify the scope of the *Broadcasting Act* as it applies to social media services.

Commission's decisions

154. The *Broadcasting Act* distinguishes between social media services, content uploaded by users of such services, and persons who upload content.[30]

155. As set out in subsection 4.1(1) of the *Broadcasting Act*, that Act does not apply in respect of a program that is uploaded to an online undertaking that provides a social media service by a user of the service. However, as set out in subsection 4.1(2), the *Broadcasting Act* does apply in respect of a program that is uploaded as described in that subsection if the program (a) is uploaded to the social media service by the provider of the service or the provider's affiliate, or by the agent or mandatary of either of them; or (b) is prescribed by regulations made under section 4.2 of the *Broadcasting Act*. To date, the Commission has not made any such regulations.

156. Specifically, under subsection 2(2.1), a person who uses a social media service to upload programs and who is not the provider of the service or the provider's affiliate is deemed not to carry on a broadcasting undertaking for the purposes of the *Broadcasting Act*.

[30] The final Direction also defines "social media creator", a term not included in the *Broadcasting Act*.

157. Further, as set out in subsection 4.1(3) of the *Broadcasting Act*, that Act does not apply in respect of online undertakings whose broadcasting consists only of programs in respect of which the *Broadcasting Act* does not apply under this section.

158. In the Commission's view, it is essential to distinguish between online undertakings that provide social media services and the users that upload content to these services. While the undertakings providing the social media services would be subject to the proposed new *Broadcasting Fees Regulations*, the users of these services would not.[31]

159. If a user earns more than $25 million annually from content uploaded to social media services, such a user would not be required to pay broadcasting fees. Nevertheless, the revenues of social media services derived from their own broadcasting activities, which could include, for example, advertising[32] or subscription revenues, should form part of those services' annual revenues as these activities would not be excluded from regulation.

160. Accordingly, the Commission finds the explicit exclusion proposed by Google to be unnecessary.

161. In light of the above, the Commission confirms that the revenues of online undertakings themselves that provide social media services, that are derived from their own broadcasting activities, such as advertising revenues or subscription revenues, are to be included in the calculation of revenue for the purposes of the *Broadcasting Fees Regulations*.

Advertising-based video-on-demand services

Positions of parties

162. Roku submitted that, without knowing the extent or scope of the Commission's "regulatory activity" with respect to online undertakings (which it noted are matters that remain under review in other proceedings), the new *Broadcasting Fees Regulations* should not be applied to online undertakings on the same basis as the current Licence Fee Regulations have historically been applied to licensed undertakings. It submitted that it would be appropriate for the Commission to exempt from the new *Broadcasting Fees Regulations* those online services that are exclusively supported by advertising, and which are available to consumers with no subscription charge.

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[31] See subsection 2(2.1) of the *Broadcasting Act*, which is cited above.

[32] This means that any advertising uploaded by the social media service that falls into the definition of "program" and that appears, for example, on a user feed in social media services, would be included. It also includes advertising added by the social media service to another program uploaded by a user, such as advertising added at the beginning or in the middle of a program uploaded by a user.

163. Roku further submitted that, in the alternative, free ad-supported services should not be subject to the same burden based on fee revenues as subscription services or licensed services. In its view, this measure would ensure that services that offer free, consumer-friendly business models are able to invest in the Canadian market and develop a compelling and sustainable offering for years to come, and are not required to overpay their share of the Commission's regulatory costs.

Commission's decision

164. In regard to whether it would be appropriate to exclude from the fee calculation revenues of online undertakings that are exclusively supported by advertising and are available to consumers with no subscription charge, the Commission notes that traditional media, such as radio stations and television stations, which are also available to consumers with no subscription charge, are also supported by advertising.

165. The Commission considers that it would be inequitable to exempt certain online undertakings on this basis when licensed undertakings (such as traditional television and radio) are similarly supported by advertising and are also available to consumers with no subscription charge.

166. In light of the above, the gross revenues of online undertakings supported by advertising, which are available to consumers with no subscription charge, are to be included in the fee revenue calculation for the purposes of the *Broadcasting Fees Regulations*.

Maintaining certain exclusions regarding the calculation of broadcasting fees

Exclusions set out in the Licence Fee Regulations

167. The IBG submitted that existing exclusions in the Licence Fee Regulations should be maintained (e.g., Indigenous broadcasters, community broadcasters, and provincial/territorial educational broadcasters).

168. The Commission notes that pursuant to section 2 of the proposed new *Broadcasting Fees Regulations*, the exclusions for certain types of licensed undertakings under the Licence Fee Regulations are maintained.

Non-Canadian services authorized for distribution in Canada

169. The MPAC requested that the Commission confirm that the revenues generated by a non-Canadian service authorized for distribution in Canada are excluded from the calculation of broadcasting fees.

170. Non-Canadian services authorized for distribution in Canada are not licensed under the *Broadcasting Act*, and without such authorization cannot be distributed by BDUs in Canada. While the revenues derived from the activities of these services may form part of the revenues of a BDU, revenues of non-Canadian services authorized for distribution in Canada are not reported to the Commission and are not included when calculating any broadcasting fees to be paid.

171. Accordingly, the Commission confirms that the revenues generated by a non-Canadian service authorized for distribution in Canada are excluded from the calculation of broadcasting fees. This is consistent with the existing approach, and does not require a change to the wording of the *Broadcasting Fees Regulations*. If non-Canadian services also operate online undertakings with programming directly accessible to Canadian consumers, they are operating in whole or in part in Canada and might be required to pay broadcasting fees, depending on their situation and revenues.

The provision against the double imposition of the same revenue

172. The Licence Fee Regulations contain a provision prohibiting the double imposition of the same revenue. Specifically, the definition of "fee revenue" specifies that "[t]his definition does not include any amount received by the licensee from another licensee, other than the amounts received from the [Canadian Broadcasting] Corporation for the sale of air time." The reason is that revenue should be assessed as part of the gross revenues of the broadcasting undertaking that first received the revenue. Otherwise, such revenue would be assessed a second time if it formed part of the revenues of another broadcasting undertaking.

173. In the Notice, the Commission indicated that the proposed new *Broadcasting Fees Regulations* would maintain this provision, save for the reference to "another licensee", which was broadened to refer to "another broadcasting undertaking".

Positions of parties

174. Certain parties considered the proposed approach for calculating fee revenue to be appropriate, and that amounts received by a broadcasting undertaking from another broadcasting undertaking should continue to be excluded from the calculation of fee revenues for the undertaking that receives such amounts. In this regard, the IBG stated that the proposed approach would ensure that revenue generated in the activity of broadcasting is captured only once and generally at the point at which programming is delivered to and received by the public. It added that a different approach would disrupt long-standing practices that are established in commercial dealings in the industry.

175. According to Roku, the concept of avoiding double counting is appropriate and helpful. It noted, however, that free, ad-supported services can offer a wide range of compelling content by licensing much of that content on a shared revenue basis. Roku considered that ad-supported services would be forced to "count" gross revenues in their fee revenues even if they immediately distribute that revenue to another undertaking, penalizing first recipients by inflating their revenues while reducing the revenues of content licensor undertakings. Similarly, Tubi submitted that a large portion of AVOD service revenues is immediately passed on to content rights owners under a revenue-share model. In its view, only revenues retained by the AVOD service should count as "fee revenue", whereas such "pass-through" amounts should not.

176. While TELUS agreed with the principle against the double counting of contributions, it noted that the provision does not consider the different business models of broadcasting and distribution that are being included in the new broadcasting fees regime. TELUS proposed that when a distributor, whether a BDU or the online undertaking that aggregates third-party services (i.e., a virtual BDU), offers third-party online streaming services that are otherwise available direct-to-consumer, the revenue assessment associated with the sale of these services should be based on margin alone. In its view, a distributor cannot be the sole source of revenues for assessment when that distributor resells a streaming service.

177. Amazon proposed amending the definition of "fee revenue" to permit the deduction of revenues collected on a "pass-through" basis. In its view, there are more business models and arrangements in the online context that call into question the adequacy of the rule against double counting revenues and the fairness of "taxing" all revenues, including revenues collected on a "pass-through" basis, at the retail level. Amazon considered that the rule against double counting would do nothing to alleviate arrangements such as app store fees, revenue-share arrangements and copyright royalties, which it noted are prevalent in the online context. It further considered that not excluding revenues of music or transaction-based services, or of online content storefronts, from the calculation of broadcasting fees would result in such services being unfairly required to count amounts collected on an operational "pass-through" basis.

178. In Spotify's view, the Commission should ensure that certain non-representative kinds of revenue are excluded from the fee calculation. It stated that royalty payments should be deducted when calculating the fee revenues. Spotify noted that music streaming services pay out approximately 70% of their revenues in licensing fees and that the commercial reality of this business necessitates high royalty payments. It further noted that rightsholders negotiate higher royalty payments with music streaming services relative to other types of music distribution services because the streaming model provides users nearly unlimited access to their music. It argued that including the sums automatically paid out to rightsholders in the fee revenue calculation creates a misleading picture of the size and scale of the music streaming business relative to other types of broadcasting undertakings.

179. According to Eastlink, the prohibition on the double imposition of the same revenue within the definition of "fee revenue" currently allows programming services to exclude the affiliate fees they receive from licensed BDUs when calculating their fee revenue. It argued that this artificially lowers programming undertakings' revenues and, consequently, their share of the broadcasting fees (simultaneously raising BDUs' and online undertakings' shares). Eastlink noted that affiliate fees received from BDUs are included in programmers' revenues when determining their Canadian programming contributions.

180. Eastlink submitted that the application of the exclusion set out in the double imposition provision to affiliate fees is flawed insofar as (a) it inappropriately allows programmers to exclude wholesale affiliate fees that are not "the same

revenue" as the retail subscriber fees received by BDUs, and (b) programmers (not BDUs) are "the first broadcasting undertaking recipient of the revenue." It considered that the Commission should either eliminate the exclusion set out in the double imposition provision or clarify that the exclusion does not apply to the affiliate fees BDUs pay to discretionary services and other programming undertakings (e.g., on-demand undertakings). As an alternative approach, Eastlink proposed that programmers be required to include affiliate fees in their fee revenue, while BDUs would include their net subscriber revenue (after deducting the affiliate fees).

181. Finally, Eastlink submitted that this is an opportune time to address this inequity. It argued that inequities have been exacerbated since the Commission made the Licence Fee Regulations in 1997 given that the number of discretionary services has increased exponentially and that they are not bearing their fair share of the increased regulatory costs they generate.

Commission's decision

182. The Commission acknowledges that different services have different business models and different costs structures. However, excluding from the calculation of fee revenue "pass-through" revenue (such as amounts paid out to rightsholders according to revenue sharing agreements and royalty payments made by music streaming services to rightsholders) would prove inequitable given that such exclusions would effectively allow deductions from revenues for fee purposes that are not allowed for traditional media.

183. Regarding the arguments made by Eastlink according to which the exclusion of affiliate fees is flawed and inequitable, the Commission considers that the provision against double imposition is based on sound principles, which were expressed by the Federal Court in *Dartmouth v. Canada*.[33] That case involved a dispute between a licensed broadcasting receiving undertaking (Dartmouth Cable TV Limited, hereafter "Dartmouth"; the equivalent of a BDU in today's regime) and a licensed programming undertaking (First Choice Canadian Communications Corporation, hereafter "First Choice"), both of which had entered into an affiliation agreement. The dispute involved, among other things, the interpretation of a provision in the Licence Fee Regulations that is essentially the same as the provision against double imposition in the proposed new *Broadcasting Fees Regulations*.

184. An issue was whether the income received by Dartmouth from its subscribers, on behalf of First Choice, had to be included as part of the calculation of the "fee revenue" derived by Dartmouth. The Court ruled that all the revenue received by Dartmouth from its subscribers in respect of the distribution of First Choice is "fee revenue", and that Dartmouth had the responsibility for paying the licence fee.

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[33] *Dartmouth Cable TV Ltd. v. Canada (Attorney General)*, 1985 CarswellNat 822, 34 A.C.W.S. (2d) 161.

185. The Federal Court noted that regardless of the type of programming distributed, the subscriber pays for a delivered product purchased at retail from Dartmouth. In the Federal Court's view:

> The subscriber has no contractual link with the pay television network, whose role is that of a wholesaler or manufacturer. All the subscriber is interested in is the final price charged him by the retailer in relation to the quality of the product. It is this activity – the distribution and sale of signals by cable to subscribers – which is the "licensed activity" of the broadcasting receiving undertaking such as Dartmouth and it is in respect of that distribution and sale that the subscriber pays his money to the broadcasting receiving undertaking. Such payments collectively form its "total revenue" from the activity of distribution and sale of signals by cable. First Choice is not licensed by the [Commission] to distribute its signals directly to the public and therefore insofar as licence fees for such distribution are concerned, they cannot be levied on it, as distribution to the public forms no part of its "licensed activity".

186. In the Court's view, the Licence Fee Regulations contemplated that the first recipient of the fees from subscribers is liable for payment of the licence fee. In the Commission's view, this principle remains valid in the context of the provision against double imposition in the proposed new *Broadcasting Fees Regulations*, regardless of how and from whom the programming distributed by the first recipient of subscription or advertising revenues is acquired.

187. Even in cases where a subscriber does not pay a fee to the distributor of programs, such as with AVOD services that have no paid subscriptions, the subscriber that views the programs (such as those within the "free" AVOD service) is still providing something valuable with its viewership. In that case, all that viewers are interested in is viewing a program, and they "pay" for it with the time spent accessing the AVOD service. In turn, the AVOD service is free to contract with a third person, for example, in a revenue-sharing agreement with a third-party rightsholder, to derive revenue from its viewership.

188. The Commission also acknowledges that a significant percentage of a broadcasting undertaking's revenues may be comprised of "pass-through" revenues that end up being paid to third parties that may or may not be subject to broadcasting fees regulations. However, these payments to third parties may be accounted for as "expenses". The broadcasting ownership group (which includes a single undertaking) exemption level of $25 million in the *Broadcasting Fees Regulations* may serve to reduce the impact of the Commission's present determination. Further, the large undertakings that will be subject to these regulations are required to follow accepted accounting principles in order to tabulate what are properly revenues and expenses.

189. Accordingly, the Commission finds that it would not be appropriate to delete or amend the provision against double imposition in the definition of "fee revenue" set out in the proposed new *Broadcasting Fees Regulations*, and has adopted the provision in the final *Broadcasting Fees Regulations*.

Fee revenue and the anti-avoidance provision

190. The Licence Fee Regulations contain an anti-avoidance provision to deal with a situation where a licensee has not filed a licence fee return covering 12 months of the most recently completed return year. It covers situations such as ensuring that fees can be imposed on newly licensed broadcasting undertakings that do not have financial information covering 12 months of broadcasting revenues. It also captures situations where a licensee neglects its regulatory obligation to file a fee return.

191. The proposed new *Broadcasting Fees Regulations* continue to include an anti-avoidance provision, applicable to all broadcasting undertakings, including online undertakings. If an online undertaking has not filed a fee return, the Commission would use available information, including market trends, the undertaking's business plan and previous financial performance, in order to determine the undertaking's gross annual revenues.

Positions of parties

192. Amazon submitted that to reduce the potential for arbitrariness, the use of estimates where an undertaking has not filed a fee return covering the most recently completed return year should be transparent to the undertaking, and hence, subject to a confidential review process. According to Amazon, this could be achieved by amending section 4 of the proposed new *Broadcasting Fees Regulations* to split that section into subsections, and by replacing section 5 with provisions describing a confidential fee revenue estimate review process. Amazon proposed revised wording for the changes to these provisions.

193. The FRPC submitted that the absence of any information about the current or historical incidence of "anti-avoidance" behaviour makes it difficult to assess either the necessity or the effectiveness of the anti-avoidance provisions in the proposed new *Broadcasting Fees Regulations*. It also expressed concern over the fairness of the Commission using "the trends of the market, the undertaking's business plan and previous financial performance, in order to determine its gross annual revenues."

Commission's decision

194. The issue to be addressed is whether a provision needs to be added to ensure that parties are consulted when applying the anti-avoidance provision.

195. As noted earlier, fees collected by the Commission finance its operations in regulating and supervising the broadcasting industry. In the case of broadcasting fees, it is important to send invoices at or near the beginning of each fiscal year

(i.e., 1 April), to ensure timely payments for its operations. The ability to accurately apply the fee formula ((A ÷ B) x C) depends on full financial data from feepayers being available through the fee return process.

196. In the absence of full financial data, the anti-avoidance provision allows the Commission to use the best available information it has to prepare and send invoices in a timely manner. For example, if a broadcasting undertaking were not to file a fee return, the Commission could estimate Canadian revenues, using information at hand, including information previously filed or public information.

197. Historically, the Commission has not had to make use of the anti-avoidance provision. In fact, the Commission (or its staff) routinely and informally follows up confidentially with feepayers, to ensure that it receives timely and accurate information before making the fee formula calculations.

198. Given the Commission's informal practice, which has proven to be highly efficient and successful, it considers that creating a formal process in the regulations for the confidential review of the calculation of an invoice would either slow down or defeat the purpose of expediting the creation and delivery of invoices. In the rare case where the Commission may need to resort to the anti-avoidance provision, and the broadcasting ownership group wishes to contest or review the invoice that has been issued, that group will have the opportunity to do so in a confidential manner after having received the invoice.

199. If there are any errors or miscalculations of fee invoices that feepayers wish to have corrected, the onus will be on them to show any such errors or miscalculations. In turn, any validated errors could be corrected by charging or crediting the balance to the broadcasting ownership group in the following year's invoice. As provided for in the *Broadcasting Fees Regulations*, invoice adjustments would not, in any case, result in a reimbursement on the part of the Commission.

200. Accordingly, the Commission finds that it is not necessary to make the amendments to the proposed new *Broadcasting Fees Regulations* to provide for a formal process of review in the event that the Commission must resort to the anti-avoidance provision to create and issue a fee invoice.

Confidentiality

Positions of parties

201. The MPAC proposed that the new *Broadcasting Fees Regulations* expressly provide that all information collected will be presumptively treated as confidential by the Commission, consistent with the Commission's current practice and determinations regarding the Digital Media Survey.

202. Google noted that the only reference to the issue of confidentiality in the Notice is in regard to the Licence Fee Regulations, which require feepayers to file annual financial returns on a confidential basis. It submitted that this express confidential

treatment must be provided for in the context of the new *Broadcasting Fees Regulations*. Google further submitted that the Commission should make clear, as it has recently done elsewhere,[34] that the determinations made in Broadcasting Regulatory Policy 2022-47 remain in effect, thereby ensuring that the information will not be placed on the public file. It welcomed the assurance provided by the Commission in that regulatory policy, in approving the launch of the Digital Media Survey, that it would "grant full confidentiality, in advance" against any disclosure of individual service-level data collected in connection with the information gathered as part of that survey.

Commission's decision

203. The Commission acknowledges that feepayers expect the Commission to preserve the confidentiality of information submitted as part of their fee returns, to protect their financial situation and even their identity as feepayers. It is reasonable that parties seek this assurance, given that this information is fundamental to the preservation of their respective competitive positions.

204. Fee return forms, which include assurances of confidential treatment of completed information contained in those forms, are sent to feepayers. The Commission will maintain this level of confidentiality when implementing the new *Broadcasting Fees Regulations*.

205. This practice is also consistent with the Commission's treatment of similar fee-related information. For instance, the transitional condition of service set out in Broadcasting Order 2023-332 has allowed the Commission to obtain fee returns from certain online undertakings while the new *Broadcasting Fees Regulations* are being implemented.[35] Further, in Broadcasting Regulatory Policy 2023-331, the Commission explained its intentions in relation to the upcoming 2024-2025 fiscal year and added that, consistent with its previous dealings with fee returns, the fee return will be treated as a confidential filing, and that it will continue to treat such information as confidential going forward.[36]

206. In light of the above, the Commission finds that although a formal confidentiality process within the *Broadcasting Fees Regulations* is not necessary, it remains appropriate to continue treating fee returns as confidential filings. Accordingly, the Commission will continue to treat such information as confidential going forward.

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[34] In this regard, Google cited paragraph 29 of Broadcasting Notice of Consultation 2023-140.

[35] As specified in condition of service 4.(c) set out in that broadcasting order (see Appendix 1 to Broadcasting Regulatory Policy 2023-331), the condition of service relating to "Fee Return" will be of no force or effect 30 days after any amendments to the *Broadcasting Licence Fee Regulations, 1997*, or new broadcasting fee regulations, come into effect. Accordingly, the condition of service relating to "Fee Return" will expire 1 May 2024.

[36] See paragraphs 116 through 121, and paragraph 126, of Broadcasting Regulatory Policy 2023-331.

Timelines

Positions of parties

207. The MPAC agreed with the Commission's proposal set out in the Notice and in Broadcasting Notice of Consultation 2023-140 to require online undertakings to file financial information for use for fee purposes by the same 30 November filing date that applies for fee returns for current feepayers, such that the required financial information is to be filed at the same time as the Digital Media Survey. Apple submitted that the new *Broadcasting Fees Regulations* should consider the collection of information provided by online undertakings through the Digital Media Survey for the purposes of charging the applicable regulatory fees. The DiMA also proposed considering the Digital Media Survey for the purposes of filing the fee returns if that survey is continued.

208. Amazon submitted that the timeframe to pay invoices for broadcasting fees once received by a broadcasting undertaking should be extended to 60 days to provide broadcasting undertakings a reasonable opportunity to review any invoices received, given the scale and structure of online undertakings.

209. In addition, Amazon proposed amendments to the proposed new *Broadcasting Fees Regulations* that would add a transition period to accommodate the set-up of tracking, accounting and reporting systems. Specifically, it submitted that the due date for the fee return for the 2022-2023 broadcast year should be extended from 30 November 2023 to six months following the issuance of the last of the decisions stemming from the Notice and from Broadcasting Notices of Consultation 2023-139 and 2023-140. The DiMA submitted that even if the Commission's decisions arising from the above-noted notices of consultation will soon provide reasonable guidance, online undertakings will need more time than is contemplated to undertake the internal review, accounting, and related operational work to be able to provide a meaningful financial report by 30 November 2023. It proposed establishing a filing deadline for initial fee returns that is at least 90 days from the date of the decisions arising from the Notice and from Broadcasting Notice of Consultation 2023-140, whichever is issued later.

210. Similarly, Roku urged the Commission to defer on finalizing the new *Broadcasting Fees Regulations* and the associated exemption levels until it renders a decision on the exemptions to its proposed registration requirements (Broadcasting Notice of Consultation 2023-139), conditions of service (Broadcasting Notice of Consultation 2023-140), and baseline contributions (Broadcasting Notice of Consultation 2023-138).

211. Sirius XM emphasized the importance of the Commission meeting the 2024-2025 fiscal year mandate to include currently exempted online undertakings under the new *Broadcasting Fees Regulations*, and the urgency to provide relief to traditional licensed broadcasting undertakings. Similarly, the CAB urged the Commission to implement the new fees regime as quickly as possible, and certainly in time for the

fiscal year starting 1 April 2024. The Conseil provincial du secteur des communications du Syndicat canadien de la fonction publique noted that it has been calling for the inclusion of online undertakings in Canadian regulation for years, and expressed support for the proposed coming into force of the proposed new *Broadcasting Fees Regulations* on 1 April 2024. It also welcomed the establishment of a transitional condition of service that would allow the Commission to obtain fee returns from all broadcasting undertakings operating in Canada before 30 November 2023, so that their data can be used in the calculation of fee invoices to be sent in 2024.

Commission's decision

212. As stated at paragraph 76 of Broadcasting Regulatory Policy 2023-331, the determinations set out in Broadcasting Regulatory Policy 2022-47 remain in effect, and undertakings that meet the thresholds set out in Appendix 1 to that regulatory policy will continue to be required to complete the Digital Media Survey. However, the information collected through that survey serves different purposes from those relating to calculating broadcasting fees, and the reporting requirements and exemption levels are different. Accordingly, the Commission will require the filing of the Digital Media Survey and of the fee return information separately, while maintaining the 30 November deadline each year for both.

213. Fees finance the Commission's broadcasting regulatory operations, and the Commission must receive fee payments early in the fiscal year—a timeframe with which the broadcasting industry has long been familiar—to responsibly fulfill its financial obligations. Maintaining a 30 November due date for broadcasting fees is critical, as the Commission and its staff need to ensure complete and accurate information from all feepayers, complete the fee formula calculation, and issue invoices.

214. In regard to the timeframe to review and pay invoices, the Commission finds that the proposed deadline of 30 days to pay invoices is reasonable and a well-established practice under the Licence Fee Regulations for current feepayers, some of which have very large organizational structures. Accordingly, the Commission has retained the same deadline in the new *Broadcasting Fees Regulations*.

215. In regard to the requests for a transition period, to allow more time to file fee returns, the Commission notes that in Broadcasting Regulatory Policy 2023-331, it determined that it would be appropriate to impose a condition of service on online undertakings, as a transitional measure, to file a fee return on or before 30 November each year. In that regulatory policy, the Commission also stated that it may accommodate requests for alternative reporting periods and may allow respondents to file data based on the closest quarter of their respective reporting years. The specifics of this condition of service and its application are set out in Broadcasting Order 2023-332.

216. Broadcasting Order 2023-332 is the order contemplated by the transitional provision of subsection 14(2) of the proposed *Broadcasting Fees Regulations* set out in the appendix to the Notice. The Commission has included a reference to Broadcasting Order 2023-332 in subsection 14(2) of the final *Broadcasting Fees Regulations*.

217. It is of critical importance that the Commission implement the new *Broadcasting Fees Regulations* to meet the 2024-2025 fiscal year. This deadline is in keeping with section 11 of the *Broadcasting Act*, which provides for the inclusion of online undertakings in the making of fee regulations and is reflective of the Commission's current and anticipated regulatory activities. For example, the Commission has already rendered decisions in response to Broadcasting Notices of Consultation 2023-139 and 2023-140, and intends to launch other proceedings to respond to amendments to the *Broadcasting Act*.

218. Given that the new *Broadcasting Fees Regulations* finance the Commission's broadcasting regulatory operations and are essential to advancing the implementation of the amendments to the *Broadcasting Act* – a priority that several interveners noted –, the Commission determines that it is appropriate to finalize the 30-day deadline set out at section 6 of the new *Broadcasting Fees Regulations*.

Various potential amendments to the proposed new *Broadcasting Fees Regulations*

The Commission's duty to calculate annual broadcasting fees

219. The DiMA noted that section 8 of the proposed new *Broadcasting Fees Regulations* states that the Commission will calculate the annual fees payable. The intervener proposed, for reasons of clarity and to connect this authority to the fee returns provided by undertakings and the prescribed calculation formula, amending section 8 so that it references those factors expressly.

220. Amazon proposed that, to more clearly link the Commission's duty to calculate the annual broadcasting fees payable with the fee returns submitted under section 4[37] and the formulas set out at section 10 of the proposed new *Broadcasting Fees Regulations*, section 8 should be deleted and subsections 10(1) and 10(2) should be amended so as to expressly refer to the fee returns required by amended fee return sections that it proposed.

221. In the Commission's view, it is sufficiently clear in sections 8 and 10 of the proposed new *Broadcasting Fees Regulations* that the Commission is responsible for calculating the annual broadcasting fees, and that the calculations must be made based on the fee revenues disclosed in the fee returns, which in turn refer to

[37] Section 4 of the proposed new *Broadcasting Fees Regulations* states the following: "On or before November 30 in each year, every broadcasting ownership group whose fee revenue for the most recent return year exceeds the exemption level must file with the Commission a fee return on the form provided by the Commission."

revenues of the broadcasting year that began on 1 September of the preceding calendar year. Accordingly, the Commission finds that the proposed amendments are not necessary.

Issues relating to "fee revenue"

Incorporating a definition of "annual revenues" into the definition of "fee revenue"

222. The MPAC submitted that the definition of "fee revenue" in the proposed new *Broadcasting Fees Regulations* should be revised to incorporate the definition of "annual revenues" proposed by the Commission for the purpose of determining exemptions from registration requirements, conditions of service, and contribution requirements. It argued that doing so would avoid inconsistencies in the Commission's use of the terms "gross revenue", "annual revenue" and "gross annual revenue".

223. The Commission considers, however, that it would be preferable to keep separate the definition of "fee revenue" in the new *Broadcasting Fees Regulations* and the definition of "annual revenue" used or proposed in other proceedings, which have different purposes. As stated in the Notice, the intent is that the new *Broadcasting Fees Regulations* substantially replicate what is in the Licence Fee Regulations, in order not to markedly affect existing feepaying broadcasting undertakings. Moreover, in the context of the new *Broadcasting Fees Regulations*, the terms "gross revenue", "annual revenue" and "gross annual revenue" have had long usage under the Licence Fee Regulations, to which current feepayers have become accustomed. These terms are used in their ordinary sense and do not need to be defined. Accordingly, the Commission finds that it would not be appropriate to adopt the MPAC's proposed amendments.

Alternative reporting periods

224. To ensure that flexibility is accorded in respect of the proposed new *Broadcasting Fees Regulations*, Google proposed an amendment to the definition of "return year" to formalize that the Commission would accommodate requests for alternative reporting periods for the return year and permit operators to file data based on the closest quarter of their respective reporting years.

225. The MPAC proposed amending the definition of "annual revenues" to allow flexibility to file data based on online undertakings' closest quarter of their respective reporting years. Similarly, Apple considered that the new *Broadcasting Fees Regulations* should permit all broadcasting undertakings to report their revenues on a flexible basis, incorporating their relevant fiscal periods.

226. In regard to Google's proposal, the Commission notes that the proposed new *Broadcasting Fees Regulations* explain in sections 4 and 5 what a fee return is and when it must be filed. Part of this explanation sets out that the fee return "must be completed with respect to the return year preceding the calendar year in which the return is to be filed" (where "return year" means the one-year period beginning 1

September in any year). The purpose of these provisions is to treat feepayers equitably, to ensure that the revenues for the same return year will be used in the calculations of fees. Some feepayers could be prejudiced if different return years were used for different feepayers in the calculation of broadcasting fees. Some flexibility may be granted in exceptional cases, but formalizing and as such normalizing such flexibility could hinder the Commission's objective to treat feepayers equitably. Accordingly, the Commission considers that it would not be appropriate to adopt Google's proposed amendments to the definition of "return year".

227. The Commission further notes that the Digital Media Survey granted some flexibility to permit digital media broadcasting undertakings (generally known now as online undertakings) to file data based on the closest quarter of their respective reporting years. In the present case, the Commission notes that, on an exceptional basis, it may accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

Definitions limited to activities within the scope of the Broadcasting Act

228. Roku submitted that definitions in the new *Broadcasting Fees Regulations* must be limited to activities that are within the scope of the *Broadcasting Act*. To reflect this, Roku proposed that the Commission revise the definition of "fee revenue" to indicate that it refers to the broadcasting activity "in Canada" of broadcasting undertakings that form part of a broadcasting ownership group.

229. In the Commission's view, the proposed amendment, although not strictly necessary, would clarify the Commission's regulatory framework. Accordingly, the Commission has amended the definition of "fee revenue" that was proposed in the Notice in order to specify that the broadcasting activity referred to in that definition is to be "in Canada".

Revenue received in respect of transmitters

230. Roku requested that the Commission clarify the meaning of part (a) of the definition of "fee revenue", which refers to "any revenue received in respect of all transmitters forming part of the undertaking." In its view, it is not clear what this means in the context of an online undertaking. Roku added that if the definition is unlikely to apply to online undertakings, the Commission should confirm this in its decision.

231. In regard to the meaning of the term "transmitter" in the definition of "fee revenue", the Commission notes that the use of the term is essentially the same in the proposed new *Broadcasting Fees Regulations* and in the Licence Fee Regulations. In the context of the new *Broadcasting Fees Regulations*, the Commission has historically interpreted "transmitters" as those devices intended for or capable of being used for the transmission of programs, by radio waves, by broadcasting undertakings other than online undertakings.

232. Examples of "transmitters" include those radio or television transmitters that form an integral part of a broadcasting undertaking, where the broadcasting undertaking consists of more than one transmitter. In traditional broadcasting, where a licensed undertaking consists of several transmitters, some revenues derived from separate programming or commercial messages have been associated with broadcasting from such transmitters. The Commission acknowledges that, in the context of the definition of "fee revenue" in the proposed new *Broadcasting Fees Regulations*, the meaning of "transmitter" generally does not include a transmitter that generates revenue that is separate from the online undertaking.

233. As such, while the Commission has clarified the meaning of the term "transmitter" in the preceding paragraphs, it finds that it is not necessary to amend the proposed new *Broadcasting Fees Regulations* in this regard. Instead, any specific situation may have to be examined by the Commission.

The addition of a definition of "broadcasting activity"

234. In its intervention, Google expressed agreement with the statement set out in the Notice that revenues from persons who upload user-generated content that are excluded from the scope of the *Broadcasting Act* pursuant to subsection 2(2.1) would "not be included within fee revenues."[38] It submitted, however, that a more express exclusion should be incorporated into the new *Broadcasting Fees Regulations* to ensure that revenues outside the scope of the *Broadcasting Act* are not included in the calculation of fee revenues.

235. In Google's view, this amendment would provide further certainty that the revenue from any activity that does not comprise the carrying on of a broadcasting undertaking would not be counted as part of fee revenues.

236. As noted above, a user of social media would not be required to pay fees as it does not carry on a broadcasting undertaking for the purpose of the *Broadcasting Act*, unless that user is also the provider of the social media service or its affiliate, or the agent or mandatary of either of them. In light of this, the Commission finds the explicit exclusion proposed by Google to be unnecessary.

The definition of "broadcasting ownership group"

237. "Broadcasting ownership group" means "a group of all operators that are affiliates of one another or, in the case of an operator that is not an affiliate of any other operator, that operator." The FRPC submitted that the term "broadcasting ownership group" is somewhat confusing because it also includes a single undertaking that does not form part of the group.

238. In the Commission's view, the term "broadcasting ownership group" can include either single or multiple broadcasting undertakings, depending on the circumstances. Thus, a single undertaking with substantial fee revenues falls within

[38] See footnote 15 to paragraph 26 of the Notice.

the ambit of the *Broadcasting Fees Regulations*. The use of "broadcasting ownership group" responds to the rapidly changing landscape of the broadcasting system in Canada, where such groups (and even large single undertakings) play a significant role and where several traditional undertakings are moving certain operations online (or supplementing existing operations with online versions). With this clarification, the Commission finds it appropriate to retain the definition of "broadcasting ownership group" as initially proposed in the Notice.

A yearly inflation adjustment for calculating exemption levels

239. The OAB submitted that, over time, due to the impact of inflation, the threshold for broadcasting fees will effectively be reduced, shifting the burden back towards smaller entities, contrary to the objectives of the proposed new *Broadcasting Fees Regulations*. It proposed that each year, the Commission publish an inflation adjustment for calculating exemption levels. For the OAB, such an approach would be similar to the Commission's long-standing practice of annually announcing an increase to Part II licence fees, based on inflation.

240. The Commission acknowledges that over time, due to the impact of inflation, the threshold for broadcasting fees will effectively be reduced. However, the OAB did not provide any detailed analysis to show that such a shift would primarily burden smaller entities. While the Consumer Price Index may change over time, the Commission considers that such changes would impact, in a similar manner, all broadcasting undertakings to which the new *Broadcasting Fees Regulations* will apply. Accordingly, the Commission finds that the publication of a yearly inflation adjustment for calculating exemption levels is not necessary.

Consistency between the English- and French-language versions of the proposed new *Broadcasting Fees Regulations*

241. Finally, the Commission notes that there were repeated words, resulting in a discrepancy between the English- and French-language versions of the proposed new *Broadcasting Fees Regulations*, set out in the Notice, in the "B" element in the fee formulas set out at subsections 10(1) and (2).

242. In the final *Broadcasting Fees Regulations*, the Commission has corrected the English-language version of the "B" element of the formulas.

Transitional provisions

243. As noted in paragraph 216, the Commission has incorporated Broadcasting Order 2023-332 by reference into subsection 14(2) of the final *Broadcasting Fees Regulations*. For the 2024-2025 fiscal year, subsection 14(1) provides for the consolidation of fee return information for broadcasting undertakings into fee revenue information for their broadcasting ownership group.

244. Section 15 of the proposed new *Broadcasting Fees Regulations* provides that both the adjustment amount for the 2024-2025 and 2025-2026 fiscal years and the

estimated and total actual regulatory costs of the Commission are to be calculated according to the relevant provisions of the Licence Fee Regulations.

245. The transitional provision states that the Commission is to apply the Licence Fee Regulations for two transition years. Since the Licence Fee Regulations only apply to licensees and not to online undertakings, for a two-year period, the adjustment amount will only affect licensed feepayers, and not online undertakings. Online undertakings are included in the calculation of fees for the 2024-2025 fiscal year, but not in the adjustment amount; a separate proportional calculation must be made affecting licensees only. After the two-year period, online undertakings will also form part of the annual adjustment calculations.

246. Both the *Broadcasting Fees Regulations*, for the transition period, and the Licence Fee Regulations make it clear that the fee returns from the most recently completed return year are to be used for fee adjustment purposes. Thus, return year information collected by 30 November 2023 – i.e., return year of 1 September 2022 to 31 August 2023 – is to be used for the adjustment amount calculation for the upcoming 2024-2025 fiscal year. The exemption levels for licensees for adjustment purposes during the transition period are also to be calculated according to their exemption levels for the same return year. For the first transition year, this again refers to the 1 September 2022 – 31 August 2023 return year. The exemption levels for that period are those in effect under the *Broadcasting Fees Regulations*.

Procedural issues

Did the Commission predetermine the outcome of the proceeding?

Positions of parties

247. According to Corus and Roku, the Commission's proposal seems to presuppose certain outcomes from or prejudge matters under consideration (such as those relating to exemption thresholds) in parallel broadcasting regulatory policy proceedings (those initiated by Broadcasting Notices of Consultation 2023-138, 2023-139 and 2023-140) following the coming into force of the *Online Streaming Act*. In Roku's view, the Commission was effectively using the present proceeding to predetermine the threshold in Broadcasting Notice of Consultation 2023-139, and that by tying the exemption thresholds proposed in the Notice to those proposed in Broadcasting Notice of Consultation 2023-139 (and vice versa), was retroactively expanding the scope of the proceeding initiated by the latter.

248. PIAC-OpenMedia expressed concern that if the Commission were already transposing key elements from ongoing related processes onto the proposed *Broadcasting Fees Regulations* (and with no apparent reply stage), it had already settled on the implementation of the *Online Streaming Act*.

Commission's decision

249. The common law rules establish that a breach of procedural fairness happens when, as stated by the Supreme Court of Canada, "there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile."[39] In other words, it is not improper for the Commission to express its preliminary views on an issue before making a decision, to seek comments from potential stakeholders about the outcome of a proposed course of action.

250. In the present case, the Commission expressed its preliminary views and proposed regulations in the Notice, for purposes of public consultation, in accordance with the requirement set out in subsection 11(5) of the *Broadcasting Act*.[40]

251. In regard to the claim made by certain interveners that, by tying the exemption thresholds proposed in the Notice to those proposed in Broadcasting Notices of Consultation 2023-138, 2023-139 and 2023-140, the Commission was prejudging matters already under consideration, the Commission notes that these constitute separate proceedings, and that decisions taken or to be taken for each are based on the public record of each proceeding.

252. The Commission considers that it has properly considered the comments on the record of each proceeding before making its decisions. Further, the fact that the Commission made decisions in the present proceeding that are different from its preliminary views set out in the Notice shows that the Commission has considered interventions received during the consultation process before making any final decisions. Accordingly, the Commission finds that it did not predetermine the outcome of the present proceeding.

Did the Commission provide an opportunity for fair participation in the proceeding?

Positions of parties

253. Certain parties, including the CAB, Cogeco and Quebecor, expressed concerns regarding the lack of critical information and clarifications necessary to allow parties to make meaningful comments on the proposed new *Broadcasting Fees Regulations*.

254. Rogers and Roku expressed concerns regarding the scope and nature of the regulatory scheme being considered by the Commission, its timing with respect to other Commission proceedings, and the impact these had on the ability of parties to

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[39] Old St. Boniface Residents Assn. Inc. v Winnipeg (City), [1990] 3 SCR 1170 at p. 1197.

[40] Subsection 11(5) of the *Broadcasting Act* provides that a copy of each regulation that the Commission proposes to make under this section shall be published in the *Canada Gazette* and a reasonable opportunity shall be given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission with respect to the regulation.

meaningfully participate and comment on the proposed new *Broadcasting Fees Regulations*.

Commission's decision

255. The issue of whether the Commission provided parties an opportunity for fair participation in the present proceeding needs to be examined in the context of the requirement of procedural fairness, to which all administrative tribunals are subject.[41]

256. According to the case law, "the content of procedural fairness varies with circumstances and the legislative and administrative context" of each case.[42]

257. In the present case, the Commission has proposed making regulations respecting broadcasting fees under the statutory authority of subsection 11(1) of the *Broadcasting Act*. The decision to make regulations is of a quasi-legislative and policy-driven nature; the proposed measure does not target a specific person; neither does it contain quasi-judicial or adjudicatory elements. Moreover, the proposed regulations are of general application, their consequences are only of limited financial liability, they are necessary to fund the Commission's regulatory mandate, and they are intended to be equitable to all affected parties. Thus, notice requirements lie at the lower end of the spectrum or, at least, are less rigorous than for other types of Commission proceeding.

258. The Commission provided interested parties with the opportunity to make representations with respect to the proposed new *Broadcasting Fees Regulations*, pursuant to subsection 11(5) of the *Broadcasting Act*. In the Notice, the Commission provided the essential elements of the proposed regulations, along with a copy of the proposed new *Broadcasting Fees Regulations*.

259. In the context of the recent amendments to the *Broadcasting Act*, there are still unknown variables in the formulas for the calculation of fees in the proposed new *Broadcasting Fees Regulations*. Given that certain financial elements will only be known close to or after the coming into force of these regulations, the Commission could not have had a complete understanding of the potential outcomes when it issued the Notice. Accordingly, the Commission could not have included such information as part of its consultation.

260. The Commission's analysis of fee returns received from potential feepayers provides it with a clearer understanding of the regulatory costs involved as a consequence of the recent amendments to the *Broadcasting Act*. The Commission

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[41] For example, *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159.
[42] See *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at paragraph 39. Factors for the level of procedural fairness include: (i) the nature of the decision being made and process followed in making it; (ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; (v) the choices of procedure made by the agency itself. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

has explained what each element in the formulas is meant to capture and the objectives and principles behind the proposed regulations,[43] allowing parties to comment.

261. Regarding the other ongoing proceedings mentioned in the Notice, the Commission was simply requesting comments on the appropriateness of incorporating, by reference, in the proposed new *Broadcasting Fees Regulations* certain elements of those proceedings. Several parties commented on these issues.

262. Further, in regard to the Commission's determinations set out earlier in the present regulatory policy, the Commission finds that the following two points deal with arguments questioning the interplay among the various proceedings:

- the revenue threshold triggering the application of the Registration Regulations and conditions of service differs from the revenue threshold triggering the broadcasting fees regime; and

- the classes of undertakings that are exempt from the Registration Regulations are no longer relevant for the purposes of the broadcasting fees regime, which include different exemption levels.

263. In summary, given the above conclusions dealing with interveners' submissions, the Commission finds that it provided interested persons and parties with an opportunity for fair participation in the present proceeding.

Conclusion

264. In light of all of the above, the Commission announces that it has, by majority decision, made the new *Broadcasting Fees Regulations*, with Treasury Board approval, with the amendments and changes to the proposed regulations as discussed in this regulatory policy.

265. The *Broadcasting Fees Regulations* will be published in the *Canada Gazette*, Part II, and will come into force on **1 April 2024**. Accordingly, the *Broadcasting Licence Fee Regulations, 1997* are repealed as of that date. A copy of the final *Broadcasting Fees Regulations* is set out in the appendix to this regulatory policy. Invoices reflecting the determinations made in this regulatory policy will be issued to the designated broadcasting undertakings of broadcasting ownership groups soon after these regulations come into force.

Secretary General

[43] See paragraph 11 of the Notice.

Related documents

- *Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings*, Broadcasting Regulatory Policy CRTC 2023-331 and Broadcasting Order CRTC 2023-332, 29 September 2023

- Online Undertakings Registration Regulations, *and exemption order regarding those regulations*, Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330, 29 September 2023

- *Call for comments – Proposed new* Broadcasting Fees Regulations, Broadcasting Notice of Consultation CRTC 2023-280, 23 August 2023

- *Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings*, Broadcasting Notice of Consultation CRTC 2023-140, 12 May 2023

- *Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations*, Broadcasting Notice of Consultation CRTC 2023-139, 12 May 2023

- *Notice of hearing – The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*, Broadcasting Notice of Consultation CRTC 2023-138, 12 May 2023, as amended by Broadcasting Notice of Consultation CRTC 2023-138-1, 9 June 2023, and Broadcasting Notice of Consultation CRTC 2023-138-2, 1 February 2023

- *Broadcasting Licence Fees – Part II*, Broadcasting Order CRTC 2022-295, 28 October 2022

- *Annual Digital Media Survey*, Broadcasting Regulatory Policy CRTC 2022-47, 23 February 2022

- *CKFG-FM Toronto – Licence renewal, licence amendment and issuance of mandatory orders*, Broadcasting Decision CRTC 2021-276 and Broadcasting Orders CRTC 2021-277 and 2021-278, 12 August 2021

- *Rogers Media Inc. – Group-based licence renewals*, Broadcasting Decision CRTC 2014-399, 31 July 2014

- *Various specialty Category A and B services – Licence renewals and modified group-based licensing approach*, Broadcasting Decision CRTC 2013-465, 30 August 2013

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

- *Astral Media inc. – Group-based licence renewals*, Broadcasting Decision CRTC 2012-241, 26 April 2012, as corrected by *Astral Media inc. – Group-based licence renewals – Correction*, Broadcasting Decision CRTC 2012-241-1, 20 July 2012

- *Group-based licence renewals for English-language television groups – Introductory decision*, Broadcasting Decision CRTC 2011-441, 27 July 2011

- *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010

Appendix to Broadcasting Regulatory Policy CRTC 2024-65

Broadcasting Fees Regulations

Interpretation

Definitions

1 The following definitions apply in these Regulations.

Act means the *Broadcasting Act*. (*Loi*)

audiobook service means the transmission or retransmission of audiobooks over the Internet for reception by the public by means of broadcasting receiving apparatus. (*service de livres audio*)

broadcasting ownership group means a group of all operators that are affiliates of one another or, in the case of an operator that is not an affiliate of any other operator, that operator. (*groupe de propriété de radiodiffusion*)

excluded revenue means revenue derived from providing audiobook services, podcast services or video game services, as well as revenue derived from broadcasting activities that are carried out by broadcasting undertakings that are, by order, exempted from licensing requirements or exempted from all regulations made under Part II of the Act, unless, in either case, otherwise specified in an exemption order. (*recettes exclues*)

exemption level means

(a) for a broadcasting ownership group that includes more than one broadcasting undertaking, the aggregate of

(i) for each broadcasting undertaking whose fee revenue is $2 million or less, the lesser of

(A) $2 million, and

(B) the fee revenue of the broadcasting undertaking, and

(ii) $25 million; and

(b) for a broadcasting ownership group that includes only one broadcasting undertaking, $25 million. (*franchise*)

fee revenue means the gross revenue minus excluded revenue derived during a return year from the broadcasting activity in Canada of all of the broadcasting undertakings that form part of a broadcasting ownership group, including

(a) revenue received in respect of all transmitters forming part of a broadcasting undertaking if the undertaking consists of more than one transmitter;

(b) the estimated annual revenue, based on the trends of the market in which a broadcasting undertaking operates, the previous financial performance of the undertaking, and, when applicable, the business plan of the undertaking for its first 12 months of operation, if that undertaking has not filed a fee return covering the most recent return year;

(c) revenue that is derived from the sale of air time of a broadcasting undertaking by the Corporation and paid by the Corporation to the undertaking; and

(d) in the case of an online undertaking that has not filed a fee return covering the most recent return year,

(i) the gross annual revenue, as reported by the online undertaking and validated by the Commission, or

(ii) if the information referred to in subparagraph (i) is not available, the estimated gross annual revenue of the online undertaking, based on the trends of the market in which it operates, its business plan and any previous financial performance that the Commission considers to be related to its broadcasting activity.

This definition does not include any amount received by a broadcasting undertaking from another broadcasting undertaking to which these Regulations apply, other than the amounts received from the Corporation for the sale of air time. (*recettes désignées*)

fiscal year means the one-year period beginning April 1. (*exercice*)

operator means a person that carries on a broadcasting undertaking to which the Act applies. (*exploitant*)

podcast service means the transmission or retransmission of podcasts over the Internet for reception by the public by means of broadcasting receiving apparatus. (*service de balado*)

return year means a one-year period beginning September 1. (*année de rapport*)

video game service means the transmission or retransmission of video games over the Internet for reception by the public by means of broadcasting receiving apparatus. (*service de jeux vidéo*)

Application

Exclusions

2 These Regulations apply to all broadcasting undertakings other than

(a) campus, community, Indigenous or student broadcasting undertakings;

(b) broadcasting undertakings carried on by the Corporation; and

(c) broadcasting undertakings carried on by an *independent corporation*, as defined in section 2 of the *Direction to the CRTC (Ineligibility to Hold Broadcasting Licences)*, that derive none of their revenues from the sale of air time.

Designated Broadcasting Undertaking

Highest fee revenue

3 (1) The operator or affiliate that controls a broadcasting ownership group must designate the broadcasting undertaking that has the highest fee revenue among the undertakings in the group.

Obligations

(2) The designated broadcasting undertaking must ensure that the broadcasting ownership group meets its obligations under sections 4 to 7.

Fee Returns

Returns

4 On or before November 30 in each year, every broadcasting ownership group whose fee revenue for the most recent return year exceeds the exemption level must file with the Commission a fee return on the form provided by the Commission.

Period covered

5 The fee return must be completed with respect to the return year beginning September 1st of the year preceding the calendar year in which the return is to be filed.

Fees

Broadcasting fees

6 Every broadcasting ownership group must pay broadcasting fees to the Commission annually, no later than 30 days after the date recorded on the invoice issued by the Commission.

Unpaid fees

7 If the broadcasting fees become overdue, the broadcasting ownership group must pay interest and administrative charges in accordance with the *Interest and Administrative Charges Regulations*.

Calculation of Fees

Calculation by Commission

8 The annual broadcasting fees payable are to be calculated by the Commission.

Amount of Fees

9 (1) The annual broadcasting fees payable are the sum of the initial amount calculated in accordance with subsection 10(1) and the annual adjustment amount calculated in accordance with subsection 10(2).

Change charged or credited

(2) Any change in the amount of the annual broadcasting fees payable that results from the calculation of the annual adjustment amount referred to in subsection 10(2) is to be charged or credited to the broadcasting ownership group in the following year's invoice and must not, in any case, result in a reimbursement on the part of the Commission.

Initial amount

10 (1) The initial amount of the annual broadcasting fees payable is determined by the formula

$$\mathbf{(A \div B) \times C}$$

where

A is the broadcasting ownership group's fee revenue for the most recent return year, less that broadcasting ownership group's exemption level for that return year;

B is the aggregate fee revenues of all broadcasting ownership groups whose fee revenue for the most recent return year exceeds the applicable exemption level, less the aggregate exemption level for all those broadcasting ownership groups for that return year; and

C is the estimated total regulatory costs of the Commission for the current fiscal year as calculated in accordance with subsection 11(1).

Adjustment amount

(2) The annual adjustment amount of the annual broadcasting fees payable is determined by the formula

$$\mathbf{(A \div B) \times D}$$

where

A is the broadcasting ownership group's fee revenues for the most recent return year, less that broadcasting ownership group's exemption level for that return year;

B is the aggregate fee revenues of all broadcasting ownership groups whose fee revenue for the most recent return year exceeds the applicable exemption level, less the aggregate exemption level for all those broadcasting ownership groups for that return year; and

D is the difference between the estimated total regulatory costs of the Commission and the actual total regulatory costs of the Commission for the fiscal year as calculated in accordance with section 11.

Estimated total regulatory costs

11 (1) The estimated total regulatory costs of the Commission for a fiscal year is the sum of the following amounts, as set out in the Commission's expenditure plan published in Part III of the *Estimates of the Government of Canada*:

(a) the costs of the Commission's broadcasting activity, and

(b) the share, attributable to the Commission's broadcasting activity,

(i) of the costs of the Commission's administrative activities, and

(ii) of any other costs used to calculate the net cost of the operation of the Commission's program, excluding the costs of regulating the broadcasting spectrum.

Actual total costs

(2) The actual total regulatory costs of the Commission are to be calculated in accordance with subsection (1) using actual amounts.

Notice

Notice

12 The Commission must publish, each year, the estimated total regulatory costs referred to in subsection 11(1) in a notice in the *Canada Gazette*, Part I.

Transitional Provisions

Definition of *former Regulations*

13 In sections 14 and 15, *former Regulations* means the *Broadcasting Licence Fee Regulations, 1997*, as they read immediately before the day on which these Regulations come into force.

Fiscal year 2024-2025

14 (1) For the fiscal year 2024-2025, the fee return information provided by broadcasting undertakings under section 5 of the former Regulations is to be consolidated into fee revenue information for their broadcasting ownership group, in accordance with sections 1 and 4.

Fee revenues for online undertakings

(2) For the fiscal year 2024-2025, the fee revenues for an online undertaking are to be calculated by the Commission, based on the fee return filed by the online undertaking and verified by the Commission, in accordance with the condition of service with respect to fee returns set out in Paragraph 4 of *Broadcasting Order CRTC 2023-332*, entitled *Conditions of service for carrying on certain online undertakings*, dated September 29, 2023.

Fiscal years 2024-2025 and 2025-2026

15 For the fiscal years 2024-2025 and 2025-2026, the annual adjustment amount that is referred to in subsection 10(2) and the estimated and actual total regulatory costs of the Commission that are referred to in section 11 of these Regulations are to be calculated in accordance with subsection 8(2) and section 9 of the former Regulations.

Repeal

16 The *Broadcasting Licence Fee Regulations, 1997*[44] are repealed.

Coming into Force

April 1, 2024

17 These Regulations come into force on April 1, 2024.

[44] SOR 97-144

Dissenting opinion by Commissioner Joanne T. Levy

The Issue:

Whether the revenues derived from providing podcast services should count towards the fee revenue calculation (Paragraphs 119 and 120 of the regulatory policy).

Dissenting View:

In my opinion, the Majority has erred in exempting podcast services revenue from fees regulation. The reason given is that such broadcasting activities are not expected to generate a significant level of regulatory activity. It is my view that the Commission has no evidentiary record to support such a conclusion; therefore, the Majority Decision is flawed. It would be more appropriate to allow revenue from podcast services to be added to the fees, assess real world evidence as to whether it is insignificant, and proceed to decide whether or not to exempt on that basis.