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April 15, 2005

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
L1A 0N2

Dear Ms. Rhéaume:

Re: Application to repeal section 22 of the *Broadcasting Distribution Regulations* – distribution of audio programming services

I. INTRODUCTION

1. On behalf of its member companies, the Canadian Cable Telecommunications Association (CCTA) is filing this application to request that the Commission eliminate the requirement for Class 1 and Class 2 BDUs to carry audio programming services. This requirement is currently set out in section 22 of the *Broadcasting Distribution Regulations*[1] (BDU Regulations).

2. CCTA estimates that only 4% of cable subscribers make use of the cable analog audio offering. Repealing section 22 of the BDU Regulations will allow cable operators to allocate capacity more efficiently, thereby providing new distribution opportunities for other programming services. Should cable operators opt to distribute some Canadian audio programming services, the distribution of these services in a discretionary digital package would also provide greater profile for the services and increased ease of use for cable customers.

[1] SOR/97-555.

3. Moreover, removing the must-carry requirement will serve to reduce the regulatory asymmetry that currently exists between cable BDUs and DTH/MDS operators. CCTA submits that by repealing section 22, the Commission will allow cable operators to offer a more attractive suite of audio programming services on par with that currently offered by competitors.

II. MUST-CARRY REQUIREMENT OF AUDIO PROGRAMMING SERVICES

4. Section 22 of the BDU Regulations currently requires Class 1 and certain Class 2 licensees to distribute the following audio programming services:

   (a) the programming services of all local radio stations;
   (b) the programming services of at least one French and English-language CBC radio station; and
   (c) a provincial educational radio programming service (where applicable).

5. CCTA submits that requiring Class 1 and Class 2 BDU to carry all local, CBC and educational radio stations no longer makes sense from a regulatory, consumer and competitive standpoint.

III. FLEXIBLE, HIGH QUALITY PROGRAMMING

A. Current Difficulties

6. A repeal of section 22 would address some of the problems associated with the current carriage of local stations by cable operators.

7. Presently, a cable operator's ability to find interference-free frequencies for priority radio stations is becoming increasingly limited as some cable operators in larger markets are required to carry as many as 45 priority stations. In larger markets, there are very few interference-free cable audio frequencies. As a result, many local stations are offered on impaired channels or are not offered at all.[2]

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[2] The absence of interference-free frequencies in large cable systems has been recognized by the Commission in the past, see Decision CRTC 96-827 (23 December 1996).

8. This situation is only exacerbated with the ongoing licensing of additional AM and FM radio stations.[3] Cable frequencies that were once clear have become restricted due to the use of the same frequency by newer over-the-air radio station or have been impaired due to the adjacency of these signals. As the Commission continues to license either additional AM and FM radio stations or rebroadcasts of these stations in other markets, the number of cable systems facing this problem is rapidly increasing.

9. In addition, accessing a cable operator's audio service is a complex operation from a consumer's perspective. Currently, subscribers who wish to access the cable audio service must install a separate cable outlet or splitter to create a separate feed for the subscriber's radio tuner or stereo.[4]

10. Subscribers must also determine the cable frequencies of their favourite radio stations. In order to identify the cable frequencies of their preferred radio stations, subscribers must either scan all cable frequencies or contact their cable operator to obtain a list of cable audio frequencies in the licensed area. This is a confusing, consumer-unfriendly process.

11. Because of the problems associated with the current cable audio service, very few subscribers are aware that the service exists, and fewer still actually use the service. CCTA estimates that only 4% of all cable subscribers make use of the cable audio offering today.[5] As such, removing the must carry requirement will not have any

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[3] *Introductory statement to Broadcasting Decisions CRTC 2003-115 to 2003-120: Applications for new radio stations to serve Toronto*, Broadcasting Public Notice CRTC 2003-20 (17 April 2003); *Introductory statement to Broadcasting Decisions CRTC 2003-192 to 2003-203: Applications related to radio stations in the Province of Quebec*, Broadcasting Public Notice CRTC 2003-33 (2 July 2003).

[4] In addition, a subscriber who installs a splitter between the cable wall-plate and the television set to create a separate feed for the FM tuner is often charged an additional monthly fee for an additional cable outlet (i.e. one for the TV signal and one for the radio signal).

[5] A report commissioned by Rogers Cable shows that audience levels are minimal. According to a consumer research survey conducted in December 2004 by The Strategic Counsel (a copy of which is attached), only 36% of subscribers were aware that Rogers offers a cable audio service and only 9% have used this service. Among those

significant impact either on a cable operator's existing base of subscribers or on the audience shares for stations currently distributed as part of a cable operator's carriage obligations under s. 22.

B. Offering What Consumers Want

12. By repealing section 22 of the BDU regulations, the Commission would foster a flexible regulatory environment in which cable operators could respond to consumer needs. In particular, discretionary carriage of audio programming services would allow cable operators to free up existing capacity on their cable network. This capacity could then be made available for the carriage of additional digital and/or HDTV services.

13. In some systems, the additional capacity would enable the launch of thirty additional standard definition digital television services or six additional high definition television services. Making this capacity available for the distribution of digital and HDTV programming may prove particularly invaluable in light of recent reports that the demand for high definition television services currently outstrips available programming.[6]

14. Eliminating the must carry requirement would also expand the diversity of audio programming services currently available. Additional capacity could be made available to offer a new complement of audio programming services to audiences who are presently underserved or un-served under the existing regulatory regime. For example, cable operators would be in a better position to offer other audio programming services that are out of market, such as French-language radio stations, or third-language specialty audio programming services.

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subscribers who have used this service, less than half (i.e. 4%) continue to do so today. In addition, since each radio station is only distributed in a specific geographical area, the audience generated for each station is lower still.

[6] J. MacKay, "*Lack of High-Def TV Content Called a Threat*", Edmonton Journal (8 March 2005), C-2. J. MacKay, "*HDTV Demand Outstrips Available Programming*", Edmonton Sun (8 March 2005) p. 33.

15. In sum, relieving cable operators from their must-carry requirement would expand the level and quality of both audio and video programming services for cable subscribers.

C. Implementing a Consumer-Friendly Service

16. A repeal of section 22 would also enable cable operators to eliminate the complexity associated with the installation and operation of the current cable audio offering.

17. For example, where cable operators opt to distribute some audio programming services on digital, subscribers would receive robust and reliable high-quality audio programming services irrespective of their geographic location or the existence of physical obstructions blocking the over-the-air radio frequency.

18. Each selected station could be given a distinct slot on a cable operator's Interactive Programming Guide (IPG) to ensure that subscribers can easily identify and access these stations on their television sets. After a subscriber selects a radio station on the IPG, the subscriber would hear the audio feed either directly on their television set or through a home theatre or stereo system connected to their digital set top box.

19. CCTA believes that this ease of use will encourage cable subscribers to use the cable audio service in greater numbers than is currently the case.

IV STRIVING FOR REGULATORY SYMMETRY

20. While cable distributors are required to offer a significant number of audio programming services, their competitors do not have this obligation. In this regard, section 39 of the BDU Regulations simply states that a DTH BDU <u>may</u> distribute, among other things, (a) "the programming service of any licensed programming undertaking".

21. Accordingly, Bell ExpressVu and Star Choice are currently free to select which radio stations will be distributed as part of their programming line-up. CCTA notes that Bell ExpressVu distributes 23 radio stations from across Canada and the world as part of their Digital Audio and Radio Channels line-up[7] whereas Star Choice offers an audio package of 71 radio stations.[8]

22. MDS operators are similarly relieved from the requirement to carry local, CBC and educational radio stations. When Look TV was originally licensed in 1997, the Commission exempted Look TV from the must carry requirement, provided that Look TV distribute these signals once it had the channel capacity to do so. In 2000, Look TV filed an application for permanent relief from the must carry obligation, thus having full discretion over which audio services it distributes.[9] This application was approved by the CRTC on February 14, 2001.[10]

23. Moreover, cable BDUs face disproportionate copyright obligations by virtue of the operation of the Commission's must carry requirement. In this regard, CCTA notes that the *Broadcasting Act* and the *Copyright Act* each contain a different definition of a "local" and "distant" signal.[11] What is considered a local signal for the purposes of the *Broadcasting Act* may be considered a distant signal under the *Copyright Act*.

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[7] Source: http://www.expressvu.com/

[8] Source: http://www.starchoice.com/

[9] *Various Applications*, Public Notice CRTC 2000-152 (8 November 2000).

[10] *Relief from the requirement to carry local radio signals*, Decision CRTC 2001-66 (14 February 2001).

[11] The *Definition of local and distant signal Regulation*, SOR/2004-33 defines these terms for the purposes of the *Copyright Act* whereas section 1 of the *Broadcasting Distribution Regulations*, SOR/97-555 defines "local radio station" for the purposes of the *Broadcasting Act*.

24. As the Commission is aware, the carriage of distant signals is subject to a compulsory licence which requires the payment of copyright royalties. Consequently, the must carry requirement sometimes creates a mandatory payment for the carriage of distant radio signals despite the fact that these signals are considered local for the purposes of the *Broadcasting Act*. CCTA submits that mandatory carriage of local signals should not impose any copyright obligation. By removing the must carry requirement, cable BDUs will now be in a position to weigh the advantages and evaluate the resulting payment of copyright fees, when determining whether to carry certain signals.

25. Should the Commission repeal section 22, Class 1 and Class 2 BDUs would still have the ability and incentive to distribute audio programming services. In this regard, paragraph 23(1)(a) of the BDU regulations allows a licensee to distribute "any audio Canadian programming service of a licensed or exempt broadcasting undertaking". Removing section 22 will simply allow cable operators to select which local stations, CBC stations and educational radio programming services make sense in a particular market.

26. Allowing cable BDUs to select which audio programming services to carry would afford cable operators the ability to compete with the suite of audio programming services currently offered by DTH and MDS competitors. Selecting which audio service to distribute would be driven by consumer needs and competitive pressures rather than regulatory intervention.

27. In the absence of a must-carry requirement, CCTA submits that cable operators will continue to offer a variety of local and distant audio programming services, given that competitors currently offer a comprehensive suite of audio programming services. However, rather than submitting to an inflexible must carry requirement, cable operators would be in a position to distinguish themselves from their competitors by creating distinctive, consumer-friendly audio packages.

V. CONCLUSION

28. A repeal of section 22 of the BDU Regulations would give cable operators the flexibility they require to offer new and distinctive audio and video programming services in response to today's competitive communications industry, with little or no impact on radio stations or customers. It would also constitute a positive and equitable streamlining of the Commission's regulatory oversight consistent with the objectives of the *Broadcasting Act*.

29. In light of the substantial benefits that would result from the approval of this application, CCTA requests that the Commission deal with this matter on an expedited basis.

Sincerely,

Michael Hennessy

Michael Hennessy
President

Attachments