



## Broadcasting Public Notice CRTC 2005-9

Ottawa, 27 January 2005

### Distribution of Spike TV by broadcasting distribution undertakings

*In this notice, the Commission finds that there is insufficient evidence to conclude that the service known as Spike TV is competitive with Canadian specialty services. The Commission therefore considers that this service is eligible to be included on the lists of eligible satellite services (the lists).*

*The Commission expects that Spike TV will continue to obtain and remain in possession of all necessary rights for the distribution of its programming in Canada; and that it will not hold, nor try to obtain, nor exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada.*

*The Commission will amend the lists to reflect this decision.*

#### Background

1. The Commission periodically publishes lists of eligible satellite services (the lists), which set out non-Canadian programming services received via satellite that may be distributed by broadcasting distribution undertakings (BDUs). Since 1984, these lists have included TNN: The Nashville Network (TNN) among the non-Canadian services that BDUs may distribute.
2. In August 2003, the new owner of TNN, Viacom International Inc. (Viacom), renamed TNN “Spike TV: The First Network for Men” (Spike TV), and re-branded it as a men’s lifestyle programming service reflecting a wide range of men’s interests.
3. The Canadian Association of Broadcasters (CAB) wrote to the Commission expressing concern that the change in programming format that would accompany the re-branding of TNN as Spike TV would result in the service becoming directly competitive with a number of existing Canadian pay and specialty services, including Men TV, CTV Travel, Report on Business Television (ROBTV), Discovery Health Network, Space: The Imagination Station (Space), TSN, The Score and Sportsnet. The CAB noted that the Commission’s policy, as affirmed in *Revised Lists of Eligible Satellite Services*, Public Notice CRTC 1997-96, 22 July 1997 (Public Notice 1997-96) is to consider the removal of a non-Canadian service from the lists if the service should undergo a change in format so as to become competitive with a Canadian pay or specialty service. The CAB requested that TNN, now re-banded as Spike TV, be removed from the lists and, therefore, from the channel line-up of all BDUs that currently distribute the service.

4. The CAB was further of the view that TNN, the service originally authorized for distribution by the Commission, no longer exists and that the service that replaced it, now branded as Spike TV, is a completely different service in that it is owned and operated by a different company and provides programming bearing no relationship or similarity to the programming service authorized by the Commission. For these reasons, the CAB argued that the existing authorization to distribute TNN in Canada does not extend to Spike TV and that, in any event, Spike TV is partially or totally competitive with Canadian specialty services and therefore should not be included on the lists.
5. In *Distribution of Spike TV – Call for comments*, Broadcasting Public Notice CRTC 2004-14, 18 March 2004 (Public Notice 2004-14), the Commission invited comments on the position of the CAB.

### **Overview of comments**

6. The Commission received 219 comments in response to Public Notice 2004-14 from a variety of individuals across the country, as well as from broadcasters, distributors and industry associations.
7. 184 individuals opposed the CAB's position, arguing that Spike TV is not competitive with Canadian services. Three individuals considered that Spike TV should not be on the lists because its programming was not appealing.
8. The CAB also submitted a comment in which it reiterated its concern that the service known as Spike TV had undergone changes in ownership, branding and programming and had become competitive with a number of licensed Canadian services, particularly Men TV. The CAB maintained its original position that the service should not be on the lists.
9. Global Television Network Inc. (Global) and TVA Group Inc. (TVA), partners in Men TV General Partnership, the licensee of the Canadian Category 1 specialty service, Men TV, filed a joint intervention arguing that Spike TV was competitive with Men TV and that Spike TV should not be on the lists. They suggested that, if the Commission were to determine that the service should be on the lists, the only other alternative would be to require that Spike TV be packaged with Men TV as a means to mitigate, to some extent, Spike TV's competitive impact on Men TV.
10. The Score Television Network Ltd. (The Score) expressed particular concern about the increase in sports programming on Spike TV. It argued that Spike TV is competitive with Canadian services and should not be on the lists.
11. In its comment, CTV Television Inc. (CTV) stated that it did not consider Spike TV to be competitive with its services (TSN, ROBTv, or Travel) and had no objection to Spike TV's distribution in Canada. CTV nevertheless emphasized the importance of protecting the program rights of Canadian services, and stated that it had "appropriate assurances" that Spike TV will respect CTV's program rights.

12. Spike TV argued that its service was not competitive with any Canadian services. As such, Spike TV submitted that its service should be on the lists and strongly opposed any change to its distribution status.
13. Distributors generally opposed the CAB's position, arguing that Spike TV was not competitive with Canadian services. They also noted that the service formerly known as TNN and now known as Spike TV has been widely available in Canada on an analog basis for almost 20 years. Distributors expressed concern that removing the service from BDUs would upset subscribers, give them the impression that the Canadian broadcasting system is unable to respond to their demands, and encourage them to access Spike TV's signal from unauthorized satellite distributors.
14. The Canadian Cable Systems Alliance Inc. (CCSA) and the Canadian Cable Telecommunications Association (CCTA) concluded that there had been no demonstrable harm caused to Men TV or to any other Canadian service as a result of the change in programming format that has resulted from the re-branding of TNN as Spike TV. However, in their view, there would be harm to consumers and to the broadcasting system as a whole if the Commission decided that Spike TV should not be on the lists.
15. Bell ExpressVu Limited Partnership<sup>1</sup> opposed the CAB's position that Spike TV should not be on the lists and urged the Commission not to consider any packaging restrictions on Spike TV, at least for digital distribution. Star Choice Television Network Inc. also considered that Spike TV should be included on the lists and that there should be no change to its distribution status.
16. The positions of the parties related to the competitiveness of Spike TV with specific Canadian services are set out in the following section of this decision.

## **Competitiveness**

### Introduction

17. The Commission's policy regarding the addition of non-Canadian services to the lists currently precludes their addition if the Commission determines them to be either partially or totally competitive with Canadian specialty or pay television services. This serves to ensure that licensed Canadian services are in a position to fulfil their commitments and obligations with respect to Canadian programming and other objectives set out in the *Broadcasting Act*, responsibilities that non-Canadian services do not share.
18. As noted above, in Public Notice 1997-96, the Commission affirmed that it might consider the removal of a non-Canadian service from the lists if that service should undergo a change in format so as to become competitive with a Canadian pay or specialty service. Alternatively, the Commission might require such a service to be linked exclusively with Canadian pay television services.

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<sup>1</sup> Bell ExpressVu Inc. (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P, a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership

19. The Commission assesses competitiveness on a case-by-case basis. Generally, the factors examined include the nature of the service and its target audience, the genre of programming, and the degree of program overlap. Where relevant, the Commission also takes into account the extent to which the non-Canadian service is a program supplier.
20. The CAB raised concern about the potential competitiveness of Spike TV with a number of Canadian specialty services. These services can be divided into three groups: (a) Men TV; (b) CTV Travel, ROBTv, Discovery Health Network, and Space; and (c) TSN, Sportsnet, and The Score (the sports services).

### **Men TV**

#### Positions of parties

21. The CAB argued that Spike TV is competitive with Men TV for a variety of reasons. It noted that Men TV and Spike TV compete for the same demographic group, which is comprised of males aged 18 to 49. The CAB further submitted that there is significant overlap in the main program categories and types of programming offered by the two services. More specifically, the CAB stated that both Men TV and Spike TV provide programming in categories 3 (Reporting and actualities), 7 (Drama and comedy), 9 (Variety), 10 (Games shows) and 11 (General entertainment and human interest).<sup>2</sup> In the CAB's view, the fact that the two services broadcast programming from the same categories "raises the additional concern that Spike TV will be in direct competition with Men TV for the acquisition of specific programs."
22. In their joint intervention, Global and TVA argued that the service known as Spike TV is totally competitive with Men TV and should not be included on the lists because Spike TV has the same mandate, targets the same demographic group, and competes directly with the programming categories that Men TV has been authorized to provide.
23. The CCTA, on the other hand, argued that Men TV is not competitive with Spike TV. In its view, there is no program overlap between the two services because Spike TV does not carry any programs that are also carried by Men TV. While noting that both services draw from the same program categories, the CCTA argued that no service has an exclusive right to particular program categories. Further, the CCTA noted that, in *Revised lists of eligible satellite services*, Public Notice CRTC 2001-82, 13 July 2001, the Commission authorized the distribution of Oxygen, a women's lifestyle service, despite the existence of WTN, now known as W, which is a Canadian lifestyle service targeted to women. The CCTA concluded that "a genre based on gender is very broad and capable of supporting more than one program service choice."
24. Spike TV argued that it is not competitive with Men TV for four key reasons. First, it argued that its nature of service is different from that of Men TV, given that Spike TV focuses on programming for "middle class American working men" while Men TV focuses on "men's lifestyle programming from an urbane, sophisticated, cultured and slightly older Canadian men's perspective."

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<sup>2</sup> The definitions of the program categories are set out in *Definitions of new types of priority programs; revisions to the definitions of television content categories; definitions of Canadian dramatic programs that will qualify for time credits toward priority programming requirements*, Public Notice CRTC 1999-205, 23 December 1999.

25. Second, it asserted that gender is not sufficient to define a programming genre, given that men represent approximately 50% of the population and deserve the widest possible range of programming.
26. Third, Spike TV submitted an in-depth analysis of its programming with respect to the overlap of its programming with that of Men TV. Spike TV noted that, although both services draw from the same programming categories, especially categories 5b (Informal education/Recreation and leisure) and 11 (General entertainment and human interest), the type of programming aired within these categories by the two services differs. Spike TV asserted that "... a review of the shows in question demonstrates the entirely different style, feel, target audience, perspective and nature of the shows." Spike TV considered that Spike TV and Men TV would not compete in the area of program acquisition because the programming broadcast by the two services is so different.
27. Finally, Spike TV noted that it offers a significant amount of original programming, which distinguishes its service from Men TV. Spike TV stated that Men TV and Spike TV "have not in the past, and are unlikely in the future, to compete for the same programming, particularly since Spike TV has established a goal of increasing its original programming to 50 per cent by the end of 2005."

The Commission's analysis and determination

28. While Spike TV and Men TV both target men from 18 to 49, the evidence is that Spike TV's target audience is, in fact, quite different from that of Men TV. As noted by Spike TV, Spike TV is a service directed to American middle class working men whereas Men TV is a service described by the Commission in *Men TV – a new specialty channel*, Decision CRTC 2000-464, 24 November 2000, with reasons that followed on 14 December 2000 (Decision 2000-464), as "directed to men who are urban professionals, healthy and socially active...offer[ing] programming related to luxury goods, gourmet foods, men's beauty and fitness, as well as books and music."
29. As regards the nature of their respective programming, according to Viacom's web site, Spike TV's programming encompasses "a wide-range of comedy, reality and lifestyle topics that are of men's interests, including animation, video games, health, finance and reality programming" with an "emphasis on original, brand-defining programming from a broad spectrum of genres." In Spike TV's words, it "supplies pure entertainment." Men TV, by contrast, as noted in Decision 2000-464, provides "programming related to the luxury market, the gourmet market, men's beauty and fitness, the book and music market, outdoor adventures and leisure sports, from a Canadian men's perspective."
30. In order to assess any overlap of programming between Spike TV and Men TV, the Commission examined the program schedules of both services from a randomly selected week of programming – the week of 28 June 2004. The Commission confirmed this week was representative of the programming generally broadcast by the two services by comparing the 28 June schedules against another randomly selected week, the week of 9 August 2004.

31. Spike TV's schedule for the broadcast week beginning 28 June 2004 demonstrated that the bulk of its schedule (54%) was devoted to drama, specifically to older hour-long dramas, such as *MacGyver* and *Star Trek*. By contrast, the bulk of Men TV's schedule is devoted to information and instructional programming. Indeed, Men TV is limited to 10% drama by condition of licence. While both services scheduled drama between 7 and 11 p.m., Spike TV's focus was on one-hour long drama programs as noted above, whereas Men TV's focus was on comedy/sitcoms of a half hour duration.
32. As with drama, while both Men TV and Spike TV also schedule reality programming as well as recreation and leisure programming, no overlap of actual programs was found to exist. Spike TV's focus was on automotive and reality programming, while Men TV's focus was on a wider array of lifestyle programming including classic car restoration, cooking, wine appreciation, beer appreciation and boating, all of which were consistent with its service orientation.
33. The Commission accordingly finds that, although like Men TV, Spike TV is a service for men between the ages of 18 and 49, it is sufficiently different in target group, service orientation, programming genres and specific programs to not be considered either partially or totally competitive with Men TV.

#### **CTV Travel, ROBTv, Discovery Health Network, and Space**

##### Positions of parties

34. The CAB submitted that Spike TV, due to the broad scope of its programming, is partially competitive with the Canadian services CTV Travel, ROBTv, Discovery Health Network, and Space.
35. CTV, the licensee of CTV Travel and ROBTv, submitted that Spike TV was not competitive with either of these Canadian services.
36. Neither Alliance Atlantis nor CHUM, the licensees of Discovery Health Network and Space respectively, submitted a comment.
37. Spike TV argued that it was not partially competitive with any of the Canadian services named by the CAB because there was little or no overlap of programming and because the services have distinctly different nature of service definitions.

##### The Commission's analysis and determination

38. Each of the four Canadian services named by the CAB provides programming in a specific and narrow niche – travel, business and financial news/information, health, and science fiction, respectively, whereas Spike TV is a general interest programming service reflecting a wide range of men's interests.

39. In its analysis of Spike TV's program schedule for the broadcast week beginning 28 June 2004, the Commission found that travel-related programming consisted of one half-hour program aired on Tuesday at 11:30 p.m. No business or financial programming was listed. Although Spike TV stated in its submission that it broadcasts one-minute interstitials related to men's health, the program schedule examined by the Commission did not include any health-related programs.
40. With respect to the science fiction genre, two science fiction programs representing 19% of Spike TV's schedule during the week examined were broadcast. Spike also aired two fantasy programs that could arguably be broadcast on Space.
41. Given that Spike TV is a broadly based service that focuses on programming for men, it airs programming from a variety of genres. The Commission is of the view that it will, therefore, overlap, to some extent, with Canadian specialty services in some programming genres. However, provided no one genre predominates, the Commission considers that limited overlap would not be sufficient for it to conclude that that the service is competitive.
42. A comparison of the schedules of Spike TV and the four niche services named by the CAB demonstrates that the only program overlap of any significance was with Space. However, the Commission is of the view that the overlap is not sufficient for it to conclude that Spike TV is competitive with Space.
43. The Commission further notes that none of the licensees of these four Canadian services expressed any concern about the competitiveness of Spike TV with their services.
44. In light of the above, the Commission finds that there is insufficient evidence for it to conclude that Spike TV is competitive with CTV Travel, ROBTv, Discovery Health Network, or Space.

### **The sports services**

#### Positions of parties

45. In its submission, the CAB pointed to recent media reports indicating that Spike TV planned to place a greater emphasis on sports and submitted that Spike TV should be considered competitive with those Canadian specialty services that provide sports programming.
46. The Score also submitted that Spike TV is competitive with its service because of Spike TV's increasing emphasis on sports programming. The Score noted, in particular, that Spike TV broadcasts World Wrestling Entertainment (WWE) programming, a type of programming that is popular on The Score. The Score also submitted that, according to media reports, Spike TV is moving to broadcast even more sports.
47. CTV stated that Spike TV is not competitive with TSN, and that Spike TV has provided CTV with appropriate assurances that it will respect the integrity of the program rights of CTV's services.
48. Rogers Communications Inc. stated that Sportsnet "takes no position with respect to the distribution of Spike TV in Canada."

49. Spike TV submitted that although 12%<sup>3</sup> of its schedule is sports programming and there is some program overlap in terms of its WWE programming, its service is not competitive with Canadian sports services.

The Commission's analysis and determination

50. The Commission's analysis of Spike TV's 28 June schedule revealed that 7.5 hours of that week consisted of sports programming, which included five WWE titles plus champ car racing. This amounted to 6% of Spike TV's program schedule for the week in question.
51. A review of The Score's schedule for the weeks of 28 June 2004 and 16 August 2004 demonstrated that The Score aired six hours of *Smackdown* each week. *Smackdown* is a WWE program that was not broadcast on Spike TV in the weeks examined. These hours represent slightly less than 5% of The Score's weekly schedule.
52. Given that both services broadcast WWE programming, the Commission examined the scheduling of this programming on each service. This examination revealed that four of the five WWE programs on Spike TV were aired in peak viewing periods, specifically from 9 p.m. to 11 p.m. on Monday, and from 7 p.m. to 8 p.m. on Saturday and Sunday. With respect to The Score, two of its six hours of WWE *Smackdown* were aired in peak viewing periods, specifically from 7 p.m. to 9 p.m. on Thursdays. The remaining hours of *Smackdown* were broadcast during the overnight period, specifically from 11 p.m. to 1 a.m. on Thursdays and from 2 a.m. to 4 a.m. on Fridays.
53. Based on the above, the Commission is of the view that the limited amount of programming devoted to sports currently broadcast on Spike TV does not constitute a significant overlap with The Score or with other Canadian sports services, even during peak viewing periods. The Commission therefore considers that there is insufficient evidence for it to conclude that Spike TV is currently competitive with The Score or with other Canadian sports services.
54. The Commission acknowledges that there are indications that Spike TV may add more sports programming in the future, and that such programming might include sports features as well as statistics and highlight shows that could increase the amount of overlap between Spike TV and The Score. The Commission considers, however, that it would be premature to assess competitiveness between The Score and Spike TV based on speculation concerning what Spike TV's schedule may become in the future.

#### **Conclusion with respect to competitiveness**

55. Based on the analysis set out above, the Commission finds that there is insufficient evidence for it to conclude that Spike TV is competitive with any Canadian service. Accordingly, the Commission will amend the lists to include Spike TV.

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<sup>3</sup> Spike's analysis is based on program titles rather than hours of programming. Therefore, the 12% reference is based on the calculation that 4 out of 33 programs that Spike TV broadcasts are WWE programs.



## Program rights

### Positions of parties

56. Global and TVA expressed concern that Spike TV might withhold program rights if distributed in Canada. For its part, CTV stated that Spike TV has provided it with assurances that it would not interfere with program rights.
57. Spike TV stated that it holds all of the programming and distribution rights necessary for the programming it distributes in Canada and that it was not aware of any instance where it had been in competition for Canadian programming rights. Spike TV noted that it had cooperated extensively with TSN with respect to the rights for *WWE Raw*. Spike TV submitted that it has never withheld program rights, and would not do so in the future.

### The Commission's analysis and determination

58. The Commission's policies with respect to the addition of non-Canadian services to the lists state, among other things, that the service provider must have obtained all necessary rights for distribution of its programming in Canada.
59. This applies to all services on the lists, as stated in *Structural Public Hearing*, Public Notice CRTC 1993-74, 3 June 1993:

The Commission emphasizes that in considering the possible addition of any non-Canadian service to the lists, it will expect the service provider to have obtained the necessary distribution rights for the programming it distributes in Canada. Similarly, it expects existing non-Canadian service providers to have obtained Canadian rights. The Commission may require service providers to demonstrate that they have obtained these rights.

60. Further, *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, Public Notice CRTC 2000-173, 14 December 2000, stated that the Commission would require proposals to add non-Canadian services to the digital lists to include:

... an undertaking from the non-Canadian service provider that it does not hold, will not obtain, nor will it exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada. For example, the provider of a non-Canadian service would have to satisfy the Commission that it does not currently, nor will it in the future, deal in rights to programming in a manner that unduly precludes a Canadian programming undertaking from acquiring that programming.

61. The Commission notes that Spike TV stated that it holds all of the programming and distribution rights necessary for the programming it distributes in Canada and that it was not aware of any instance where it had been in competition for Canadian programming rights.

62. The Commission expects that Spike TV will not hold, nor try to obtain, nor exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada, consistent with the Commission's above-noted requirements.
63. The Commission also expects that Spike TV will continue to obtain and remain in possession of all necessary rights for the distribution of its programming in Canada.

**Amendment to the lists**

64. Only non-Canadian services approved for distribution by the Commission may be distributed by BDUs. Where a service undergoes such fundamental changes as occurred in this case, so that it is no longer is the same service as was approved for distribution by the Commission, the distribution of that service similarly requires the approval of the Commission.
65. The Commission will amend the lists by adding Spike TV and removing TNN.

Secretary General

*This document is available in alternative format upon request and may also be examined at the following Internet site: <http://www.crtc.gc.ca>*