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49th Media Inc.
Kevin Shea, President and CEO
1240 Bay Street, Suite 700
Toronto, ON M5R 2A7

**Re: Application 2003-0766-2 - Licence to operate a new satellite
relay distribution undertaking**

Dear Mr. Shea:

The following is in reference to the application filed on 18 June 2003 by 49th Media Inc. (49th Media) requesting a licence to operate a new satellite relay distribution undertaking to distribute to Canadian broadcasting distribution undertakings, U.S. programming services in which the advertising produced for and targeted to the U.S. market would be replaced with Canadian advertising. In its application, 49th Media expressly provided that the replacement of U.S. advertising with Canadian advertising would be done "with the permission of the owners of such U.S. services..."

The application filed on 18 June 2003 did not include evidence of the permission or support of U.S. broadcasters for 49th Media's proposal and, consequently, letters from Commission staff were sent on 30 July 2003 and 18 September 2003 requesting, among other things, specific evidence of such permission or support.

The Commission has now received a letter dated 3 October 2003 from 49th Media in which it summarized its discussions to date with U.S. broadcasters and attached letters from Discovery Communications Inc., A&E Television Networks and Turner Broadcasting System Inc.

The Commission notes that, while the letter of 3 October 2003 indicates that 49th Media is confident that if it is licensed it will obtain the agreement of the U.S. broadcasters, the attached letters do not provide evidence that supports such confidence. In the Commission's view, it is reasonable to conclude that the U.S. services will not grant their permission at this time.

Given the clear indication that the implementation of 49th Media's proposal is based upon the permission of the U.S. broadcasters, the Commission considers that the application cannot be considered complete, absent that permission or support. The Commission is therefore returning the application herewith.

In returning the application, the Commission makes no decision on its merits or on any related policy issues.

Should you decide to submit another proposal, please ensure that all the information previously requested by the Commission is included in your application.

The dissenting opinion of Commissioner Langford is attached.

Yours sincerely,

Diane Rhéaume
Secretary General

Encl.

Dissenting opinion of Commissioner Stuart Langford

I disagree with the majority in this matter. In my opinion, the public interest would be best served if the Commission were to declare 49th Media Inc.'s application complete, gazette it and proceed to a public hearing. Only by so doing can the many issues raised by the 49th Media's proposal be properly analysed and evaluated. To simply return the application on grounds that it is deficient – a questionable conclusion, in my view – is to deny the applicant the process to which I believe it is entitled and to deny the Canadian public an opportunity to become better informed on issues of pressing importance to it.

The 49th Media's application is for a licence to operate a satellite relay distribution undertaking (SRDU) dedicated to "Canadianizing" the advertising content of popular American satellite services such as A&E and CNN, and then distributing them in Canada. "With the permission of the owners of the U.S. services, ...49th Media will delete the advertising in the signals produced for and targeted to the U.S. market and replace it with advertising produced for and targeted to Canadian consumers."¹ Programs would remain the same; only the ad minutes would change. Twenty-five percent of the gross revenues generated by the sale of Canadian advertising would be directed to the Canadian Television Fund (CTF) to finance Canadian television programs in English, French and aboriginal languages. As well, 49th Media has undertaken "...to provide a proportion of any unsold inventory of advertising time to provide local promotion to Canadian services that do not currently benefit from local availabilities, including French-language broadcasters, for the promotion of their service in anglophone markets; the non-profit aboriginal television service APTN; Canadian feature films, in both theatrical release and video release, and public service announcements."²

According to the 49th Media application, the benefits flowing from the patriation of American ad minutes would extend far beyond the millions of dollars (estimated at \$230 million during the first seven year licence term) earmarked to subsidize Canadian television production. Other stakeholders will gain as well. The application promises that advertisers will benefit as the number of buyable minutes in Canada increases, Canadian viewers will see more relevant advertisements without experiencing any disruption to their viewing habits, and, according to a third party report commissioned for the application, "The economic impact on broadcasters – in terms of advertising inventory and pricing – after licensing the proposed SRDU application will be negligible."³ Finally, according to the application, for the first time the Canadian broadcasting system will be directly supported by popular U.S. satellite services that until now have provided no monetary benefits for Canadians.

At a time when government cutbacks to CTF funding and the inability of the CTF to meet demands has both regulators and the television industry extremely worried about the future of Canadian television production generally and the production of Canadian drama particularly, it is not difficult to understand why 49th Media's proposal has generated interest, at least in some sectors of broadcasting and related industries. In a letter of April 10th, 2003, Sandra Macdonald, President and CEO of the CTF, while

¹ *Supplementary Brief* to the 49th Media application, p. 1

² *Ibid.*, p. 2

³ *The Flatiron Report*, May 31, 2003, p 2.

neither endorsing nor opposing the application, had this to say about what an additional \$230 million over seven years would mean in terms of financing and production: “Given that CTF funding normally triggers three times as much funding from other sources, we project the following impact: over \$780M in Canadian television production activity (includes feature film, Aboriginal, English and French); over 2,600 hours of original, first run programming in English, French and Aboriginal languages.”⁴

Other stakeholders were equally aware of the positive impact 49th Media’s proposal, should it be licensed, could have on different aspects of the Canadian television system. The Association of Canadian Advertisers saw an opportunity to reach audiences that have historically been closed to them: “Canada’s advertisers have had to cope over the years with severely restricted access to Canadian audiences. Approximately one-quarter to one-third of all viewing in this country is to signals that cannot be commercially exploited by advertisers in Canada. Mr. Shea’s proposal helps to redress this inequity and repatriate audience and revenue to Canada’s broadcasting system.”⁵ The Aboriginal Peoples Television Network (APTN) added the following observation: “It is evident ...that the proposed package and funding of approximately \$3 million per year will allow APTN ...to present a much more fair representation of who are the Aboriginal Peoples in Canada both to ourselves, as we learn of each other’s lives, languages and cultures, but also to all Canadians in order to foster a greater understanding of the reality of the original inhabitants of this land.”⁶

Not all stakeholders in the Canadian broadcasting system support the 49th Media application. Unfortunately, as the application has been returned and may never be revived, it is unlikely in the foreseeable future that Canadians will have an opportunity to weigh the merits of competing opinions. In a letter written in reaction to the 49th Media’s application and another application that raised similar issues, the Canadian Association of Broadcasters (CAB) urged the Commission to deny 49th Media further process: “These applications strike at the structural underpinnings of the Canadian broadcasting system. ...Given the

potential impact of these proposals on all sectors of the industry including conventional television as well as the specialty and pay sector, they call into question the foundation upon which the Canadian broadcasting system has been built over the past thirty plus years.”⁷

There is no doubt that the 49th Media application, though applauded by some, has its share of detractors. It also raises a number of policy issues. Consider the following questions: Is a service that distributes only foreign programming services licensable in Canada? Would acceptance of the 49th Media’s application constitute accepting a contribution by foreign services to the Canadian broadcasting system? If so, is the nature of the contribution appropriate? I make no comment on the merits of the 49th Media’s application and take no position on either the competing views of stakeholders

⁴ CTF letter to Mr. Kevin Shea, 49th Media, April 10, 2003

⁵ Association of Canadian Advertisers letter to CRTC, April 7, 2003

⁶ APTN letter to Mr. Kevin Shea, June 16, 2003.

⁷ CAB letter to Mr. Charles Dalfen, Chairman, CRTC, June 27, 2003.

or the policy issues concerned. It seems to me, however, that for the benefit of the Canadian broadcasting system the merits or lack thereof of all questions raised would be better debated sooner rather than later. I see no value in turning a blind eye to them.

To simply declare the 49th Media application deficient in one area and return it as the majority has done is to miss a rare opportunity to analyse and evaluate the pros and cons of this proposal and the positions of those who support or condemn it. Is the status quo, U.S. services with U.S. ads preferable to the alternative proposed? Is the Flatiron Report's assessment of market impact accurate? At a time when Canadian television production, particularly television drama production, desperately requires financial nurturing, what solutions are available? These questions deserve objective analysis. A public process would provide precisely the much needed forum in which to do so. The majority decision shuts this door, perhaps forever. One wonders why. The majority says it does so because the 49th Media application is incomplete. I disagree.

On July 30, 2003 in a letter to 49th Media's solicitors, Commission staff reminded the applicant that thus far it had supplied no "...evidence that, if 49th Media were licensed, the U.S. broadcasters would enter into the type of agreement set out in the letter of intent." Staff requested the applicant to: "Please supply written evidence of support by U.S. broadcasters for your proposal." In response, 49th Media forwarded to the Commission three letters, one from Turner Broadcasting System Inc. (Turner), one from A&E Television Networks (A&E) and one from Discovery Communications Inc. (Discovery). None of the three pledged absolute permission and it was this absence of a clear statement that the Majority considered fatal to the application.⁸ With respect, "permission" is not what

Commission staff requested in its July 30, 2003 deficiency letter. It asked for "evidence that if 49th Media were licensed, the U.S. broadcasters would enter into..." and it quoted an earlier Commission letter seeking "the nature and outcome of any discussions with key participants, including any written agreements indicating support for your proposal."

In my view, the information Commission staff requested was provided by the applicant. Granted, 49th Media was unable to supply signed contracts or unequivocal statements of intent, but it never promised to do so and such evidence was never requested of it. It did what was asked of it. It fulfilled Commission staff's request to bring them up to date on "the nature and outcome of any discussions" as follows: "49th Media has discussed its proposal with each of the U.S. broadcasters. Each of the U.S. Broadcasters is respectful of the CRTC's jurisdiction and is interested in being informed of the progress of the Application and the Commission's decision with respect to our proposal. ... We are confident that if 49th Media is licensed and conditions of licence are known, we will be able to get the signed agreements during our pre-launch phase."⁹ As well, 49th Media fulfilled Commission staff's request for "written evidence of support." The Majority is correct when it concludes, "that the U.S. services will not grant their permission at this time." That, however, is not what Commission staff asked for. The July 30, 2003

⁸ The Majority decision says: "Given the clear indication that the implementation of 49th Media's proposal is based upon permission of the U.S. broadcasters, the Commission considers that the application cannot be considered complete, absent that permission or support."

⁹ 49th Media letter to CRTC, October 3, 2003

deficiency letter asks for evidence that **“if 49th Media were licensed,** (emphasis added) the U.S. broadcasters would enter into the type of letter set out in the letter of intent.” Not until the majority decided to return 49th Media’s application as incomplete was the applicant ever informed that “permission” agreements with U.S. broadcasters were a condition precedent to further process designed to evaluate the merits of its application. Until now the applicant has been led to believe that it need only inform the Commission of the agreements it expected to enter into **“if 49th media were licensed.”** (emphasis added) In my view the applicant is entitled to rely on that belief.

In response to the Commission staff’s July 30, 2003 letter, 49th Media provided both the status report and the written evidence, in the form of the three letters referred to above, requested. While the letters are not unequivocal and, in places, strike a cautious even reluctant tone, they also hold out hope that the U.S. broadcasters who wrote them would enter into some sort of agreement should 49th Media successfully complete the application process. Afraid that it might “jeopardize A&E’s current Canadian distribution rights,”¹⁰ A&E indicated that until it learned, “much more, including any terms and conditions that the CRTC might impose on a licence for 49th Media to operate an SRDU, including the reaction of other groups in Canada,”¹¹ it could not enter into an agreement with 49th Media. Discovery did not rule out negotiations with 49th Media but stated that: “...we cannot move forward in support of your efforts until we fully understand the proposals and the impact on both our business and our partners’ businesses.”¹² The Turner letter was not encouraging but it seems obvious from various references in it that Turner’s unwillingness to commit to 49th Media’s proposal may be more a product of the lobbying it has endured from Canadian stakeholders opposed to it than Turner’s own sense of reluctance. “We have in fact had several communications with the CAB in which they thanked us for not getting involved in the 49th Media proposal. We saw significant risk in appearing to move from our neutral position. It is also our understanding that our major cable distributors, Rogers and Shaw, have expressed their opposition to the ad insertions proposal filed by 49th Media.”¹³

In my view, 49th Media has fulfilled its obligations to file a complete application including frank and forthright answers to all deficiency inquiries. The majority decision places it in a no-win situation. Worried about jeopardizing current business arrangements in Canada, U.S. broadcasters are not willing to commit themselves until 49th Media is licensed. The Majority is unwilling to begin the licensing process until 49th Media obtains commitments. This seems grossly unfair to the applicant and to the Canadian broadcasting system that can only benefit from having the issues underlying the 49th Media proposal aired publicly. There is a lingering sense culled from reading the three letters supplied by the applicant that backroom lobbying has displaced open forum discussion. This is unfortunate. The Canadian broadcasting system requires fresh ideas if it is to continue to serve Canada well. How sad it would be if on a technicality – a technicality, by the way, which appears to be founded upon a misinterpretation by the majority of what 49th Media proposed and what Commission staff requested – the broadcasting system and Canadians in general were deprived of the opportunity to evaluate whether or not the 49th Media proposal is just such an idea.

¹⁰ A&E letter to Mr. Joe Uva, CEO, Omnicom Inc., September 4, 2003

¹¹ Ibid.

¹² Discovery letter to Mr. Kevin Shea, 49th Media, June 13, 2003

¹³ Turner letter to Joe Uva, September 4, 2003