



## Broadcasting Public Notice CRTC 2004-96

Ottawa, 16 December 2004

### **Improving the diversity of third-language television services – A revised approach to assessing requests to add non-Canadian third-language television services to the lists of eligible satellite services for distribution on a digital basis**

*In this public notice, the Commission sets out a revised approach to the assessment of requests to add non-Canadian third-language television services to the lists of eligible satellite services for distribution on a digital basis. The revised approach puts a greater emphasis on expanding the diversity and choice in television services available to underserved third-language ethnic communities in Canada.*

#### **Background**

1. In *Call for comments on proposals for the addition of non-Canadian satellite services to the list of services eligible for digital distribution*, Broadcasting Public Notice CRTC 2003-36, 11 July 2003 (Public Notice 2003-36), the Commission invited comments on requests to place 15 non-Canadian third-language satellite services on the Commission's lists of satellite services eligible for distribution on a digital basis (the digital lists) contained in the Revised lists of eligible satellite services.
2. The requests were considered in the light of the criteria established by the Commission in order for non-Canadian services to be added to the digital lists. These criteria and the principles underlying them were enunciated in the early 1980s. Specifically, in announcing the public hearing that led to the licensing of Canada's first specialty services (Public Notice CRTC 1983-93, 4 May 1983), the Commission stated that it was willing to allow carriage on cable of certain non-Canadian specialty services that would add diversity to the overall mix of programming services available to Canadian cable subscribers, provided that such services "contribute to, and do not adversely affect, the development of the Canadian broadcasting system." Subsequently, in *Specialty programming services*, Public Notice CRTC 1984-81, 2 April 1984, the Commission announced its decisions and its regulatory framework for the introduction of specialty services in Canada. On the subject of non-Canadian services, the Commission stated that it had:

...determined that it would not be in the interest of the Canadian broadcasting system to allow the carriage, at this time, of non-Canadian specialty programming services which, in the Commission's opinion, could be considered either totally or partially competitive with Canadian discretionary services.

3. These principles were reiterated by the Commission when it first called for proposals for additions to the digital lists in *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 (Public Notice 2000-173).
4. The requests were also examined against the background of the Commission's longstanding approach to licensing, designed to ensure that the objectives of the *Broadcasting Act* (the Act) are met, including those related to diversity. Under that approach, Canada's ethnic communities have gained access to a broad range of Canadian services in the language of their heritage.<sup>1</sup>
5. With respect to diversity, the broadcasting policy for Canada set out in the Act declares that the Canadian broadcasting system should:
  - serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada (section 3(1)(d)(i));
  - encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view (section 3(1)(d)(ii)); and
  - through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society (section 3(1)(d)(iii)).
6. Under the Commission's licensing approach, Canada's ethnic broadcasting landscape has expanded considerably over the years. It currently includes four ethnic over-the-air television stations and 17 radio stations, all of which devote a significant portion of their schedules to third-language programming. There are also five general interest third-language specialty services that were approved under the analog licensing framework (the analog services). The first analog services were licensed in 1984. Telelatino Network Inc. (Telelatino), originally called Latinovision and now known as Telelatino, provides a schedule that is divided fairly evenly between Italian- and Spanish-language programming. Fairchild Television Ltd. (Fairchild), the successor of Chinavision Canada Corporation, provides service almost entirely in Cantonese. The next third-language

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<sup>1</sup> See *Ethnic Broadcasting Policy*, Public Notice CRTC 1999-117, 16 July 1999 and its predecessor *A broadcasting policy reflecting Canada's linguistic and cultural diversity*, Public Notice CRTC 1985-139, 4 July 1985.

specialty service licensed by the Commission under the analog licensing regime was Talentvision, originally licensed in 1985, and operating principally in Mandarin. South Asian Television Canada Limited was licensed in 1996 and provides a predominantly Hindi service known as ATN, while Odyssey Television Network Inc. was licensed in the same year to provide a Greek-language specialty service.

7. In addition to the third-language ethnic broadcasting services noted above, 21 Category 2 ethnic specialty services licensed for digital distribution have now been launched, as have several specialty audio services. A further 30 Category 2 ethnic digital services have received authorization, but have not commenced operation.
8. As noted above, the Commission's approach to authorizing the distribution of non-Canadian services has reflected its belief that non-Canadian services can enrich the diversity of viewing options for Canadians by complementing Canadian services. To ensure that Canadian services remain viable, the Commission has long required that a non-Canadian service, if it is to be authorized for distribution, not be totally nor partially competitive with a Canadian service. At the same time, the Commission has consistently taken into account the contribution that non-Canadian services can make to the diversity of the Canadian broadcasting system. This approach was designed to ensure that Canadian services are viable and in the best possible position to fulfil their commitments and obligations, particularly with respect to the production, acquisition and exhibition of Canadian programming, a responsibility that non-Canadian services do not have.
9. Under the Commission's approach, 19 third-language, non-Canadian services have been authorized to date for distribution in Canada. Six of them are currently offered by Canadian broadcasting distribution undertakings (BDUs).
10. In response to Public Notice 2003-36, the Commission received a large volume of comments from individuals, community, business and cultural organizations, and from parties within the broadcasting industry, expressing support for the increased availability of non-Canadian third-language television services. At the same time, many parties expressed concern for the continued viability of Canadian third-language ethnic television services with the addition of further non-Canadian third-language services to the digital lists, and the need to ensure that third-language ethnic communities in Canada retain access to programming that reflects Canadian points of view.
11. The Commission authorized the distribution of nine additional non-Canadian third-language services in *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2004-52, 15 July 2004. The Commission's determinations regarding these additions were set out in *Requests to add non-Canadian third-language services to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2004-50, 15 July 2004 (Public Notice 2004-50). In that notice, the Commission also denied requests to add six non-Canadian third-language services to the digital lists on the basis of its longstanding policy precluding the authorization of non-Canadian services that would be either totally or partially competitive with Canadian specialty or pay services.

12. In Public Notice 2004-50, the Commission took note of the views of parties concerning the availability of third-language non-Canadian services, the view of third-language ethnic communities that they were underserved, and the requests for greater access to third-language programming, including third-language programming from non-Canadian programming services. Further, the Commission considered data from the 2001 Census demonstrating that Canada's already considerable level of ethno-cultural diversity is growing and will continue to grow.
13. In light of the above, as well as some evidence of a growth in the number of subscriptions in Canada to unauthorized third-language satellite services and the impact of this growth on Canadian services, the Commission decided to undertake a reassessment of the appropriateness of its approach for additions of third-language services to the digital lists. The Commission thus issued *Review of the approach to assessing requests to add non-Canadian third-language services to the lists of eligible satellite services for distribution on a digital basis – Call for comments*, Broadcasting Public Notice CRTC 2004-53, 15 July 2004 (Public Notice 2004-53), in which it asked for the views of interested parties regarding possible refinements to its approach, including the adoption of a financial impact test and different safeguards for Canadian third-language ethnic services, such as requirements that they be packaged with non-Canadian services. It also specifically asked for views regarding the current distribution requirements for the five analog services.

### **Positions of parties**

14. The Commission received 152 comments in response to Public Notice 2004-53. Among the submissions filed with the Commission was a report prepared by a panel of experts selected by the Minister of Canadian Heritage, entitled *Integration and Cultural Diversity: Report of the Panel on Access to Third-Language Public Television Services*, and published on 27 September 2004 (the Panel Report). Other comments included 30 form letters in support of greater choice for services in South Asian languages, 55 form letters supporting the recommendations of the Panel Report, and a petition supporting the addition of more non-Canadian third-language services, in particular the Italian-language service, RAI International (RAI).
15. The Panel Report emphasized the importance of ensuring greater access to the cultural diversity offered by television services from around the world, while also supporting measures to strengthen existing Canadian third-language ethnic services and to encourage the development of new Canadian third-language ethnic services. The Panel Report recommendations included the following:
  - the adoption of a policy and regulatory framework specific to third-language programming, based in part on a definition of a public broadcaster as being “the principal, or significant broadcaster(s) in a foreign country that provides generalist programming culturally relevant to a particular language group in Canada”;

- preference to non-Canadian services that enter into partnerships, alliances, contractual arrangements or equity participation with Canadian broadcasters that result in the provision of programming and, where such alliances or partnerships are not feasible, the addition of non-Canadian third-language services to the digital lists, unless their distribution is likely to cause irreparable harm to an existing Canadian service; and
  - contributions by non-Canadian third-language services, including those that currently appear on the digital lists and any that are added in the future, to a third-language programming fund representing not less than 10% of the payments that such services receive from Canadian BDUs.
16. Most of the remaining comments also supported the addition of more non-Canadian third-language programming services to the Canadian broadcasting system, arguing that such services would respond to demands for greater diversity in programming, ensure better service to third-language ethnic communities, and possibly discourage subscription to unauthorized satellite services. Many of these comments, including those by BDU operators, the providers of various non-Canadian services, individuals, and several groups representing third-language ethnic communities in Canada, recommended that the Commission introduce greater flexibility to the approach it uses in assessing requests for the addition of non-Canadian services to the digital lists, with a view to increasing the overall availability of third-language services.
17. A few parties recommended that the Commission adopt a more open approach to public broadcasters. Radiotelevisão Portuguesa Internacional (RTP), RAI and Rogers Cable Communications Inc. (Rogers), for example, argued that public broadcasters serve a very different mandate than commercial broadcasters and, by virtue of this mandate, cannot be seen as competitive with commercial Canadian services. They recommended that the distribution of these services in Canada be permitted without the application of the competitiveness test.
18. Some comments, including those by Canadian broadcasters, producers, unions and related associations, supported the status quo, arguing that the Commission's current approach strikes the appropriate balance between ensuring an adequate level of service to third-language ethnic communities and fostering the introduction of Canadian third-language ethnic services that are capable of meeting their Canadian programming commitments. They generally recommended that the Commission continue to promote Canadian services first and foremost. They submitted that this was the best way to ensure that Canadian third-language ethnic services are able to continue to make a direct and meaningful contribution to Canadian society.
19. The key areas addressed in the comments filed in the present proceeding are examined below.

### **The competitiveness test**

20. As noted above, the Commission's approach to the authorization of non-Canadian services for distribution in Canada currently precludes the addition of services that are either partially or totally competitive with Canadian specialty or pay services, including Category 2 services that have not yet launched, on the basis that they could jeopardize the viability of the Canadian services.
21. In assessing competitiveness, the Commission applies a case-by-case approach, taking into account such factors as the nature and genre of programming, the target audience, the language or languages in which the programming is broadcast, the source of programming, and any relevant competitive concerns raised by parties, in order to determine the degree of overlap that might exist to make the non-Canadian service partially or totally competitive with any Canadian pay or specialty service.
22. Some parties suggested that the Commission's competitiveness test is subjective and arbitrary, and has resulted in decisions that unduly restrict the choices available to Canadian television viewers. These interveners generally recommended the adoption of a simpler test. For example, the Canadian Cable and Telecommunications Association (CCTA) recommended that the Commission only be concerned with circumstances in which a non-Canadian third-language service and a Canadian third-language service are clearly totally competitive, such that the Canadian service would suffer significant and irreparable harm from the distribution of the non-Canadian service. BDUs and non-Canadian third-language programming services generally echoed this argument.
23. Other parties, including Canadian broadcasters, producers, unions and related associations, generally argued that the Commission's test continues to be an important mechanism for ensuring that Canadian services are able to contribute to the objectives of the Act. Many stated that the test ought to be maintained, or even strengthened. The Canadian Association of Broadcasters (CAB), for example, noted that the Commission's existing policies have ensured that many Canadian ethnic communities are served by high quality Canadian programming combined with high quality programming produced in their countries of origin. The CAB also argued that a standard of irreparable harm is unrealistic, noting that the presence of a competitive non-Canadian service in the market might cause significant harm, but still fall short of causing harm that could be described as irreparable. The Canadian Category 2 service, Festival Portuguese Television (Festival Portuguese) stated that the loss of even five percent of its subscriber base would threaten its survival.
24. A few parties noted that a test based on financial impact would be difficult to apply since the potential for financial impact would be difficult to assess. For example, Telelatino suggested that financial impact could be taken into account, but only in general terms, as determining precise figures would be impossible due to all the uncertainties involved.

25. The Panel Report suggested that the competitiveness test focused too strongly on the potential impact on existing services, rather than on the interests and needs of third-language ethnic communities. It also argued that the test was too negative, and did not take into consideration the positive benefits that competition could produce. The Panel Report further noted that the Commission's existing approach to assessing programming overlap, and specifically the example of the Commission's denial of RAI, suggested that no general interest non-Canadian third-language programming service would be allowed in Canada. It recommended that a finding of competitiveness with respect to programming overlap should not result automatically in the denial of a proposed general interest service, especially when the relevant community sees the service as desirable, and when it would not cause some form of irreparable harm to an existing Canadian service, as determined by a thorough analysis of relevant factors.
26. Several third-language community groups also called upon the Commission to put an increased emphasis on the needs and interests of third-language ethnic communities, noting the wide array of international programming for third-language ethnic communities that is not currently available in Canada, due in part to the Commission's current approach to assessing competitiveness.

*Application of the competitiveness test with respect to unlaunched Category 2 services*

27. In *Licensing framework policy for new digital and specialty services*, Public Notice CRTC 2000-6, 13 January 2000, the Commission noted that a diverse range of non-Canadian programming is a valuable supplement to Canadian programming in a variety of genres. The Commission therefore encouraged the development of alliances between Canadian and non-Canadian services as an appropriate way to achieve the objectives of the Act. At the same time, the Commission recognized that there may be programming genres in which a Canadian service is unlikely to be offered. As a result, it determined that it would be appropriate to add non-Canadian services to the digital lists. However, to ensure that Canadian Category 2 services would have an opportunity to obtain BDU carriage, the Commission determined that it would not be predisposed to authorize non-Canadian services that are either partially or totally competitive with Canadian services, including any approved Category 2 service, whether or not it had launched. At the same time, to ensure that unlaunched Category 2 services would not unduly prevent the addition of non-Canadian services, the Commission imposed a three-year deadline by which these services would have to launch. This deadline has generally been extended by one year upon application by a Category 2 service.
28. Several parties to the present proceeding stated that unlaunched Category 2 services have become a barrier to the provision of service to underserved third-language ethnic communities. For example, Phoenix Satellite Television Company Limited (Phoenix) noted the ease with which a Category 2 applicant can obtain approval. Phoenix submitted that approved but unlaunched Category 2 services are not services at all, but merely paper authorizations for services that may never launch. It recommended that the Commission take only launched services into account when determining whether to add a non-Canadian third-language service to the digital lists. It argued that this would ensure that unlaunched Category 2 services do not act as placeholders that prevent Canadian

subscribers from having access to non-Canadian services. Other non-Canadian third-language services also recommended that unlaunched Category 2 services not be taken into account, or only be taken into account for a period of time shorter than the three or four years the Commission currently allows when applying the competitiveness test.

29. Canadian broadcasters recommended that the Commission continue to consider Category 2 services when determining whether to add a non-Canadian third-language service to the digital lists, in order to ensure that they have an opportunity to secure carriage on BDUs. The CAB submitted, however, that the onus should be on approved but unlaunched Canadian third-language ethnic Category 2 services, when opposing the addition of a non-Canadian third-language service to the lists, to provide proof that they are making a positive effort to secure carriage.

*Application of the test to Canadian services targeting more than one language group*

30. As noted in Public Notice 2004-53, there are Canadian third-language specialty or pay services that target more than one language group, permitting them to serve audiences that might not otherwise be able to support a full service. For example, as mentioned above, Telelatino offers a schedule that is approximately half Italian and half Spanish, while Fairchild operates Talentvision principally in Mandarin, but also offers some Vietnamese and Korean programming. South Asian Television, while predominantly broadcasting in Hindi, also offers programming in a mix of South Asian languages, including Punjabi, Gujarati and Urdu.
31. Most parties recommended that the Commission keep in mind the well-being of Canadian services that offer programming in more than one language, but not permit their existence to restrict the presence of non-Canadian services in Canada. On the other side, Telelatino submitted that the entry of non-Canadian Spanish- or Italian-language services would have a direct negative impact on its service and on its ability to satisfy its conditions of licence. It recommended that the Commission continue to rigorously apply the competitiveness test when a Canadian general interest service devotes at least 25% of its programming hours to the language of a proposed general interest non-Canadian service. The CAB echoed Telelatino's recommendation. Fairchild recommended a threshold of 15%.

**Packaging**

32. As noted in Public Notice 2004-53, one possible means to increase the availability of non-Canadian third-language programming services, while avoiding the risk that any such service might have a significant negative impact on a Canadian service, would be to make its distribution subject to a requirement that it be packaged for sale with the affected Canadian service.



33. A number of parties expressed concern about the packaging concept. Some representatives of third-language ethnic communities noted that packaging would result in increased costs for subscribers by requiring them to subscribe to a number of services. Distributors, in particular, were generally opposed to Commission-imposed packaging requirements. The CCTA argued that BDUs are best positioned to make decisions about packaging and that, in a competitive environment, they require flexibility to respond to the demands of their customers. Rogers argued that any packaging requirement applied to Category 2 services would fly in the face of the Commission's digital licensing framework, which is based upon a market-driven, open-entry approach.
34. A few non-Canadian service providers, including RTP, Reach Media and MTV Networks International, considered that packaging would be an effective method for increasing subscription and advertising revenues, particularly for new services. The Panel Report also supported the development of packaging options, suggesting that the packaging of services in the same language would strengthen existing Canadian services and reduce the possible negative impact of the introduction of non-Canadian services. The Panel Report noted that packaging would help make the Canadian broadcasting system more attractive to Canadians and help reduce the sense that desirable programming choices are only available through unauthorized satellite services.
35. Of those comments that addressed packaging, most supported its introduction, with certain provisos. For example, the CAB and several Canadian third-language ethnic broadcasters recommended that packaging only be permitted with the consent of the Canadian service. These parties noted that some popular Canadian services would see no advantage to their being packaged with a non-Canadian service, if that packaging resulted in an increased cost for subscribers. The CAB also recommended that, if there is a Canadian service offering programming in a particular language, no non-Canadian service in that language be approved for distribution on a stand-alone basis, that is, the Commission should require BDUs to carry all complementary Canadian services before they can carry the non-Canadian service in question. Fairchild recommended a buy-through requirement, under which consumers would have to receive the Canadian third-language ethnic specialty service before being able to receive a non-Canadian third-language service in the same language. Bell ExpressVu<sup>2</sup> recommended that subscribers be obliged to purchase an existing analog ethnic specialty service in a particular language if they also wished to subscribe to any discretionary package of Category 2 and/or non-Canadian services in the same language. Quebecor Média inc. (Quebecor) suggested that large packages of three to ten third-language services would not only be more attractive to subscribers than services offered by themselves, but might also encourage subscriptions to Canadian BDUs rather than to distributors that have not been authorized to operate in Canada.

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<sup>2</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

### **Program supply and program rights**

36. A number of parties raised concerns about situations in which non-Canadian services are program suppliers to Canadian services, and commented on the effectiveness of the Commission's existing rules with respect to program rights. The rules regarding program rights, as set out in Public Notice 2000-173, require sponsors to obtain and file the following statement and undertaking from the provider of a non-Canadian service before the Commission will consider any request to add the service to the digital lists:
- a statement by the non-Canadian service provider that it has obtained all necessary rights for distribution of its programming in Canada; and
  - an undertaking by 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 must 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.
37. Many parties emphasized the importance of the rights market. The CCTA suggested that an argument against the introduction of a non-Canadian service could be made if a Canadian service was to convincingly demonstrate that the addition of a non-Canadian service would reduce its ability to acquire specific programming rights to the extent that it would be unable to fulfil its regulatory obligations and would no longer be viable.
38. Fairchild stated that, without strict enforcement of the program rights requirements, a non-Canadian service provider that chooses to launch its service directly in Canada may cease to supply programming to Canadian services, demand exorbitant rates for its programming, or withhold the choicest programming from Canadian services. Any of these actions would increase the cost and reduce the selection of programming, and make it difficult for Canadian services to maintain the quality and attractiveness of their services. Global Communications Limited (Global) expressed concern that non-Canadian service providers may withhold certain program rights in anticipation of their services being added to the digital lists. Both the CAB and Festival Portuguese recommended that the Commission require that any non-Canadian third-language service proposed for inclusion on the digital lists provide to the Commission, in confidence, copies of any program supply agreements in place with Canadian programming services.
39. The Panel Report also emphasized the importance of ensuring that Canadian services continue to have access to non-Canadian programming, and recommended that the rule prohibiting the holding of exclusive rights for the Canadian market be maintained for non-Canadian third-language services. It also noted that conflicts regarding access to programming may require some resolution mechanisms.

40. Rogers stated that the existing rights requirements are too onerous. Rogers proposed that, instead of requiring non-Canadian services to offer their entire program schedules to existing Canadian licensees, the program rights rule be reinterpreted as requiring non-Canadian services to offer “a reasonable mix of [their] programming to Canadian licensees at a reasonable price.” Rogers submitted that any further requirement would not be financially reasonable for the non-Canadian service. RAI and the CCTA made similar arguments. RAI considered that the current interpretation of the program rights provision was far too broad, and that it conferred upon Canadian broadcasters the right to cherry-pick any and all programs for which the non-Canadian broadcaster owns the rights. RAI therefore recommended that the existing rule be reinterpreted as proposed by Rogers.

#### **Access to Canadian third-language ethnic services**

41. In Public Notice 2004-53, the Commission invited comments regarding the current distribution requirements for the five analog services Telelatino, Fairchild, Talentvision, ATN and Odyssey.
42. The CAB and Canadian third-language ethnic services noted the difficulties encountered by Canadian ethnic specialty and pay services in obtaining carriage. Ethnic Channels Group Limited, MediaNet Canada Ltd., South Asian Television Canada Limited, Telelatino, and Fairchild all described the challenges they have faced in their negotiations with BDUs, including issues of channel capacity, size of target market, and terms and conditions of carriage. ATN also noted that the five analog services had been licensed under more stringent processes and with more onerous Canadian programming obligations than Category 2 services, and argued that they ought to be given some form of priority carriage.

#### **Creation of a third-language programming fund**

43. One of the conclusions of the Panel Report was that any new approach should not provide for the entry into Canada of non-Canadian third-language services without imposing the requirement that they make a contribution to the Canadian broadcasting system. The Panel Report recommended that non-Canadian third-language services appearing on the digital lists, as well as any such services that are added in the future, be required to make a contribution to a new third-language programming fund representing not less than 10% of the payments they receive from Canadian BDUs. The Panel Report envisaged that a non-Canadian third-language service “would agree that the appropriate funds would be withheld by the Canadian distributors and turned over to the appropriate fund.” It also proposed that this contribution be in addition to the existing contributions by BDUs to the Canadian Television Fund. The Panel Report further recommended that the Government of Canada consider matching the funds contributed by non-Canadian third-language broadcasters. The panel also made specific recommendations regarding the management of the fund.

44. Several interveners commented on the Panel Report's recommendation. Representatives of the distribution industry, including the CCTA, Rogers, and Quebecor, generally opposed the fund proposal, arguing that non-Canadian services already make a contribution to the system by providing greater programming choice and diversity and by virtue of the existing financial contribution to local expression, Canadian programming and community television required of all Canadian BDUs amounting to 5% of gross revenues derived from their broadcasting activities. They also noted that a financial contribution may act as a disincentive to the introduction of new non-Canadian third-language services into the system, thus continuing to deprive underserved communities. They, as well as several representatives of third-language ethnic communities, further noted that imposing such a requirement on non-Canadian third-language services would be unfair to those services, especially when non-Canadian English- and French-language services have no similar obligation, and unfair to subscribers, since the additional cost would most likely be passed on to them.
45. Producers, unions and related associations generally supported the development of a third-language programming fund. The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) and the Writers Guild of Canada recommended that the contribution requirement be no less than 30% of gross revenues. The CAB, ATN and Festival Portuguese supported the concept of a fund in principle. However, they recommended that, if the Commission were to consider a fund, it should initiate a separate public proceeding to consider it further, along with other measures to ensure that non-Canadian third-language services operating in Canada make a direct contribution to the Canadian broadcasting system.

### **The Commission's analysis and determinations**

46. Throughout this process, the Commission has been mindful that the Canadian broadcasting system currently offers a significant choice of services to English-speaking Canadians and a broad range of choice to French-speaking Canadians in Quebec, and is also making progress towards expanding the choices available to French-speaking Canadians outside of Quebec. It has also been mindful of the fact that, as the make-up of Canadian society continues to evolve, and as the diversity and size of its cultural and linguistic communities continue to expand, the need for programming in languages other than English or French will continue to grow.
47. The Commission remains committed to ensuring that the Act's objectives are met through the implementation of policies that encourage the emergence and maintenance of Canadian third-language ethnic services that inform, enlighten, entertain, and serve the needs and interests of their communities, through programming that reflects Canadian points of view. As noted in the comments of many parties to this proceeding, Canadian third-language ethnic services play an important role in assisting Canadians who speak languages other than English or French to become engaged and integrated with Canada's social fabric.

48. The Commission remains of the view that Canadian third-language ethnic services are best positioned to provide the most attractive non-Canadian programming, alongside quality programming reflecting Canadian perspectives, experiences and values. It thus considers that Canadian services are the most efficient and effective vehicles for meeting the needs and interests of Canada's third-language ethnic communities and fulfilling the objectives of the Act. The Commission also considers that many Canadian third-language ethnic services benefit from partnerships with non-Canadian services, ensuring that Canadians have access to programming from their countries of origin, along with Canadian programming and coverage of Canadian issues. Through their Canadian content, such joint ventures ensure a direct contribution to the Canadian broadcasting system. The Commission therefore continues to support and encourage alliances between Canadian and non-Canadian services as an efficient and appropriate way to achieve the objectives of the Act, whether through arrangements in which non-Canadian services supply programming to a Canadian service and/or through equity participation by non-Canadian services up to the maximum permitted by Canadian law.
49. At the same time, the record of this proceeding clearly demonstrates that, in a world where technology increasingly facilitates greater choice, the Commission's policies should also enhance access to a variety of non-Canadian third-language programming services that contribute to meeting the needs of underserved third-language ethnic communities.
50. The Commission's longstanding competitiveness test has been effective in allowing the addition of non-Canadian services to the Canadian broadcasting system without threatening the continued viability of Canadian services or their ability to meet their obligations under the Act. At the same time, the application of the test to all third-language services has resulted in the denial of certain non-Canadian services that, with appropriate safeguards, could have enhanced the diversity and choice available in the system, without depriving Canadian third-language ethnic services of the ability to fulfil their conditions of licence and other regulatory obligations.
51. This is particularly the case with non-Canadian third-language general interest services. The application of the existing test to these services has generally resulted in the finding of competitiveness between these services and Canadian general interest third-language ethnic services in the same language, due to the breadth and comprehensiveness of their respective program mandates and schedules and the potentially significant overlap between the two. Yet it is precisely this broad array of programming that is attractive to many people in Canada's third-language communities, and that would assist in diversifying the range of third-language programming available to these communities, were such services added to the digital lists.

52. The same issues of competitiveness do not arise with non-Canadian third-language niche services that are focused on a specific programming genre or a particular target group. These services are rarely found to be competitive with a Canadian general interest service in the same language, since their focuses and schedules are considerably more specific. They would be competitive only with very similar Canadian niche services, of which there are generally very few. Accordingly, as discussed further below, the Commission will continue to apply its existing test to requests to add non-Canadian third-language niche services to the digital lists, subject to certain amendments.
53. However, with respect to non-Canadian third-language general interest television services (that is, those services that offer programming from a broad spectrum of program genres and categories), the Commission has determined that it would be appropriate to adopt a more open-entry approach to the consideration of requests to add such services to the digital lists. At the same time, in order to ensure that Canadian third-language general interest services are in a position to continue to fulfil their conditions of licence and other regulatory obligations, the more open entry approach will also involve certain other regulatory measures that are discussed further below.
54. As noted above, certain interveners suggested that the Commission adopt a more open approach with respect to non-Canadian third-language public broadcasters. In the Commission's view, establishing what is meant by the terms "public broadcaster" and "public broadcasting" would be difficult, particularly in an international context, where the models for public broadcasting vary significantly. The Commission is also of the view that the following approach to its consideration of requests for authorization of non-Canadian, general interest, third-language services is such that the adoption of a different approach specific to public broadcasting services is unnecessary.
55. Finally, among the matters raised in Public Notice 2004-53 was whether a financial impact test should be developed to determine if the addition of a non-Canadian third-language television service to the digital lists would adversely affect Canadian services. Having examined the views of interested parties, the Commission concurs with those who argued that a financial impact test, necessarily based on projected results, would be difficult to apply with precision and conclusiveness. The Commission is also mindful that such an approach would be burdensome to sponsors and interveners.

#### **Revised approach to general interest third-language non-Canadian services**

56. Going forward, requests to add non-Canadian, general interest, third-language services to the digital lists will generally be approved, subject, as appropriate, to the new distribution and linkage requirements specified below. Under this approach, a general interest service means one that, unlike a niche service, offers programming from a broad spectrum of program genres and categories. A third-language programming service means one that provides at least 90% of its programming in languages other than English or French. For the purpose of making this calculation, a program that is accompanied by secondary audio programming (SAP) or subtitles in either English or French will not be counted as

a third-language program. Requests for the addition to the digital lists of niche or other non-Canadian services providing programming in a third language or languages that do not match the above description will continue to be assessed on a case-by-case basis, under the Commission's existing competitiveness test, subject to certain amendments as discussed further below.

57. To address the concern that the addition of a non-Canadian, general interest, third-language service may have a negative impact on any of the analog services or on any Category 2 service operating in the same language or languages, the Commission will adopt new distribution and linkage requirements for these services. In light of the more substantial requirements imposed on the analog services, specifically their Canadian programming spending obligations, and their greater obligations for the exhibition of Canadian content relative to those required of ethnic Category 2 services, the Commission will impose, where relevant, a requirement for a buy-through of the analog services operating in the same language. To help to foster licensed, general interest, third-language ethnic Category 2 services, the Commission will also impose, where relevant, a must-offer requirement, as explained further below.

*The buy-through requirement in respect of the analog services*

58. Where a sponsored general interest, non-Canadian, third-language service offers 40% or more of its programming in any of the Cantonese, Mandarin, Italian, Spanish, Greek or Hindi languages, the Commission will be disposed to authorize its distribution, subject to the requirement that the non-Canadian service only be distributed to customers who also subscribe to the analog service operating in the same language. Under this requirement, while subscribers would have to subscribe to the Canadian analog service before they could subscribe to the non-Canadian service, they would not be required to subscribe to the non-Canadian service in order to obtain the Canadian one.
59. The Commission is of the view that this buy-through requirement is more flexible than a strict packaging requirement, in that subscribers would still be able to subscribe to the Canadian service alone. In addition, ethnic Canadian services currently distributed on an analog basis would benefit from the marketing and promotion they would receive, along with non-Canadian third-language services offered on a digital basis. The Commission considers it likely that BDUs now distributing any of the analog services on a digital basis would also choose to offer that service in a package with the relevant non-Canadian general interest third-language service.

*The must-offer requirement in respect of licensed, third-language, general interest ethnic Category 2 services*

60. Where a sponsored general interest, non-Canadian, third-language service provides programming in a third language that represents 40% or more of the service's program schedule (a principal language) that is also a principal language of one or more launched, general interest, third-language ethnic Category 2 services, the Commission will be disposed to authorize the distribution of the non-Canadian service, subject to the requirement that a BDU choosing to distribute it also distribute at least one third-

language ethnic general interest Category 2 service in the same principal language, and further, that the BDU make available at least one third-language ethnic general interest Category 2 service in the same principal language as part of a package with the general interest, non-Canadian, third-language service. Under this requirement, subscribers would have the option of choosing to receive the non-Canadian service, a Canadian Category 2 service providing programming in the same principal language as the non-Canadian service, or the non-Canadian service in a package with at least one Canadian Category 2 service in the same principal language, as selected by the BDU. The subscriber would not have to subscribe to the Category 2 service in order to receive the non-Canadian service, or vice versa. This requirement is in addition to distribution of any of the analog services as may be required under the buy-through provision described above.

61. The Commission notes that, in some instances, there are two and, in at least one case, three, licensed, general interest, ethnic Category 2 services operating in the same third language. Although the Commission is of the view that obliging BDUs to offer all general interest Category 2 services in a given third language may be too onerous a requirement, it notes that a distributor may well elect to offer larger packages of such services. It is also satisfied that the must-offer provision described above will benefit third-language ethnic Category 2 services without unduly raising the cost for subscribers. In this regard, the Commission is convinced that general interest third-language ethnic Category 2 services have a major role to play in meeting the current and future needs of Canadians whose first language is other than French or English. As additional general interest third-language ethnic Category 2 services are launched, they will join the pool of services from among which BDUs may choose in order to meet the must-offer requirement.
62. As indicated above, in meeting this requirement, a BDU will generally be free to choose which general interest third-language ethnic Category 2 service or services it may offer in a package with a general interest, non-Canadian, third-language service operating in the same principal language. However, where a BDU is affiliated with the licensee of one of those Category 2 services and chooses to offer only that service, the Commission will consider this to be, *prima facie*, undue preference.

#### **Application of the revised approach to services already on the lists**

63. The Commission is of the preliminary view that it may be appropriate to apply the same new distribution and linkage requirements announced in this public notice to non-Canadian third-language services that are already on the Revised lists of eligible satellite services. The Commission will soon issue a call for comments on its preliminary view.



## **Implementation**

64. The Commission will amend its public notices entitled *Distribution and linkage requirements for Class 1 and Class 2 licensees* and *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, both of which are incorporated by reference into the *Broadcasting Distribution Regulations* (the Regulations), to make these new requirements applicable to each Class 1 and Class 2 BDU, and each DTH operator, respectively, except as otherwise provided by a condition of its licence. Class 3 and exempt BDUs will not be subject to the new requirements.
65. Sponsors of non-Canadian third-language services, in addition to meeting the Commission's existing information requirements, will be asked to identify the language(s) of the non-Canadian service, to specify whether it is a general interest or niche programming service, and to provide such other information as is listed in the appendix to this notice. Interveners will have an opportunity to assess and comment on these aspects of a request to add a non-Canadian, third-language service to the digital lists. The Commission must also be satisfied that the non-Canadian service will abide by the Commission's policies with respect to the prohibition against the holding of preferential or exclusive rights, as discussed later in this public notice.

### **Approach to niche services and other services that do not meet the definition of a third-language general interest service**

66. For non-Canadian third-language services that provide narrowly targeted or 'niche' programming, that do not meet the 90% language threshold, or that offer programming in languages none of which exceed 40% of the programming schedule, the Commission will continue to apply a case-by-case assessment to determine whether the service is partially or totally competitive with Canadian services. To assist in the determination of competition, sponsors will be asked to provide the information listed in the appendix to this notice.
67. However, in applying the competitiveness test to these non-Canadian services, the Commission will cease to take into consideration unlaunched ethnic Category 2 services, unless the Category 2 service presents compelling evidence that launch of the service is imminent. Such evidence could include distribution agreements or ongoing negotiations, programming contracts or negotiations with non-Canadian program suppliers, and licence fees paid to Canadian content suppliers. The Commission is of the view that to deny BDUs authority to distribute non-Canadian third-language services that could contribute to the diversity of the Canadian broadcasting system, based solely on concerns for their potential competitive impact on Category 2 services that have been authorized, but may not launch, would be contrary to the objective of providing improved service to underserved third-language ethnic communities.

68. In assessing niche services or other third-language services that do not meet the definition set out above, there may be cases where the Commission, rather than denying authorization, might be prepared to consider adopting distribution requirements similar to those that it has now adopted for general interest third-language services, where such an approach would contribute to increased diversity, while alleviating the potential financial impact that the addition of a non-Canadian service may have on a licensed Canadian service. Sponsors and interested parties would have an opportunity to comment on the appropriateness of such an approach in any particular instance, as part of the normal procedures followed by the Commission when considering the addition of a non-Canadian service to the digital lists.
69. The Commission notes that non-Canadian services, once added to the digital lists, may undergo format changes. Such format changes could, for example, result in what had been a non-competitive niche service becoming competitive with a Canadian niche service. Alternatively, a non-Canadian service may alter its format in such a manner that it would fall within the definition of a general interest service operating in one or more of the languages of the analog services or licensed general interest third-language ethnic Category 2 services. In such cases, the Commission may consider making the continued distribution of the non-Canadian service subject to buy-through or must-offer requirements, or may reassess the distribution of the service in light of the approach outlined in this public notice, as appropriate.

#### **Program rights**

70. The Commission considers that continued access to non-Canadian programming rights by all Canadian broadcasters, including those operating licensed third-language ethnic services, is of vital importance to the preservation of the Canadian rights market, and to the Canadian broadcasting system as a whole. Accordingly, it will continue to require sponsors of non-Canadian third-language services to obtain statements from the service provider, as described in paragraph 36 above, confirming that it possesses all necessary rights for the distribution of its programming in Canada and that these rights are non-preferential and non-exclusive. In addition, non-Canadian services placed on the digital lists will be subject to the rights provisions currently set out in the digital lists, specifying that providers of these non-Canadian services:
- must have obtained and must remain in possession of all necessary rights for the distribution of their programming in Canada; and
  - must not hold, nor try to obtain, nor exercise, preferential or exclusive programming rights in relation to the distribution of programming in Canada.
71. In response to the concerns of several parties to this proceeding, the Commission wishes to emphasize that, should complaints arise about the manner in which a non-Canadian service on the digital lists makes rights available to a Canadian service, and if, following an appropriate process, the service were found to be exercising preferential or exclusive rights, the Commission would consider its removal from the list.

72. The Commission notes that these rights provisions require that all programming, and not just a portion or “reasonable selection” thereof, be made available on a non-exclusive and non-preferential basis. The Commission considers that there is no compelling reason to establish a less stringent policy requirement for non-Canadian third-language services in this area than that which it applies to other non-Canadian services on the Lists of eligible satellite services.
73. To address concerns expressed by some parties, as summarized in paragraph 38 above, the Commission will ask Canadian sponsors to obtain from non-Canadian service providers a description of any program supply agreement that they may have with any Canadian service, including the period of time covered by the agreement, and the number of hours of programming to be supplied under the agreement’s terms. In addition, where any such agreement has been terminated by the non-Canadian service provider within the preceding twelve months, it will be asked to provide the rationale for its termination.

#### **Access to Canadian services**

74. Under section 38(2)(a) of the Regulations, except as otherwise required by condition of licence, DTH operators are required to carry the five analog services, to the extent of available channels. Under sections 18(5)(c)(i) and 18(5)(c)(ii) of the Regulations, also subject to available channel capacity and except as provided by condition of licence, Class 1 BDUs are required to carry the five analog services where:
- (i) the licensee was distributing the service on May 16, 1994, or
  - (ii) 10% or more of the total population of all cities, towns and municipalities encompassed in whole or in part within the licensed area of the licensee is of one or a combination of the ethnic origins to which the service is intended to appeal, according to the most recent population figures published by Statistics Canada.
75. The Commission notes that, while very few cable BDUs serve communities where any one ethnic group makes up 10% or more of the total population, the analog services are fairly broadly distributed across the country by cable and by DTH BDUs. However, under the access requirements cited above, there is nothing to prevent many cable BDUs from ceasing to distribute the analog services.
76. Given their significant contributions to the Canadian broadcasting system, and in light of the Commission’s revised approach to non-Canadian third-language services, the Commission considers that it would be appropriate that Class 1 BDUs that are currently carrying any of the five analog services be required to continue to do so. Accordingly, the Commission will request comment on an amendment to section 18(5)(c) of the Regulations that would require the continued distribution of each of these services that was distributed by a licensee on the date of this public notice, instead of on May 16, 1994.

### **A third-language programming fund**

77. The Commission has considered the Panel Report's recommendation concerning the creation of a third-language programming fund. In the Commission's view, the record of this proceeding is not sufficient to allow a clear assessment of the potential merits and mechanisms of implementing such a proposal. For example, it is unclear whether such a fund, equalling 10% of the funds received by non-Canadian third-language services from Canadian BDUs, would be of sufficient size to justify the costs of administering the fund and leave enough money to be of any true or significant benefit to broadcasters, or independent producers, of Canadian, third-language ethnic programming.
78. The Commission is satisfied that its revised approach to the consideration of requests to add non-Canadian third-language programming services to the digital lists will serve the objectives it envisaged for this public process, namely the provision of greater diversity and choice among the services available to Canada's third-language ethnic communities, without adverse impact on the viability of Canadian third-language ethnic services and their ability to contribute to that diversity. At the same time, the Commission acknowledges that the concept of a new program fund, along with other possible mechanisms for increasing the resources available for third-language ethnic Canadian programming, may, in the future, warrant further exploration.

### **Approach to applications for Category 2 services**

79. The Commission's current approach to the consideration of an application proposing a new Category 2 service includes examination of whether the service would compete directly with any Category 1 or analog specialty or pay television service. Given the changes announced in this public notice for non-Canadian third-language services, the Commission considers that it may be appropriate for it to adopt a more open approach to the consideration of Canadian third-language ethnic Category 2 pay or specialty services.
80. Accordingly, the Commission will soon issue a call for comments on possible changes to the licensing framework that would provide for a more open approach to its consideration of third-language ethnic Category 2 pay and specialty service applications.

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>*

## **Appendix to Broadcasting Public Notice CRTC 2004-96**

### **Filing requirements to be met by sponsors requesting the addition of non-Canadian third-language services to the digital lists**

The Commission will consider proposals to add non-Canadian third-language services to the digital lists when they are submitted by a Canadian sponsor. Acceptable sponsors include licensees of broadcasting distribution undertakings, licensees of pay television or specialty service undertakings, and such industry organizations as the CCTA or CAB.

Consistent with the approach set out in this public notice, proposals for the addition of non-Canadian third-language services to the digital lists must include the following information, in either of Canada's official languages:

- evidence that the non-Canadian third-language service has agreed to be sponsored by the Canadian party filing the proposal;
- a statement from the service provider that it has obtained all necessary rights for distribution of its programming in Canada;
- a description of the service in a form appropriate for gazetting by the Commission, indicating whether it is a general interest or a niche service, and specifying the language or languages in which the service operates, the amount of time devoted to programming in each language (if more than one), and a breakdown of programming in the following genres (with reference to the Commission's program categories)<sup>3</sup>, expressed as both the total number of hours per week and as a percentage of the overall weekly programming schedule, excluding any programming that contains subtitles or secondary audio programming (SAP) in English or in French:
  - news (categories 1, 2a and 3)
  - documentaries (category 2b)
  - lifestyle/human interest/recreation and leisure (categories 5b and 11)
  - sports (categories 6a and 6b)
  - drama/fiction/comedy (category 7)
  - music/variety (categories 8 and 9)
  - religious (category 4)
  - other (e.g. categories 5a and 10);

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<sup>3</sup> For the definitions of the programming categories, see *Definitions for new types of priority programs; revisions to the definitions of television content categories; definitions of Canadian dramatic programs that will qualify for time credits towards priority programming requirements*, Public Notice CRTC 1999-205, 23 December 1999.

- a program schedule for a recent week that would be representative of the non-Canadian service over the year, with program descriptions;
- A breakdown of the amount of time during which the service is accompanied by subtitles and/or SAP in English or French, expressed as both the total number of hours per week and as a percentage of the overall weekly programming schedule;
- evidence of potential demand, as gathered through discussions with distributors;
- 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 future, deal in rights to programming in a manner that unduly precludes a Canadian programming undertaking from acquiring that programming; and
- a description from the service provider of any program supply agreement with any Canadian service, including the period of time covered by the agreement and the number of hours of programming to be supplied under the agreement's term. Where any such agreement has been terminated by the service provider within the preceding twelve months, the rationale for its termination.