CBC Radio-Canada

Appendix A

Previous submissions submitted to the CRTC by CBC/Radio-Canada :

- September 1, 2006, regarding submission n° 2006-0823-4 presented by TELUS Communications Inc. (BPN CRTC 2006-96, item 9);

- July 25, 2006, regarding submission n° 2006-0667-6 presented by Bell Canada (BPN CRTC 2006-78, item 9); and

- June 12, 2006, regarding submission n° 2004-0196-5 presented by Rogers Cable Communications Inc (BPN CRTC 2006-58, item 6)

October 3, 2006

1 September 2006

Ms. Diane Rhéaume
Secretary-General
Canadian Radio-Television &
Telecommunications Commission
Ottawa, Ontario
K1A ON2

Re: Broadcasting Public Notice CRTC 2006-96- Item 9, Application by TELUS Communications Inc. (Application No. 2006-0823-4) to amend its cable distribution licences in British Columbia, Alberta and Quebec to authorize those cable systems to distribute one or both of the services offered by Canada's two satellite subscription radio undertakings on a digital basis

Dear Ms. Rhéaume:

Introduction

1. The Canadian Broadcasting Corporation/Radio-Canada ("CBC/Radio-Canada") files the following intervention in response to an application by TELUS Communications Inc. ("TELUS") for amendments to the conditions of licence of its cable distribution undertakings in British Columbia, Alberta and Quebec to authorize those cable systems to distribute one or both of the services offered by Canada's two satellite subscription radio undertakings on a digital basis.

2. CBC/Radio-Canada opposes TELUS' request on the following grounds:

    - If granted, the TELUS application would fundamentally change the nature of the satellite subscription radio services authorized by the Commission in Broadcasting Public Notice 2005-61, Broadcasting Decision 2005-246 and Broadcasting Decision 2005-247. Such a change would be contrary to the satellite-use policy of the Government of Canada, as well as the Commission's long-standing approach to the licensing of broadcasting undertakings.

- No policy objectives in the *Broadcasting Act* (the Act) would be promoted by approving the TELUS application since pay audio and satellite subscription radio services are complementary services, both of which are offered on a competitive basis and both of which are already available directly to Canadians living in urban, remote and underserved communities. On the other hand, granting the TELUS application would undermine the viability of pay audio services and impair the ability of these services to contribute to the Canadian broadcasting system.

- Approval of the TELUS application would make satellite subscription radio services directly competitive with pay audio services even though the two types of services are subject to radically different regulatory obligations. This would create a situation of severe competitive inequity which would have to be remedied prior to implementation of a decision on the TELUS application. In order to resolve this competitive inequity, it would be necessary to address significant policy issues relating to the regulatory obligations of these two types of service and, more generally, the regulatory obligations of all audio services licensed by the Commission.

- Contrary to TELUS's submission, it is not necessary to approve its application on the basis of competitive equity since neither cable nor DTH are permitted to distribute the programming of satellite subscription radio services.

3. For all these reasons CBC/Radio-Canada submits that the TELUS application should be denied.

4. As the Commission is aware, CBC/Radio-Canada has intervened in respect of two other applications by BDUs seeking licence amendments which would authorize them to distribute one or both of the services of the two satellite subscription radio undertakings: BPN 2006-58 Item 6, Rogers Communications Inc.; and, BPN 2006-78 Item 1, Bell Canada. Copies of those interventions are attached as Appendix A.

5. The grounds identified above for denying the TELUS application are discussed in CBC/Radio-Canada's previous submissions, attached as appendices to this intervention. CBC/Radio-Canada will not repeat those arguments in the main body of this intervention, but relies on the arguments set out in those submissions for the purposes of TELUS's application as well.

6. In the main body of this intervention, CBC/Radio-Canada wishes to respond specifically to three additional points raised by TELUS in its application:

    - the need for a licence amendment;

- the idea that satellite subscription radio would not be competitive with pay audio; and
- the threat of the grey or black market.

Each of these issues is discussed, in turn, below.

The need for a licence amendment

7. TELUS refers at paragraphs 3 and 4 of its application to the argument advanced by the Telco Television Association of Canada (Telco TV) in its 12 June 2006 and 25 July 2006 submissions to the Commission that no licence amendment is required by a terrestrial BDU in order to distribute satellite subscription radio services since, in Telco TV's view, those services are a class or category of pay audio services which may be distributed pursuant to section 23(1) of the *Broadcasting Distribution Regulations* (the Regulations). TELUS agrees with Telco TV, but states that it is filing its application to avoid the possibility of "regulatory lag".

8. With all due respect to TELUS and Telco TV, the arguments Telco TV put forward in its submissions are a case of trying to pull yourself up by your own boot straps.

9. Telco TV argues that section 23(1) of the Regulations must be interpreted as applying to satellite subscription radio since, in Telco TV's view, section 39 of the Regulations permits DTH providers to distribute these services and the Commission would not create regulatory asymmetry between two types of BDUs in this regard. On the basis of this reasoning, Telco TV argues that satellite subscription radio must qualify as a pay audio service for the purposes of the Regulations.

10. This argument is, in essence, a circle and has no merit for two reasons: DTH is not permitted to distribute subscription satellite radio services under section 39; and, satellite subscription radio is not a type of pay audio service.

<u>DTH is not permitted to distribute satellite radio</u>

11. Contrary to Telco TV's assertion, section 39 of the Regulations does not permit DTH BDUs to distribute satellite subscription radio services since these services are not programming services. Instead, as indicated by the 12 April 2006 Commission staff letter responding to a request by CBC/Radio-Canada for clarification on this issue, satellite subscription radio services are a distinct class of broadcasting undertaking.

12. It is clear from the scheme of the *Broadcasting Act* that the Commission may create new classes of broadcasting undertakings if it chooses to do so.

13. The definition of "broadcasting undertaking" in section 2 of the *Act* states that it "includes a distribution undertaking, a programming undertaking and a network". The use of the word "includes" means that this list is not exhaustive. If Parliament had wished the list to be exhaustive, it would have used the word "means", instead of "includes".

14. In addition, section 9(1)(a) of the *Act* states that the Commission may "establish classes of licences".

15. Taken together, these provisions make it clear that the Commission may create a new class of undertaking if it so wishes. In the present case, that is precisely what the Commission has done.

16. CBC/Radio-Canada notes that if satellite subscription radio were not a new class of licence it would not, in any event, qualify as a programming undertaking. Rather, there are several reasons why a more appropriate classification would be as a distribution undertaking.

17. First, both Sirius Canada and XM Canada applied for licences as distribution undertakings. Sirius Canada applied to be licensed as a "satellite audio broadcasting distribution undertaking". XM Canada applied to be licensed as a "satellite audio distribution undertaking". It is evident from this fact that both satellite radio licensees viewed themselves as distribution undertakings.

18. Second, at the oral hearing in November 2004, both the Commissioners and the panels for Sirius Canada and XM Canada repeatedly referred to the proposed undertakings as "distribution undertakings". For example, on November 1, 2004, John Bitove for XM Canada stated: "we are a subscription satellite distribution undertaking". On November 2, 2004, Robert Buchan, counsel for XM Canada, stated: "we are applying for satellite, subscription, radio or audio distribution undertaking". On that same day, Grant Buchanan, counsel for Sirius Canada, stated: "we think we should be a BDU". On November 4, 2004, the CRTC Chairman, Charles Dalfen, referred to Sirius Canada and XM Canada and stated: "they are applying as distribution undertakings".[1]

19. Third, the Commission indicated in *New Broadcasting Act - Amendments to Classes of Licence*, Public Notice CRTC 1991-63, 19 June 1991 that it would focus on the "primary function" when deciding how to classify an undertaking: "The new licence classes reflect the primary function of the undertaking to be licensed, be it for program origination, program distribution or as a network operation". Both Sirius Canada and XM Canada originate only a small percentage of the programming they distribute to their subscribers. Their primary function is the distribution of

[1] November 2004 Hearing Transcripts at paragraphs 811, 1764, 2999 and 5256.

programming originated by the U.S. satellite radio operators. Hence, the most reasonable classification for Sirius Canada and XM Canada is as distribution undertakings.

20. Overall, CBC/Radio-Canada submits that satellite subscription radio is a new class of licence. In the alternative, if the Commission concludes that one of the pre-existing classes should be applied, then satellite subscription radio is a form of distribution undertaking. In either case, satellite subscription radio is not a programming undertaking.

21. In light of the above, it is evident that section 39 of the Regulations does not permit DTH BDUs to distribute satellite subscription radio services. Hence, Telco TV's argument that regulatory symmetry requires a distorted reading of the Regulations and, in particular, of section 23(1) of the Regulations has no merit.

Satellite radio is not a class of pay audio

22. It is also evident that the notion that satellite subscription radio services are a form of pay audio service has no merit. If the Commission had intended to license satellite subscription radio services as pay audio services, it would have said so in its licensing decision. The Commission would also have applied the same regulatory regime to satellite subscription radio as exists for pay audio and, to the extent it chose not to do so, the Commission would have identified the differences in the regimes and explained why those difference were justified.

23. The Commission did not take this approach. On the contrary, at paragraph 66 of *Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings* Broadcasting Public Notice CRTC 2005-61, 16 June 2005, the Commission noted the potential impact of satellite subscription radio services on pay audio services and maintained a clear distinction between the two classes of undertakings.

24. There is nothing to suggest that the Commission ever considered satellite subscription radio as a form of pay audio. On the contrary, as noted above, satellite subscription radio is either a new class of undertaking, as indicated by the 12 April 2006 letter of Commission staff, or a type of distribution undertaking. It is not a type of programming undertaking and definitely not a type of pay audio service, as alleged by Telco TV.

A licence amendment is required

25. In light of the above, it is clear that TELUS's suggestion that a licence amendment is not required is not correct. The distribution of satellite subscription radio services is not permitted under section 23(1) of the

Regulations. Consequently, a licence amendment is required. For the reasons identified above, TELUS's application for such an amendment should be denied.

The content and format of satellite radio

26. At paragraph 11 of its application, TELUS argues that pay audio and satellite radio services differ in content and format and, therefore, would not be competitive if distributed by BDUs :

> Pay audio services are mainly jukebox-like music services. All uninterrupted music all the time. They differ substantially from the personality-driven satellite radio services which offer a mix of talk, sports, news and music. Both offer distinct choice to consumers.

27. This argument plays fast and loose with the facts. Pay audio provides all music channels. Satellite subscription radio provides all music channels, plus a variety of talk programming. In other words, from a content perspective, satellite subscription radio's offering is pay audio plus talk. This would make it directly competitive with pay audio if it were offered by a BDU. TELUS's suggestion that the two types of service would not compete is totally without merit. Indeed, the ultimate question is whether a BDU would continue to carry pay audio at all, given the scope of the satellite subscription radio content offering.

The threat of the grey market

28. At paragraph 15 of its application, TELUS raises the threat of the grey market as a reason for granting its application. With all due respect, this argument borders on frivolous. The idea that a consumer would choose the grey market for BDU services because subscription satellite radio is not available over a BDU makes no sense whatsoever when the consumer can get satellite subscription radio directly from the Canadian licensees.

29. Satellite subscription radio services are available throughout Canada at competitive prices and require a minimal investment in a specialized receiver which, if it is a portable model, grants the consumer the best of all possible worlds – satellite subscription radio service in the car, at home, in a boat, at the cottage, on a bicycle – anywhere, in fact.

30. Why would any consumer who was deeply interested in obtaining subscription satellite radio consider switching to a grey market BDU service in order to obtain satellite radio - only at home - when legal satellite radio services are already available in Canada - everywhere?

31. The grey market argument of TELUS has no merit whatsoever and highlights the lack of policy justification for permitting BDU distribution of satellite subscription radio services.

Conclusion

32. TELUS has applied for amendments to the conditions of licence of its cable distribution undertakings in British Columbia, Alberta and Quebec to authorize those cable systems to distribute one or both of the services offered by Canada's two satellite subscription radio undertakings on a digital basis.

33. The TELUS application does not differ in any substantive way from the earlier applications by Rogers Communications Inc. and Bell Canada for similar licence amendments.

34. If the Commission were to grant any of these applications it would radically alter the nature of the satellite subscription radio services in a way that would be directly contrary to the Government's satellite use policy and which would make satellite subscription radio directly competitive with pay audio services, despite the dramatically different regulatory obligations of the two types of services. This would not be appropriate from a legal or policy perspective and would have a direct, negative effect on the Canadian broadcasting system.

35. Consequently, for the reasons canvassed above and in the attached appendices, CBC/Radio-Canada submits that the TELUS application should be denied, just as the Commission should deny the applications of Rogers Communications and Bell Canada.

Yours truly,

Bev Kirshenblatt
Senior Director, Regulatory Affairs

P.O. Box 3220, Station C
Ottawa, ON
K1Y 1E4

Attachment: Appendix A

cc: Michael Hennessy, TELUS
michael.hennessy@telus.com

25 July 2006

Ms. Diane Rhéaume
Secretary-General
Canadian Radio-Television &
Telecommunications Commission
Ottawa, Ontario
K1A ON2

Re: Broadcasting Public Notice CRTC 2006-78
Item 1 – Application No. 2006-0667-6, Bell Canada

Dear Ms. Rhéaume:

1. In accordance with the procedures established by the above referenced Public Notice, CBC/Radio-Canada is providing the following comments on the application by Bell Canada (Bell) to amend the licences of each of its two Class 1 broadcasting distribution undertakings (BDUs) to redistribute one or both of the licensed satellite subscription radio (SSR) services on a digital basis.

2. CBC/Radio-Canada is the licensee of the national pay audio programming undertaking Galaxie.

3. Bell's application raises the identical issues as the application filed by Rogers Cable Communications Inc. (Rogers) as set out in Broadcasting Public Notice 2006-58, Item 6. For the reasons cited in CBC/Radio-Canada's intervention filed in response to the Rogers application, CBC/Radio-Canada **opposes** Bell's application for authority to redistribute SSR services via BDUs. A copy of our intervention filed in Broadcasting Public Notice 2006-58 is attached for ease of reference.

4. In summary, CBC/Radio-Canada opposes Bell's request on the following four grounds:

    - If granted, the Bell application would fundamentally change the nature of SSR services authorized by the Commission in

Broadcasting Public Notice 2005-61, Broadcasting Decision 2005-246 and Broadcasting Decision 2005-247. Such a change would be contrary to the satellite-use policy of the Government of Canada, as well as the Commission's longstanding approach to the licensing of broadcasting undertakings.

- No policy objectives in the *Broadcasting Act* (the Act) would be promoted by approving the Bell application since pay audio and satellite subscription radio services are complementary services, both of which are offered on a competitive basis and both of which are already available directly to Canadians living in urban, remote and underserved communities. Approval of the Bell application would undermine the viability of pay audio services and impair the ability of these services to contribute to the Canadian broadcasting system.

- Approval of the Bell application would make satellite subscription radio services directly competitive with pay audio services even though the two types of services are subject to radically different regulatory obligations. This would create a situation of severe competitive inequity which would have to be remedied prior to implementation of a decision on the Bell application. In order to resolve this competitive inequity, it would be necessary to address significant policy issues relating to the regulatory obligations of these two types of service and, more generally, the regulatory obligations of all audio services licensed by the Commission.

- Contrary to the Bell submission, it is not necessary to approve its application on the basis of competitive equity since neither cable nor DTH are permitted to distribute the programming of satellite subscription radio services.

5. CBC/Radio-Canada would like to address three specific issues raised in Bell's application and demonstrate that contrary to Bell's assertions: there is no competitive inequity between BDUs, there is no support among consumers and artists for this proposal, and no broadcasting objectives would be promoted in permitting BDUs to distribute these services.

There is no Competitive Inequity Between BDUs

6. In support of its application dated 29 May 2006, Bell states that it is seeking competitive equity with DTH licensees. Bell contends that DTH is currently permitted under paragraph 39(a) of the Broadcasting Distribution Regulations (the Regulations), to distribute SSR services. This is simply incorrect. Bell was aware at the time it filed its application that Commission

staff issued a letter dated 12 April 2006 stating, among other things, that DTH licensees must obtain an amendment to their conditions of licence in order to carry satellite subscription radio services.

7. CBC/Radio-Canada agrees with the 12 April 2006 staff opinion that the Canadian SSR undertakings are not "programming undertakings" within the meaning of the *Broadcasting Act*, and therefore DTH cannot redistribute them pursuant to section 39(a) of the Regulations and must seek further CRTC authorization to do so.

8. The Commission's staff opinion is correct since satellite subscription radio services are not programming undertakings because they do not originate or transmit programming but control only its distribution within Canada and all transmission is conducted in a foreign jurisdiction (the US) by US entities outside the jurisdiction of the *Broadcasting Act.*

9. In addition, satellite subscription radio licensees are materially different to pay audio licensees. First, the pay audio services originate programs and themselves transmit them to BDUs while the licensed SSR undertakings neither originate nor transmit programs, but only control distribution in Canada. Second, the pay audio services licensees are licensed on the basis of their Canadian-produced channels only while the SSR licensees are licensed on the basis of <u>all</u> the channels that they distribute.

10. Further, the Commission has jurisdiction to create new type of broadcasting undertakings given that the definition of a broadcasting undertaking does not limit broadcasting undertakings to a programming undertaking, a distribution undertaking or a network. Therefore, it is reasonable to assume that Parliament, recognizing that broadcasting operates in a swiftly changing technological environment, left flexibility in the legislation in the definition of broadcasting undertaking to allow the creation of new types of broadcasting undertakings. To find otherwise would be to suggest each material technological advance could require a change in legislation to accommodate it.[2]

11. More specifically:

    - the CRTC is designated by the Broadcasting Act as regulator of the broadcasting system in Canada,

    - the CRTC is instructed by the Broadcasting Act to regulate in a flexible manner that is readily adaptable to scientific and

[2] In the event it is determined that these are not a new type of undertaking, then CBC/Radio-Canada submits that satellite subscription radio undertakings are distribution undertakings, not programming undertakings and DTH must seek CRTC authorization to redistribute them.

technological change and to facilitate the provision of broadcasting to Canadians,

- the CRTC has a clear power to create classes of licences and there is nothing in the Act that restricts a class of licence to one of the three types of broadcasting undertakings defined in the Broadcasting Act, and

- the CRTC has the power to determine questions of fact or law in relation to any matter within its jurisdiction under the Act.

12. Therefore, there is no merit to Bell's claim that it be granted its requested licence amendment on the basis on competitive equity since no BDU is permitted to carry satellite subscription radio services at present.

No Consumer or Artist Support

13. In its application Bell submits that the carriage of SSR services would offer a number of benefits to the Canadian broadcasting system which would benefit consumers and artists alike. At paragraph 7 of the application:

> *Accordingly, Bell submits that approval of this condition of licence would be welcomed by both consumers and artists.*

14. Given the similarities between the nature of the Bell and Rogers application, the record of the proceeding in the Rogers application demonstrates that neither subscribers nor artists support BDU carriage of satellite radio. Not one Rogers customer or artist filed a letter in support of the proposal. Rather, artists groups, including CCA, CIRPA, L'ADISQ, ACTRA, L'Union des Artistes and SOCAN filed interventions opposing Rogers' application.

15. These intervenors were unanimous in opposing Rogers intervention. As noted by the CCA, an umbrella organization representing hundreds of thousands of Canadian artists and creators, cultural producers exhibitors, presenters, distributors, heritage institutions, professional cultural organizations and trade associations in all cultural industries in both official languages at paragraph 20 of its intervention:

> *Much is said these days about "consumer choice" and this application from Rogers is not different in that respect. The CCA submits respectfully if this application is granted, the result will be a restriction of choices for consumers, as existing pay audio services, whose carriage is optional, will at best be marginalized or dropped entirely. Preventing Canadians from having access to their own artists is, we submit, not a sign of being preoccupied by "consumer choice" … What this application*

and others like them ignore is that consumers cannot "choose" something that is not on the menu.

No Policy Objectives Promoted

16. One of Rogers arguments in support of its application was that digital cable carriage of these services would contribute to the objectives of the Broadcasting Act by making the service easily accessible to all Canadians. In our intervention we demonstrated that satellite subscription radio services are readily available to Canadians and their redistribution by Rogers or any BDU is not necessary.

17. Bell's application contradicts Rogers position that service coverage and the cost of equipment stands as a serious impediment to all Canadians receiving satellite subscription radio service directly from two licensees. Bell states at paragraph 9 of its application:

> It is important to note that SSR services, though widely considered to be targeted for listeners in vehicles, are already available to subscribers in their homes. Consumers are now able to purchase portable satellite radio receivers from a growing list of mainstream electronics manufacturers which can be plugged into separate docks to accommodate both car and home use. **Relatively inexpensive home kits can be purchased to allow reception of satellite radio in any home audio system.** More devices for home use are being introduced on a regular basis. Further, the Canadian SSR licensee are likely to follow the US lead in providing free access to their subscribers through the Internet, increasing the value of the service but likely not its subscription cost.

18. The widespread availability and low cost of direct receivers demonstrate that no policy objectives would be promoted if SSR services were permitted to move beyond the niche market for which they have been licensed.

19. Rather, for the reasons outlined in our intervention opposing Rogers application, approval of the Bell application would undermine the viability of pay audio services and impair the ability of these services to contribute to the Canadian broadcasting system.

Conclusion

20. Bell's application for authority to redistribute SSR services via cable BDUs on a digital basis raises the same issues as the application filed by Rogers and considered in Broadcasting Public Notice 2006-58. For the reasons

cited in CBC/Radio-Canada's intervention filed in response to the Rogers application, CBC/Radio-Canada **opposes** Bell's application.

All of which is respectfully submitted.

Bev Kirshenblatt
Senior Director, Regulatory Affairs

P.O. Box 3220, Station C,
Ottawa, ON
K1Y 1E4

cc : Bell Canada

CBC Radio-Canada

12 June 2006

Ms. Diane Rhéaume
Secretary-General
Canadian Radio-Television &
Telecommunications Commission
Ottawa, Ontario
K1A ON2

Re: Broadcasting Public Notice CRTC 2006-58- Item 6, Application by Rogers Cable Communications Inc (Application No. 2004-0196-5) to amend its cable distribution licences in various localities to carry audio programming services of Canadian satellite subscription radio undertakings

Dear Ms. Rhéaume:

I. Introduction

1. The Canadian Broadcasting Corporation/Radio-Canada ("CBC/Radio-Canada") files the following intervention in response to an application by Rogers Cable Communications Inc. ("Rogers") for amendments to the conditions of licence of its cable distribution undertakings in Ontario, New Brunswick and Newfoundland and Labrador to distribute one or both of the audio programming services offered by Canada's two satellite subscription radio undertakings.

2. CBC/Radio-Canada is the licensee of Galaxie, a national pay audio programming undertaking that offers 45 channels of continuous music, without talk, to over five million broadcasting distribution undertaking ("BDU") subscribers across Canada.

3. CBC/Radio-Canada opposes Rogers request on the following grounds:

    - If granted, the Rogers application would fundamentally change the nature of the satellite subscription radio services authorized by the Commission in Broadcasting Public Notice 2005-61, Broadcasting Decision 2005-246 and Broadcasting Decision 2005-247. Such a

change would be contrary to the satellite-use policy of the Government of Canada, as well as the Commission's long-standing approach to the licensing of broadcasting undertakings.

- No policy objectives in the *Broadcasting Act* (the Act) would be promoted by approving the Rogers application since pay audio and satellite subscription radio services are complementary services, both of which are offered on a competitive basis and both of which are already available directly to Canadians living in urban, remote and underserved communities. On the other hand, granting the Rogers application would undermine the viability of pay audio services and impair the ability of these services to contribute to the Canadian broadcasting system.

- Approval of the Rogers application would make satellite subscription radio services directly competitive with pay audio services even though the two types of services are subject to radically different regulatory obligations. This would create a situation of severe competitive inequity which would have to be remedied prior to implementation of a decision on the Rogers application. In order to resolve this competitive inequity, it would be necessary to address significant policy issues relating to the regulatory obligations of these two types of service and, more generally, the regulatory obligations of all audio services licensed by the Commission.

- Contrary to Rogers submission, it is not necessary to approve its application on the basis of competitive equity since neither cable nor DTH are permitted to distribute the programming of satellite subscription radio services.

4. For all these reasons CBC/Radio-Canada submits that the Rogers application should be denied.

II. The Nature of Satellite Subscription Radio Services

5. Satellite subscription radio services are a new type of broadcasting service utilizing advanced satellite technology to provide audio services directly to individual subscribers in vehicles, homes and businesses. There are no Canadian satellites which can be used for this type of service. Consequently, the two satellite subscription radio services licensed by the Commission rely entirely on U.S. satellites to distribute their service.

6. Rogers wants to distribute the programming carried by satellite subscription radio services in a totally new manner. Specifically, Rogers wants to distribute that programming to its cable subscribers as part of its cable service in a manner directly analogous to the pay audio services licensed by the

Commission. This would radically change the nature of the satellite subscription radio services, effectively converting them into pay audio services by virtue of their carriage by a BDU.

7. In CBC/Radio-Canada's submission, the change proposed by Rogers would be directly contrary to the Government of Canada's satellite-use policy. It would also be contrary to the Commission's longstanding approach to licensing of broadcasting undertakings.

The Satellite-Use Policy

8. Satellite subscription radio services occupy a unique place in the Canadian Broadcasting System. They are the only type of broadcasting undertaking licensed by the Commission that rely entirely on non-Canadian satellite facilities to distribute programming.

9. Until very recently, the satellite-use policy of the Department of Canadian Heritage and Industry Canada expressly prohibited the Commission from licensing a broadcasting undertaking which made exclusive use of non-Canadian satellite facilities. However, in September 2005 the policy was amended:

> Effective September 26, 2005, the government amended its satellite-use policy to permit the use of foreign specialized satellite facilities for the transmission of Canadian subscription satellite radio services. In this context, where a Canadian broadcasting undertaking wishes to use foreign satellite facilities, the Canadian policy concerning the use of satellite facilities for direct reception of broadcasting services by the public should now be interpreted as follows:
>
> (i) the undertaking should make use of Canadian satellite facilities to carry (i.e. receive and/or distribute to Canadians) all Canadian programming services but may use either Canadian or non-Canadian satellite facilities to carry foreign originated services that are intended primarily for foreign audiences and are authorized, in whole or in part, for distribution by the CRTC;
>
> (ii) in exceptional circumstances, where no Canadian satellite facilities are available to accommodate specialized satellite delivery of a digital subscription radio service to the public, including vehicular reception, the use of foreign facilities is permitted to provide Canadian programming services; and
>
> (iii) in the case of emergencies leading to lack of availability of Canadian satellite facilities for broadcasting undertaking, back-up

arrangements with foreign satellite operators could be utilized, on an interim basis, with appropriate authorization.

Note: Specialized satellite delivery in the context of provision (ii) is meant to differentiate unique satellite transmission/reception, such as for vehicular reception, not achievable by conventional Canadian satellite facilities used for DTH, e.g. direct broadcast satellite and fixed satellite in the 12 GHz range. [3]

10. The wording of the satellite-use policy is very clear. The general rule is that broadcasting undertakings must "make use of Canadian satellite facilities to carry (i.e. receive and/or distribute to Canadians) all Canadian programming services". A narrow exception is created which permits the exclusive use of non-Canadian satellite facilities solely for the purpose of "specialized satellite delivery of a digital subscription radio service to the public, including vehicular reception, ... [which is] not achievable by conventional Canadian satellite facilities...".

11. This narrow exception does not permit the exclusive use of non-Canadian satellite facilities for other purposes. In particular, it does not permit the exclusive use of non-Canadian satellite facilities to distribute programming, via a cable BDU, in a manner that is directly comparable to a licensed pay audio service since this latter of type of service is "achievable by conventional Canadian satellite facilities".

12. Thus, if the Commission were to grant the Rogers application it would be modifying the nature of satellite subscription radio services in a manner that would be directly contrary to the Government of Canada's satellite-use policy. In the submission of CBC/Radio-Canada, there is no overriding policy reason for contradicting the Government of Canada's satellite-use policy in this way. Consequently, the Rogers application must be denied on this basis.

<u>The Commission's Approach to Licensing</u>

13. In its policy and licensing decisions, the Commission has consistently adopted an approach that has provided for complementarity and diversity among broadcasting undertakings. It has also consistently considered the impact on existing licensees of the possible licensing of new services.

14. In the case of audio programming services that are licensed for distribution via BDUs, the Commission has established two types of services: pay audio programming services and specialty audio programming services. In creating and licensing these audio programming services, the Commission has been

[3] Annex C – Statement on the Utilization of Fixed Satellite Service Facilities for Broadcasting Services, Policy Framework for Provision of Fixed Satellite Services (RP-008).

careful to develop distinct policy frameworks and impose specific conditions of licence to ensure that these services are complementary with conventional radio services and with each other. The Commission has also established regulatory obligations for each type of undertaking which ensure a level competitive playing field as between the same type of undertaking.

15. If the Commission were to approve the Rogers application it would, in effect, be modifying the nature of satellite subscription radio services so as to give them a dual nature: first, as satellite subscription radio services available directly via satellite on a subscription basis to the public; and, also as a form of pay audio service available to cable subscribers over Rogers' cable systems.

16. In other words, the Commission would permit the satellite subscription radio services to morph from one type of service into another service without requiring any licensing process to accommodate the different regulatory obligations associated with the second type of undertaking (i.e., pay audio). This would be an unprecedented step and would be completely at odds with the Commission's existing approach to licensing. In CBC/Radio-Canada's submission, there is no policy rationale for adopting such an approach in the present situation.

III. The Policy Objectives of the *Broadcasting Act*

17. Rogers argues in its application that it would contribute to the policy objectives of the *Broadcasting Act* if Rogers were permitted to distribute satellite subscription radio services. At paragraph 11 of its application, Rogers states:

> ...the ability of the satellite subscription radio undertakings to meet the needs of Canadian consumers and to, therefore, fully contribute to fulfilling the policy objectives of the *Broadcasting Act* is hindered to some degree because these satellite radio services are not easily accessible to all Canadians. In order to receive one of the satellite radio services, a subscriber must first acquire a separate receiver, which can cost in excess of $350, and then pay an incremental monthly fee for the service. This can be a deterrent for many Canadians and ultimately limits the accessibility of these services in Canada. As a result, the benefits to consumers and to the broadcasting system that are associated with the licensing of satellite subscription radio services, and that were highlighted by the Commission in PN 2005-61, may not be fully realized.

18. With all due respect, Rogers' argument is totally lacking in merit and borders on frivolous.

No Policy Objective Would Be Served

19. The two satellite subscription radio services licensed by the Commission are available to Canadians across the entire country at the price and on the terms set by the licensees. There is no need to extend the availability of these services by means of BDU carriage. All locations are already served. As far as the cost of the satellite radio receiver is concerned, according to the Sirius Canada website, receivers are available for as little as $79.99.[4] This is less than the cost of a set top box required for digital cable.

20. Thus, neither service coverage nor equipment cost stands as a serious impediment to Canadians receiving satellite subscription radio services directly from the two licensees. If the monthly subscription fees charged by the satellite subscription radio services do act as an impediment, that is a matter which is wholly within the control of the licensees to address in accordance with the demands of the market.

21. On this last point, it is also important to recognize that the Commission licensed two satellite subscription radio services, just as it originally licensed four pay audio programming services, thereby establishing competitive markets in respect of each type of service. In other words, the Commission has established two complementary types of services – pay audio and satellite subscription radio – both of which are available to Canadians across the entire country and both of which are offered on a competitive basis, thereby ensuring that market forces operate to the benefit of consumers. No policy objective would be served by approving the Rogers application.

The Potential Negative Consequences

22. On the other hand, if the Rogers application were approved, this would seriously undermine the position of the existing pay audio services since they are subject to much more stringent regulatory obligations than the satellite subscription radio services. This, in turn, would undermine the ability of the pay audio services to continue to contribute to the achievement of the policy objectives of the *Broadcasting Act*. This would be a significant loss, especially for the Canadian music industry.

23. The pay audio services make significant contributions to Canadian artists and the Canadian broadcasting system as a whole. On Rogers' digital cable service – where Rogers proposes to carry the programming of one or more satellite subscription radio services – Max Trax and Galaxie provide

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[4] http://siriuscanada.ca/SIRIUSNewsRelease-e7.htm. XM Canada's website identifies portable radios for as little as $99.99: https://direct.xmradio.ca/ItemList.aspx.

40 channels of commercial-free music channels which are programmed by Canadians for Canadians. These pay audio services promote the airplay of Canadian content through a mix of classic hits, contemporary chart toppers and little known treasures: from rock and country to the great arias and dance music, from jazz and blues to pop, from the soothing sounds of nature to the best sounds of yesterday.

24. Max Trax and Galaxie promote French-language vocal music through 8 French language channels in a variety of musical genres: *Franco Relax,* French soft rock, *Top Détente*, a dynamic bilingual mix of adult pop hits, *Franco Energie*, energetic French pop-rock, *Souvenirs*, bilingual pop hits from 1975 to 1990; *Nostalgie,* the quintessential chanson francaise of the fifties, sixties and seventies; *Franco Country,* the very best in francophone new and traditional country, *Mousses Musique*, a musical wonderland for francophone youngsters and *Musique Bout'choux*, French music for little ones.

25. On Bell ExpressVu and Videotron, which carry the entire line-up of Galaxie's 45 channels, several additional French channels are available: *Bande à Part,* a dynamic lineup of alternative rock and rap by the hottest artists of the new generation; *Francopop*, the greatest pop hits and urban music of the 90's from the French-speaking world; and *Franco-Retro,* A hit parade of French pop songs from the 60s to the 80's.

26. In addition to the exposure and associated copyright fees – over $16 million in this licence term to date – provided to the community of composers and performers, Galaxie also provides other significant financial benefits to the Canadian music industry. Indeed, each of the pay audio licensees contributes 4% of its annual revenues to Canadian Talent Development ("CTD"). During the current licence term to date, Galaxie and Max Trax have made a combined CTD and rights payments investment of over $26 million in composers and performers.

27. Max Trax and Galaxie also support the development of up-and-coming artists through their active participation in a variety of important Canadian events, including Canadian Music Week, the Canadian Country Music Awards and the East Coast Music Awards, among others.

28. Galaxie launched its Rising Stars Program in 1998 and has worked with many music industry partners across the country to offer cash prizes and provide showcase opportunities for Canadian artists in a wide array of genres. Almost 500 artists have benefited from the Rising Stars Program since its inception, including Remy Shand, George Canyon, Matt Mays, Ron Sexsmith, The New Pornographers, Coral Egan, Corb Lund Band and Stephie Shock. A list of these Canadian artists is attached in Appendix A.

29. Max Trax supports the Canadian Songwriters Hall of Fame, the National Youth Orchestra, and a number of music education initiatives across the country.

30. Overall, the pay audio services make a major contribution to the Canadian broadcasting system and the Canadian music industry. That contribution would be seriously undermined if the Rogers application were approved.

IV. The Need for Competitive Equity

31. If the Commission were to approve the Rogers application this would make the satellite subscription radio services directly competitive with the pay audio services licensed by the Commission. However, these two types of undertakings are subject to very different regulatory obligations.

The Pay Audio Regime

32. The Commission's licensing framework for pay audio services recognizes that these are niche audio services. They are licensed on a national basis for delivery via satellite to Canadian cable and direct-to-home ("DTH") satellite subscribers. They are carried on a discretionary basis by BDUs. The principal source of revenue for these services is subscriber revenue. These services were also licensed as complements to commercial radio stations. Unlike conventional radio, pay audio licensees are not permitted advertising or spoken word programming.

33. The Canadian content levels imposed on pay audio services are entirely consistent with and even exceed the requirements for over-the-air radio. This is because the 35% per week Canadian content level is measured across all the Canadian-produced channels. Unlike the channel-specific approach for conventional radio licensees, all the Canadian produced audio music channels, including special interest music (Category 3), are included in this calculation.

34. The requirements for French-language vocal music reflect the linguistic duality of Canada and are entirely consistent with the regulatory requirements for over-the-air radio stations. At least 25% of all Canadian produced pay–audio channels, other than those consisting entirely of instrumental music or of music entirely in languages other than English or French, are required to devote a minimum of 65% of all vocal category 2 music selections in the French language.

35. The Commission also established linkage requirements to ensure the availability of high levels of Canadian content across the channel offerings of all licensed pay audio undertakings. Pay audio licensees are permitted to link

a maximum of one non-Canadian produced channel with each Canadian produced channel. Currently, all of the channels on Galaxie and Max Trax channels are Canadian produced.

36. Finally, the Commission ensures that pay audio services cultivate Canadian music talent by contributing 4% of annual gross revenues to Canadian Talent Development ("CTD") initiatives.

The Satellite Subscription Radio Service Regimes

37. In contrast to pay audio, the satellite subscription radio services are subject to much lighter regulatory obligations.

38. Satellite subscription radio services may distribute both music and spoken word programming whereas pay audio services are prohibited from distributing spoken word programming, with the exception of the identification of musical selections, promotion of the service, and programming directed to children.

39. Satellite subscription radio services have a linkage ratio for Canadian to non-Canadian channels of 1:9, whereas pay audio services have a much higher ratio of 1:1.

40. As a consequence of the linkage rules, pay audio services have higher overall Canadian content requirements than satellite subscription radio services.

41. Satellite subscription radio services are required to ensure that not less than 25% of the Canadian channels distributed by the service are French language channels. However, as a consequence of the pay audio requirement that all channels be music-only, pay audio services have higher overall French-language vocal requirements.

42. Satellite subscription radio services are permitted to carry six minutes of national advertising per hour while pay audio services are prohibited from distributing advertising.

The Consequences of a Lack of Competitive Equity

43. If the Commission were to approve the Rogers application and permit satellite subscription radio services to compete directly with pay audio services, the lack of competitive equity between the two types of services would make it extremely difficult for pay audio services to compete. In fact, it is questionable whether pay audio services could remain viable in the long-run if steps were not taken to remove the regulatory disparity.

44. In CBC/Radio-Canada's submission, if the Commission were inclined to approve the Rogers application, it would first be necessary to either adjust the regulatory obligations of the pay audio services so as to bring them into line with those of the satellite subscription radio services; or, to modify the licences of the satellite subscription radio service so as to require them to meet the same regulatory obligations as pay audio services in the event that a satellite subscription radio service wishes to have some or all of its programming distributed by a BDU.

45. CBC/Radio-Canada also submits that permitting the satellite subscription radio services to move beyond the niche market for which they have been licensed – a market where unique regulatory obligations were deemed necessary because of distribution capacity issues – would necessarily require a re-assessment of the overall regulatory regime applicable to audio services. It would be grossly unfair and undermine the integrity of the Commission's broadcasting regime to permit a two tier system to develop whereby one type of undertaking would be subject to much lighter regulatory obligations than all others.

46. In light of these concerns, CBC/Radio-Canada submits that the appropriate approach for the Commission to take with respect to the Rogers application is to deny it outright. However, if the Commission were to conclude that it would be appropriate to proceed differently, it would be essential that a level playing field be established for all players. It would also be essential that if regulatory changes were to be introduced, that they be made in such a manner as to prevent the satellite subscription radio services from receiving a competitive head start.

V. Competitive Equity Between BDUs

47. Finally, in support of its application, Rogers states that it is seeking competitive equity with DTH licensees. Rogers contends that DTH is permitted under paragraph 39(a) of the *Broadcasting Distribution Regulations* (the Regulations), to distribute satellite subscription radio services. Based on this assumption, Rogers argues that it should be permitted to distribute satellite subscription radio services as well.

48. CBC/Radio-Canada notes that since Rogers filed its application, Commission staff has responded to an enquiry by CBC/Radio-Canada for clarification on the question of the distribution of satellite subscription radio services by BDUs. On 12 April 2006 Commission staff issued a letter stating, among other things, that DTH licensees must obtain an amendment to their conditions of licence in order to carry satellite subscription radio services. On 25 May 2006, Bell ExpressVu filed a letter with the Commission challenging the conclusions of the 12 April 2006 Commission staff letter and asking for a formal decision from the Commission on this matter.

49. As a result of these developments, it is clear that there is no merit to Rogers claim that it should be granted its requested licence amendment on the basis of competitive equity since no BDU is permitted to carry satellite subscription radio services at present. However, as noted by Bell ExpressVu in its 25 May 2006 letter, in order to prevent competitive inequity as between BDUs, it is important that the Commission address the issues raised by the Rogers application and by Bell ExpressVu's letter in a coordinated manner. In CBC/Radio-Canada's submission, both requests should be denied and no BDU should be permitted to distribute the programming of satellite subscription radio services.

VI. Conclusion

50. CBC/Radio-Canada submits that the Rogers application should be denied on the following grounds:

- If granted, the Rogers application would fundamentally change the nature of the satellite subscription radio services authorized by the Commission in Broadcasting Public Notice 2005-61, Broadcasting Decision 2005-246 and Broadcasting Decision 2005-247. Such a change would be contrary to the satellite-use policy of the Government of Canada, as well as the Commission's long-standing approach to the licensing of broadcasting undertakings.

- No policy objectives in the *Broadcasting Act* (the Act) would be served by approving the Rogers application since pay audio and satellite subscription radio services are complementary services, both of which are offered on a competitive basis and both of which are already available directly to Canadians living in urban, remote and underserved communities. On the other hand, granting the Rogers application would undermine the viability of pay audio services and impair the ability of these services to contribute to the Canadian broadcasting system.

- Approval of the Rogers application would make satellite subscription radio services directly competitive with pay audio services even though the two types of services are subject to radically different regulatory obligations. This would create a situation of severe competitive inequity that would have to be remedied prior to implementation of a decision on the Rogers application. In order to resolve this competitive inequity, it would be necessary to address significant policy issues relating to the regulatory obligations of these two types of service and, more generally, the regulatory obligations of all audio services licensed by the Commission.

- Contrary to Rogers submission, it is not necessary to approve its application on the basis of competitive equity since neither cable nor DTH BDUs are permitted to distribute the programming of satellite subscription radio services.

51. CBC/Radio-Canada appreciates the opportunity to provide its comments in this proceeding.

All of which is respectfully submitted

Bev Kirshenblatt
Senior Director, Regulatory Affairs

P.O. Box 3220, Station C
Ottawa, ON
K1Y 1E4

cc: Pamela Dinsmore pam.dinsmore@rci.rogers.com

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