

12 June 2006

Ms. Diane Rhéaume  
Secretary-General  
Canadian Radio-Television &  
Telecommunications Commission  
Ottawa, Ontario  
K1A 0N2

**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.<sup>1</sup>

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 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.

### The Commission’s Approach to Licensing

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 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

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<sup>1</sup> Annex C – Statement on the Utilization of Fixed Satellite Service Facilities for Broadcasting Services, Policy Framework for Provision of Fixed Satellite Services (RP-008).

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.<sup>2</sup> 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 40 channels of commercial-free music channels which are programmed by

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<sup>2</sup> <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>.

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 française 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; *Franco pop*, 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 Stephe 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

A handwritten signature in black ink that reads "B Kirshenblatt". The signature is written in a cursive, slightly slanted style.

Bev Kirshenblatt  
Senior Director, Regulatory Affairs

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Attachment: Appendix A

cc: Pamela Dinsmore [pam.dinsmore@rci.rogers.com](mailto:pam.dinsmore@rci.rogers.com)

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