



Canadian Association of Broadcasters
Association canadienne des radiodiffuseurs

January 22, 2010

Via Epass

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

Re: **Broadcasting and Telecom Notice of Consultation CRTC 2009-602 - *Call for Comments on new draft regulations concerning CRTC Rules of Practice and Procedure (BNC 2009-602)***

1. The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.
2. In these reply comments, the CAB responds to certain recommendations and proposals submitted in response to the issues raised in Broadcasting Notice of Consultation 2009-602 (hereinafter "BNC 2009-602"). These parties include, but are not limited to, ACTRA, CEP, CFTPA, PIAC, NCRA, Media Inc, TekSavvy, Bell Canada, Bragg Communications Inc., MTS Allstream, Quebecor, Rogers, Shaw Communications, and TELUS Communications.
3. The CAB's reply comments will focus on responding to certain parties' proposals regarding the treatment of confidential information in broadcasting proceedings and proposals that seek to increase or decrease the burden on broadcasters.

1.0 A second round of consultation is necessary

4. Parties generally support the Commission's objective to modernize and simplify the rules of procedure. Despite this support, several parties have raised concerns regarding the clarity of the rules as drafted and have suggested that the rules do not sufficiently meet some basic rights afforded by administrative and civil law. Many parties have called on the Commission to permit a second round of consultation in order that all parties have the opportunity to comment further on the objectives and propose additional revisions.

5. The CAB agrees that an iterative process is necessary given the many issues raised by parties and changes submitted in response to BNC 2009-602. A second version of the Proposed Rules of Procedure should be gazetted and parties should be given the opportunity to comment on the second version by way of a second CRTC consultation. Further, as noted by the CAB in its comments filed December 17, 2009, the CRTC should conduct information seminars¹ for broadcasters who may require additional clarification on the requirements they must undertake to implement the Proposed Rules of Procedure.

2.0 The objectives of the harmonized rules deserve clarification

6. In its comments filed December 17, 2009 the CAB was clear that its support of the Commission's objectives to modernize and simplify the rules was conditional on the outcome of a clearly articulated and streamlined process for broadcasters. The CAB further noted that the rationale for harmonizing the rules must not be at the expense of the achievement of the policy objectives under each the *Broadcasting Act* and the *Telecommunications Act* or at the expense of parties' fundamental right to be heard and to expect procedural fairness.
7. In its comments filed December 17, 2009 the CAB set out a number of concerns regarding the lack of clarity in relation to several provisions in the Proposed Rules of Procedure and signaled areas where broadcasters' right to be heard and expect procedural fairness may be compromised. The CAB, accordingly, agrees with those parties, such as TELUS and PIAC that advocate in favour of a more fulsome discussion of the objectives that the combined rules of procedure are intended to achieve particularly in light of the substantive differences between the policy objectives and the terms set out in *Telecommunications Act* versus those found in the *Broadcasting Act*. The CAB will, nevertheless, respond to some of the proposals raised in the comments filed December 17, 2009.

3.0 Response to parties' proposals

3.1 Treatment of Confidential Information

8. In its submission filed December 17, 2009, the CAB recommended that the current provisions for the treatment of confidential information as set out in section 20 of the current *CRTC Rules of Procedure*, Circular 429 and Circular 2006-5 should continue to guide the treatment of confidential information in broadcasting proceedings, and as such should be retained and incorporated by reference or appended to the Proposed Rules of Procedure. The CAB maintains this position.
9. The CAB's position was supported by Astral and Corus in their joint filing.
10. Other parties such as Bell Canada and Bragg Communications similarly recommended that the Commission include specific provisions in the Proposed Rules of Procedure to specifically capture and enunciate the opportunity for an applicant to file comments in response to a proposal to disclose confidential information and include a provision allowing applicants to withdraw a document if it deems it necessary.

¹ Such information seminars should be conducted once the new Rules of Procedure have been adopted.

3.1.1. Response to the CEP

11. In paragraph 61 of its submission, the CEP recommends that the Proposed Rules of Procedure require that documents filed and granted confidentiality be made public at the end of seven years. In support of this recommendation the CEP argues that the rules, as drafted, significantly expand the scope of information that can be filed in confidence allowing applicants to file all materials in confidence. CEP further notes that under the CRTC's current licensing and policy proceedings there are no circumstances that require or justify that confidentiality be granted into perpetuity.
12. In response, the CAB notes that the CEP has failed to provide any legal or policy justification for its request to disclose confidential information after seven years. Similarly there are no legal or regulatory precedents that the Commission could rely on to justify a process of automatic disclosure after seven years.
13. Second, the CEP's request is based on a gross misinterpretation of section 27 of the Proposed Rules of Procedure. It is their position that the rules, as drafted, implicitly expand the scope of information that broadcasters may file in confidence from the types of information provided in section 20 of the existing *CRTC Rules of Procedure* to any information including an entire application.
14. Finally, the CAB notes that in Broadcasting Regulatory Policy CRTC 2009-560 the Commission announced its intent to disclose on an annual basis certain information provided in the annual returns filed by large broadcasting distribution undertakings, multi-system operators, over the air television and radio ownership groups. Accordingly, a substantial amount of information regarding over-the-air television and radio ownership group operations is now disclosed on an annual basis and is publicly available on the CRTC's website. The CEP participated in the proceeding leading to Broadcasting Regulatory Policy 2009-560 requesting disclosure of historical information. Clearly the Commission has already denied the CEP's request.
15. The CAB accordingly strongly opposes the CEP's recommendation and believes the adoption of such a proposal would not serve the public interest.

3.1.2 Response to PIAC

16. PIAC observed that "the section on confidential information is Spartan" and that "it should [...] provide the alternative of a non-disclosure agreement and the process for determining and adjudicating the applicability of such alternative."
17. In response, the CAB notes that it is not clear from PIAC's comments the role that a non-disclosure agreement could play in a regulatory proceeding that is open to the public. Typically, non-disclosure agreements are between two parties that permit the sharing of certain confidential information under specified non-disclosure provisions. Granting third parties access to confidential information via non-disclosure agreements could be unduly onerous on all parties including the CRTC.
18. The CAB does agree with PIAC that the proposed provisions governing confidentiality in the Proposed Rules of Procedure are "Spartan". Creating uniform rules to apply to broadcasting undertakings and telecom service providers, regardless of whether they are "Spartan" may not be

the solution given the substantive differences in the objectives and the terms of their respective governing legislation.

3.1.3 Response to Rogers's

19. In paragraph 14 of its comments, Rogers observed that Broadcasting Circular 2008-8 does not address confidentiality issues and instead refers to the confidentiality provisions in the current Broadcasting Rules. Rogers notes that it is unclear how the confidential terms in a purchase and sale agreement and the home addresses of directors will be protected from disclosure. Accordingly, Rogers recommends in paragraph 15 of its submission that the confidentiality provisions be applicable to all three parts of the Proposed Rules of Procedure and not just Part 1.
20. The CAB supports Rogers' recommendation to articulate in the Proposed Rules of Procedures that the confidentiality provisions governing the treatment of information filed by Canadian broadcasters applies to every proceeding and process that the Proposed Rules of Procedure contemplate.

3.2 In camera hearings

21. TELUS and Tecksavvy both recommend that the Commission adopt guidelines to inform parties of the rules governing *in camera* proceedings. TELUS recommends that the Commission develop and articulate a set of procedures for *in camera* hearings that comports with common law and constitutional requirements, and that such procedures be incorporated into the new rules. TELUS notes that the Commission is specifically authorized under the *Telecommunications Act* to employ *in camera* hearings. TekSavvy recommends that section 45 of the *Canadian International Trade Tribunal Act* and sections 16 and 23 of the *Canadian International Trade Tribunal Rules* could inform the Commission's proposed rules.
22. The CAB notes that while there is no comparable provision in the *Broadcasting Act*, the Commission does have the power under section 21a) of *the Act* to make rules "... for making representations and complaints to the Commission." The CAB accordingly, strongly supports the recommendation to add specific procedures in the Proposed Rules of Procedure to guide the conduct, the procedures and the publication of any transcripts resulting from *in camera* sessions. Moreover, the CAB agrees with TeckSavvy that adding specific procedures to guide *in camera* session will provide a degree of predictability that will enhance the efficiency of the Commission's regulatory process.

4.0 Other proposals to decrease the administrative burden on broadcasters

23. The CAB emphasized in its December 17, 2009 submission that the Commission needs to remain sensitive to the burden of its regulations on all broadcasters and accordingly should use section 5 (2)(g) of the *Broadcasting Act* as the yardstick for measuring all regulations and procedures emanating from the current proceeding are measured. Other parties to the current proceeding identified provisions in the Proposed Rules of Procedure that have the potential to introduce additional burden to broadcasters. For example, the CAB would like to acknowledge and support the recommendation of Bell Canada on page 2 of the Appendix to its submission that the word "written" be removed from the section 11 of the Proposed Rules of Procedure so that parties are not required to keep a written record of electronic transmissions. The CAB

agrees that the requirement to keep a written record may be overly burdensome. Having said this, the CAB does not agree with Bell's recommendation that the record needs to be kept for a period of two years. Instead a six month period should be sufficient.

24. The CAB further agrees with Rogers and Bragg Communications that section 17 of the Proposed Rules of Procedure should include a "deemed receipt" rule or a "mandatory confirmation rule" so that applicants can assume that respondents and interveners who are supposed to receive a copy of an application or reply are deemed to have received the applicant's document.
25. The CAB also supports Rogers' recommendation in paragraph 12 of its submission that all third party studies be released the same day as the Notice of Consultation it is intended to supplement. This will give parties a reasonable period of time to review the studies and comment on them in their submissions. Where this is not possible the Commission should endeavor to notify parties of the date studies are to be expected and give parties no less than two weeks prior to the deadline for comments or appearance at a public hearing in order to review the third party study. The CAB further supports Rogers' recommendation that the deadline for reply comments be set out in the notice of consultation instead of announced at the oral hearing.
26. Finally, the CAB supports Bell Canada's proposal to add at the beginning of section 49 dealing with the service of reply argument the sentence "if the applicant files a reply....".

CONCLUSION

27. The CAB appreciates the opportunity to provide the foregoing reply comments in this proceeding and looks forward to working collaboratively with the Commission on the second version of the Proposed Rules of Procedure.

Sincerely,

Originally signed by:

Pierre-Louis Smith
Vice-President, Policy and Chief Regulatory Officer

*****End of document*****