



Canadian Association of Broadcasters  
Association canadienne des radiodiffuseurs

May 27, 2009

*Via Epass*

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario  
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Dr. Mr. Morin:

**Re: CAB reply comments – Broadcasting Notice of Consultation CRTC 2009-173  
*Call for comments on a proposed exemption order for terrestrial broadcasting  
undertakings serving fewer than 20,000 subscribers (BNC 2009-173)***

1. The Canadian Association of Broadcasters (CAB) is pleased to provide these reply comments in response to the submissions filed by other parties in connection with the Commission's proposal to exempt terrestrial broadcasting distribution undertakings (BDUs) serving fewer than 20,000 subscribers, as set out in BNC 2009-173.
2. For convenience, our reply comments are organized according to the specific issues that the CAB had identified in its initial submission on May 6, 2009.

### **The scope of the proposed exemption order**

3. In our initial comments, the CAB made the following recommendations addressing three issues related to the scope of the proposed exemption order:
  - (i) cable systems owned by one of the top four BDUs (i.e. Rogers, Shaw, Vidéotron and Cogeco) should not be eligible for exemption;
  - (ii) any cable system fully interconnected with a separately licensed BDU should not be eligible for exemption; and
  - (iii) a "discrete operation", for the purpose of identifying those areas within a regional licence that would be eligible for exemption, would have to meet all of the following three criteria:

- the existence of a separate headend and signal processing facility for the local serving area;
  - the existence of a separate business office; and
  - no interconnection with any other licensed or exempt system or serving area within the regional licenced territory.
4. Cable systems owned by the top 4 MSOs account for approximately 75% of the Class 1 systems that would become eligible for exemption under the Commission’s proposal. The CAB’s recommendation that the Commission refrain from exempting these systems is based on the view that the circumstances that might warrant a streamlining of the regulatory framework for independently owned small systems do not apply to small systems owned by the large MSOs – a position that the Commission itself has expressed on a number of occasions in the past.
  5. The CAB’s position was supported directly or indirectly by three interveners, Bell Video Group (Bell), TELUS Communications and the Canadian Cable Systems Alliance (CCSA).
  6. Bell recommended that the exemption order contain the following addition to the fourth criterion for determining what constitutes a “discrete operation”:

*...In this regard, the proposed exemption order will not apply to any terrestrial BDU affiliated with one of the major distribution system groups: Rogers Cable Communications Inc., Shaw Cable systems Limited, Quebecor Média inc. (for Vidéotron ltée) and Cogeco Cable inc.*
  7. While this recommendation was made in the context of the discussion as to what constitutes a “discrete operation” for the purpose of allowing a carve-out of an existing regional licence, it is apparent that the intended effect is to ensure that systems owned by the four largest MSOs would not qualify for exemption. Accordingly, the CAB supports this proposal by Bell.
  8. TELUS expressed concern about the fact that including systems owned by the five largest cable MSOs (the top four MSOs referred to above plus Eastlink) within the scope of the exemption order would allow these large and highly profitable MSOs to avoid making contributions to Canadian programming, including production funds and the new Local Programming Improvement Fund (LPIF), for a significant number of their subscribers. The solution proposed by TELUS is to add a criterion to the exemption order to require the five largest cable MSOs to include revenues from exempt undertakings when calculating their required contributions to Canadian programming.
  9. The CAB shares TELUS’ concern regarding the inequity of allowing the large MSOs to avoid contributions to Canadian programming for their exempt systems. Indeed, the CAB believes that all exempt systems with more than 2,000 subscribers should be required to make such contributions. We note that, under the current BDU framework, all BDUs with more than 2,000 subscribers, even those that operate under the existing exemption order, are required to contribute 5% of their revenues to Canadian programming.

10. The CAB remains of the view that the continued licensing of all systems, large and small, owned by the top four MSOs is warranted. This is the most effective means of ensuring that they make appropriate contributions to the Canadian broadcasting system and continue to be subject to all other obligations generally applicable to licensed BDUs that are designed to further broadcasting policy objectives.
11. The CCSA comments addressed the significant differences between small systems owned by the large MSOs and small systems owned by the independent operators that make up the CCSA membership. At paragraph 52 of its submission, the CCSA noted that “[t]he primary concern of independent small systems with respect to systems operated by larger MSOs qualifying for exemption is that such systems could enjoy access to financial, business and operational resources that the independent systems cannot match.”
12. This strengthens the point made by the CAB at paragraph 17 of its May 6 submission that the rationale for an expanded exemption order, at least in part, was to streamline regulatory requirements for small systems that do not have the resources and/or regulatory expertise to deal efficiently with such matters. Such circumstances clearly do not apply to any system owned by one of the top four cable MSOs.
13. The CAB submits that the comments provided by Bell, TELUS and the CCSA on this matter provide support for the recommendation that cable systems owned by the top four cable MSOs should not be eligible for exemption.

#### **Appropriate definition of “discrete operations”**

14. With regard to the proposed criteria for identifying “discrete operations” within regional licences that could qualify for exemption, the CAB notes that several BDUs have recommended a considerable relaxing of the proposed criteria so that they would have greater freedom to carve up their regional licences into a larger number of exempt sectors.
15. Shaw, for example, proposed that meeting any one of three specified criteria (i.e., the presence of a separate headend/signal processing facility; or the offering of any unique priority signals; or the operating a local community channel) would be sufficient to define a “discrete operation”. In addition, Shaw proposed that interconnection with a large system should not affect the potential exempt status of a serving area.
16. Rogers made a similar recommendation to the effect that the presence of only one of the proposed criteria for a “discrete operation”, not a requirement that all criteria be present, should be sufficient to demonstrate a discrete operation. Rogers further argued that the presence of a competitor’s exempt system should not be a pre-requisite for allowing the carve-out of a portion of a regional licence.
17. The CAB further notes that SaskTel and TELUS made contradictory proposals as to what should constitute a “discrete operation”, with SaskTel proposing that a separate headend should not be required and TELUS arguing that the presence of a separate headend should in fact be the sole criterion that would be required.

18. The CAB submits that the Commission should reject all of these proposals on the grounds that they are designed to provide BDUs holding a regional licence with the ability to pick and choose where they will be regionally licensed and where they will be exempt. In the CAB's view, they do not adequately address the underlying issue which is to identify truly "discrete operations", in other words, those standalone systems that are not tied to and/or dependent on separately licensed systems for their operation.
19. The CAB has taken particular note of the CCSA comments in this regard. The CCSA agrees that the criteria proposed by the Commission are valid tests for determining whether a system carved out of a regional licence truly is a "discrete operation" and that if only one criterion is met the system under consideration cannot qualify for a carve-out.
20. The CAB therefore supports the CCSA proposal that, in order to qualify for carve out from a BDU's regional licence, a system must meet all of the following criteria:
  - maintain a separate business office;
  - maintain a separate customer service operation;
  - offer unique local content in the form of local priority programming or a community channel;
  - maintain a separate headend of independent signals processing facility; and
  - not be fully interconnected to an affiliated BDU or a BDU that remains subject to licensing.

### **Removal of access obligations**

21. The issue of access obligations was not addressed by BDUs in their initial filings. Parties directly affected by the Commission's proposal to not require such obligations as a requirement for exemption, namely pay and specialty licensees, argued strongly that as a condition of exemption there should be a requirement to meet the same access rules as generally apply to licensed systems.
22. Astral Media, for example, noted that the Commission recently affirmed the importance of access rights in fostering diverse programming choices and supporting Canadian services and their production and acquisition of Canadian programming.
23. Pelmorex Communications agreed that the failure to provide access obligations for exempt BDUs undermines the ability of Canadian programming services to meet their regulatory obligations and provides a disservice to Canadians living in communities served by exempt BDUs.

24. The CAB supports the views expressed by these interveners with respect to the importance of maintaining access obligations for exempt BDUs. We reiterate the recommendation contained in our May 6 submission that the exemption order should contain a provision that requires exempt systems with more than 2,000 subscribers to adhere to the access rules applicable to licensed cable BDUs.
25. Access rights are a critical component of the broadcasting regulatory regime. This was affirmed by the Commission in Broadcasting Public Notice CRTC 2008-100:

*The overarching principles of the Act require that Canadian content be fostered by the Canadian broadcasting system in both official languages. Equally important, access to this content must be assured so that broadcasters may deliver those programs through all parts of the system and so that viewers may select the content that is relevant to them. [paragraph 3]*

*The Commission considers that the issue of access rights is fundamental to any regulatory framework for the digital world. Removing most access requirements would unquestionably result in a simpler, more flexible and more market-oriented approach. However, such a market-oriented approach must not come at the expense of other objectives, in particular those that foster diverse programming choices and support Canadian services through the production and acquisition of Canadian programming. [paragraph 65]*

26. The CAB therefore urges the Commission to maintain access obligations for BDUs with more than 2,000 subscribers. This will result in the availability of a richer, stronger and more diverse broadcasting system for Canadians.

### **Contributions to Canadian programming**

27. BDUs did not comment on the notion that the exemption order proposed by the Commission would relieve exempt cable systems from the existing obligation to contribute 5% of their gross revenues to Canadian programming.
28. As noted above, the current exemption order for cable systems with between 2,000 and 6,000 subscribers requires that each exempt system contribute 5% of its gross revenues to support Canadian programming. The omission of such an obligation from the proposed exemption order would constitute a windfall for existing and newly exempt BDUs but would have a material negative impact on Canadian production funds and, in the future, on the LPIF<sup>1</sup> currently under consideration by the Commission.
29. The CAB notes that similar concerns were expressed by Astral, TELUS and the CFTPA. As noted above, TELUS focused on the fact the exempt systems owned by the five largest cable MSOs would no longer be required to make contributions to Canadian programming as well as other fees such as Part 1 licence fees, LPIF and any new fee for carriage<sup>1</sup>. In the CAB's view this concern is equally applicable to all exempt BDUs, regardless of ownership, given the *Broadcasting Act* requirement that each element of the Canadian broadcasting system contribute in an appropriate manner to the creation and presentation of Canadian programming.

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<sup>1</sup> Paragraph 19, TELUS May 6, 2009 submission.

30. As discussed in more detail in our May 6 comments, the CAB therefore reiterates the following recommendation:

**All exempt systems with more than 2,000 subscribers should be required to make a direct financial contribution of 5% of gross revenues (to be increased to 6% or higher with implementation of the LPIF), less any contribution to local expression, to Canadian programming. Should the Commission increase the required contribution of licensed BDUs in the future (e.g. to fund the LPIF), then exempt undertakings with more than 2,000 subscribers should be required to make similar increased contributions.**

### **The insertion of commercial messages by exempt BDUs**

31. In our May 6 comments, the CAB opposed the inclusion of section 11(f) of the proposed exemption order, which would allow an exempt system to insert targeted commercial messages in a programming service pursuant to an agreement between the exempt BDU and the operator of the programming service.
32. In support of its position the CAB noted that the provision contained in the proposed exemption order mirrored a provision currently under review in the proceeding announced by Broadcasting Notice of Consultation CRTC 2009-176 (BNC 2009-176).
33. Parties that addressed the provision relating to targeted advertising contained in the exemption order raised significant policy issues. The CCSA, for example, argued that the reference to “target market” should be eliminated so that exempt systems can insert advertising capable of reaching their entire subscriber base. Bragg Communications similarly took the position that permitted advertising should not be limited to targeted advertising only. Bragg argued that it is premature to insert definitive language into the exemption order that limits the type of advertising that will be permitted, and instead suggests that the Commission adopt more general language that would permit BDUs to insert advertising that is consistent with Commission policies and requirements.
34. The CAB submits that the proposal to include section 11(f) in the exemption order has in effect opened up a policy debate on the scope, limitations, definitions and other issues related to the insertion of advertising by BDUs. These are issues that must not be determined in the context of the current proceeding as they fall properly within the scope of other proceedings currently before the Commission.
35. Accordingly, the CAB maintains its recommendation that section 11(f) concerning the insertion of targeted advertising should be removed from the proposed exemption order. Appropriate amendments to the exemption order can be introduced, if necessary, when the Commission finalizes its policy on the insertion of targeted commercial messages by BDUs, with the certainty that the precise language of the provision and the relevant terms and conditions associated with the insertion of targeted advertising will properly reflect the policy determinations to be made by the Commission.

### **Programming service substitution**

36. Shaw has proposed an amendment to the proposed exemption order to either: (i) exempt all terrestrial BDUs serving fewer than 6,000 subs from all simultaneous substitution rules; or (ii) mirror simultaneous substitution provisions in the current exemption order for BDUs with 2,000 to 6,000 subs.
37. The CAB opposes alternative (i) of Shaw's recommendation. Under the current exemption order, exempt systems with 2,000 to 6,000 subscribers are required to carry out simultaneous substitution on behalf of a local station where the main studio of that station is located within the service area of the exempt undertaking and is used to produce locally originated programming. This is an important protection for conventional television stations serving small markets and the CAB submits that it must be retained in the new exemption order.
38. Since the proposed provision respecting simultaneous substitution generally mirrors the simultaneous substitution requirements in the existing exemption order, the CAB has no objection to alternative (ii) of Shaw's recommendation provided that it is limited to exempt systems with 2,000 to 6,000 subscribers.
39. With respect to exempt systems with more than 6,000 subscribers, the CAB maintains the recommendation contained in its May 6 submission that section 21 of the proposed exemption order should be revised to ensure that exempt BDUs with more than 6,000 subscribers have the same programming service substitution obligations as licensed Class 1 cable systems.
40. Simultaneous substitution obligations were developed as a means to preserve the integrity of program rights, an issue that goes to the foundation of the Canadian broadcasting system. It is important that this critical mechanism apply to all BDUs, whether licensed or exempt.
41. Adopting the CAB recommendation will ensure that exempt systems with more than 6,000 subscribers carry out substitution requests in the same circumstances as licensed cable BDUs, i.e., on behalf of both local and regional television stations and without any requirement that such stations have a local studio producing local programming in the serving area of the exempt undertaking.

### **Information requirements**

42. The CAB notes that BDUs generally opposed the introduction of information filing requirements or argued in favour of reduced or streamlined requirements. We continue to believe that it is important that all exempt BDUs be required to file, at least annually, basic identification as to location and ownership of the exempt undertaking, a map of the serving area and a detailed channel line-up, in addition to the information required to be filed in the simplified Annual Return. This will assist third parties in monitoring the operation of exempt systems and the extent to which they are in compliance with the Commission's exemption order.
43. The CAB also reiterates its recommendation that the operator or individual responsible for the exempt undertaking should be required to file an annual attestation or sworn statement to the effect that he/she has examined the requirements of the BDU exemption order and certifies that the operation of the exempt undertaking complies in all respects with the relevant criteria.

44. Finally, the CAB agrees with the recommendation made by Rogers that, prior to finalizing the simplified annual return, the Commission should make it available for public comment.

### **Other matters**

45. In addition to the issues addressed above, the CAB wishes to comment briefly on a few other matters raised in comments to this proceeding.

#### Mechanism for case-by-case relief from specific requirements in the exemption order

46. Bragg has suggested that the exemption order contain some sort of mechanism through which an exempt system could apply for a decision from the Commission authorizing it to depart from one or more specific provisions of the exemption order. In the CAB's view, such a provision is completely inappropriate and inconsistent with the manner in which an exemption order is designed to function.

47. Subsection 9(4) of the *Broadcasting Act* gives the Commission the power to issue an order to exempt "...persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or a regulation made under this Part...", but only after the Commission first makes a factual determination that "...compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)."

48. From a legal perspective, this means that the Commission can only exempt classes of undertakings and only where the licensing of such class of undertaking will not materially contribute to the implementation of broadcasting policy objectives. Such a factual determination can only be made on a class basis, not on a case-by-case basis. In this context, therefore, the CAB submits that the Bragg proposal for case-by-case treatment is legally incorrect and inconsistent with the Commission's power of exemption contained in the *Broadcasting Act*.

49. Once the Commission has decided to exempt a certain class of undertaking from the requirement to hold a licence, it issues an exemption order containing the specific criteria that qualify a given undertaking eligible for exemption. There must be a clear and common understanding on the part of all parties, including the Commission, the exempt undertaking, and third parties who have a material interest in the terms of exemption, as to the specific requirements that must be met, as there are no applications, decisions, regulations or conditions of licence that otherwise apply.

50. Bragg's suggestion is tantamount to a licensing framework, which does allow exceptions to policy and regulation to be considered on a case-by-case basis, but it is at odds with the streamlined framework that an exemption order represents.



51. The CAB notes that, if a given BDU has a concern with a particular requirement of the applicable exemption order, it always has the option of continuing to operate under the terms of its existing licence, in which case it is free at any time to apply for conditions of licence relevant to its particular circumstances.

Increase small/large exempt system threshold from 2,000 to 6,000 subscribers

52. The CCSA has proposed that the threshold that distinguishes smaller exempt systems with few obligations from the larger exempt undertakings with more extensive obligations should be increased from 2,000 to 6,000 subscribers.
53. The CAB opposes this suggestion. The 2,000 subscriber threshold is an appropriate demarcation between small and large exempt systems and is a distinction that currently exists in the context of the two existing exemption orders, one for systems with fewer than 2,000 subscribers and the other for systems with 2,000 to 6,000 subscribers.
54. The CCSA has provided no compelling reason why that well-established threshold should now be moved upward. In the CAB's view, the only reason to do so would be to give larger systems even more flexibility and relief from fundamental regulatory requirements, but this would come largely at the expense of licensed programming services and the implementation of *Broadcasting Act* policy objectives.

Grandfather provision to ensure no new regulatory burdens imposed

55. The CCSA has also proposed that the exemption order should contain a grandfather provision to ensure that it does not impose any new regulatory obligations on either licensed or previously exempted systems that apply for and qualify for exemption.
56. The CAB opposes this proposal, for reasons similar to those outlined in our comments above about the Bragg recommendation for a mechanism to provide case-by-case relief from specific obligations in the exemption order. The CAB submits that the criteria for exemption must be clear, specific and applicable to all exempt systems. A general provision that provides relief from unspecified criteria depending on the previous status of an exempt system would be virtually impossible to monitor and enforce, and is therefore inappropriate for an exemption order. Finally, from a legal perspective, a case-by-case approach under which the specific requirements applicable to a given exempt system are dependent on that system's prior licensing status is inconsistent with the Commission's power of exemption under subsection 9(4) of the *Broadcasting Act*.

Revocation of existing licences

57. As a final matter, the CCSA proposed a procedure by which a currently licensed system that meets the exemption criteria could simply notify the Commission of its intention to operate under the exemption order, without the need for a formal application to revoke its licence.

58. While acknowledging the CCSA's desire to streamline procedures to make it as simple as possible for eligible systems to move from licensed to exempt status, the CAB points out that the normal process of requiring such systems to apply to revoke their licence is an important safeguard that protects the legitimate interests of third parties, including programming services who may be directly affected by a change in status of a given system. The application for revocation ensures a public process that, at a minimum, informs the public of the proposed change in operating circumstances of the cable system in question. Such would not be the case under the notification process suggested by the CCSA.
59. Furthermore, the rules of natural justice require that prior notice be given of a proposed change in operational status. The CCSA proposal to do away with such a requirement is inconsistent with this fundamental principle of administrative law.
60. Accordingly, the CAB recommends that the Commission reject this CCSA proposal and retain the process by which currently licensed systems would be expected to apply to revoke their licences if they wished to operate under the exemption order.
61. The CAB does, however, agree with the CCSA's recommendation that the Commission should publish a list of the systems newly exempted as a result of this order. This is a simple, convenient mechanism that will help inform interested parties of the licensing status of the numerous small cable BDUs that operate in Canada.
62. The CAB appreciates the opportunity to participate in this proceeding.

Sincerely,

*Originally signed by:*

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

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