



Canadian Association of Broadcasters  
Association canadienne des radiodiffuseurs

February 23, 2009

*Via Epass*

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

Dear Mr. Morin:

**Re: Proposed amendments to the *Broadcasting Distribution Regulations* respecting the carriage of Canadian distant signals**

1. The Canadian Association of Broadcasters (CAB) represents the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The CAB represents and advances the interests of Canada's private broadcasters in the social, cultural and economic policy areas.
2. The Canadian Association of Broadcasters (CAB) urges the Commission to proceed expeditiously to amend the *Broadcasting Distribution Regulations* (BDU Regulations) to implement its new policy respecting the distribution of Canadian television stations in distant markets.
3. The new Canadian distant signals policy is established in Broadcasting Public Notice CRTC 2008-100, *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (BPN 2008-100). As noted at paragraph 307, "...the Commission's policy with respect to Canadian distant signals will be to require all licensed BDUs to obtain the consent of OTA licensees prior to distributing their local signals in a distant market."
4. The CAB agrees with the Commission's assessment that "...providing broadcasters with the right to negotiate the terms under which their signals will be retransmitted is consistent with the Commission's objective to rely on market forces whenever possible" (paragraph 304) and that "[m]arket-based negotiations will allow broadcasters to recover the 'full value' of their signals and the programming rights they have acquired" (paragraph 305).

5. These determinations are consistent with the position advanced by the CAB during the public proceeding leading up to the issuance of BPN 2008-100. We strongly believe that the early implementation of the new policy is a critical step towards resolving in an equitable manner the long-standing problems associated with the current distant signals policy.
6. In this context, therefore, the CAB is greatly concerned about the Commission's apparent intention to delay implementation of the new distant signals policy for over 2½ years, until August 31, 2011. This is the date on which the Commission intends to make omnibus amendments to the BDU Regulations, the majority of which will be for the purpose of implementing the Commission's determinations in BPN 2008-100 respecting the distribution of specialty and pay television services.
7. Our concerns in this regard were heightened by comments contained in a letter from Commission staff on January 12, 2009, further to a CAB request for clarification of several questions flowing from BPN 2008-100. In that letter, and in response to specific questions raised by the CAB about the implementation of the new distant signals policy, Commission staff outlined the following approach:

*As set out in paragraph 385 of BPN 2008-100 "...the majority of the changes to the Commission's frameworks for BDUs and programming undertakings will be implemented via amendments to the relevant regulations, most specifically the BDU Regulations, and will take effect on 31 August 2011." It is currently the Commission's intention to amend the BDU Regulations to reflect the changes related to distant signals by this date. In doing so, the Commission will likely implement this policy by, in part, deleting the sections of the BDU Regulations that relate to program deletion...*

*Although the amendments to the BDU Regulations have not yet been put in place, there is nothing to prevent parties from negotiating and arriving at an agreement on distant signals at this time, for example, as an alternative to program deletion. Given the complexity of the issues raised, parties are encouraged to initiate these discussions as soon as possible...*

*... parties are strongly encouraged to avail themselves of its mediation and/or dispute resolution processes prior to any breakdown in negotiations that would, in the CAB's view, necessitate the filing of deletion requests.*

8. The CAB considers that delaying implementation of the new distant signals policy until August 31, 2011 will only perpetuate the current untenable situation whereby broadcasters' signals are taken without their consent and distributed in distant markets. At the same time, unless the Commission is prepared to enforce its existing program deletion regulations, the expectation that broadcasters and BDUs will negotiate "alternative measures" in lieu of program deletion will continue. The end result is that, under the current distant signals framework, any financial compensation that might flow to broadcasters in return for them not exercising program deletion rights against distant signals imported into local markets will in no way compensate broadcasters for the economic damage attributable to distant signals.

9. We submit that there are at least three compelling reasons why the Commission should move quickly to enact the necessary amendments to the BDU Regulations to implement the new distant signals policy.

**There is no policy, regulatory or administrative rationale for delay**

10. First, the CAB submits that there is no logic or rationale, whether on policy, regulatory or administrative grounds, to delay the required amendments to the BDU Regulations for a further 2½ years.
11. The proposed amendment date of August 31, 2011 is based on factors having nothing to do with the distribution of distant signals. It stems from considerations related to the transition to all-digital distribution for both BDUs and discretionary programming services, including the need to provide a reasonable period of time for programmers and BDUs to adapt to the new digital distribution environment.
12. Adopting this same date for the timing of unrelated amendments intended to address the distribution of distant signals is arbitrary and unsupported by the facts. It has no foundation in logic and fails to take into account the need for swifter action with respect to distant signals.
13. It is even more illogical when one considers the very positive findings of the Commission in BPN 2008-100 in relation to the rationale and benefits for the new distant signals policy. It is clear that the Commission considers the new policy to be fully warranted and, to the extent that it relies on market forces, to be fair to both broadcasters and BDUs.
14. By implication, therefore, the existing distant signals policy must be flawed. The CAB submits that this must be so primarily because it fails to provide appropriate recognition and protection of the program rights acquired by Canadian broadcasters. Indeed, this has been the thrust of numerous submissions that the CAB has made over the years on the distant signals issue. We are gratified that the Commission has now reached the same conclusion.
15. Given these facts, the CAB fails to understand the logic for allowing a flawed policy that has already been in place for a decade or more to continue for another 2½ years. This is even more incomprehensible given that the remedy identified by the Commission in BPN 2008-100 could be easily implemented at an early date through a straightforward amendment to the BDU Regulations.
16. If the Commission's new policy approach is correct, and the CAB firmly believes that it is, logic dictates that the necessary regulatory amendments should be put in place as soon as possible, not delayed by more than 2½ years.

**The deteriorating economics of the OTA sector require action on distant signals now, not in 2½ years**

17. Second, the CAB's submissions to last year's public proceeding leading up to the issuance of BPN 2008-100 estimated that the economic impact of the distribution of Canadian distant signals on the OTA television sector was about \$70 million in lost advertising revenues in 2005/2006. This impact has undoubtedly risen since then, in large part because Shaw Cablesystems began distribution Canadian distant signals only after the 2005/2006 broadcast year. We further note that, using the most up-to-date, detailed and confidential information available (provided by two of our members, Canwest and CTVglobemedia), Armstrong Consulting established an even higher impact number for the use of distant signals.
18. At the same time, financial compensation paid by BDUs to broadcasters under the existing "alternate arrangements" in lieu of program deletion was only about \$10 million, including DTH contributions to the Small Market Local Programming Fund. This means that the net impact on the OTA sector attributable to the distribution of Canadian distant signals in 2005/2006 was some \$60 million. This net impact has only increased in the subsequent two years.
19. This impact becomes all the more significant when set against the backdrop of the most recent financial results for the OTA television sector released by the Commission on February 10, 2009. For the 2007/2008 broadcast year, PBIT plummeted to only \$8 million, compared to \$113 million in the previous year and \$233 million only four years earlier. Furthermore, these bleak results do not include the impact of the global economic meltdown which occurred in Fall 2008, meaning that the full magnitude of the economic downturn of the OTA television sector remains yet to be seen.
20. In these circumstances, repatriation of the lost revenues attributable to the current distant signals policy has become a matter of even greater urgency. The Commission has explicitly noted in BPH 2008-100 that the new policy requiring a broadcaster's prior consent before its signal may be distributed in distant markets will give broadcasters an opportunity to negotiate a fair price for the use of the signals, based on market forces. It is crucial that the amendments to the BDU Regulations to permit these market negotiations to take place be put in place as soon as possible. It is simply not an option to allow the hemorrhaging that has taken place over the past 10 years in respect of distant signals to continue for another 2½ years, when the economics of the industry have reached a critical stage today.
21. The CAB acknowledges that the negotiation of equitable distant signal agreements may not be the whole answer to the current economic challenges facing the OTA television sector; nevertheless, the CAB submits that it is a critical element of the overall solution. The necessary amendments to the BDU Regulations to implement the new distant signals policy need to be put in place immediately, not delayed until August 31, 2011.

**The current framework of negotiated “alternate measures” in lieu of program deletion cannot resolve the distant signals issue**

22. Third, the CAB does not share the Commission’s optimism that, in the interim period until the new distant signals policy is implemented, broadcasters will be able to negotiate appropriate “alternate measures” in lieu of program deletion.
23. Commission staff alluded to this possibility in their January 12, 2009 letter. They encouraged parties to initiate discussions as soon as possible with a view to reaching new distant signals agreements as an alternative to program deletion.
24. We also note that in Broadcasting Notice of Consultation CRTC 2009-70, *Scope of licence renewal hearings for private conventional television stations*, the Commission explicitly identified the need for completion of distant signals negotiations between conventional broadcasters and BDUs as one of the reasons why it would be difficult at the present to determine appropriate regulatory obligations for a full seven-year licence term.
25. It is clear, therefore, that the Commission expects parties to move as quickly as possible to negotiate new distant signals agreements, but under the current distant signals regulatory framework rather than under the new policy announced in BPN 2008-100.
26. The CAB submits that, under the existing distant signals policy, the possibility of broadcasters and BDUs reaching new agreements that fairly address the devaluation of program rights due to distant signals carriage is virtually zero. The CAB has consistently made the point in numerous submissions over the past several years that it is impossible to reach such agreements because the alternative to a negotiated agreement – namely, program deletion by the BDUs – has never been enforced and in our view will never be enforced by the Commission. Thus, broadcasters have zero leverage in these negotiations and there is no incentive for BDUs to negotiate new agreements.
27. We need look no further than the experiences in 2002 when negotiations between the CAB and Star Choice respecting a comprehensive distant signals agreement broke down. In the absence of agreement on “alternate measures”, broadcasters exercised their right to request program deletion as provided for in the BDU Regulations. As has been previously documented by the CAB, all deletion requests were ignored by Star Choice. Furthermore, notwithstanding a formal complaint by the CAB, the Commission declined to even investigate the apparent regulatory breach, let alone enforce compliance. Instead, the Commission agreed to consider an application by Star Choice for relief from the requirement to carry out program deletion on distant signals and subsequently approved that application subject to various conditions imposed by the Commission.
28. It is instructive to read the comments of Commission staff in their January 12 letter respecting the possibility of program deletion requests going forward, should the parties fail to reach a negotiated agreement: “...parties are strongly encouraged to avail themselves of its mediation and/or dispute resolution processes prior to any breakdown in negotiations that would, in the CAB’s view, necessitate the filing of deletion requests.”

29. The right of a local television station to request program deletion where a BDU imports a distant signal with programs that duplicate programs broadcast by the local station is set out in the BDU Regulations. The CAB submits that, in the absence of an agreement between the BDU and the licensee of the local station respecting “alternative measures” in lieu of program deletion, there should be an absolute expectation that, upon request, the BDU will be required to carry out program deletion vis-à-vis identical programs broadcast on the distant signal.
30. It is therefore alarming that the Commission’s position as expressed in the January 12 letter appears to be at odds with this expectation. Indeed, there is a clear message that the Commission would not look favourably on deletion requests, but would instead expect the parties to make use of the Commission’s dispute resolution procedures to resolve any disagreement about appropriate compensation in lieu of program deletion.
31. In other words, the Commission appears to be quite prepared to impose the terms of distant signal carriage rather than allow the parties to avail themselves of the existing remedy set out in the BDU Regulations (i.e. program deletion), in the event the parties cannot reach a new agreement. This approach would seem to fly in the face of the “market-based” and “free” negotiations explicitly envisioned by the Commission in paragraph 305 of BPN 2008-100.
32. In this context, it is hardly surprising that under the existing distant signals framework BDUs would be unwilling to agree to anything other than a continuation of the status quo going forward. They know that the Commission will not enforce program deletion, so have nothing to lose in refusing to negotiate changes to existing arrangements. They are confident that, at worst, the Commission would simply impose a continuation of the status quo arrangements, arrangements that are favourable to BDUs but clearly unacceptable to broadcasters.
33. In short, it is clear that the Commission’s expectations that broadcasters and BDUs will be able to arrive at mutually acceptable agreements under the existing distant signals regulatory framework are misguided.
34. Furthermore, the Commission’s “strong encouragement” for the parties to avail themselves of a Commission-imposed settlement rather than enforce program deletion regulations in the event a new agreement is not reached is hardly consistent with the “market-based negotiations” that the CAB and its members had expected based on the approach set out in BPN 2008-100.
35. For all of these reasons, the CAB submits that a continuation of the current framework for a further 2½ years cannot satisfactorily address the distant signals issue. The only realistic solution is to move immediately to implement the new distant signals policy based on a requirement that a BDU obtain the consent of a broadcaster before distributing that broadcaster’s signal into distant markets. That is the only way to ensure that parties will be able to fruitfully engage in the type of market-based negotiations that underpin the Commission’s new approach.

36. The CAB therefore urges the Commission to take immediate steps to effect the required amendments to the BDU Regulations at the earliest possible date.
37. The CAB thanks the Commission for its consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pierre-Louis Smith', with a large, sweeping flourish on the left side.

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

- c.c. Konrad von Finkenstein, Chairman  
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