



Canadian Association of Broadcasters
Association canadienne des radiodiffuseurs

January 20, 2009

Via Epass

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

Dear Mr. Morin:

Re: Broadcasting Public Notice CRTC 2008-118, Item 1: Application #2008-1381-7 by Shaw Communications Inc. (Shaw) to distribute multiple sets of US 4+1 signals

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. The CAB is pleased to submit this intervention concerning the above-noted application by Shaw to authorize the distribution of multiple sets of US 4+1 signals on 45 Class 1, 2 and 3 cable broadcasting distribution undertakings (BDUs) that it controls.
3. Specifically, Shaw is seeking the authority to distribute high definition (HD) 4+1 signals sourced from different markets than the standard definition (SD) 4+1 signals it distributes. If approved, Shaw would be able to distribute four distinct sets of 4+1 signals, notwithstanding the Commission's longstanding policy permitting no more than two distinct sets of such signals.
4. This application stems from the Commission's decision on recent licence renewal applications for these cable systems. In its intervention respecting those applications, the CAB raised a concern about Shaw's practice of distributing different HD and SD versions of the US 4+1 signals, in apparent contravention of Commission policy and regulation.

5. In Broadcasting Decision CRTC 2008-234 issuing short-term renewals for these licences, the Commission confirmed the CAB's interpretation of the US 4+1 policy as follows:

With respect to the arguments presented by Shaw to support its distribution of several sets of U.S. 4+1 signals, the Commission finds that this practice is inconsistent with Commission policy and policy objectives. The Commission notes that BDUs authorized to distribute a second set of U.S. 4+1 signals may distribute different first and second sets of U.S. 4+1 signals and, pursuant to Broadcasting Public Notice 2003-61, may distribute the upgraded (HD) version of an authorized service, provided that no less than 95% of the video and audio components of the upgraded and analog versions of the service are the same. The Commission finds that Shaw's current distribution of U.S. 4+1 signals on several of its systems is not consistent with this policy.

6. Rather than adjusting its channel line-ups to comply with Commission policy, Shaw has chosen to submit this application to regularize its existing distribution and to give it additional scope to add new US 4+1 signals in those systems that do not currently provide four distinct sets.
7. **The CAB opposes this application by Shaw.** For the reasons provided in the balance of this intervention, the CAB urges the Commission to maintain its current policy respecting the distribution of the US 4+1 signals, to deny Shaw's application for an exception to this policy and to require Shaw to bring all of its cable systems into compliance at the earliest possible opportunity.

Approval would set a precedent that would effectively change the longstanding US 4+1 policy to the detriment of television licensees

8. Approval of this application would open the door to similar applications by all other BDUs in Canada to distribute separate and distinct sets of the 4+1 signals in HD. If the Commission accepts Shaw's rationale that it is in the public interest to approve this application because it would further the objectives of the Commission's HD policy by encouraging subscriber take-up of HD services, there may be no grounds to refuse similar applications by any other BDU. The inevitable result would be an effective amendment to the current policy to allow every BDU subscriber in Canada to receive four distinct sets of US 4+1 signals.
9. The CAB submits that such a fundamental change would have undue impact on Canadian television licensees by using up capacity for more non-Canadian services, further fragmenting viewing and removing opportunities for simultaneous substitution. The Shaw application should be denied for these reasons alone.
10. Shaw attempts to minimize concerns about impact on television licensees by committing to receiving the 4+1 signals distributed on HD from the same time zones as the SD signals. It maintains that prime time schedules of different network stations from the same time zone are largely duplicative and so few simultaneous substitution opportunities would be lost.

11. This argument is flawed for several reasons. First, it contradicts Shaw's own rationale for approval of the application – that it would increase the attractiveness of the HD offering and incent subscribers to subscribe to HD services. If, as Shaw maintains, the program schedules of the HD 4+1 signals are largely duplicative of the SD 4+1 signals from other markets, then what would be the incentive for an SD-only subscriber to subscribe to the HD services, other than the improved technical quality that HD services provide? Shaw's assurances that there would be no appreciable impact on Canadian television licensees are inconsistent with its arguments about enhancing the value of the HD service.
12. Second, even if the prime time schedules were largely duplicative, Shaw's arguments fail to take into account the fragmentation and loss of simultaneous substitution opportunities of non-duplicated programming outside of prime time. Any loss of simultaneous substitution opportunities seriously devalues the foreign program rights Canadian broadcasters obtain. Sunday afternoon NFL football, for example, provides opportunities for Canadian broadcasters to take advantage of simultaneous substitution – such opportunities would be effectively cut in half with approval of Shaw's application because US network stations originating from different markets typically carry different games.
13. Contrary to Shaw's assertions, the carriage of a 3rd and 4th set of US 4+1 signals would have a significant incremental impact on Canadian television licensees.
14. The CAB further notes that, as the digital transition proceeds, cable BDUs will eventually discontinue analog distribution in favour of digital-only distribution. As this occurs, it is unlikely that such BDUs will simply drop the US 4+1 stations that up to that point were being distributed in SD analog format. It is inevitable that BDUs would argue for a continuation of those same signals as part of the HD digital service, adding to the two other sets of US 4+1 signals that would already be part of the HD digital service as a result of approval of this application.
15. In other words, it is not just the digital transition period that would be impacted by approval of this application, as Shaw suggests, but the long-term digital only environment as well. In this context, approval of this application would mean that the Commission's policy would be to allow capacity to be dedicated to four distinct sets of US 4+1 signals, whether on a hybrid analog/digital basis or on a long-term digital-only basis available to all subscribers.

Applicability of current program deletion/compensation arrangements respecting the 2nd set of US 4+1 signals

16. BDUs are currently authorized to distribute a 2nd set of US 4+1 signals subject to the requirement to carry out program deletion on behalf of local broadcasters in relation to identical programming broadcast on the US signals. This regulatory requirement is suspended where the BDU and the CAB have negotiated alternate measures. In the case of Shaw and other BDUs, alternate arrangements in lieu of program deletion involve the payment of financial compensation of \$0.25 per month for each subscriber that receives the 2nd set of US 4+1 signals.

17. Provided that the HD 4+1 signals distributed by a BDU are simply the upgraded version of the authorized SD signals, no additional compensation is payable in respect of the carriage of those signals in both SD and HD. Shaw, however, is proposing to distribute separate and distinct 4+1 signals in HD, representing in effect the 3rd and 4th sets. Shaw has not committed to undertaking program deletion in respect of these additional sets of US 4+1 signals, nor has it indicated any intention to negotiate appropriate alternative measures in lieu of program deletion with affected broadcasters.
18. In these circumstances, given the incremental impact that the 3rd and 4th sets of US 4+1 signals would represent and given the absence of any recognition by Shaw of its regulatory obligations in this regard, the CAB submits that this application must be denied.

Applicability of new linkage rules respecting the distribution of a 2nd set of US 4+1 signals

19. In Broadcasting Public Notice CRTC 2008-100 issued on October 30, 2008 (PN 2008-100), the Commission set out its new regulatory framework for BDUs. Among other things, the Commission indicated its intention to amend the *Broadcasting Distribution Regulations* to authorize a BDU to offer a 2nd set of US 4+1 signals to a subscriber only when that subscriber also receives at least one signal, originating from the same time zone as the US signals, of each large multi-station Canadian broadcasting group.
20. In its deficiency response dated November 19, 2008, Shaw argues that the current application is not impacted by this new regulatory requirement. It is unclear as to the basis for Shaw's position, but at best it would appear to be a technical interpretation based on the fact that the new linkage rule addresses only the 2nd set of US 4+1 signals. The new rule does not contemplate the distribution of 3rd and 4th sets of US 4+1 signals by a single BDU, as is now proposed by Shaw, since such a possibility was not raised during the public proceeding leading up to the issuance of PN 2008-100.
21. The CAB submits that, over and above the significant policy concerns identified above, Shaw's current proposal is inappropriate inasmuch as the Commission has not made a policy determination respecting the application of the new linkage rule to the distribution of 3rd and 4th sets of US 4+1 signals by a single BDU.

Approval would undermine Commission policies respecting the authorization of non-Canadian satellite services

22. In addition to the impacts on existing policies respecting the carriage of the US 4+1 signals as discussed above, the CAB submits that approval of this application could also undermine its current approach to the authorization of other non-Canadian satellite services. This approach, based on the underlying premise that any non-Canadian satellite service authorized for distribution in Canada should not compete with Canadian pay and specialty services, was recently confirmed by the Commission in PN 2008-100.

23. On the surface, Shaw's application directly impacts only policies pertaining to the distribution of the US 4+1 signals. Shaw's basic premise is that those policies should be set aside, notwithstanding their merits, because of the overriding public interest in allowing BDUs to take steps to encourage customers to subscribe to HD services.
24. In other words, it is Shaw's position that the importance of promoting HD by adding new US 4+1 signals not currently distributed should take precedence over other policies that attempt to balance the distribution of additional non-Canadian services with the potential impact that such distribution would have on licensed Canadian services.
25. The CAB believes that Shaw's rationale does not justify overturning policies respecting the distribution of the US 4+1 signals. Nevertheless, if the Commission should take a different view by approving this application, it would in fact be endorsing the Shaw rationale. As such, there may be nothing to prevent a BDU from applying a similar rationale to an application to import any non-Canadian service, irrespective of its competitiveness with Canadian pay and specialty services, provided it was in HD.
26. The CAB submits that approval of the current application would set a precedent that would undermine existing policies respecting the authorization of non-Canadian satellite services.

A fundamental change to the US 4+1 policy should only be considered as part of a broad policy review

27. As discussed above, approval of Shaw's application would have numerous implications – a fundamental amendment to the existing US 4+1 policy, incremental impact on licensed television broadcasters, unresolved questions about the applicability of program deletion/compensation arrangements, uncertainty about the applicability of the new linkage rules for US 4+1 services and the potential undermining of policies respecting the authorization of non-Canadian satellite services.
28. The CAB submits that such fundamental impacts should not be allowed to occur by default as a result of approval of a licence amendment application, but should only be considered within a broader policy context where all implications can be carefully examined. The appropriate time to do this would have been during the recently completed review of the BDU distribution framework, but no such change was proposed by any party or discussed with interveners as part of that review.
29. There was considerable discussion during that proceeding about the impact on licensed television broadcasters of the 2nd set of US 4+1 signals and potential means of mitigating or compensating for such impact. This application now contemplates the addition of the 3rd and 4th set of US 4+1 signals and raises many related issues that were not considered during the proceeding.
30. Given that there has been no discussion of the potential implications and impacts on an industry-wide basis, the CAB submits that it would be inappropriate to approve Shaw's application to fundamentally alter the Commission's 4+1 policy.

Conclusion

31. For all of the reasons discussed above, the CAB urges the Commission to maintain its current policy respecting the distribution of the US 4+1 signals and to deny Shaw's application for an exception to this policy.
32. Furthermore, the CAB urges the Commission to require Shaw to bring all of its cable systems into compliance within 60 days and to report back to the Commission to confirm that it has done so.
33. The CAB appreciates the opportunity to participate in this proceeding.

Sincerely,

Original signed by

Jay Thomson
Vice-President, Regulatory and Policy

c.c. Shaw Communications Inc. (michael.ferras@srjb.ca)

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