



Canadian Association of Broadcasters
Association canadienne des radiodiffuseurs

May 11, 2009

Via Epass

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

Dear Mr. Morin:

Re: Broadcasting Notice of Consultation CRTC 2009-176 *Call for comments on proposed amendments to the Broadcasting Distribution Regulations, the Television Broadcasting Regulations, 1987, the Pay Television Regulations, 1990 and the Specialty Services Regulations, 1990 (BNC 2009-176)*

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 BNC 2009-176, as amended by BNC 2009-176-1, the Commission has proposed to amend the *Broadcasting Distribution Regulations* (the BDU Regulations), the *Television Broadcasting Regulations, 1987* (the TV Regulations), the *Pay Television Regulations, 1990* (the Pay Regulations) and the *Specialty Services Regulations, 1990* (the Specialty Regulations) in order to implement certain of the proposed regulatory framework for broadcasting distribution undertakings (BDUs) and discretionary programming services set out in Broadcasting Public Notice CRTC 2008-100 (BPN 2008-100), and in order to implement changes relating to sections 29 and 44 of the BDU Regulations to require that contributions to Canadian programming be remitted on a monthly basis and reconciled on an annual basis.

3. More specifically, the Commission has proposed to amend the above-mentioned regulations in order to give effect to the following aspects of the new regulatory framework for BDUs and discretionary services:
 - It allows BDUs to make use of the new forms of targeted advertising;
 - It establishes the evidentiary burden in cases of undue preference or disadvantage;
 - It requires that certain licensees make contributions to the local Programming Improvement Fund (LPIF);
 - It provides that pay television and specialty television services cannot withhold their signals during a dispute;
 - It provides that pay television and specialty television services whose programming services are required to be distributed must ensure that their signals are transmitted to distribution undertakings; and
 - It provides that television broadcasting undertakings cannot give an undue preference to any person or subject any person to an undue disadvantage.
4. At the outset, the CAB commends the Commission for formally enshrining the Local Programming Improvement Fund (LPIF) in the BDU Regulations. Notwithstanding the pending determination of an appropriate percent contribution, the CAB believes the LPIF is an important vehicle for maintaining local programming into the future.
5. The CAB's comments in this proceeding are limited to the Commission's proposed amendment to allow BDUs to make use of new forms of targeted advertising, the respective obligations of programmers and distributors during a dispute, the proposed amendment to the TV Regulations to include a provision dealing with undue preference and the proposed amendment to the Specialty Regulations regarding the transmission of programming services.

Amendments to the BDU Regulations re targeted advertising

6. In BPN 2008-100 the Commission indicated at paragraph 142 that an amendment to section 7 of the BDU Regulations would be required to allow "BDUs and broadcasters to work cooperatively so as to manage and exploit the possibilities of new forms of advertising", including targeted advertising. To this end, the CAB notes that in paragraph 143 of BPN 2008-100, the Commission specifically prescribed the following:
 - a. *the Commission is of the view that it may be appropriate to convene an industry working group that would be responsible for developing best practices to guide arrangements between broadcasters and BDUs regarding various matters. Such matters would include, among others, those relating to determining the party that would be responsible for selling the advertising inventory and the appropriate sharing of costs and revenues. The Commission considers that the appropriate time to establish such a working group may be following the establishment of the framework for VOD undertakings, in regard to which it has today issued a call for comments in Broadcasting Public Notice 2008-101.*
7. On the same day that it issued BPN 2008-100, the Commission initiated two public proceedings that deal, in part, with the issue of targeted advertising. These proceedings are *Call for comments on the proposed regulatory framework for video-on-demand undertakings* – Notice of consultation (BPN 2008-101) and *Call for comments on a proposed framework for the sale of commercial advertising in the local*

availabilities of non-Canadian satellite services – Notice of consultation (BPN 2008-102). These two proceedings are currently pending determinations from the Commission.

8. The CAB also notes that when referring to the consultations on the issue of local avails and the issue of video-on-demand the Commission indicated the following:

Should the ensuing proceeding result in determinations that will require amendments to those set out in this public notice, the Commission will provide interested parties with an opportunity to comment on those determinations when it issues its call for comments on proposed amendments to the Broadcasting Distribution Regulations.¹ [emphasis added]

9. In light of the above, the CAB is of the view that at the very least it is premature to proceed with the proposed amendment to allow BDUs to make use of the new forms of targeted advertising until such time as the Commission releases its decision with respect to BPN 2008-101 and BPN 2008-102. Proceeding to amend the regulation in advance of a determination presumes the Commission's decision on issues raised in the context of the VOD and local avails proceedings that are still pending, and therefore fails to recognize the legitimate interest of affected parties to state their positions and have their concerns considered. Further, amending the regulation in advance of a policy determination stemming from BPN 2008-101 and BPN 2008-102 is contrary to the Commission's stated principles of transparency, predictability and fairness.
10. Nevertheless, should the Commission decide that it is warranted at this point to proceed with an amendment to section 7 of the BDU Regulations to allow BDUs to insert targeted advertising, the CAB recommends changes to the proposed wording of the amendment. Left as it is, the language proposed by the Commission could be broadly interpreted by some BDUs to allow a range of activities including advertising in local avails and inserting targeted advertising absent an agreement. Currently, the proposed wording of the amendment of section 7 of the BDU Regulations reads as follow:

(g) for the purpose of inserting a commercial message, if the insertion is in accordance with an agreement between the licensee and the operator of the service or the network responsible for the service, and that agreement pertains to commercial messages directed at a target market of consumers.

11. The CAB recommends the following change to the proposed wording of the amendment:

(g) for the purpose of inserting a commercial message, insertions must, in all cases, be done pursuant to the terms and conditions of a written agreement between the licensee and the Canadian licensee which is the operator and responsible for the Canadian programming service (be it conventional, pay or specialty programming service), and that agreement pertains to commercial messages directed at a target market of consumers.

¹ Appendix 4 of Broadcasting Public Notice CRTC 2008-100

12. The CAB believes that its proposed changes to the wording recommended by the Commission would, in the least, ensure that the amendment to section 7 clearly serves the interest of the Canadian broadcasting system. It would support the Canadian broadcasting system by ensuring that targeted advertising be limited to insertions in Canadian programming services. Allowing ad insertions in non-Canadian programming services will only serve to divert more revenues to non-Canadian programming services that do not directly contribute to Canadian programming through Cancon and CPE requirements. Such a course of action would not be in the public interest and should be discouraged.

Obligations of programmers and distributors during a dispute

13. In paragraph 218 of BPN 2008-100 the Commission noted that BDUs are generally required to continue to distribute pay and specialty services during a dispute but that a similar provision did not apply to programming services. Accordingly, as proposed in BNC 2009-176, the Commission has proposed to amend the Pay Regulations and the Specialty Regulations to require that programming undertakings not withhold their signals in the event of a dispute.
14. The specific language proposed by the Commission for inclusion in each of the regulations reads as follows:

During any dispute between a licensee and the licensee of a distribution undertaking or the operator of an exempt distribution undertaking concerning the carriage or terms of carriage of programming originated by the licensee or concerning any right or obligation under the Act, the licensee shall continue to provide the distributor or operator with its programming services on the same terms and conditions as it did before the dispute.

15. The CAB believes that there are three specific issues to be addressed in the context of this proposed amendment:

- (i) Definition of “dispute”

16. First, the CAB submits that the term “dispute” needs to be clearly defined to ensure that this new obligation imposed on a programming service takes effect only in the context of a formal dispute in front of the Commission, not during normal business negotiations between the parties.
17. To this end, the CAB recommends that the following definition be included in the Specialty Regulations and in the Pay Regulations:

“dispute” means a dispute between the licensee of a programming undertaking and the licensee of a distribution undertaking that has been referred to the Commission for dispute resolution pursuant to section 12 (2) of the Broadcasting Distribution Regulations.

18. The CAB notes that, since the BDU Regulations apply only to licensed BDUs, the type of dispute that is contemplated by the Commission's proposal must be a dispute between a licensed programming undertaking and a licensed BDU, but not an exempt BDU.
 - (i) Obligation to provide service should apply only to services with access rights
19. Second, the CAB is of the view that a requirement that the licensee of a specialty or pay service continue to make its service available to a BDU during a dispute should apply only to those services that are guaranteed distribution pursuant to the Commission's access rules; i.e., Category A services.
20. Unlike Category A services, Category B services and the new competitive services do not have access entitlements. The CAB submits that such "non-access" services cannot be compelled to participate in the Commission's dispute resolution process to resolve terms of carriage, since access and terms of carriage are subject to negotiations on a case-by-case basis with individual BDUs.
21. The CAB acknowledges that a "non-access" service and BDU may mutually agree to enlist the Commission's assistance to resolve matters related to the distribution of the service, but one party cannot request the Commission to compel the other party to take part in such a process, since there is no right of access/obligation to carry in the first place.
22. In these circumstances then, where there is no right of access on the part of the programming service, no obligation to carry on the part of the BDU and no ability to compel the programming service to subject itself to dispute resolution, the CAB submits that it is illogical to impose a requirement for a "non-access" service to continue to offer its service during a dispute.
23. Such an obligation imposed on Category B services and competitive services would be contrary to the spirit of the market-based negotiations which should govern their distribution. It would give BDUs an opportunity to delay the signing of affiliation agreements with "non-access" services already being carried and/or demand carriage of such services beyond the term of existing agreements, surely an unintended consequence of this provision.
24. With regard to any concerns that the absence of such a provision applicable to "non-access" services could result in the loss of a programming service to consumers, the CAB submits that there is sufficient competition in the programming and distribution sectors to ensure that consumers will be able to access the programming they want. Furthermore, competition will put pressure on programmers and distributors to reach a commercial agreement.
25. Accordingly, the CAB recommends that the language of the proposed amendment be revised as follows to apply only in the case of disputes involving Category A services which have access rights and licensed BDUs which are subject to the BDU Regulations:

During any dispute between the licensee of a Category A programming service and the licensee of a distribution undertaking concerning the carriage or terms of carriage of programming originated by the licensee or concerning any right or obligation under the Act, the licensee shall continue to provide the

distributor or operator with its programming services on the same terms and conditions as it did before the dispute.

26. As a final observation on this issue, the CAB notes that “non-access” services could be subject to dispute resolution in the form of an expedited hearing, but only in the context of an undue preference complaint brought by a BDU. In such cases, the Commission already has the power to require both parties to maintain the status quo pending a decision, without the need for a specific amendment to the regulations.

(iii) Need for a reciprocal provision in the BDU Regulations

27. Third, the CAB notes that the proposed amendment to the Specialty Regulations and the Pay Regulations requires that a licensee not only continue to make its service available during a dispute but also do so on the same terms and conditions as existed prior to the dispute. The CAB notes, however, that a similar reciprocal requirement that BDUs must continue the provision of service under the existing terms and conditions during a dispute is not proposed for the BDU Regulations. In the CAB’s view, this unbalanced approach would place the programming services at a significant disadvantage.

28. The CAB therefore recommends that the Commission add the following provision to the BDU Regulations:

During any dispute between a licensee and the licensee of a programming undertaking concerning the carriage or terms of carriage of programming or concerning any right or obligation under the Act, the licensee shall continue to distribute the programming service on the same terms and conditions as it did before the dispute.

29. The CAB notes that above-noted provision is necessary in order to ensure that a level playing field exists between the licensees of programming services and the licensees of BDUs.

Amendment to the TV Regulations re undue preference

30. The CAB acknowledges that the Commission indicated in BPN 2008-100 that it intended to insert undue preference provisions into the TV Regulations. The CAB does not object to such a provision since it mirrors similar provisions already in place in the regulations applicable to specialty and pay services. However, the CAB believes that the proposed wording for such an amendment is too broad and risks opening the door for third parties, such as independent producers, to use this provision of the TV Regulations to complain against private broadcasters on issues such as terms of trade.

31. Accordingly, and to ensure that the amendment to the TV Regulations deals specifically with issues related to the carriage of television signals, the CAB recommends the Commission change the wording of the proposed amendment. The current wording proposed by the Commission reads as follows:

No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

32. The CAB recommends the following changes to the proposed wording of this amendment:

No licensee shall give an undue preference to any programming or distribution undertaking, including itself, or subject any programming or distribution undertaking to an undue disadvantage.

33. To ensure a symmetrical approach among the regulations applicable to television, and specialty services on the issue of undue preference, the CAB further recommends that the Pay Regulations and the Specialty Regulations also be amended to reflect the same wording.

34. The CAB believes that the adoption of the proposed changes to the provisions dealing with the issue of undue preference will ensure clarity of the purpose of these provisions in the CRTC regulations.

Amendment to the Specialty Regulations regarding the transmission of programming services

35. Finally, the CAB notes that the Commission has proposed to add a new section to the Specialty Regulations regarding the transmission of programming services. The CAB does not take a position relative to the merits of the amendment. The CAB notes, however that there are differences between the French and English versions of the proposed regulation that may lead to differing interpretations.

36. The English version reads as follows:

12. Except as otherwise provided under a condition of its licence, a licensee whose programming service is required to be distributed under section 18 of the Broadcasting Distribution Regulations or under an order of the Commission made under subsection 9(4) of the Act shall:

- a) ensure that the programming service is transmitted from its production facilities to each broadcasting distribution undertaking's head end or satellite uplink centre that is within the area for which the licensee is licensed; and*
- b) bear the costs of the transmission.*

37. The French version reads as follow:

12. Sauf condition contraire de sa licence, le titulaire dont le service de programmation doit être distribué en application de l'article 18 du Règlement sur la distribution de radiodiffusion ou d'une ordonnance du Conseil prise en vertu du paragraphe 9(4) de la Loi, est tenu

- a) de veiller à ce que son service de programmation soit transmis de son installation de production d'émissions à chacune des têtes de ligne ou chacun des centres de liaison ascendante des entreprises de distribution de radiodiffusion situées dans le territoire dans lequel le titulaire est autorisé à opérer;*
- b) de supporter les frais de la transmission.*

38. The CAB notes that this new regulation is intended to capture the requirement to send signals to the head end or uplink “centre” not “centres”.
39. The CAB appreciates the opportunity to file these comments respecting the proposed amendments to the regulations noted in BNC 2009-176.

Sincerely,

Originally signed by:

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

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