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Canadian Association of Broadcasters

L'Association canadienne des radiodiffuseurs

April 21, 2005

VIA EMAIL

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Ms. Rhéaume:

Re: Broadcasting Notice of Public Hearing CRTC 2005-3, Item 3 (Application No. 2004-1434-2 by Astral Broadcasting Group Inc. to renew the licence of Canal D)

1. The Canadian Association of Broadcasters (CAB) – the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private television and radio stations, networks and specialty, pay and pay-per-view television services – is pleased to submit this intervention concerning the above-noted application.

2. In Broadcasting Public Notice CRTC 2004-2 (PN 2004-2), introducing the licence renewal decisions of 22 services originally licenced in 1996, the Commission adopted a profitability-based test for determining increases to the levels of Canadian programming expenditure requirements (CPE) for the second licence term of each service in question. As the Commission explained in PN 2004-2, it considers such an approach to be "fair and balanced."

3. The CAB notes that, in its February 18, 2005 deficiency letter, the Commission raises questions as to whether that same approach should now be applied to Canal D.

4. The CAB does not wish to comment on the specifics of the Canal D licence renewal application. The CAB does, however, wish to provide some general comments with

respect to the Commission's apparent intention to extend the profitability-based test introduced in PN 2004-2 to additional specialty services as they come up for renewal. In particular, the CAB submits that such a profitability-based test is not "fair and balanced" because it does not take into account the specific circumstances of each service in question, and leaves several important considerations unaddressed.

5. The CAB recognizes that the Commission's intention in introducing profitability-based CPE requirements was to create an objective test that could be fairly applied to all services at the time of their licence renewal, thereby achieving regulatory balance across the board with respect to how CPE requirements are calculated.

6. However, the CAB has a number of concerns as to whether it is appropriate to base increases in CPE requirements on a service's profitability, and as to whether it is even possible to apply such a test uniformly across the specialty and pay sector.

7. Specifically, the CAB submits that such a test:
   - does not take into account the unique nature of each service;
   - fails to distinguish between not-for-profit and commercial services; and,
   - leaves important questions unanswered with respect to services whose average profitability does not exceed the sector average.

Profitability-based CPE requirements do not take into account the unique nature of each service

8. The CAB submits that it is not "fair and balanced" for the Commission to apply a one-size-fits-all approach to calculating CPE requirements for services with disparate and distinct types of programming.

9. By their very nature, specialty services are different from one another. These differences are realized in the categories of programming carried on each service, in the audience attraction and retention strategies of each service, and in the advertising, promotion and marketing strategies of each service.

10. These strategies clearly have a direct impact on the profitability of each service, yet the Commission's formulaic approach to determining increases in CPE requirements assumes that the measured profitability of each service is an equivalent indicator of all services' successes in implementing these strategies.

Profitability-based CPE requirements fail to distinguish between not-for-profit and commercial services

11. In PN 2004-2, the Commission compared the historical profit margin before interest and taxes (PBIT) of each service up for renewal at that time with the overall average PBIT

margin of the analog specialty services sector. Those services whose historical PBIT margin exceeded the industry average were subject to increases in their CPE requirements, the precise amount of the increase depending on the actual PBIT margin of each service.

12. The CAB considers, however, that it is not equitable to apply that approach to services that are publicly owned, and/or that operate on a not-for-profit basis. The 'profitability' of such services is clearly not an equivalent indicator of their success relative to services that operate on a commercial basis.

13. Similarly, the CAB submits that it is inappropriate for the Commission to include the PBIT of not-for-profit services in any calculation of the average profitability of the sector as a whole.

Profitability-based CPE calculations leave important questions unanswered with respect to services whose profitability does not exceed the sector average

14. If the Commission were to determine that it is appropriate to automatically increase the CPE requirements of services whose historical PBIT margin exceeds the average for the sector as a whole, then it stands to reason that it would also be appropriate to <u>reduce</u> the CPE requirements for services whose historical PBIT margin is less than the sector average. It would also be appropriate to give special consideration to those services whose PBIT margin declines over a licence term and to services with negative PBIT at the end of a licence term.

15. These will be important considerations as analog services undertake expensive transitions to digital and high definition broadcasting, and as the first wave of Category 1 and Category 2 digital services approach the end of their first licence term: Will the Commission be prepared to lower CPE requirements for a service whose PBIT margin underperforms the sector average? For a service whose PBIT margin declines over a licence term? For a service with negative profitability?

16. If this is not the Commission's intention, than the CAB strongly submits that a uniformly applied, profitability-based test for determining CPE requirements, without taking into account additional factors that are unique to individual services, cannot be considered either fair or balanced.

17. The CAB urges the Commission not to adopt, as matter of policy, a uniformly applied, profitability-based test for determining CPE requirements of individual specialty and pay services. Instead, the Commission should state its readiness to receive, on a case-by-case basis, suggestions from licensees with respect to how the Commission should assess their individual CPE requirements, at the time each service comes up for licence renewal.

18. The CAB appreciates the opportunity to participate in this proceeding.

Sincerely,

David Keeble
Senior Vice-President
Policy and Regulatory Affairs

c.c. Astral Broadcasting Group Inc. (proy@chaines.astral.com)

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