



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

August 25, 2005

Via e-mail

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

Dear Ms. Rhéaume:

Re: Broadcasting Public Notice CRTC 2005-74: Call for comments on a request by the Canadian Cable Telecommunications Association to repeal section 22 of the Broadcasting Distribution Regulations

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 these comments in response to the above-noted Public Notice.
2. In its application, the Canadian Cable Telecommunication Association (CCTA) is requesting that the Commission eliminate the requirement for Class 1 and Class 2 BDUs to carry audio programming services. This requirement is currently set out in section 22 of the *Broadcasting Distribution Regulations* (BDU Regulations). Section 22 of the BDU Regulations requires Class 1 and Class 2 licensees to distribute the following audio programming services: (a) the programming services of all local radio stations; (b) the programming services of at least one French and English-language CBC radio station; and (c) a provincial educational radio programming service (where applicable).
3. In filing this submission, the CAB wishes to comment on some of the general policy matters raised by the CCTA application as reflected in Broadcasting Public Notice CRTC 2005-74, in particular the appropriateness of repealing section 22 of the BDU Regulations for the reasons set forth by the CCTA.

4. After reviewing the application filed, the CAB is of the view that CCTA has not provided compelling arguments that would justify repealing section 22 of the BDU Regulations. While the CAB recognizes that capacity on BDUs is not unlimited, the CAB strongly believes that the principle of local carriage of local stations should remain a cornerstone of the Canadian broadcasting system. That principle is derived directly from the *Broadcasting Act* (the Act) which states at subparagraph 3(1) (t) (i) that “*Distribution undertakings should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations.*” (emphasis added).
5. Furthermore, the CAB notes that the importance of local programming was reinforced by the Government in its April 4, 2005 report *Reinforcing Our Cultural Sovereignty – Setting Priorities for the Canadian Broadcasting System*, which formed its second response to the Report of the Standing Committee on Canadian Heritage on the Canadian broadcasting system. In that report the Government noted that “*Canadians have made it clear that local and regional content is important to them*¹” and emphasized its commitment to ensuring that Canadians continue to have access to such programming from a variety of sources, including private broadcasters.
6. Accordingly, the CAB considers that the issues and concerns raised by the CCTA do not justify, in part, the repealing of section 22 of the BDU Regulations, as they do not and should not outweigh the provision of the Act that requires the carriage of local Canadian stations in their local market. The CAB believes that should cable BDUs move all the must carry audio programming services identified in section 22 from analog to digital, it would ensure continued access to the services while at the same time addressing the capacity concerns identified by the CCTA in its application.

Cable BDUs capacity problems

7. According to the CCTA, certain cable BDUs operating in larger markets must distribute as many as 45 radio stations under the section 22 requirement. It argued that repealing this requirement would provide significant capacity savings for BDUs, permitting the distribution of as many as 30 additional standard definition or six high definition digital television services as well as new audio services on a digital basis to currently unserved or underserved audiences.
8. The CAB recognizes that capacity is not unlimited and moving local audio programming services to digital would free up bandwidth capacity to allow for the carriage of more Canadian digital services. However, any such accommodations should not be at the expense of Canadian local stations, in contradiction to the specific objectives of the *Broadcasting Act*.

¹ *Reinforcing Our Cultural Sovereignty – Setting Priorities for the Canadian Broadcasting System*, Department of Canadian Heritage, April 4, 2005, page 7.

9. Within that context, the CAB considers that one simple solution to the capacity issues raised by the CCTA would be for cable BDUs to move all the must-carry audio programming services identified in section 22, including all local radio stations in their local licensed area, from analog to digital. Given the increasing penetration levels of digital cable and the limited penetration of analog cable audio, the carriage of local radio signals on digital has the potential to increase their accessibility and customer awareness. Such an option would not only progressively fulfill the broadcasting policy objective regarding the priority carriage of local stations, but it would also acknowledge the capacity objectives emphasized by the CCTA in their application.
10. In our submission, since section 22 does not specify whether the must-carry audio programming services should be carried on analog or digital, such an option would not require amending, let alone repealing, section 22 of the BDU Regulations, but would simply involve removing the reference to section 22 in the definition of “basic service” under Section 1 of the BDU regulations.
11. On the other hand, should cable BDUs also refuse to distribute the must-carry audio programming services as part of a their basic digital offering, they should apply to get relief, by condition of license, from the requirement set out in section 22 of the BDU Regulations. It is CAB’s view that such applications should continue to be dealt by the Commission on a case-by-case basis.
12. The CAB recommends therefore that the Commission maintain the requirement set out in section 22 of the BDU Regulations, as it currently exists.

Tuning of local stations on cable

13. In support of its claim that section 22 of the BDU Regulations should be repealed, the CCTA estimates that only 4 % of all cable subscribers make use of the cable audio offering. This leads CCTA to conclude that “*removing the must carry requirement will not have any significant impact either on a cable operator’s existing base of subscribers or on the audience shares for stations currently distributed as part of a cable operator’s carriage obligations under s. 22.*”²
14. The CAB notes that the Commission has in the past denied applications filed by BDUs, where the applicant stated a low level of awareness or tuning to justify being relieved from carrying local radio stations required by section 22 of the BDU Regulations. In Decision 2001-324, dated 6 June 2001, the Commission denied an application filed by Vidéotron Ltée requesting relief from carrying local radio station, CIME-FM St-Jérôme, in communities served by Vidéotron or its subsidiaries where this station is a local signal. In

² CCTA’s application, supplementary brief, paragraph 11, pages 3-4.

support of its application, Vidéotron argued that there were more radio stations than available frequencies on the distribution band of their cable undertakings and that since it had stopped carrying the radio station “*the cable licensees have not received any complaints regarding the change in distribution.*” In decision 2001-324 the Commission stated that:

(It) is not convinced that the licensees should be granted an exemption to the requirement that they distribute all priority audio signals before they carry non-priority audio programming services. Accordingly, the Commission has denied these applications.

15. The CAB shares the Commission’s view expressed in decision CRTC 2001-324 and strongly believes that the level of tuning to a Canadian programming service does not constitute a legitimate argument for removing the requirement to carry local radio stations by local cable systems as set out in section 22 of the BDU Regulations.
16. Furthermore, there is currently no BBM data that can capture the actual level of tuning of local radio stations carried on their local cable system. However, for many local radio stations, cable carriage is very important to their business. For instance, commercial AM radio stations, especially those with music formats, benefit from the reception quality of their signal available on cable audio. This would be especially true for those listeners living in densely-developed apartment buildings in larger urban markets. Therefore, losing that service would not only affect these AM stations, but deprive their listeners from getting access to a better quality reception of their favorite radio stations. Accordingly, the CAB submits that its solution to move all local audio programming services from analog to digital would not only ensure continued access to all local audio programming services but could also potentially increase penetration of these services as it will facilitate tuning by cable subscribers.

The Regulatory Symmetry Argument

17. Another argument put forward by the CCTA in support of its application is that while cable distributors are required to offer some audio programming services, their competitors be it DTH or MDS services do not have this obligation. CCTA then claims that “*allowing cable BDUs to select which audio programming service to carry would afford cable operators the ability to compete with the suite of audio programming services currently offered by DTH and MDS competitors*”³. In the CCTA’s view, repealing section 22 of the BDU Regulations would create a level playing field between all BDUs concerning the carriage of audio programming services.
18. The CAB notes that even before the BDU Regulations were implemented, the Commission elected to exclude DTH undertakings from the requirement to carry local radio signals as set out in section 22. In Public Notice CRTC

³ CCTA’s application, supplementary brief, paragraph 26, pages 7.

1996-69, entitled *Call for Comments on a Proposed Approach for the Regulation of Broadcasting Distribution Undertakings* it is stated that:

*Given the national nature of the service provided by DTH distribution undertakings, the Commission does not intend to impose a requirement that such undertakings distribute a radio service.*⁴

19. As for MDS services, the CAB notes that in Public Notice 1997-25, entitled *New Regulatory Framework for Broadcasting Distribution Undertakings*, it is clearly stated at paragraph 155 that:

With regard to the priority carriage radio signals, the Commission had proposed to extend application of the current radio priorities for Class 1 cable undertakings to terrestrial wireline distributors only, and not to wireless and DTH undertakings. Having reassessed the technical capability of wireless distributors to distribute radio services, the Commission now intends to extend the current priority radio requirements to such distributors, subject to any technological constraint. (emphasis added)

20. The fact that Look TV was exempted by the Commission from the must carry requirements, as pointed out by CCTA, does not mean that all MDS operators are exempted or will be exempted in the future from the provision of section 22 of the BDU Regulations. Rather it shows that Look TV, like any other BDU licensee subjected to the requirement set out at section 22, can be exempted, by condition of its license, from the obligation of carrying local radio stations provided that it demonstrate compelling arguments that would justify for the Commission to approve its request for exemption.
21. As a matter of fact, in other cases, the Commission has denied similar requests for an exemption from the requirement to carry local radio stations based on technological issues, because it was not convinced such an exemption was warranted. Accordingly in cases such as *Application for a broadcasting license to carry on a new (cable) distribution undertaking to serve the Province of New Brunswick*, Broadcasting Decision CRTC 98-194, 23 June 1998, as well as *New cable distribution undertaking*, Decision CRTC 2000-332, 16 August 2000, *New cable distribution undertaking in Saskatchewan*, Decision CRTC 2001-171, 12 March 2001, and in *Regional broadcasting distribution undertakings in Alberta and British Columbia*, Decision CRTC 2003-407, 20 August 2003, the Commission denied requests to be exempted from the requirement set out in section 22 and required these undertakings to carry audio programming services.
22. These decisions demonstrate that a case-by-case approach, rather than repealing section 22 of the BDU Regulations, constitutes the best tool for the Commission to assess the merits of a BDUs application as it provides an

⁴ Public Notice CRTC 1996-69, entitled *Call for Comments on a Proposed Approach for the Regulation of Broadcasting Distribution Undertakings*, page 9 of the electronic version.

opportunity to weigh requests for relief from section 22 against the policy objectives set out in section 3 (1) (t) (i) of the Act.

23. Finally, the CAB submits that section 22 of the BDU Regulations should not be repealed as it constitutes a de facto safeguard against undue preference. Should section 22 of the BDU regulations be repealed and BDUs, as stated in the CCTA's application, be given the opportunity to "*select which local stations, CBC stations and educational radio programming services make sense in a particular market*"⁵ the Commission will have removed an important regulatory mechanism that ensures unaffiliated audio programming services are not placed at an undue disadvantage. While the CAB acknowledges that concerns regarding undue preference can be brought forward under section 9 of the BDU regulations, the onus is placed on the programming service to establish undue preference and/or disadvantage which traditionally involves a lengthy regulatory process. Accordingly, the CAB submits that section 22 acts is an important safeguard to ensure equitable carriage among all local radio stations.

Conclusion

24. For the reasons outlined above, the CAB submits that it would be both inappropriate and inequitable for the Commission to approve CCTA's request to repeal section 22 of the BDU Regulations and urges the Commission to maintain the requirement for cable BDUs to carry all local audio programming services in their licensed markets.
25. However, the CAB believes its proposal that BDUs move all the must-carry audio programming services identified in section 22 from analog to digital will ensure continued access to these services while at the same time addressing the capacity concerns identified by the CCTA in its application.
26. The CAB appreciates the opportunity to participate in this proceeding.

Sincerely,



David Keeble
Senior Vice-President, Policy and Regulatory Affairs

cc: Michael Hennessy, President
Canadian Cable Television Association

*** End of Document ***

⁵ CCTA application, supplementary brief, paragraph 25, page 7