



Canadian
Association of
Broadcasters

L'Association
canadienne des
radiodiffuseurs

January 17, 2005

SENT BY EMAIL

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

Dear Ms. Rhéaume,

Re: Broadcasting Public Notice CRTC 2004-61: *Call for comments on a request by the CCTA for the addition of HD Net and Discovery HD Theatre to the lists of satellite services eligible for distribution on a digital basis (BPN 2004-61)*

Introduction

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 television and radio stations, networks and specialty, pay and pay-per-view television services.
2. The CAB is filing this submission with respect to the Commission's call for comments on the CCTA's request to add HD Net and Discovery HD Theater to the lists of satellite services eligible for distribution on a digital basis (the lists). Pursuant to the issuance of Broadcasting Public Notice CRTC 2004-61-2 on January 7, 2005, the Commission now proposes to consider the CCTA request at the same time as it considers a proposed regulatory framework for the licensing and distribution of high definition pay and specialty services (the HD framework proceeding) and a proposed framework to guide the migration of pay and specialty services from an analog to a digital distribution environment (the digital migration proceeding). The Commission has scheduled a common deadline of March 7, 2005 for the submission of comments with respect to all of these matters.

3. For the reasons set out below, the CAB believes that the Commission's intention to deal with the CCTA request at the same time as the HD framework and digital migration proceedings is inappropriate. Instead, the CAB submits that the Commission should extend the deadline for comments on the CCTA request until after it has issued its final determinations with respect to the HD framework and digital migration proceedings. This would allow parties wishing to comment on the CCTA request to know beforehand the regulatory framework by which such a request will be considered and the policy that will govern any such services authorized by the Commission.
4. Alternatively, if the Commission is not prepared to extend the deadline for initial comments on the CCTA request, the CAB submits that the Commission should, at a minimum, defer final consideration of the CCTA request until after it has issued its determinations with respect to the HD framework and digital migration proceedings, and provide a further opportunity for parties to comment on the CCTA request in light of the new digital distribution framework resulting from those proceedings.
5. This would provide Canadian broadcasters the opportunity to avail themselves of the regulatory framework applicable to Canadian pay and specialty services in a digital environment, and for interveners to comment on the CCTA request in light of this framework, prior to the Commission's consideration of whether the non-Canadian HD services proposed by the CCTA should be authorized for distribution in Canada.

The Commission must maintain a “Canada first” policy in the digital environment

6. The CAB submits that the fundamental “Canada first” principles under the *Broadcasting Act* and the Commission's stated objectives to ensure “the continued predominance of Canadian services in the emerging digital distribution environment”¹ and to ensure that priority is given to the distribution of Canadian digital services over non-Canadian digital services² requires that the Commission establish the regulatory framework for Canadian pay and specialty HD services before it entertains applications for the inclusion of non-Canadian HD services on the lists.
7. Otherwise, by considering the entry of non-Canadian HD services into the Canadian market before Canadian broadcasters have had the opportunity to digest and implement the HD framework, the Commission will give these non-Canadian HD services a head-start over Canadian HD services – in direct contradiction to the “Canada first” principles of the *Broadcasting Act* and the Commission's stated objectives with respect to the predominance and priority of Canadian services in the digital environment.

¹ Public Notice CRTC 2000-6: *Licensing framework policy for new digital pay and specialty services*, 13 January 2000, at para. 37.

² Broadcasting Public Notice CRTC 2003-61: *The regulatory framework for the distribution of digital television signals*, 11 November 2003, at para. 69.

Procedural fairness requires that the regulatory framework be established first

8. The Commission's determination with respect to the CCTA request is inextricably linked to its determination of the HD framework. In BPN 2004-58, the Commission called for comments on a proposed HD framework that would govern, among other things, the addition of non-Canadian HD services to the lists, as well as the appropriate linkage requirements for such services. Paragraph 82 of that notice explicitly states that: "In addition, the Commission must determine the regulatory framework under which it will evaluate applications to add new non-Canadian high definition pay and specialty services that have no analog or low definition counterpart services to the lists of eligible satellite services."
9. Moreover, the Commission has invited those parties who file comments on the current CCTA request to take into account the proposed HD framework set out in BPN 2004-58, and has noted that its assessment of the CCTA request may be made in light of any determinations in the proceeding initiated by BPN 2004-58.³
10. Without knowing what criteria will be used in the evaluation of applications, it is impossible for concerned parties to file relevant and cogent submissions. It is therefore essential that the framework and evaluation criteria be published in advance of a call for comments. Otherwise, much of the discussion may be irrelevant, and the crucial points may be entirely neglected by intervenors.
11. The CAB submits that the need for a relevant discussion and, indeed, the principle of procedural fairness, requires that Canadian broadcasters have the right to know the regulatory framework by which requests for the inclusion of non-Canadian HD services on the lists will be judged, in order to fully comment on such requests and in order for the Commission to consider the CCTA request.
12. It is therefore essential that the Commission defer the deadline for comments on the CCTA request to add HD Net and Discovery HD Theater to the lists until after it has issued the final HD framework – which framework will govern the distribution of both licensed Canadian and authorized non-Canadian pay and specialty HD services.

Consistency with past Commission practice

13. Lastly, the CAB submits that by extending the deadline for comment on, and deferring its consideration of, the CCTA request until after it has established the HD framework and digital migration policy, the Commission would be acting consistently with past Commission practice of allowing Canadian broadcasters to avail themselves of a new regulatory framework, prior to the Commission entertaining applications for the inclusion of non-Canadian services on the lists.

³ BPN 2004-61, at para. 9.

14. For instance, the Commission first issued its digital licensing framework and approved the issuance of licences for new Category 1 and 2 digital Canadian pay and specialty services before even entertaining proposals for the inclusion of non-Canadian digital services on the lists.⁴

Conclusion

15. For all of these reasons, the CAB requests that the Commission extend the deadline for comment on the CCTA request to add HD Net and Discovery HD Theater to the lists until after it has established the HD framework and digital migration policy, so that parties may comment on the CCTA request in light of the new distribution environment.
16. If the Commission is not prepared to extend the deadline for comments on the CCTA request, the CAB submits that, at a minimum, the Commission should defer its final consideration of the CCTA request until after it has issued its determinations with respect to the HD framework and digital migration proceedings, and provide interested parties with a further opportunity to comment on such applications in light of the outcome of those proceedings.
17. We appreciate the Commission's attention to this matter and would be pleased to provide any further information the Commission may require.

Yours very truly,



David Keeble
Senior Vice-President
Policy and Regulatory Affairs

cc: Michael Hennessy, President, CCTA

*****End of Document*****

⁴ Public Notice CRTC 2000-173: *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, 14 December 2000.