



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

May 12, 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 2005-1 (Call for proposals for a framework to guide the migration of pay and specialty services from analog to a digital distribution environment) – Reply comments of the Canadian Association of Broadcasters

1. The Canadian Association of Broadcasters (CAB) is pleased to provide these reply comments concerning the submissions filed in response to Broadcasting Public Notice CRTC 2005-1 (BPN 2005-1), calling for proposals for a framework to guide the migration of pay and specialty services from analog to digital distribution.

Competing visions of digital migration

2. The submissions filed in Phase I of this proceeding make it clear that the Commission is faced with a stark choice between two competing visions for migrating analog services to digital cable distribution.
3. On the one hand, the CAB and others have argued that the terms of digital migration should be based on negotiations between programmers and broadcasting distribution undertakings (BDUs), undertaken in good faith and guided by two key principles: (i) the requirement for prior consent by programmers before the migration of programming services to digital is implemented, and (ii) assurances that programming services will not be substantially worse off as a result of migration.
4. Rogers Cable Communications Inc. (Rogers) and Québecor Média inc. (QMi), representing the largest cable BDUs in each language market, have submitted well-reasoned and balanced submissions based on similar principles. Rogers and QMi both recognize that good-faith negotiations between BDUs and

programmers can indeed result in a migration framework that works to the benefit of all parties.

5. While the some of the details in the Rogers and QMi submissions may differ from the CAB position, the CAB believes that they are based on sound principles and seek to provide stability for all parties throughout the period of transition to a choice-driven and fully digital distribution environment.
6. The Canadian Cable Telecommunications Association (CCTA) and Shaw Communications Inc. (Shaw), on the other hand, have filed proposals that would relieve BDUs of any obligation to negotiate with programmers before migrating their services to digital. Their approach would leverage the digital transition to strip away most of the regulatory obligations of BDUs and allow them to unilaterally dictate virtually all aspects of the carriage of specialty and pay services. In short, cable BDUs would be able to further entrench their gatekeeping position. Their proposals do not address the economic impact on programming services and the continuing ability of those services to further the objectives of the *Broadcasting Act*.
7. The CCTA and Shaw submissions fail to recognize that this proceeding is about the best way to integrate digital and high definition (HD) technologies into a broadcasting system that works to the achievement of the objectives of the *Broadcasting Act*. The CAB acknowledges that adjustments to the regulatory framework are appropriate to this end. However, the CCTA and Shaw are clearly attempting to use this process as a lever to give distributors an insurmountable advantage in all negotiations.
8. This is not necessary or productive. The approach contained in the memorandum of understanding reached by Rogers and the operators of numerous programming services (the Rogers-Programmer MOU) demonstrates that negotiations within a framework based on principles that supports the Canadian broadcasting system will indeed work.

Programmer consent is essential

9. The CCTA argues that “as long as there is a regulatory requirement for distributors to obtain the prior consent of pay and specialty services to migrate to digital, there is little likelihood that the digital transition will ever be completed” [para. 27]. Shaw argues that “a regulatory requirement for broadcaster consent to migration or duplication would delay and complicate the transition to digital” [para. 3]. The CCTA and Shaw appear to have given up on the possibility of good-faith negotiations leading to a mutually satisfactory arrangement for all parties.
10. The CAB strongly rejects the arguments of the CCTA and Shaw. A requirement for programmer consent to the terms of migration is fundamental to a successful transition to digital distribution. The CAB notes that most existing affiliation agreements with respect to analog services were negotiated in an analog environment and that further, good faith negotiations between programmers and BDUs should occur with respect to the specific issues raised by the transition to a digital environment.

11. Furthermore, a requirement for programmer consent will not prevent or delay the digital transition on cable. As indicated in the CAB's Phase I submission, programmers are prepared to consent to migration, including packaging flexibility similar to that already provided to DTH licensees, provided that measures are put in place to ensure that programmers are not substantially worse off after migration.
12. The best evidence of this is the Rogers-Programmer MOU, which clearly demonstrates that good faith negotiations can indeed produce consensual, compromise solutions that work to the benefit of all parties and advance the principles enunciated in the *Broadcasting Act*.

Programming services should not be substantially worse off as result of digital migration

13. The CAB notes that the Alliance of Canadian Cinema Television and Radio Artists (ACTRA) and the Directors Guild of Canada (DGC) both acknowledge in their submissions that Canadian specialty and pay services make a valuable contribution to the production and exhibition of Canadian content. They share the CAB's concern that if the digital transition were to be seen as an excuse to unravel the current regulatory framework, without regard to the impact on programmers' revenues and expenses, it would lead to reduced Canadian content spending across the system.
14. The CCTA argues that "[t]here can and should be no expectation that services will be kept whole on digital, regardless of audience" [para. 23]. Similarly, Shaw contends that there should be "no regulatory requirement for 'make whole' arrangements" [para. 3]. Contrary to these concerns, the CAB does not advocate that a "make whole" principle be invoked when analog specialty services are migrated to digital. The CAB does however believe that BDUs and programmers must negotiate the terms of digital distribution in light of the fundamental changes to distribution that can result from migration. A requirement for programmer consent to migration is based on the underlying principle that a programming service should not be substantially worse off as a result of migration, a principle that is also at the core of the Rogers-Programmer MOU.
15. The CCTA also purports to provide the results of an economic analysis of their migration scenario. The CAB notes that the CCTA did not file the complete study, or any other supporting data, to back up its conclusion that all parties would benefit economically under their proposed scenario. Shaw provides no economic analysis of the impact of digital migration on specialty subscription and advertising revenues and goes so far as to assert, without providing any supporting data, that "it is difficult for the broadcasters to claim before the fact that they will be substantially harmed by migration" [para. 32]. In fact, penetration rates for analog services in the all-digital DTH platform run completely counter to this assertion.
16. The unexplained revenue projections provided by the CCTA suggest an increase of 19% in revenues across the system after 5 years. Although the CCTA did not file any analysis or research that might explain this assumption, it is apparent that any increase in revenues following the transition to digital will only occur if (i) the current number of subscribers

spends more on television services than they do now, or if (ii) more subscribers spend the same on television services as they do now, or (iii) both.

17. The CAB submits that it is equally if not more valid to assume that subscribers will spend *less* on television services in an environment of more flexible choice. The Wall Communications (Wallcom) study included in the CAB's Phase I submission to BPN 2005-1 takes a middle-ground approach, assuming that subscribers' television budgets will remain the same.
18. Based on this moderate assumption, the Wallcom study makes it clear that migration places broadcasters' revenues at risk, at the same time as the conversion to HD will lead to increased operating costs. Taken together, reduced revenues and increased costs can only put downward pressure on program spending.
19. The CAB therefore strongly submits that a successful transition to digital distribution can only occur if the regulatory framework ensures that programming services are substantially no worse off as a result of digital migration.

Regulatory certainty is needed to meet the objectives of the *Broadcasting Act*

20. The CAB's Phase I submission argues that clear rules respecting the interests of all parties are essential to the successful migration to digital distribution and for the maintenance of the 'Canada first' priorities of the *Broadcasting Act*. The ability of programming services to contribute to the objectives of the *Broadcasting Act* will be diminished if the terms of migration are left to unilateral BDU decisions, with no guiding regulatory framework.
21. In calling for the maintenance of a regulated wholesale rate, the preservation of a basic service and support for the continuation of key linkage rules in a digital environment, the Rogers-Programmer MOU recognizes that regulatory certainty will be critical throughout the period of transition. The CAB fully supports this position.
22. Likewise, while the CAB does not necessarily accept all of the specific recommendations in the QMi submission, it endorses QMi's underlying philosophy, which is founded on a consensus-based approach to migration and on minimizing disruption for consumers. A balanced approach such as this, within a framework providing regulatory certainty, will allow all parties to develop successful business plans.
23. As noted above, both ACTRA and DGC call for the maintenance of the existing regulatory framework throughout the period of transition, recognizing that it has enabled specialty and pay services to play a leading role in the creation and exhibition of Canadian content.
24. The CCTA, on the other hand, calls for "the elimination of restrictions on packaging" [para. 13]. It "cannot overstate the importance of rejecting any requirement for programmer consent" [para. 27]. It recommends that there be "no requirement to carry specialty services as part of the basic service (i.e. no dual status)" [para. 29], and that the Commission "should eliminate all remaining linkage requirements" for BDUs [para. 33],

replacing them “with a requirement for overall preponderance of Canadian programming services” [para. 36].

25. Similarly, Shaw calls for the elimination of all distribution and linkage rules [para. 2], argues that “there should be no further requirement for broadcaster ‘consent’ to migration, nor for ‘duplication’...” [para. 27], and submits that there is “no need for the CRTC to regulate the business relationships between BDUs and programmers with respect to the digital transition” [para. 27]. Shaw also argues in favour of the elimination of all linkage rules, and would not even require consumers to subscribe to a single discretionary Canadian service [para. 69].
26. Bell ExpressVu and the prospective Class 1 BDU service of Bell Canada (Bell) also argue in favour of the elimination of distribution and linkage rules in favour of a simple preponderance rule, a view that is also shared by the BDU services of TELUS, MTS Allstream and SaskTel. Bell further advocates the elimination of regulated wholesale rates for basic.
27. The Canadian Cable Systems Alliance (CCSA) proposes to offer consumers a drastically reduced digital basic service and an end to distribution and linkage rules. The CCSA also argues that there should be no requirement for programmer consent prior to migration or duplication.
28. The record of this proceeding, including the views of the CAB and its members, as well as ACTRA, DGC, Rogers and QMi, does not support the arguments of these BDUs. The proposed elimination of existing distribution and linkage rules, the discontinuance of wholesale rate regulation of specialty services carried as part of the basic service, and the use of a simple preponderance rule at the level of the distributor as the only requirement governing the distribution of Canadian specialty and pay services in a digital environment, are dangerous measures that threaten to undermine today’s successful broadcasting system.
29. In effect, those parties advocating such extreme measures are proposing a model that strips away the fundamental right of the programmer to control the distribution of its signal. Under the scenarios outlined by the CCTA, Shaw, Bell and the CCSA, BDUs would control all aspects of the migration to digital distribution and would be able to unilaterally dictate terms of carriage to all programming services. The CAB submits that this proposition would have negative consequences for the system as a whole and for the achievement of the objectives of the *Broadcasting Act* and, accordingly, should be rejected by the Commission.
30. Canadian specialty and pay services have a solid track record of building and maintaining audiences – a track record that will be put into jeopardy if key packaging rules are eliminated. The CAB, in calling for regulatory certainty, is seeking to maintain, not erode, existing consumer support for Canadian specialty and pay services.
31. The digital transition must not be an excuse to relieve BDUs of their current obligations under the regulatory framework. A change in technology is not a reason to throw out the regulatory framework that has fostered a successful Canadian broadcasting system. In particular, the distribution and linkage rules and the dual status/modified dual status rules

have been key elements in the success of the specialty and pay sector. As elaborated in the CAB's Phase I submission, these rules should apply equally to all BDUs, including all-digital BDUs.

32. As the Rogers-Programmer MOU makes clear, and as existing negotiated agreements between programmers and smaller cable systems support, when guided by a regulatory framework negotiations between programmers and BDUs can indeed lead to a consensus position that respects the regulatory obligations of all parties.

Genre protection is a fundamental tenet of the regulatory framework

33. As the Commission noted recently in Broadcasting Public Notice 2005-9, *Distribution of Spike TV by broadcasting distribution undertakings*:

The Commission's policy regarding the addition of non-Canadian services to the lists currently precludes their addition if the Commission determines them to be either partially or totally competitive with Canadian specialty or pay television services. This serves to ensure that licensed Canadian services are in a position to fulfill their commitments and obligations with respect to Canadian programming and other objectives set out in the Broadcasting Act, responsibilities that non-Canadian services do not share [para. 17].

34. The CAB fully supports this policy and submits that it must be preserved throughout, and following, the period of digital migration. As a critical measure that ensures a distinct Canadian rights market, genre protection is a fundamental tenet of the specialty and pay regulatory framework and should not be discarded because of a change in distribution technology. The CAB notes that the Rogers-Programmer MOU specifies that Canadian specialty and pay services would maintain genre protection.
35. Notwithstanding the positive role genre protection has played in the success of the Canadian specialty and pay sector, Shaw cites genre protection as one of the "protectionist" policies that, in its view, were intended to be "temporary," and are no longer necessary [paras. 51-55].
36. The Canadian specialty and pay sector has developed in large measure because of progressive policies, including genre protection, that continue to ensure a distinctive Canadian rights market. There is no justification for the view that these policies were intended to be temporary; on the contrary, they continue to be necessary as we move through the period of transition and beyond.
37. At a time when specialty and pay services are attempting to develop workable business plans to support their migration to digital and the provision of HD programming, it is more important than ever for the Commission to maintain the principle of genre protection in order not to further undermine the already fragile economics of the digital/HD transition.

Flexibility does not mean ‘ability to dictate terms of carriage’

38. The CAB recognizes that digital distribution brings with it the potential for packaging flexibility above and beyond that which is available in the analog world. This is why numerous programmers have demonstrated their willingness to negotiate the terms and conditions of digital migration, both in the context of the Rogers-Programmer MOU and in the context of separate agreements reached between certain programmers and smaller cable systems.
39. Both the CCTA and Shaw caution against a “one size fits all” regulatory framework, and urge the Commission to provide BDUs with more flexibility. However, whereas the CAB’s vision of a flexible framework is one in which all parties have the right to protect their interests in negotiations, the CCTA’s and Shaw’s interpretation of ‘flexibility’ is the opposite: BDUs would have the unilateral right to determine the terms of digital migration and packaging arrangements. Under their approach, for example, a cable BDU would be able to migrate a single specialty service from a large analog tier to a digital “mini-tier” or even to a digital *à la carte* offering, completely undermining the business plan of the specialty service.
40. The CAB supports flexibility, and believes that fair negotiations will provide it. The CAB therefore urges the Commission to see through the agenda being advanced by Shaw and other BDUs, in which ‘flexibility’ is a code word for ‘ability to dictate terms of carriage to programmers.’

Revenue stability is essential

41. The CAB has stated as a fundamental principle that a programmer can reasonably be expected to consent to digital migration when it can be demonstrated that the programming service will not be substantially worse off as a result. This requirement mirrors the current framework for digital duplication and migration for small cable systems (Broadcasting Public Notice CRTC 2001-130), and should now be extended to apply to all cable systems.
42. The CAB submits that the regulatory framework adopted by the Commission for digital migration must address the issue of revenue stability, in light of the serious impact on both subscription revenues and advertising revenues that could otherwise result. Indeed, the experience of analog services that have been repackaged in ‘theme packs’ on DTH demonstrates that repackaging can result in a significant drop in subscription levels, which has an attendant negative impact on advertising revenues.
43. The CAB is pleased to note that the Rogers-Programmer MOU and the QMi submission both recognize that a successful transition to digital distribution requires the preservation of the financial health of all parties throughout the period of transition.
44. On the other hand, the CCTA and Shaw argue that programmers should have no expectation of protection from undue harm throughout the period of transition.

45. For its part, Shaw argues that BDUs will have an incentive to protect their existing revenues and that this will in turn, protect programmers' revenues. The CAB notes that BDUs in fact have multiple non-programming revenue streams from which they can recover any revenue losses resulting from digital migration (e.g. VoIP, Internet access, etc.). There are no "market safeguards," in Shaw's words, to ensure that the programmers' revenue base will be similarly protected.
46. The CCTA and Shaw argue that only BDUs will bear any real costs as a result of migration, and that only BDUs know what's best for the broadcasting system. This position completely ignores the contributions that have been made and will continue to be made by programmers in partnership with BDUs, to the benefit of the Canadian broadcasting system.

***À la carte* packaging works against the interests of consumers**

47. The CCTA and Shaw purport to respond to consumer demand by asking the Commission to remove all regulatory obligations that might otherwise prevent them from offering a range of packages to consumers, ranging from *à la carte* to large bundles of foreign services and themed tiers.
48. Shaw specifically, and erroneously, cites the ability of DTH and other digital BDUs to "offer programming services in a variety of packages, including on a stand-alone basis or in combination with other programming services" [para. 13]. In fact, analog specialty licensees do not permit the DTH licenses to market their services on a pick pack or *à la carte* basis, and the ability of cable BDUs to achieve competitive equity with DTH does not turn on their ability to offer analog services in this manner.
49. As the CAB notes in its Phase I submission, the Federal Communications Commission (FCC) recently completed an extensive study into *à la carte* and themed-tier packaging scenarios. The FCC reached a number of conclusions that are directly relevant to the Commission's current consideration of the digital migration framework.
50. Specifically, the FCC found that the offering of large tiers, equivalent to the analog tiers currently offered by Canadian BDUs, produces several benefits for cable and satellite households. Such large packages reduce transaction costs, help programmers achieve economies of scale, enhance the attractiveness or convenience of the product to consumers, and provide a wide variety of viewing choices serving many diverse, niche, viewer interests.
51. The FCC report found that *à la carte* or themed-tier packaging, on the other hand, would increase operational costs for BDUs, which would likely be passed on to consumers, resulting in higher retail rates. It also found that *à la carte* or themed-tier packaging would have a significant negative impact on programmers' advertising revenues and subscription fees. The CAB submits that the concerns identified by the FCC in its report would take on even greater significance in Canada, given its exponentially smaller subscriber base.

Conclusion

52. The framework proposed by the CAB in its Phase I submission, and the principles embodied by the Rogers-Programmer MOU and the QMi submission, recognize that the contribution of the specialty and pay sector to the achievement of the objectives of the *Broadcasting Act* is the direct result of a balanced and equitable regulatory framework.
53. As we move through the period of digital transition, the ability of specialty and pay services to continue to deliver a substantial level of contribution depends on two key principles: (i) the right of prior consent to the terms of migration, and (ii) an expectation that such consent will not unreasonably be withheld where there are measures to ensure that the programming service will not be substantially worse off as a result of migration.
54. The CAB appreciates the opportunity to participate in the second phase of this proceeding.

Yours sincerely,



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