



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

May 30, 2005

SENT BY E-MAIL

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

Dear Ms. Rhéaume:

Re: PN 2005-42: *Call for comments on a proposal to accord confidentiality to the detailed financial information provided to the Commission in the annual returns of pay and specialty programming services*

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 Broadcasting Public Notice CRTC 2005-42 *Call for comments on a proposal to accord confidentiality to the detailed financial information provided to the Commission in the annual returns of pay and specialty programming services*.
2. One of the CAB's recommendations in the recent 'good commercial practices' proceeding was that the Commission accord confidentiality to the detailed financial and operating information filed in the annual returns of specialty and pay services. The CAB argued that because specialty and pay services have to negotiate terms of carriage with distributors, there should be equitable treatment with respect to how the Commission treats sensitive revenue information that it receives from the annual returns of programmers and distributors.

3. The CAB submits that the principle of equitable treatment is fundamental to any consideration of the 'public interest.'
4. At present, there is a real and tangible inequity with respect to the Commission's treatment of annual returns. In according confidentiality to the annual returns of BDUs, while making public the annual returns of specialty and pay services, the Commission creates an imbalance in the negotiating environment. Good faith negotiations require equitable treatment of sensitive commercial information at the hands of the regulator.
5. In this Public Notice, the Commission seeks comment on the following specific question: "would the public interest be best served by generally according confidentiality to the annual returns of specialty and pay services?"
6. The CAB respectfully submits that there should be a presumption that such information would generally be kept confidential in the interests of equitable treatment with other sectors of the broadcasting system. Thus, the real question should be "are there compelling public interest reasons for making the annual returns of pay and specialty services public, at a time when the annual returns of BDUs, conventional television and radio services are accorded confidentiality?"
7. The CAB strongly submits that there is no compelling public-interest argument in favour of disclosure of specialty and pay annual returns that outweighs the fundamental principle of equitable treatment. If the Commission increasingly expects specialty and pay services to negotiate terms of carriage, rather than relying on regulation, then its practices and policies should not prejudice the negotiating environment.

The principle of equitable treatment is fundamental to any consideration of the 'public interest'

8. In Public Notice CRTC 1998-89 *Broadcasting Distribution Undertakings: Confidentiality of Information Filed in Annual Returns and in Applications for new licences* (PN 1998-89) the Commission determined that it is in the public interest to accord confidentiality to the annual returns of BDUs, as their detailed financial information would "be of value to the operators of other distribution undertakings in a competitive environment."
9. In that public notice, the Commission acknowledged the competitive nature of distribution, radio and television undertakings as the fundamental reason why their annual returns are accorded confidentiality.
10. In a number of recent proceedings, the Commission has determined that given the current competitive environment for specialty and pay services, the public interest would be best served by leaving most aspects of the commercial relationship between programmers and BDUs to contractual negotiation.

11. However, the Commission presently discloses the detailed revenue and operating information for only one of the parties to carriage negotiations. The CAB submits that this inequitable practice hinders the ability of pay and specialty operators to negotiate in an open and unbiased environment.

Rate regulation is not an appropriate criterion for disclosure

12. In PN 1998-89, the Commission determined that the public interest would be best served by only granting confidentiality to those BDUs that are rate deregulated.
13. The CAB notes that at the time the Commission issued PN 1998-89, cable was rate-regulated at the retail level, whereas today, specialty and pay services are regulated at the wholesale level, and even then, only when offered as part of the basic service.
14. At present, the vast majority of specialty and pay services are distributed on a discretionary basis, for which the terms of carriage (including the wholesale rate) have to be negotiated. In this increasingly competitive, discretionary distribution environment, it is hardly conducive to good-faith negotiations if detailed revenue and operating data of programming services is available to the BDUs with whom programmers are expected to negotiate equitable terms of carriage.
15. The CAB further notes that the Commission's current disclosure requirements are at odds with that of provincial securities regulators. Most programming services are publicly-traded companies that are subject to tough disclosure rules. Compliance with these rules requires a certain level of accounting segmentation to comply with securities regulation. The Commission's disclosure standard (segregating revenues by subscribers and advertising) exceeds this accounting standard.

The public interest is not served by disclosing the annual returns of specialty and pay services

16. It is evident that a private interest is served by the disclosure of pay and specialty services' financial information – that of other parties with whom they must negotiate. But the public interest is not served by the observance of an inequitable disclosure policy.
17. One might argue that members of the public have a right to know what they are paying for when they are billed for programming services. The CAB notes that the precise regulated wholesale rate for specialty and pay services, when distributed as part of the basic service, is already made public in the context of their individual licences.
18. And, while it is theoretically possible for subscribers to deduce the average wholesale rate of a discretionary service from its annual return, they would still not know how much they are actually paying for that service, since the retail markups applied by BDUs are not made public.

19. Consumer interests are therefore not served by the disclosure of specialty services' detailed financial information. If BDUs, who are 'retailers', are not required to disclose their revenue and operating information, how is the public interest served by requiring that level of disclosure from programmers, who are, in effect, 'wholesalers?'

The current competitive environment requires equitable treatment of financial information at the hands of the Commission

20. Prior to PN 1998-89, the Commission placed the annual returns of cable BDUs on the public file on the grounds that they were licensed as monopoly service providers. In the absence of any other apparent public-interest argument, it follows that the only reason to continue the practice of placing the annual returns of specialty and pay services on the public file would be out of concern that those services might otherwise abuse a monopoly position in negotiations with BDUs.
21. As the record of numerous recent proceedings makes clear, the balance of negotiating power is squarely in the hands of BDUs, not programmers. While BDUs are competitive with one another, each BDU exerts considerable market power with respect to its negotiations with pay and specialty services, because the service cannot reach its paying customers without the active co-operation of the BDU. There is simply no danger of programmers "abusing" their relatively weak negotiating position if they are granted confidentiality for their detailed financial information.
22. Finally, the CAB notes that other parties with whom specialty and pay services must negotiate on a regular basis also unduly benefit from the public disclosure of their sensitive commercial and operating information. Producers and program suppliers clearly have a vested private interest in accessing the annual returns of specialty and pay services.
23. For example, the CAB notes the letter sent from the CFTPA to the Commission, dated March 5, 2005. In this letter, the CFTPA states that aggregated revenue information from specialty and pay services is less "useful" to its members (with whom programming services must negotiate program-supply deals) than segregated revenue information.
24. The CAB considers that this letter is further evidence that disclosing sensitive financial and operating information for specialty and services prejudices their ability to conduct good faith negotiations with other stakeholders in the broadcasting system. Programmers would find it equally "useful" if they had access to the detailed financial and operating information of producers with whom they were negotiating, but recognize that this is not a compelling public-interest argument.
25. The CAB further notes that the current inequitable disclosure policy not only hampers negotiations between Canadian stakeholders, but also impacts negotiations with foreign program suppliers.

26. Many of these foreign program suppliers are also on the eligible satellite services list, and as such, have a direct and competitive presence in the Canadian market. However, these foreign services are not required to disclose *any* financial information with respect to their operations in Canada. At the same time, they obviously benefit from having direct access to the detailed financial information of Canadian services, which are both clients (for programming) and competitors (for subscribers and audience).
27. Again, Canadian BDUs, conventional television services, radio services and foreign programming services are not required to make as detailed a financial disclosure as Canadian specialty and pay services. This is fundamentally inequitable, and works against the public interest by providing only one party to commercial negotiations with an unobstructed view of the operations of the other party.

Conclusion

28. The CAB concludes that there is no compelling public-interest reason to continue the disclosure of sensitive financial and operating information of specialty and pay services at a time when the annual returns from all other sectors of the broadcasting system are accorded confidentiality, and at a time when foreign competitions are not required to make any financial disclosure. This inequitable practice works against the public interest as it prejudices the ability of specialty and pay services to undertake equitable negotiations with other stakeholders in the broadcasting system.
29. The fundamental principle in ensuring the public interest must be one of equitable treatment. Accordingly, consistent with its practices with respect to all other stakeholders in the broadcasting system, the Commission should accord confidentiality to the annual returns of specialty and pay services.
30. The CAB appreciates the opportunity to participate in this proceeding.

Sincerely,



David Keeble
Senior Vice-President
Policy and Regulatory Affairs

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