



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

September 27, 2005

Via email

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

Dear Ms. Rhéaume:

**Re: Broadcasting Public Notice CRTC 2005-82 – Call for comments
on a regulatory framework for mobile broadcasting services, Phase II**

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 Phase II comments in response to the above-noted Public Notice.

Introduction

2. The CAB notes that Phase I submissions from most parties have focused on three primary issues:
 - (a) are the mobile broadcasting distribution services being offered by the wireless carriers “broadcasting” services?
 - (b) are these services being “broadcast over the Internet” (and, according, should the existing New Media Exemption Order (NMEO) apply?
 - (c) what is the appropriate form of regulation of these services at this time?
3. The CAB is firmly of the belief that, by any standard, the provision of video and audio programming to mobile devices is clearly a form of “broadcasting” as defined by the *Broadcasting Act*.

4. The mobile broadcasting services which are the subject of this proceeding do not “broadcast over the Internet.” The distributors do not act as ISPs, offering all the video available on the Internet to anyone with an Internet connection. Instead, they operate as value-added aggregators who assemble specific broadcast sources through affiliation agreements – in short, as broadcast distribution undertakings (BDUs). Their services are not available to all users of the Internet but only to those specific subscribers who run a proprietary client application on those specific mobile phones which have been so enabled by the particular wireless companies, who in turn, have deals with the technical aggregator, MobiTV.
5. It is clear from the Canadian Wireless Telecommunication Association’s (CWTA) Phase I submission that the mobile broadcasting distribution services in question do not operate over anything resembling the Commission’s definition of the Internet (as set out in Public Notices 1999-84 and 1999-197).
6. Given the stage of development of these services and the quality of signal available, the CAB believes that the appropriate form of regulation today is the adoption of a two-phase approach. Initially, the implementation of temporary experimental exemption order to be followed by the introduction of a new class of mobile broadcasting distribution licence.
7. The experimental exemption order would exempt mobile broadcasting distribution services from the requirement to hold a licence for two years provided they adhere to certain conditions. Prior to the expiry of the exemption order, the Commission should initiate a public policy process to: (a) assess the impact of these services on the Canadian broadcasting system and their contribution to the objectives of the *Broadcasting Act* and (b) determine the appropriate scope of a new class of “mobile broadcasting distribution” licence. After that process, a separate process would be held to hear applications from potential licencees.
8. The CAB is generally in agreement with comments filed in Phase 1 by Québecor Media Inc, Pelmorex, Global Television Network, CHUM Limited, CFTPA, and ADISQ. Each of these intervenors has submitted submissions noting that mobile broadcasting distribution services do not fall within the scope of the NMEO and should not operate in the absence of any regulatory oversight.
9. The CAB notes that the three carriers currently offering mobile broadcasting distribution services did not file individual submissions in Phase I. The CAB understands that the carriers consider their position(s) to be already a matter of public record, pursuant to their various correspondence with the Commission on point. The CAB further understands that these carriers consider their Phase I positions to have been captured in the Phase I submission of the Canadian Wireless Telecommunications Association (CWTA).

10. Accordingly, the CAB assumes that any Phase II submissions filed by these carriers will be limited to replying to other intervenors' Phase I submissions, and will not be used to introduce any new arguments as to why mobile broadcasting distribution services should fall under the NMEO.

Sasktel

11. Sasktel submits that mobile broadcasting distribution services do not constitute broadcasting and "deems that they are therefore beyond the Commission's jurisdiction" (para. 4). To support this argument, Sasktel notes that "broadcasting," as defined in the *Broadcasting Act*, includes programs intended "for reception by the public."
12. Sasktel concludes that because mobile broadcasting programs are "transmitted to a particular person, only once they have been requested by that person," they do not constitute broadcasting intended "for reception by the public" (para. 4).
13. To the contrary, the CAB notes that the Commission has already specifically rejected this argument. In PN 1999-84 *New Media*, the Commission clearly states, in paragraphs 39-44, that,

"The fact that an end-user activates the delivery of a program is not, in the Commission's view, determinative. ... on-demand delivery is included in the definition of "broadcasting". ... The Commission notes that the legislator could have, but did not, expressly exclude on-demand programs from the Act. As noted by one party, the mere ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting. The Commission considers that programs that are transmitted to members of the public on-demand are transmitted "for reception by the public"."
14. Accordingly, the CAB rejects Sasktel's assertion that the on-demand nature of mobile broadcasting distribution services renders them beyond the Commission's jurisdiction.
15. If Sasktel's interpretation of the Commission's existing policy were accurate, then pay-per-view and video-on-demand services would also not constitute "broadcasting," and would therefore also fall outside of the Commission's jurisdiction.
16. Under the Commission's existing, clearly-stated policy, mobile broadcasting distribution services transmit programming intended for reception by the public, and as such, clearly constitute a broadcasting activity, subject to an appropriate level of regulatory oversight.

Canadian Wireless Telecommunications Association

17. The CWTA essentially makes three arguments in its Phase I submission and accompanying Annex: (i) that the role of Canadian carriers in providing these services

is more akin to that of an ISP than that of a BDU, (ii) that because of the low quality of the images in question, there is no need for regulatory oversight of mobile broadcasting distribution services, and (iii) that even if there were, the nature of mobile broadcasting distribution services is such that they fall under the scope of the NMEO and as such, do not require any regulatory oversight.

Carriers are functioning as BDUs, not ISPs

18. It is clear from CWTA's description of the carriers' role that they will make all of the decisions about which programming services will be offered, in what packages, for what price, and on which types of receiving apparatus. They will conclude program distribution agreements with program operators, and transmit their programming signals through proprietary networks, to customers whom they have equipped with proprietary hardware and software not generally available to all Internet users.
19. In other words, the CWTA's description of the carriers' role in this process makes it abundantly clear that they exercise complete control over all aspects of access to the distribution platform (BDUs) and as such, are not common carriers (ISPs).

Image quality is not at issue in this proceeding

20. The CAB submits that the 'quality' argument is not determinative of regulatory status. The CWTA argues that mobile broadcasting distribution services "are more comparable to the quality of Internet-based media services than to conventional broadcasting services" because of, among other things, the limited screen size and lower audio quality on mobile devices. The CWTA concludes that for this reason, there should be no regulatory oversight of mobile broadcasting distribution services.
21. The CAB notes that the size, resolution and functionality of screens on mobile phones has improved steadily in recent years, and will undoubtedly improve rapidly in coming years as well as networks are upgraded. More to the point, however, the CAB submits that 'image quality' is not at issue in the determination of the crucial questions, as 'image quality' is irrelevant to definitions of "broadcasting," "broadcast distribution undertaking," "broadcast receiving apparatus," "program," or "programming undertaking" under the *Broadcasting Act*.
22. However, it is in part because of the video quality issues that exist today that the CAB considers the services operated by the carriers to be experimental, and therefore eligible for regulation by way of an experimental exemption order.

These services do not "broadcast over the Internet"

23. Based on the CWTA's own description of how mobile broadcasting distribution services operate, it is clear that they do not meet any regulatory definition of "broadcasting over the Internet."

24. The CAB notes the detailed description of the server-client-consumer ‘transaction chain’ on page 10 of the September 12, 2005 report by Lemay-Yates Associates, filed by CWTA as an annex to its intervention:

The MobiTV server farm in Reston, Va. is interconnected to the public Internet via a high-speed digital link. Each unique digitally encoded video stream travels from the MobiTV server farm to the

Internet gateway of the mobile carrier over the public Internet as IP packets. . . . From the mobile carriers’ Internet gateway, the signal is routed by the mobile carrier on its mobile network to the appropriate tower and antenna where the signal is transmitted wirelessly for the last mile for reception on the end-user handset.

25. The CAB also notes that PN 1999-197 *Exemption Order for New Media Broadcasting Undertakings* clearly states that the NMEO exempts from licensing “new media broadcasting undertakings (which) are those undertakings that provide broadcasting services delivered and accessed over the Internet.” Under this definition, and by their very nature, the mobile broadcasting distribution services described above by the CWTA simply do not constitute broadcasting “delivered and accessed over the Internet.”
26. The glossary of terms that accompanies PN 1999-84 provides the following definition of “Internet”: “*The Internet is a distributed, interoperable, packet-switched network.*” The transmission network described in the Lemay-Yates Report is neither “distributed,” nor “interoperable,” and therefore does not fall within the scope of the NMEO.
27. The fact that the video and audio are encoded in Internet Protocol (IP) data packets really makes no difference: IP has become a normal mode for data transmission in many situations, including inter-office and home networks. The use of the word “Internet” in “IP” does not imply that all data so encoded is traveling on the Internet, *per se*.
28. In this case, the data packets do make part of their journey to the subscriber over the public Internet, and part of the journey over dedicated wireless transmission infrastructures. But this makes no difference to the essentially closed nature of the transmission. The transmission cannot be received by other users of the public Internet – only by those who are on the proprietary wireless systems that make up the “last mile.” Nor can other users of the Internet transmit programming signals via the MobiTV/carrier network— only those who have affiliation agreements with the service providers.
29. The glossary attached by the CRTC to the new media decision defines “a distributed network” as one that has: “*no one central repository of information or control, but is comprised of an interconnected web of “host” computers, each of which can be accessed from virtually any point on the network.*” The CAB submits that MobiTV’s “server farm” is clearly “a central repository of information and control.” Moreover, consumers cannot access the

network “from virtually any point on the network.” To the contrary, consumers who purchase a subscription can only access MobiTV’s server farm by way of a particular appliance (one of only seven specific models of handset: see Lemay-Yates, p. 10), via a closed, proprietary wireless network.

30. The glossary defines an “interoperable” network as one that: “*uses ‘open protocols’ . . . and allows multiple services to be provided to different users on the same network.*” The only service available to users is that assembled and enabled by the service provider. While some protocols in general use may be employed in the transmission of these services, the net effect of the transmission chain is that it is closed, not open. It simply does not allow multiple service providers to access consumers on the same network.
31. Finally, the fact that the mobile broadcast “*signal is transmitted wirelessly for the last mile for reception on the end-user handset*” makes it clear that the services in question are not “delivered and accessed” over the Internet. The service may make use of the “public Internet” at one or more links of the transmission chain, but the signal is delivered to the subscriber, and accessed by the subscriber, via a closed, proprietary wireless network, not over the public Internet.
32. In fact, were the Commission to accept the premise that using the Internet as one link in a program delivery chain exempts the entire undertaking from regulatory oversight, then any programming service or BDU using the Internet for collecting or relaying programming signals, prior to or during broadcast, would also be exempt. This is obviously not the situation contemplated by the NMEO, in which any person can feed video to anyone, anywhere in the world, on any type of computer, over the Internet.
33. The mobile broadcasting distribution services at issue in this proceeding do not operate on an open network, do not meet any regulatory definition of “broadcasting over the Internet,” and as such, do not fall within the scope of the NMEO.

A new, two-year experimental exemption order, consistent with fundamental principles of the *Broadcasting Act*, is an appropriate form of regulatory oversight

34. The CWTA argues that regulation of mobile broadcasting distribution services would not materially contribute to the implementation of the policy objectives set out in section 3(1) of the *Broadcasting Act* (para 10). However, in the event the Commission determines otherwise, the CWTA has proposed specific wording for a new exemption order that would exempt mobile broadcasting distribution services from any or all requirements of Part II of the *Broadcasting Act* or of any supporting regulation (para 21).
35. As the CAB stated in its Phase I submission, new technologies should enhance the objectives of the *Broadcasting Act*, not compromise them. New technologies should be put to work in support of its fundamental principles, not embraced as an excuse to abandon them.

36. As CWTA itself notes, “some parts of (mobile broadcasting distribution services) could be considered ‘programs’ and likely constitute ‘broadcasting’ as defined by the *Broadcasting Act*” (para 3). The CWTA notes that mobile broadcasting distribution services “will offer suppliers a new opportunity to develop and deliver both new content and content that complements conventional and specialty broadcast services, both strengthening the loyalty of existing viewers to these broadcasters and helping create new audiences for these programs and programming undertakings” (para 11). The CWTA submits that mobile broadcasting distribution services “will open new interesting windows for broadcasting content” (para 13).
37. In other words, the CWTA conclusively demonstrates that programming distributed via mobile devices has the potential to make important and lasting contributions to the furtherance of the objectives of the *Broadcasting Act*.

Conclusion

38. The CAB considers that the Phase I submission filed by Sasktel, while purporting to demonstrate how programming transmitted via mobile broadcasting distribution services is not “broadcasting” and therefore falls outside of the Commission’s jurisdiction, in fact demonstrates that such programming clearly constitutes “broadcasting,” as defined in the *Broadcasting Act*, and as underscored by the Commission in related proceedings.
39. The CAB considers that the CWTA, while purporting to demonstrate that mobile broadcasting distribution services fall within the scope of the NMEO, in fact demonstrates conclusively that mobile broadcasting distribution services do not meet any regulatory definition of broadcasting “delivered and accessed over the Internet,” and as such, clearly fall outside the scope of the NMEO.
40. The CAB has proposed an experimental exemption order that would exempt mobile broadcasting distribution services from the requirement to hold a broadcasting licence, provided that they adhere to the following conditions, consistent with fundamental principles of the *Act*:
 - a) The company offering the mobile broadcasting service must be owned and effectively controlled by Canadians.
 - b) The service received by each subscriber shall consist of a preponderance of Canadian signals.
 - c) The company must source its content only from licensed Canadian programming services, or from non-Canadian services previously authorized for distribution in Canada. That content must be related to content carried on the programming service in question.
 - d) The company must contribute 5% of its gross annual revenues derived from its mobile broadcasting service, including transmission or airtime charges for reception of the service, to an appropriate Canadian talent development fund.

41. The CAB notes that content sourced solely from a licensee's VOD service would not qualify under condition 40(c) above. Only content, including on-demand content, sourced from licensed Canadian conventional, specialty and pay services (or non-Canadian services previously authorized for distribution in Canada) should qualify.
42. The CAB reiterates that this exemption order should expire after a two-year period, at which time the Commission and interested parties would be in a position to assess the impact of mobile broadcasting distribution services and their ability to contribute to the objectives of the *Broadcasting Act*.
43. Prior to the expiry of the exemption order the Commission should initiate a public policy process to determine the appropriate scope of a new class of 'mobile broadcasting distribution' licence, and a separate, subsequent process to hear applications from potential licensees.
44. The CAB appreciates the opportunity to provide these Phase II comments.

Sincerely,



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