



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

July 15, 2004

SENT BY EMAIL

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

Dear Ms. Rhéaume:

Re: Notice of Public Hearing CRTC 2004-4, Item 10: Application Nos. 2004-0008-6 and 2004-0007-8 by Bell Canada (Bell) for two regional licences to operate cable distribution undertakings to serve locations in Ontario and Québec – Intervention by the Canadian Association of Broadcasters

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 provide its comments in the above-noted matter.
2. These applications by Bell to operate all-digital cable broadcasting distribution undertakings (BDUs) in major urban markets in Ontario and Québec emphasize the fact that the distribution of programming services in Canada is now moving rapidly to a digital environment. The Commission has previously licensed provincial telephone companies to operate digital cable BDUs in western Canada, and most major cable companies now provide digital service offerings in addition to their analog service offerings. In some cases, subscribers to the incumbent cable companies can receive all broadcasting services in a digital format. Moreover, all terrestrial BDUs across the country compete on a daily basis with licensed digital DTH undertakings that between them serve some 2.2 million households.

3. This rapidly evolving distribution environment makes it imperative that the Commission act sooner, rather than later, to finalize the ground rules governing the distribution of programming services on a digital basis. The CAB notes that the Commission has previously conducted various processes to address certain elements of the transition to a digital environment, but has not yet finalized its position on the issues raised in those processes. These include the deliberations of the Digital Migration Working Group, which has subsequently been suspended, and the proceeding initiated by Broadcasting Public Notice CRTC 2002-48 *Call for comments on the establishment of rules to govern the distribution of specialty services on the basic service of fully digital cable undertakings* (PN 2002-48), for which a Commission decision is still pending.
4. The CAB urges the Commission to move quickly to address outstanding issues that are raised in the context of digital BDUs, so that the implications for programming services of these applications by Bell and future proposals by other distributors can be properly assessed. Otherwise, Bell's proposed BDUs in Ontario and Québec will serve to set the precedent in the Canadian market that will effectively establish the rules for digital distributors.
5. In addition to highlighting the need to finalize the rules for digital distributors, these applications also raise a number of other fundamental issues relevant to all BDUs, issues that in the CAB's view must be addressed by the Commission to restore a balance between all sectors of the broadcasting industry. These issues include: the development of cost separation procedures to ensure a proper identification and allocation of costs between broadcasting and non-broadcasting activities of BDUs; the need for clear and enforceable audit guidelines; the development of a more equitable approach to commercial negotiations between programming undertakings and BDUs; and reducing the length and complexity of dispute resolution procedures.
6. While emphasizing the need for the Commission to undertake a broader examination of the many issues identified above, the CAB does not oppose the granting of licences to Bell to operate cable BDUs in Ontario and Québec. If it approves these applications, however, the CAB submits that the Commission must ensure that Bell complies with all current Commission regulations and policy requirements pertaining to Class 1 cable systems, including the distribution of television and radio services, Canadian specialty services, digital Category 1 and Category 2 services, and pay and pay-per-view services.
7. In this regard, the CAB notes the statements made by Bell in Appendix 1A (Supplementary Brief) of its application that, in each community that it serves, it will comply with the all content and carriage obligations established by the Commission for Class 1 licensees, including:
 - priority carriage obligations respecting television and radio services, as set out in sections 17 and 22 of the *Broadcasting Distribution Regulations* (BD Regs);
 - preponderance of Canadian programming services (section 6 of the BD Regs);
 - the buy-through obligation (section 5 of the BD Regs);
 - contribution to Canadian programming;
 - access rules;

- distribution and linkage requirements (which include the rules applicable to Class 1 terrestrial BDUs for dual status and modified dual status specialty services);
 - the “5 to 1” rule for Category 2 services;
 - simultaneous substitution, at the request of local broadcasters; and
 - the passing-on to subscribers of closed-captioning and described video that is part of the original signals received from broadcasters.
8. There are a number of areas, however, where further clarification is required to address specific concerns and to ensure that the service to be provided by Bell would in fact comply with all applicable regulations and policies. In addition, given that approval of these applications would effectively provide Bell with a second all-digital BDU serving major urban markets in Ontario and Québec, the CAB submits that the Commission should consider the need for certain safeguards to ensure that no undue preference or disadvantage is conferred by Bell's terrestrial BDU or its DTH undertaking in their respective dealings with programming services.

Carriage of a second set of US 4+1 network signals and distant Canadian signals

9. Bell proposes to distribute a second set of US 4+1 network signals from Seattle and a selection of distant Canadian stations from the list of Part 3 eligible satellite services, all on a discretionary basis, in each of the communities that it serves. The distribution of distant signals from other time zones raises concerns with respect to the protection of the program rights of local broadcasters in the markets to be served by Bell.
10. Consistent with a number of previous decisions relating to the carriage of distant Canadian signals and a second set of US 4+1 signals by cable BDUs, the CAB submits that the carriage of these signals should be approved only if Bell adheres to the requirements respecting non-simultaneous program deletion set out in section 43 of the BD Regs. Further, as noted in previous decisions, the CAB acknowledges that the Commission could suspend the requirement for program deletion only upon approval of an agreement between Bell and the CAB that deals with issues related to the protection of program rights.

Distribution and linkage rules

11. In paragraph 12 of its Supplementary Brief, Bell states that it will comply with the distribution and linkage requirements established by the Commission in Public Notice CRTC 2001-90. Among other things, these requirements pertain to the treatment of dual status and modified dual status programming services by Class 1 BDUs.
12. The CAB notes that the public notice referred to by Bell has been superseded by Broadcasting Public Notice CRTC 2003-42. In that notice, the rules pertaining to the distribution of dual status and modified dual status programming services are set out in paragraphs 5 and 6, under the heading *Rules regarding the distribution of programming services on an analog basis*.

13. The CAB notes that the detailed language of paragraphs 5 and 6 makes it clear that the dual status and modified dual status provisions apply to all Class 1 licensees, irrespective of the technology used to distribute those services. The heading, however, creates potential confusion and leaves open the possibility that digital-only Class 1 BDUs may seek to exempt themselves from the distribution and linkage requirements applicable to the incumbent cable BDUs.
14. As a fundamental principle, all Class 1 BDUs, whether using analog technology, digital technology or a combination of the two, must comply with the established rules respecting the distribution of dual status and modified dual status services. Accordingly, the CAB submits that Bell should confirm its intentions in this regard.
15. Furthermore, to avoid any uncertainty pending the finalization of the rules for an all-digital environment, the CAB urges the Commission to clearly reiterate that the current distribution and linkage rules for Class 1 BDUs apply to all such BDUs, no matter what distribution technology is used.

Packaging of specialty services

16. Bell notes that it intends to offer subscribers a number of options, including à la carte and thematic tiers, by which they can select and receive discretionary specialty services.
17. The CAB submits that an undue reliance on à la carte and theme pack marketing could ultimately erode the ability of specialty services to continue to make extensive and positive contributions to the Canadian broadcasting system. Moreover, the continued broad-based carriage of the analog specialty services is important as a foundation to support the digital Category 1 and Category 2 service offerings.
18. These concerns are even more critical where the BDU in question serves the largest urban markets in Canada and may establish a precedent that results in incumbent cable BDUs in those markets moving towards similar offerings as they convert to digital distribution technology.
19. The CAB addressed the issue of the impact on specialty services in a fully digital environment in its submission regarding PN 2002-48. In that submission, the CAB noted that the revenue base of discretionary specialty services (i.e. wholesale rates) is critically dependent upon the particular penetration and packaging afforded to a given service. The CAB further submitted that many of the principles outlined in the February 2001 Report of the Digital Migration Working Group should also apply.
20. In the context of the current Bell applications, the CAB submits that the following key principles developed by the Digital Migration Working Group are particularly relevant:
 - The wholesale pricing of specialty services distributed as discretionary services on fully digital BDUs should be determined by the particular packaging arrangements

employed for such services, the retail pricing thereof, the existence of a minimum penetration guarantee, the rate of penetration achieved and/or subscriber volume.

- BDUs should focus their marketing efforts on maximizing the price/value relationship for subscribers. While there could be a variety of packaging and pricing options, programmers and distributors should work together to provide subscribers with incentives for the take-up of a greater number of services, which will provide a wider distribution of specialty services and lower costs per service to subscribers. In addition, subscribers should be given the option of choosing an all-inclusive package of specialty services, and BDUs should first promote the value of all-in packages to their subscribers, in priority to smaller, more customized packages.

21. The CAB recognizes that, under the current distribution and linkage rules, Bell would have considerable flexibility with respect to the packaging of analog specialty services that have been licensed as modified dual status services. Given the significant contribution these services make to the broadcasting system, however, it is important that Bell not undermine their economic viability by relegating them solely to small or à la carte tiers.
22. In meetings with CAB members, Bell has given assurances that it will seek to package specialty services – and particularly the analog specialty services – in attractive and affordable larger packages to minimize the concerns expressed above. We understand that Bell has also undertaken to consult fully with all affected parties when developing its packaging options for specialty services. The CAB welcomes these assurances and asks that Bell confirm them in its reply to this intervention.

Provision of high-definition signals

23. Bell proposes to use a Very High Speed Digital Subscriber Line (VDSL) network to deliver broadcast services to subscribers. Using this technology, Bell states that it will be able to provide voice, high-speed data and up to three video streams over a copper twisted-pair medium to each subscriber.
24. While VDSL technology appears to be capable of simultaneously providing up to three standard definition television signals to a subscriber, it is unclear as to whether the capacity available for broadcasting services on a VDSL network is capable of the provision of high definition (HD) signals to subscribers. There appears to be no mention of this matter in Bell's application.
25. Canadian conventional broadcasters have begun the transition to digital broadcasting and several are currently providing or will soon be providing HD programming, either via a digital over-the-air transmitter or by direct feed to BDUs. In addition, a number of specialty and pay television services have also started to provide HD programming.

26. BDUs should have the technical capability to ensure that all HD programming made available by Canadian television, specialty and pay services can be provided to subscribers. The CAB submits that Bell should clarify its intentions in this regard.

Maintaining confidentiality of affiliation agreements

27. Bell ExpressVu Limited Partnership (ExpressVu) operates a DTH distribution undertaking with about 1.5 million subscribers and, as such, is one of the largest BDU licensees in Canada. Given the common ownership links, the CAB submits that approval of Bell's proposed terrestrial BDU would raise the question as to whether certain safeguards are required to prevent any possibility of undue preference or disadvantage that might be conferred by Bell and/or ExpressVu in their dealings with programming services.
28. The CAB believes that, to ensure all programmers are treated fairly, procedures must be put in place so that affiliation agreements between programming services on the one hand, and Bell/ExpressVu on the other hand, are treated as separate and confidential.
29. The contents of agreements negotiated with either Bell or ExpressVu must not be shared between the BDUs. Access by one licensee to the terms enjoyed by the other in their respective affiliation agreements must not be allowed, otherwise Bell or ExpressVu could obtain an inappropriate competitive advantage from access to such information.
30. Accordingly, the CAB recommends that the Commission impose the following condition of licence on Bell's cable BDU licences, if approved. The proposed condition is similar to a condition imposed on Star Choice Television Network Incorporated in Broadcasting Decision CRTC 2002-84 to address similar concerns:

The licensee shall require all staff involved with the negotiation and/or administration of affiliation agreements with programming services to comply with written procedures established by the licensee designed to ensure that any confidential information pertaining to its affiliation agreements with programmers will remain confidential. The license will file a copy of such procedures, as the same may be amended from time to time, with the Commission for prior approval.

31. The CAB further submits that, in their dealings with programming services, Bell and ExpressVu must not be permitted to aggregate the subscribers of their respective undertakings for the purpose of negotiating discounts in wholesale rates in affiliation agreements.

Cost separation

32. Bell is a highly integrated company and, as such, is in a position to derive significant advantages from the provision of telecommunications, distribution, and programming services. Of particular concern to specialty and pay services is Bell's potential ability to allocate common costs amongst its various activities in such a way as to overstate the real costs attributable to its BDU activities. Such a practice would introduce a distortion

in its negotiations with these programming services regarding the appropriate level of wholesale rates.

33. Accordingly, the CAB submits that the Commission should require Bell to adopt appropriate cost separation measures and safeguards to ensure that the costs attributed to Bell's BDUs are appropriate and not overstated. Similar measures should also be put in place for other BDUs that are owned by integrated companies involved in a range of communications activities, to preclude the possibility of inappropriate cross-subsidy between those activities.
34. The CAB appreciates the opportunity to submit these comments concerning the applications by Bell. If the Commission decides to schedule these applications for the agenda of an oral public hearing, the CAB respectfully reserves the right to appear to present its intervention.

Sincerely,



Wayne Charman
Senior Vice-President
Television, Specialty & Pay Services and New Technologies

cc: Bell Canada (bell.regulatory@bell.ca)

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