



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

October 6, 2004

Via Email

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
1, Promenade due Portage
Hull, Quebec
K1A 0N2

Dear Ms. Rhéaume:

RE: Public Notice CRTC 2004-64: Call for comments on possible requirements for the provision of notice to programming services by distributors of their plans to change packages

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 and pay and pay-per-view television services – is pleased to submit its comments with respect to the above-noted call for comments.

Attached is a copy of the CAB's submission.

Sincerely,

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

Encl.

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**A Submission to the
Canadian Radio-television and Telecommunications Commission**

With respect to

Broadcasting Public Notice CRTC 2004-64

**Call for comments
on possible requirements for the provision of notice
to programming services by distributors
of their plans to change packages**

Prepared by



Canadian Association of Broadcasters
L'Association canadienne des radiodiffuseurs

October 6, 2004

Executive Summary

1. The current business and regulatory environment in which programmers and distributors conduct commercial negotiations is characterized by an imbalance in the relative negotiating positions of programmers and BDUs. It is also characterized by the lack of a meaningful incentive for BDUs to enter into good faith negotiations towards mutually satisfactory carriage agreements with programming services.
2. In the current environment, most programming services are left with little to no leverage when negotiating terms and conditions of carriage with BDUs, a situation exacerbated by rapid advances in technology and consolidation among BDUs. This situation is particularly pronounced where smaller, independent or not-for-profit programming services are concerned.
3. Accordingly, the CAB submits that the Commission should introduce measures to ensure that there is an effective environment in which good commercial negotiations can occur, and that those measures should be based on the following key principles:
 - (i) prior agreement of a programming service before packaging changes are implemented, to the extent that any realignment, repackaging, or significant change to other terms of carriage may result in material harm to the service;
 - (ii) recourse to the Commission for dispute resolution when a mutually satisfactory agreement is not possible;
 - (iii) maintenance of the status quo pending a mutually satisfactory agreement or settlement pursuant to a dispute resolution proceeding; and,
 - (iv) incorporation of appropriate measures with respect to advance notification and related carriage and packaging issues in the *Broadcasting Distribution Regulations*, applicable to all BDUs.
4. Consistent with these key principles, the CAB calls on the Commission to:
 - (i) introduce a 90-day advance notification period before channel realignment, repackaging, or other significant change to existing terms of carriage can occur, applicable to all BDUs;
 - (ii) as part of the advance notification measure, require a BDU to provide sufficient information to enable the programming service in question to undertake a full analysis of the estimated financial impact of the realignment repackaging, or other change to existing terms of carriage. In addition, the notification should include the measures proposed by the BDU to alleviate such impact where it negatively affects the advertising and/or subscription revenues of the service, where those measures are not already addressed in an active affiliation agreement;

- (iii) elaborate consistent standards for the application of the undue preference test that take into account the current regulatory and business environment in which programmer/BDU negotiations occur;
- (iv) accord confidentiality to the detailed financial information provided to the Commission in the annual returns of specialty and pay programming services;
- (v) develop and enforce appropriate cost separation reporting for BDUs to ensure that common operating costs and capital expenditures are being properly allocated to programming and non-programming services;
- (vi) amend the *Broadcasting Distribution Regulations* to provide a means by which programming services can verify the accuracy of affiliation payments;
- (vii) amend the definition of “subscriber” in the *Broadcasting Distribution Regulations* to ensure fair payment by BDUs with respect to commercial and institutional accounts;
- (viii) ensure the principles developed under the auspices of the Digital Code of Conduct are being adhered to;
- (ix) amend the *Broadcasting Distribution Regulations* to stipulate that, upon the expiry of an affiliation agreement, existing terms of that agreement will continue to be binding until a new agreement is reached;
- (x) amend the *Broadcasting Distribution Regulations* to specify that where a distribution system is acquired by another operator, the terms and conditions of any existing affiliation agreements between a programming service and the newly acquired BDU will continue to apply;
- (xi) consider the merits of an expedited dispute resolution process that would shorten the current 45 day process, and ensure that Commission decisions arising from dispute resolution proceedings are binding on all parties;
- (xii) in the event of a dispute concerning a change in packaging or other terms of carriage, suspend implementation of the proposed change pending resolution of the dispute; and,
- (xiii) prioritize disputes on a first-come, first-served basis.

Introduction

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 2004-64 *Call for comments on possible requirements for the provision of notice to programming services by distributors of their plans to change packages* (PN 2004-64).
2. In PN 2004-64 the Commission seeks comment on possible measures to ensure that distributors and programmers conduct negotiations in accordance with good commercial practices. The Commission’s objective is to provide an effective environment for commercial negotiations, thereby reducing the number of disputes that are brought to the Commission for resolution.
3. The present business environment in which commercial negotiations are conducted is characterized by an inherent lack of balance with respect to the relative negotiating positions of programmers and broadcasting distribution undertakings (BDUs), particularly those with integrated cable and DTH holdings. It is also characterized by rapid advances in distribution technology, by the development by BDUs of business lines relating to telecommunications, and by recent consolidation in the distribution sector – factors which combine to exacerbate the existing imbalance in negotiating power between programmers and BDUs.
4. The CAB believes that the current proceeding is an important element in restoring a balance in the programmer-distributor negotiation process. In particular, the adoption of appropriate measures by the Commission will help address some of the deficiencies with respect to the current framework under which programmers and distributors deal with issues related to carriage, packaging, promotion and wholesale rates for specialty and pay services.
5. The current commercial relationship between programmers and BDUs is governed by a balance of market forces and certain provisions in the *Broadcasting Distribution Regulations* (BD Regulations). The latter include access rules that require BDUs to carry certain specialty and pay services, a requirement to maintain a preponderance of Canadian programming services, and distribution and linkage rules setting out the broad parameters for dual status and modified dual status specialty services and the linkage of specialty and pay services in discretionary packages with non-Canadian services.
6. Beyond this broad framework, however, there are few Commission guidelines addressing the packaging of specialty and pay services, the establishment of appropriate wholesale fees and other terms of carriage, as such matters are generally left to negotiations between individual services and BDUs.

7. In this context, the CAB notes that commercial negotiations between programmers and many BDUs are usually conducted in good faith, even in the absence of specific regulatory provisions. There are significant exceptions, however. These include the particular situations that triggered this proceeding and other cases relating to unilateral cuts in wholesale fees with no attendant reduction in retail subscriber fees, where there has been an apparent unwillingness on the part of the BDU to make good-faith efforts to reach mutually satisfactory agreements respecting the terms of carriage of programming services.
8. One of the key issues in this regard is that, given the current gatekeeping power of BDUs, there is often little incentive for them to engage in the normal give and take of commercial negotiations. In most circumstances (the exception being the carriage of dual status programming services on analog cable), a BDU can effectively dictate the terms of carriage to a programming service – acting in a gatekeeper role rather than in partnership with programming services that, in most circumstances, have no leverage when entering into commercial negotiations with a BDU. This lack of incentive for a BDU to negotiate mutually satisfactory carriage terms is particularly acute with respect to Category 2 digital programming services, which have absolutely no negotiating power when entering into carriage negotiations with a BDU.
9. At the same time, in the absence of a mutually satisfactory agreement between a programming service and a BDU as to the terms of carriage, a programming service has no options that would create an incentive for the BDU to negotiate fair and equitable terms. For example, under current Commission policy (as set out in Broadcasting Public Notice CRTC 1997-25, and reiterated in Broadcasting Public Notice CRTC 1997-150) programmers are expected “to provide continued access to their programming services during an ongoing dispute with a distributor”, an expectation that strips programmers of any substantive leverage when attempting to reach a mutually satisfactory agreement with a BDU.
10. The imbalance that is inherent in the distribution framework is further exacerbated by the Commission’s practice of making public the detailed financial and operating data of individual specialty and pay services, while maintaining confidentiality of the corresponding information for BDUs. This creates an environment in which one party to a commercial negotiation has far greater insight into the operations of the other party, a situation hardly conducive to effective commercial negotiations.
11. Moreover, programming services are often placed in a position of receiving affiliation payments from BDUs without having any satisfactory means to verify the accuracy of such payments. The absence of a meaningful framework under which programming services conduct affiliate audits has led to a spiraling number of requests to the Commission for dispute resolution proceedings – proceedings whose results are not always considered binding by BDUs, who have, on occasion, continued to deflect requests for audits.
12. The CAB submits that the proceeding announced in Public Notice CRTC 2004-20 *Call for comments on a request to amend the Broadcasting Distribution Regulations to add provisions*

governing the audit of affiliation payments (PN 2004-20) is a positive step forward in this regard, but notes that in the absence of a timely decision from the Commission with respect to this proceeding, programmers continue to be frustrated in their attempts to verify the accuracy of affiliation payments.

13. The issues addressed in this submission are of direct interest to all operators of specialty and pay programming services in Canada. However, the effects of the current imbalance in negotiating power between BDUs and programmers are more pronounced where smaller, independent and not-for-profit programmers are concerned, particularly those who hold licenses to operate digital services only. These programmers do not have recourse to economies of scale with which to mitigate the unfair business practices that have come to characterize current market conditions, and as such, have a direct interest in the outcome of this proceeding.

Key Principles

14. With regard to the Commission's goal of ensuring that negotiations between distributors and programmers are conducted in accordance with good commercial practices, the CAB submits that the Commission should adopt a number of specific measures that are described in the detailed responses to the questions raised in PN 2004-64. These measures would help foster good commercial relations between programming services and BDUs and reduce the growing number of dispute resolution requests before the Commission.

15. The measures directly related to the terms of carriage of a programming service and the provision of advance notice of such changes are based on the following key principles:

(1) Prior agreement before changes to terms of carriage

16. The CAB submits that there must be agreement between a BDU and a programming service on the terms of a proposed realignment, repackaging, or other significant change to existing terms of carriage that may result in material harm to the programming service, before the BDU implements the proposed change.
17. In this regard, the CAB agrees with the Commission that it is preferable that such an agreement be reached through good faith commercial negotiations between the BDU and the programming service. The CAB submits, however, that effective negotiations are only possible where there is a relative balance between the negotiating positions of both parties, and where there is meaningful incentive for both parties to conclude a mutually satisfactory agreement. As noted above, this is not the case in the current BDU/programmer environment. As a result, it is not realistic to expect that the parties will always be able to negotiate an appropriate agreement.

(2) Recourse to the Commission for dispute resolution

18. In the absence of an agreement, even after a reasonable period of time where the parties have engaged in good faith negotiations, programming services must have recourse to the Commission for dispute resolution pursuant to sections 12 to 15 of the BD Regulations.
19. The CAB recognizes that the Commission's current view, as stated in Public Notice CRTC 1996-60 *Access Rules for Broadcasting Distribution Undertakings* (PN 1996-60), is that it is generally not disposed to entertain dispute resolution applications that deal with matters such as channel placement and the packaging and marketing of programming services. PN 1996-60 notes that "...were the Commission to become involved in all access disputes, parties might thereby be discouraged from doing their best to resolve any differences themselves, a primary objective of the Commission in this context."
20. The CAB agrees with the Commission's primary objective, but notes that since BDUs are currently capable of forcing unilateral changes on programming services, they have little incentive to resolve differences in any case. The flexibility afforded to BDUs by modern distribution technologies has resulted in a significant risk to programming services where that flexibility results in unilateral changes that have a material, negative impact on the operating margins of programming services.
21. Were the Commission to accept such matters for expedited dispute resolution, as a last resort to resolve commercial disputes, the prospect of an imposed decision would be an added incentive to reach a negotiated solution. The core issues in such situations generally go to the financial underpinnings of a programming service's business, including its continued ability to make a meaningful contribution to the Canadian broadcasting system. As such, the CAB believes that a Commission role in addressing such issues is not only appropriate, but essential.
22. The CAB notes that the presence of an expedited, effective and binding dispute resolution process will serve as a powerful incentive for parties to reach a negotiated agreement in most cases. As in the case of other guidelines and regulations, the dispute resolution process is as much a key instrument in creating the balance necessary to encourage good faith commercial negotiations as it is a measure of last resort where good faith negotiations fail to produce a mutually satisfactory result.

(3) Maintain status quo pending agreement

23. Pending the attainment of an agreement through negotiations or a Commission determination pursuant to a dispute resolution proceeding, the BDU must maintain the status quo with respect to carriage and packaging arrangements affecting the service in question.
24. The CAB submits that this would not only protect the interest of the programming service, it would also protect consumers from unnecessary disruptions, in the event that

the BDU is required to undo the change in question following a Commission determination pursuant to a dispute resolution proceeding.

(4) Incorporate key elements in the BD Regulations, applicable to all BDUs

25. The CAB submits that the best way to ensure these principles are respected is to incorporate the key elements in the BD Regulations and make them applicable to all licensed BDUs, regardless of size or type.
26. The CAB again notes that the majority of negotiations between BDUs and programming services are conducted in good faith; however, in the current environment it is clear that the actions of a few BDUs are so problematic that there is a need for a formal regulatory framework fostering good faith negotiations, applicable to all BDUs.
27. Section 26 of the BD Regulations requires Class 1 and Class 2 cable licensees to provide 60 days advance notice of channel realignment. The CAB notes that this requirement was created in an analog environment and no longer reflects the realities of digital duplication and migration, which can involve repackaging of specialty and pay services without the need for labour-intensive retrapping at the residential level. Moreover, the current notification rules do not apply to DTH distributors.
28. The CAB submits that, given the potential for harm to a programming service in the event of unilateral realignment, repackaging, or other significant change to existing terms of carriage, any rules that address notification periods should apply to all BDUs. Such rules should specify the circumstances under which prior notification must be provided to a programming service, the length of time in advance of a proposed change in distribution that notice must be provided, and the information that must be provided with the notification in order to facilitate good faith negotiations with respect to the proposed realignment, repackaging, or other significant change to existing terms of carriage.
29. In the balance of this submission, the CAB provides detailed response to the specific questions posed by the Commission in PN 2004-64. The CAB also addresses certain other issues that would facilitate good commercial practices between programming services and BDUs.

Provision of notice measures

Should a mandatory notice period be introduced requiring all BDUs, including DTH BDUs, to provide programming services with notice of changes to terms of carriage (including packaging changes) before changes may be made? If the Commission were to introduce such a measure, should it be implemented as part of the Regulations or in some other manner?

30. The CAB submits that the Commission should indeed introduce a mandatory notice period requiring all BDUs, including DTH BDUs, to provide a programming service of

advance notification of any proposed change to the terms of carriage of that service. Furthermore, because issues related to packaging and terms of carriage are central to the ability of programmers to gain full access to viewers, the notification period should be incorporated in the BD Regulations to ensure that it is respected by all BDUs.

If the Commission were to introduce such a requirement, is 60 days an appropriate and sufficient notification period, or would a longer or shorter period be preferable?

31. The CAB is concerned that a 60 day notification period would be insufficient to permit parties to reach a mutually satisfactory agreement in situations where repackaging of a service is being proposed.
32. An appropriate advance notification period must provide a reasonable length of time for the BDU and programming service to negotiate the new terms of carriage, and must provide programming services with adequate opportunity to develop marketing plans that advise viewers of the change, in order to reduce the negative impact on audience levels. Moreover, in the event that the parties cannot reach a timely agreement on these matters, the notice period must also accommodate a dispute resolution process with the Commission.
33. The CAB notes that in PN 1996-60 the Commission stated that it would endeavour to render a determination on disputes properly before it within 45 days of receipt of requests for dispute resolution. Providing for this 45 day period, in addition to a reasonable period of time for good faith negotiations prior to seeking dispute resolution from the Commission, argues strongly in favour of a period of time greater than 60 days for advance notification.
34. Finally, the CAB notes that several weeks prior to a proposed channel realignment involving repackaging, a BDU may have begun implementation procedures with respect to reprogramming its billing and Electronic Programming Guide software, altering its website, and reprinting collateral marketing material. Earlier notification is required to allow time for the parties to agree on the detailed implementation and subscriber notification plans, in advance of these activities by BDUs.
35. In light of these considerations, the CAB submits that an advance notification period of at least 90 days would be a more appropriate and effective notification period with respect to a BDU's intent to repackage or reposition a programming service.
36. While this should be the general rule applicable to all BDUs, the CAB notes that where the parties are able to come to a mutually satisfactory agreement prior to the passage of 90 days, obviating the need for dispute resolution, an implementation period of less than 90 days would still be achievable. For example, if a BDU and a programming service were able to reach an agreement within 20 days, part of that negotiated agreement could be to implement the change 30 days later, or 50 days after the initial notification.

37. The CAB submits that by expanding the mandatory notification period from 60 to 90 days, and by extending the requirement to provide notification to all BDUs, the Commission would be creating an effective incentive for BDUs and programming services to conclude mutually satisfactory agreements.

What information should accompany any notice provided to programmers? For example, in addition to providing timely notice, should distributors be required to provide programmers with comprehensive information concerning such matters as the proposed new terms of carriage and the estimated financial impact on the affected specialty service of any packaging changes, if any?

38. Given the potential for realignment, repackaging, or other significant change to existing terms of carriage to materially affect the financial position of a programming service and its attendant Canadian programming expenditures, the CAB submits that notice from a BDU of its intent to realign or repackage a programming service should be accompanied by a full explanation as to why the realignment or repackaging is necessary, and a clear indication of the impact the realignment or repackaging will have on the affected programming service. Such an explanation should include an indication of the other programming services involved, and the retail price and penetration implications of the proposed realignment, repackaging or other significant change to existing terms of carriage.
39. Above all, the onus should be on the BDU to provide sufficient information that the programming service in question can undertake a full analysis of the estimated financial impact of the realignment, repackaging or other significant change to the terms of carriage and the measures proposed by the BDU to alleviate such impact, where the proposed change negatively affects the advertising and/or subscription revenues of the service and where such measures are not already addressed in an active affiliation agreement.
40. Moreover, consistent with Commission policy respecting the digital migration of analog services on small cable systems, as set out in Broadcasting Public Notice 2001-130, it should be incumbent on the BDU to ensure that the programmer will be substantially no worse off, in terms of wholesale fees received, as a result of any repackaging, realignment, or other significant change to existing terms of carriage.

Other possible measures

What measures, instead of or in addition to the provision of detailed and timely notice, may be required to foster the conduct of negotiations between distributors and programmers in accordance with good commercial practices?

41. The CAB submits that there are a number of measures that the Commission should consider to foster the conduct of negotiations between programmers and BDUs.

(1) Clarify undue preference test

42. Section 9 of the BD Regulations stipulates that no licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.
43. The CAB submits that the Commission should confirm that the undue preference provision is intended, among other things, to ensure that terms and conditions related to the distribution of unaffiliated programming services are no more disadvantageous than terms and conditions extended to BDU-affiliated services with respect to carriage, channel placement, packaging, penetration levels, and marketing support, including presentation on an electronic programming guide and/or barker channel. The undue preference provision should also reinforce the application of the Commission's structural separation conditions, to ensure that senior executives in a given company are not privy to negotiations between more than one affiliated BDU and a programming service.
44. The CAB further submits that the current test for demonstrating that any given preference is, in fact, 'undue' is often unclear, and is based on general principles of competition law that do not take into account the unique nature of the relationship between programming services and BDUs. Even in cases where the Commission has recognized that an affiliated service has been accorded a distinct preference, it has found that that preference did not meet the test for what it considers undue.¹
45. The CAB suggests that the Commission could provide greater regulatory certainty for all parties to a commercial negotiation were it to elaborate consistent standards for the application of the undue preference test that take into account the current regulatory and business environment in which programmer/BDU negotiations occur, and that ensure that the standard for demonstrating that a preference is indeed 'undue' is not so high as to lose all meaningful impact.
46. Moreover, the Commission should specify the sanctions that would be triggered by a determination that a licensee had breached Section 9 of the BD Regulations.

(2) Provide for equitable financial disclosure for all licensees

47. As noted previously, it is the Commission's practice to make public the detailed financial and operating data of individual specialty and pay services, on the grounds that these services occupy protected genres and thus do not operate in a competitive environment.
48. All other types of undertakings, including television, radio and BDUs, are permitted to maintain the confidentiality of their operating and financial data, because the Commission has concluded that these types of undertakings operate on a competitive

¹ See Broadcasting Decision CRTC 2004-188, 20 May, 2004: *Complaint from CTV Television Inc. alleging that Rogers Cable Inc. contravened section 9 of the Broadcasting Distribution Regulations.*

basis in their markets. The Commission publishes only aggregated information for these types of undertakings.

49. This situation whereby specialty and pay services alone are required to publicly disclose detailed financial information ignores the highly competitive environment in which specialty and pay services must compete for programming and viewership, and negatively impacts the commercial relationship between these services and BDUs. It creates an environment in which one party to a commercial negotiation has far greater insight into the operations of the other party, a situation hardly conducive to effective commercial negotiations.
50. The CAB further notes that the Commission's recent change to its annual reporting requirements for specialty and pay programmers, requiring them to report on production and programming expenses by programming category, threatens to exacerbate the current situation.
51. The CAB submits that the Commission should accord confidentiality to the detailed financial information provided to the Commission in the annual returns of specialty and pay programming services. It should publicly disclose such information only in a manner that would not make it possible for another party to commercial negotiations to determine the revenue and expense patterns of individual programming services.

(3) Cost separation

52. The CAB appreciates that the Commission's ability to render an accurate picture of the financial performance of various classes of broadcasting licensees is dependent on the provision by those licensees of accurate and detailed financial and operating information. However, in the current environment where specialty and pay services are being requested to provide increasingly detailed and segregated financial reports, there exists a growing imbalance in the nature of the information reported by programming services and BDUs, and the degree to which it is made public by the Commission.
53. With respect to financial information provided by cable BDUs, the Commission's current cost separation and recovery requirements for the distribution of discretionary programming services and non-programming services, such as high-speed Internet and telephony services, have been in place since 1990, as set out in Public Notice CRTC 1990-53. The Commission's current cost separation policies generally require cable BDUs to allocate common costs between programming services and any non-programming services distributed based on their respective shares of gross revenues. However, it is not clear that the Commission audits the annual returns of cable BDUs to ensure that they adhere to the specified cost separation procedures and reporting requirements, raising questions as to whether common operating costs and capital expenditures are in fact properly allocated.
54. Given the increasing level of investment by cable BDUs in digital broadband and telephony, cable BDUs are increasingly offering more than broadcasting services. This situation underlines the importance of the Commission being able to determine whether

common operating costs and capital expenditures are being properly allocated, inasmuch as the amount and nature of financial information provided to the Commission by BDUs has a direct impact on their financial position, which in turn, impacts the conduct of negotiations between programmers and BDUs.

(4) Audit framework

55. The Commission is currently considering the comments previously filed in response to PN 2004-20, concerning the CAB's proposed affiliate audit framework for BDUs. The CAB reiterates the importance of that proceeding and the need for a regulatory framework to guide the conduct of affiliate audits of a BDU's records.
56. In the absence of such a framework, programming services continue to be frustrated in their attempts to verify that the accuracy of affiliation payments, a situation that continues to undermine the ability of programming services to successfully conclude commercial negotiations with BDUs. Successful commercial negotiations between programming services and BDUs are only possible where programming services are able to exercise clear and reasonable audit rights with respect to affiliation payments from BDUs.
57. The CAB notes that in those cases where BDUs have been prepared to include audit clauses in affiliation agreements, it is often extended under the auspices of an audit *privilege*. The CAB strongly believes that the ability of one party to a commercial negotiation to verify that they have been fairly and accurately paid by the other party is not a privilege, but a *right*, and as such, must be codified in regulation to ensure that programming services have confidence in their ability to verify the accuracy of affiliation payments.

(5) Definition of 'subscriber'

58. The current definition of 'subscriber' in the BD Regulations is inherently problematic in that it creates confusion that can result in underpayments by BDUs to programming services with respect to commercial and institutional accounts.
59. As currently defined in the BD Regulations, a 'subscriber' means:
 - a) *a household of one or more persons, whether occupying a single-unit dwelling or a unit in a multiple-unit dwelling, to which service is provided directly or indirectly by a licensee; or*
 - b) *the owner or operator of a hotel, hospital, nursing home or other commercial or institutional premises to which service is provided by a licensee.*
60. The CAB submits that by counting each commercial and institutional account in the same way as a single residential subscriber, the current definition permits BDUs to remit artificially low affiliation payments in relation to these accounts. In effect, specialty and pay services receive affiliation payments in respect of a commercial or residential account as if it were a single residential subscriber, even though the total subscription revenue obtained by the BDU from such an account is significantly larger than from a residential customer.

61. The CAB submits that the Commission should amend the definition of 'subscriber' in the BD Regulations to ensure fair payment by BDUs with respect to commercial and institutional accounts, thereby addressing a long-standing commercial irritant.

(6) Digital duplication and migration

62. The result of analog-to-digital repackaging can be as, or more, devastating on programmers as repackaging within the analog system. The CAB submits that the Commission should ensure that the principles that were developed under the auspices of the Digital Code of Conduct are being adhered to and that no instance of duplication or migration occurs without the consent of the programming service in question, to ensure that digital duplication and migration are not to the detriment of licensed Canadian programming services.

(7) Absence or expiry of an affiliation agreement

63. The CAB notes that there are currently no guidelines with respect to which elements of an expired affiliation agreement should continue to be binding on programmers and BDUs during the negotiation for a new agreement. This situation, coupled with the Commission's policy precluding a programming service from withdrawing or withholding its signal upon the expiry of an affiliation agreement, serves as a disincentive for the timely conclusion of commercial negotiations leading to a new, mutually acceptable affiliation agreement.
64. The CAB submits that the Commission should amend the BD Regulations to stipulate that, upon the expiry of an affiliation agreement, existing terms of that agreement shall continue to be binding until a new agreement is reached or a dispute resolution decision is rendered. Any such agreement or dispute resolution decision should be retroactive to the date of the expiry of the previous agreement. Such an amendment would provide for a greater degree of certainty, allowing for more successful commercial negotiations between programming services and BDUs.

(8) Transfer and/or acquisition of assets

65. Upon acquiring the assets of another distributor, BDUs often pick and choose which terms and conditions of the existing affiliation agreements between programming services and the newly acquired BDU they will honour.
66. The CAB submits that the BD Regulations should specify that where a distribution system is acquired by another operator, the terms and conditions of any existing affiliation agreements between a programming service and the newly acquired BDU will continue to apply for the previously agreed-upon term of that agreement.

Implications of any new requirements and the existing Commission complaint and dispute resolution processes

The Commission's policy is that negotiations should be left to the parties themselves, with Commission involvement occurring only as a last resort. In light of this policy, at what point, if any, should any proposed measures nevertheless allow recourse to the Commission's existing mechanisms for dealing with disputes and complaints? Are there certain types of disputes that the Commission should not involve itself in? Please explain in detail for each type of dispute identified.

67. The CAB maintains that where parties to a good faith negotiation are unable to reach agreement after a reasonable period of time, they should have recourse to the Commission's dispute resolution mechanisms. This should be the case for significant changes to terms of carriage, including matters such as channel placement, packaging, wholesale rates, affiliate audits, and marketing of programming services. As noted previously, the core issues in such situations generally go to the financial underpinnings of a programming service's business, including its continued ability to make a meaningful contribution to the Canadian broadcasting system. As such, the CAB believes that a Commission role in addressing such issues is not only appropriate, but essential.
68. The CAB notes that in several recent instances, even where the Commission has rendered a decision in a dispute resolution proceeding, BDUs have appealed that decision to Federal Court, further delaying the coming-into-force of crucial aspects of the Commission's decision.
69. In the interests of minimizing the amount of time during which proposed changes involving channel positioning and/or repackaging are placed on hold during a dispute resolution process, the CAB suggests that the Commission consider the merits of an expedited dispute resolution process that would shorten the current 45 day process, and that the Commission consider mechanisms by which to ensure that its decisions in dispute resolution proceedings are binding on all parties.

If the Commission were to accept a dispute for expeditious resolution concerning proposed packaging or other changes to terms of carriage (pursuant to sections 12 to 15 of the Regulations) should implementation of the proposed change be suspended pending such resolution? If so, what would be the appropriate period of such a suspension?

70. The CAB appreciates that recourse to dispute resolution should not be used by parties as a stalling tactic. It notes, however, that under the proposed 90 day notification period, sufficient time should exist for expeditious resolution of disputes, obviating the need for the suspension of any proposed change.

71. In the event that the timeline for delivering an expeditious resolution to a dispute exceeds the notification period for reasons outside of the control of the parties to the dispute, then the proposed change should indeed be suspended.
72. The CAB submits that the Commission should also ensure that the outcome of the dispute resolution process is binding upon all parties. The CAB notes that in recent instances, the Commission has concluded a dispute resolution proceeding only to be forced to undertake a subsequent mandatory order proceeding to ensure parties' compliance with its original decision.
73. The CAB submits that follow-up mandatory order proceedings provide a window of opportunity for parties to attempt to negotiate a better deal than that provided for under the terms of the Commission's decision in the initial dispute resolution proceeding, and therefore serves as a disincentive for parties to table their actual final offers in the context of the original dispute resolution process.

In view of the potential volume of disputes, should there be some method developed for prioritizing disputes so that those of highest priority are dealt with first? If so, what elements should be taken into consideration for prioritizing the disputes?

74. The CAB maintains that the only effective method for prioritizing disputes is on a first-come, first-served basis.

Conclusion

75. The CAB agrees with the Commission's view that commercial arrangements between programmers and distributors are matters best determined by negotiations between them. However, effective and fair commercial negotiations are not possible when there exists an imbalance in the relative negotiating positions between parties to that negotiation, nor are they possible in the absence of an effective incentive for both parties to conclude a mutually satisfactory agreement.
76. The CAB submits that technology and consolidation in the BDU sector, combined with a lack of regulatory certainty in key areas relating to the terms and conditions under which programming services are carried, positioned and packaged, have resulted in a situation whereby programming services have no leverage when entering into commercial negotiations with BDUs.
77. Accordingly, the CAB recommends that the Commission adopt key measures to ensure that there is an effective environment in which fair commercial negotiations can occur.
78. The CAB appreciates the opportunity to participate in this proceeding.

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