



Canadian
Association of
Broadcasters

L'Association
canadienne des
radiodiffuseurs

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April 6, 2006

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

VIA EMAIL

Dear Ms. Rhéaume:

Re: Broadcasting Notice of Public Hearing CRTC 2006-3, Items 5, 6, 7 and 8 – Application Nos. 2005-1430-9 (Food Network Canada Inc.), 2005-1459-8 (Astral Broadcasting Group Inc.), 2005-1516-6 (YTV Canada Inc.) and 2005-1552-0 (CHUM Limited)

1. The Canadian Association of Broadcasters (CAB) is 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. The CAB is pleased to submit this intervention in relation to the above-noted applications to renew the licences of the specialty programming services Food Network Canada, VRAK.TV, YTV and MuchMusic.
2. The CAB does not wish to comment on the specifics of these licence renewal applications. It does, however, wish to provide some general comments with respect to the Commission's practice of applying a profitability-based test for determining increases to the levels of Canadian programming expenditure requirements (CPE) for specialty services as they come up for renewal.
3. The Commission first adopted such a profitability-based test in the 2004 licence renewal decision for 22 specialty services originally licensed in 1996. Specifically, the Commission determined that it would set CPE requirements for the upcoming licence term based on the historical average PBIT margin, or profitability expressed as a percentage of revenues, for

each service over the previous licence term. As explained in Broadcasting Public Notice CRTC 2004-2 (PN 2004-2) introducing the licence renewal decisions, the Commission was "...satisfied that this approach is balanced and fair to all parties, taking into account the past financial performance of each service, and its projections going forward."

4. Subsequently, in an intervention concerning the licence renewal application of Canal D (Broadcasting Notice of Public Hearing CRTC 2005-3), the CAB argued that the use of a profitability-based test to determine CPE requirements for all specialty services was inappropriate for a number of reasons. Specifically, such an approach does not take into account the unique nature of each service to which it is applied, it fails to distinguish between not-for-profit and commercial services, and it leaves important questions unanswered with respect to services whose profitability does not exceed the sector average.
5. For these reasons, the CAB urged the Commission not to adopt a uniformly applied profitability-based test for determining CPE requirements of individual specialty and pay services. Instead, the CAB submitted that the Commission should consider, on a case-by-case basis, suggestions from licensees with respect to how the Commission should assess their individual CPE requirements tailored to their individual circumstances, at the time each service comes up for licence renewal.
6. Notwithstanding these concerns, in Broadcasting Decision CRTC 2005-441 renewing the licence of Canal D, the Commission reiterated its view that the profitability-based test for determining increases to the levels of Canadian programming expenditure requirements "...is balanced and fair in that it takes into account a service's past financial performance and future projections, and relates its Canadian programming expenditure requirements directly to its profitability."

Profitability-based CPE requirements are inappropriate in light of uncertainty related to digital migration and the transition to HD

7. The CAB submits that the concerns it has previously expressed about the use of profitability-based CPE requirements are even more pronounced today than they were a year ago. The specialty and pay sector is facing an increasingly uncertain future related to the migration of analog services to digital distribution on cable broadcasting distribution undertakings (BDUs) and the concurrent transition to high definition (HD) broadcasting formats.
8. The recently released digital migration framework (Broadcasting Public Notice CRTC 2006-23) sets out the licensing and distribution rules that will guide the migration to a digital distribution environment of those pay and specialty services that were approved under an analog licensing regime. Under the new digital migration framework, numerous regulatory measures affecting the distribution of specialty and pay services and their business models will be substantially altered over time as cable BDUs convert their systems to digital-only distribution.

9. In PN 2006-23, the Commission explicitly recognized the potential impact of digital duplication and migration on the existing analog services, noting that "...the very flexibility promised by digital technology poses risks for the analog services, **including a significant degree of uncertainty to individual programming services**, since adjustments to how they are packaged and offered to subscribers will result in changes to their penetration levels." [emphasis added]
10. Moreover, the Commission is shortly expected to announce its licensing and distribution framework for the transition of the specialty and pay sector to HD, adding another layer of uncertainty to the business plans of the analog services.
11. The CAB submits that the transition to digital distribution and the conversion to HD formats pose immediate and lasting challenges. In its submission to the recent digital migration and HD transition proceedings, the CAB noted the following significant challenges faced by the specialty and pay sector as a result of these two fundamental changes:
 - revenue uncertainty arising from digital distribution;
 - concerns raised by *à la carte* and "mini-tier" packaging;
 - the costs of the HD transition;
 - the difficulty of developing a viable migration/HD business plan;
 - the limited HD programming supply;
 - uncertainty re the technical capacity of the broadcasting system to deliver an all-HD system; and
 - uncertainty re consumer acceptance of HD.
12. The CAB acknowledges that one of the Commission's goals in devising its digital migration framework was to ensure that individual services are not unduly affected during the transition period. The fact remains, however, that the period of uncertainty attributable to digital duplication and migration and the HD transition will extend throughout the next licence term and beyond, and the degree of impact on individual services will only become clear as we move through that period.
13. The precise impact will be felt differently by each individual programming service, depending on such factors as the genre of the service in question and the cost and availability of programming, the size and linguistic composition of each market in which it is distributed, the distribution and packaging terms it is able to negotiate with BDUs, and the number of subscribers and viewers resulting from narrower forms of distribution, such as *à la carte* and theme packs. No two services will be affected in precisely the same way by these factors, which go directly to the ability of a programming service to meet its conditions of licence.
14. In this sense, the CAB submits that we have entered into a new regulatory paradigm for specialty and pay services, one in which a "one-size-fits-all" approach has become increasingly irrelevant under the new licensing and distribution framework. Moreover, the impact of these dramatic regulatory changes related to digital migration and HD

will be further exacerbated by the proliferation of unregulated content choices, on platforms that carry no market entry or content requirements whatsoever.

15. In this context, therefore, the CAB submits that using historical profitability levels achieved in an analog distribution environment to establish CPE requirements for a future period characterized by the uncertainty of a transition to digital and HD distribution and the reality of new competitive environment is clearly inappropriate and could threaten the ability of individual services to adapt as required. Simply put, a one-size-fits-all approach is not consistent with the flexible regulatory approach that is warranted by current technological and marketplace uncertainties.
16. The CAB appreciates the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink that reads "Wayne Charman". The signature is written in a cursive, flowing style.

Wayne Charman
Vice-President
Television and Specialty & Pay Services

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