



Canadian  
Association of  
Broadcasters

L'Association  
canadienne des  
radiodiffuseurs



June 12, 2006

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

*VIA EMAIL*

Dear Ms. Rhéaume:

**Re: Broadcasting Public Notice CRTC 2006-58, Item 6: Application No. 2006-0196-5 by Rogers Cable Communications Inc. (Rogers Cable) to amend the licences of its cable distribution undertakings serving various locations in Ontario, New Brunswick and Newfoundland**

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 application by Rogers Cable to distribute one or both of the audio services offered by Canada's two satellite subscription radio undertakings (the satellite radio services) as part of its digital offering.
2. The CAB does not oppose, in principle, this application by Rogers Cable. The CAB submits, however, that the application focuses attention on one of the fundamental principles of the Canadian broadcasting system, i.e. the requirement for a predominance of Canadian services, and that therefore a number of matters need to be addressed by the Commission before authorizing the distribution of subscription radio services by Rogers Cable or by broadcasting distribution undertakings (BDUs) in general.

**BDU carriage changes the underlying business plans of the satellite radio services**

3. The applications for satellite subscription radio services were predicated on the assumption that these services would be delivered via satellite to special receivers designed specifically for that purpose. BDU distribution was not contemplated in the applications and the Commission, in licensing these services, imposed obligations on the licensees of the satellite radio services that were based on the nature of the delivery technology and the detailed business plans proposed by the applicants. Because the services are delivered by satellite with a North American footprint, they were given different conditions and obligations than those delivered through purely terrestrial means to Canada.
4. Authorizing BDUs to distribute the satellite radio services would greatly expand the potential subscriber base for these services and could have a significant impact on their respective business plans. Depending on the number of BDUs who ultimately choose to distribute these services and the specifics of the distribution arrangements negotiated with individual BDUs, it is possible that the satellite radio services could access hundreds of thousands if not millions of new subscribers through BDU distribution. This could in turn fundamentally alter the basis on which the Commission originally determined the obligations that would be appropriate for these services under their satellite-only delivery model.
5. Accordingly, given the potential implications of distribution through BDUs, the CAB submits that any authorization for BDU distribution should be accompanied by consideration, perhaps by licence amendments proposed by the satellite radio licensees, of what incremental obligations should apply to satellite radio services as a result of incremental distribution arrangements.

**DTH distribution of subscription radio services is not authorized by the *Broadcasting Distribution Regulations***

6. In its application, Rogers Cable asserts that "...DTH distributors already have the authority to distribute any licensed programming services under section 39 of the [Broadcasting Distribution] Regulations, which would appear to include the two Canadian satellite subscription radio services..." It argues that approval of the current application is required to rectify what it characterizes as the competitive and regulatory imbalance resulting from the fact that cable BDUs are not similarly authorized by the Regulations to distribute subscription radio services.

7. The CAB submits that this rationale for approval of its application is flawed. Section 39(1)(a) of the Regulations authorizes DTH licensees to distribute the programming service of any licensed programming undertaking, excluding a television pay-per-view service. The satellite radio services, on the other hand, are licensed as satellite subscription radio undertakings which, although exhibiting certain characteristics of a programming undertaking in respect of the Canadian-produced channels they provide, are nevertheless clearly distinct in terms of their overall undertaking from the traditional type of programming undertaking authorized in section 39(1)(a) of the Regulations; in many respects they are closer to resembling distribution undertakings.
8. For this reason, the CAB submits that DTH undertakings would, like Rogers, also need to apply to the Commission for specific approval to carry the satellite radio services.

**Rogers Cable must provide a majority of Canadian audio programming channels on its digital service**

9. Section 6(2) of the Regulations requires a BDU to “...ensure, in respect of each of analog and digital technology, that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services...”. If Rogers Cable carries one of the licensed satellite radio services as part of its digital service, it will be distributing up to 90 non-Canadian channels and 10 Canadian produced-channels. The CAB submits that, in order to comply with the requirements of section 6(2), Rogers would need to distribute a sufficient number of Canadian programming services, such as Canadian commercial radio stations, Canadian specialty radio licensees, Canadian pay audio services and/or other Canadian audio services, to ensure that there is in fact an overall majority of digital audio channels devoted to Canadian services.
10. The CAB notes that the regulation requires a majority of Canadian channels in each category. That is, it would clearly be unacceptable for a BDU to contend, in the video world, that it had reached a majority of Canadian channels by adding Canadian audio channels until they outweighed foreign video channels. The converse is also true: the regulation requires that an overall majority of digital audio channels be Canadian. Nor would the foreign audio channels carried by satellite radio undertakings be considered Canadian because they are part of a Canadian satellite radio licensee’s offering; the licences for these services clearly distinguish between foreign and Canadian channels.

11. While section 6(2) of the Regulations has a mechanism for the Commission to relax the requirement for a majority of Canadian channels, the CAB notes that Rogers has not applied for such relief. In any event, the CAB is of the view that any relaxation of this fundamental requirement in the case of Rogers Cable or any other BDU cannot be justified on any reasonable grounds and would therefore be inappropriate.

12. Paragraph 3(1)(f) of the *Broadcasting Act* states that::

*each broadcasting undertaking shall make maximum use, and in no cases less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking...renders that use impractical, in which case the undertaking shall make the greatest practicable use of those resources.*

13. The satellite radio services were authorized to distribute more non-Canadian than Canadian audio channels in view of their special circumstances, including the use of non-Canadian satellites providing service to all of North America which in turn limits the amount of Canadian programming that can be delivered to Canadian audiences. The CAB submits that such special circumstances do not apply in the case of Rogers Cable or other BDUs, given the ready availability of Canadian programming services that could be distributed to ensure compliance with the requirements of section 6(2) of the Regulations.

14. Nor can capacity limitations be argued in this case. The Commission recently lifted the regulation requiring the analog carriage of commercial radio stations, giving cable companies a large capacity windfall.

**Traditional radio programming undertakings need the flexibility to compete in the evolving competitive audio landscape**

15. This application by Rogers Cable represents yet another example of how radio's environment continues to evolve with increasing competition, both regulated and unregulated, to the traditional sector.

16. As recently argued by the CAB in the context of the Radio Review Hearing, these changes in the environment call for a flexible approach to the current regulatory framework for the commercial radio sector, one that allows licensees to continue to serve their listeners and contribute to the goals of the *Broadcasting Act* while recognizing the reality of an increasingly competitive marketplace with a parallel and largely unregulated component.

17. The CAB appreciates the opportunity to participate in this proceeding.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D. Keeble'.

David Keeble  
Senior Vice-President  
Policy & Regulatory Affairs

c.c. Rogers Cable – via fax: (416) 935-4875

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