

INDEPENDENT BROADCAST GROUP (IBG) LE GROUPE DE DIFFUSEURS INDÉPENDANTS (GDI)

Filed via e-pass

February 26, 2009

Robert Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
1 Promenade du Portage
Gatineau, Quebec
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Dear Mr. Morin:

**Re: *Broadcasting Public Notice CRTC 2008-102
Call for comments on a proposed framework for the sale of commercial
advertising in the local availabilities of non-Canadian services.***

A. Introduction

1. These are the comments of the Independent Broadcast Group (IBG)/Le groupe de diffuseurs indépendants (GDI) concerning the above-mentioned proceeding. The IBG/GDI is an affiliation of small and independent pay and specialty licensees. Our participants include: Aboriginal People's Television Network (APTN), Channel Zero Inc., Ethnic Channels Group Limited, Fairchild Television Ltd., TV5 Québec Canada, Stornoway Communications and the S-VOX Group of Companies. A list of the services we represent is attached as an appendix to this submission.
2. The IBG/GDI opposes the sale of advertising by broadcasting distribution undertakings in the local availabilities of non-Canadian services. The CRTC has already examined the question of whether the sale of local avails by BDUs in non-Canadian services would be appropriate twice in the last four years. In both instances, after thorough analysis and detailed economic study, the CRTC rejected the idea principally on the basis that such a fundamental change in the structure of the Canadian broadcasting system could not be justified.
3. In this proceeding, the Commission is returning again to the use of local avails by BDUs. This time, it is based on a revamped, twofold argument put forward by BDUs. It is argued: first, that new forms of digitally-based advertising represent new and higher-valued advertising opportunities for all sectors of the broadcasting system; and, second, that the reason these opportunities are not already being exploited is because

“BDUs do not have the incentive to incur the costs required to upgrade their networks”.

4. The CRTC has requested BDUs seeking to use local avails to submit detailed information to support this twofold argument. This information will need to be analyzed by the CRTC and by all participants in this proceeding to ensure that the information is fully tested, based on valid assumptions, and, among other factors, takes into account the existing state of the broadcasting advertising market in Canada.
5. It is not yet known what information will be filed by BDUs, but we anticipate that BDUs may seek confidentiality for some of this information. In our view, it would be unwarranted and contrary to the fact-finding nature of this proceeding for the Commission to grant confidentiality for any such information. An exception could, perhaps, be made only in respect to information relating to the actual financial results industry participants (if any such information is filed).
6. The IBG/GDI intends to comment in the second round of this proceeding on the information that the CRTC has requested BDUs to file to support their arguments. In this submission, we will discuss some of the underlying aspects of broadcasting policy and the broadcasting system that are at stake and that should inform the Commission’s analysis.

B. Past CRTC Determinations

7. We are confident that the Commission is fully aware of its previous decisions, and the complete record of these past proceedings. But, it is useful to summarize the principal reasons why the Commission has rejected BDU exploitation of advertising in non-Canadian services twice in the past four years:
 - (i) BDUs did not establish an economic need to access a new source of revenue from the sale of local avails;
 - (ii) even with a significant portion of revenue from the sale of local avails promised to fund Canadian programming (through contributions to the Canadian Television Fund), the net impact on the system would be a potential decrease in expenditures on Canadian programming; this is because conventional and specialty television services already spend more on Canadian programming as a proportion of their advertising sales than was promised by the BDUs;
 - (iii) the Commission was especially concerned about the impact of the sale of local avails on new - and yet to be launched - small Category 2 programming services; it was noted that these Category 2 services already compete to sell advertising directed to audiences targeted by their niche programming and that the sale of new inventory in U.S. services “could hamper the ability of these newly launched Category 2 services to establish themselves and could discourage other Category 2 services from launching”;
 - (iv) the impact on the use of local avails to promote Canadian programming services had not been properly evaluated, or taken into account by proponents of the sale of local avails;

- (v) the proposal would weaken the effectiveness of other Commission policies with respect to the sale of advertising and, in particular, the sale of advertising that supports the production of high cost programming, such as Canadian drama programming, and the sale of local advertising by television licensees that provide local programming;
- (vi) the proposal amounted to a “fundamental change” to the structure of the broadcasting system (the reliance on advertising by programming undertakings to support programming expenditures, and not by BDUs that have direct access to subscription revenue) and no clear and substantial net benefits had been established to justify such a fundamental change; and
- (vii) lastly, in the case of the proposal put forward by Only Imagine Inc., that proposal had not properly taken into account the impact on the contractual arrangements between BDUs and non-Canadian suppliers - including the fact that the rates currently paid by BDUs for these services were already discounted by the non-Canadian suppliers to account for BDUs’ limited ability to exploit local avails (in other words, rates charged by non-Canadians to BDUs for non-Canadian services would go up)¹.

C. The Unrestricted Sale of Local Avails is a Fundamental Change to the System

8. The CRTC has recognized that the sale of advertising in non-Canadian services by BDUs represents a fundamental change to the broadcasting system. This issue has never been considered on the basis that it represents merely an “incremental” change to existing policy. In considering, therefore, whether the proposal would result in a “net benefit” to the broadcasting system, as the CRTC has indicated, BDUs must be held to a very high standard. It is not merely a question of how much money is available to Canadian production funds from BDUs. Rather, there are more fundamental issues, some immediate and some longer term that must be taken into account. There are sound policy reasons for taking this approach.
9. First, the CRTC has always limited the role BDUs play in programming activities. BDUs have traditionally been seen to be somewhat comparable to “common carriers”. BDUs should not, in their capacity as distributors, exercise control over broadcasting content - except for the content, which they are permitted to originate themselves under section 3(1)(t)(iv) of the *Broadcasting Act*.
10. Advertising is, without question, one form of content. It is the form of content that is most directly related to the generation of revenue for broadcasters, so it is very important indeed. Permitting BDUs to make general use of advertising avails is significant because it changes BDUs from being primarily focused on the *distribution* of packaged programming to subscribers, into entities that are focused on the *scheduling* and *content* of that programming and the advertising it contains for the purpose of

¹ Respectfully, the BDUs’ views on this issue are changeable. At the recent review of the regulatory framework for BDUs, it was argued by the BDUs that they “already paid” for the use of the local availabilities (see *Public Notice CRTC 2008-100* at paragraph 145). It is far more likely that BDUs use the fact that local avails are not generally accessible by them to lower the affiliation payments that would otherwise be made to non-Canadian services. Once these services generate advertising revenue to BDUs, this fact will be used by suppliers to increase the cost of the services.

attracting advertisers. It puts BDUs into direct competition with all programming services for advertising and, just as importantly, in some instances for *programming content*.

11. We recognize that the bridge has already been crossed to permit the use of local avails for certain limited purposes. The point is, though, that the *Broadcasting Act* clearly envisioned a distinct role for distributors, acting in that capacity, in contrast to the role played by programming undertakings. The sale of advertising within programming has always been the function of the programmer, acting in the capacity of the entity that is responsible for the programming content and has the relationship with advertisers. Changing that role to permit the direct and generally unrestricted sale of local avails is not a small, incremental change to the system. It is a fundamental change.
12. Second, the Canadian broadcasting system has for sound reasons drawn a bright line between Canadian programming services and their obligations to the broadcasting system, and non-Canadian services and their role in *supporting* the broadcasting system. Access to advertising revenue in Canada has traditionally been tied to the requirement to provide Canadian programming. Similarly, access to local advertising has, with the exception of ethnic broadcasters, been tied to the provision of local programming - in the same service. In fact, the CRTC found in its 1993 review of the broadcasting distribution environment, that the sale of advertising targeted to Canadians by non-Canadian services could be construed as carrying on a broadcasting undertaking in Canada - for which a broadcasting licence would be required.²
13. In more practical terms, the sale of advertising directed to Canadians on non-Canadian services has not been permitted because it simply diverts monies that would otherwise be spent on Canadian programming. It hurts Canadian broadcasters with significant programming obligations and enriches non-Canadian services with no such obligations. Obviously, this is counterproductive.
14. The various schemes proposed by BDUs to “prop up” programming funds, or offer advertising spots to promote Canadian services are all designed merely to address a fundamental problem with the whole concept: Canadian broadcasters have obligations that they must fulfil. Non-Canadian services have no such obligations. Every advertising dollar that is spent on an ad in a non-Canadian service - regardless of whether it is sold by a BDU or by the non-Canadian service itself - is diverted from a Canadian broadcaster and must, necessarily, weaken the ability of the broadcaster to offer Canadian programming. Canadian broadcasters are responsible for creating, commissioning, and delivering Canadian programming to Canadians. They should, therefore, have access to all available advertising resources within the small Canadian market to meet those obligations.
15. In addition to the points that the Commission has considered in the past, the following are additional factors that must be addressed.

D. The Current Economic Climate

16. The current proceeding has at least one difference from the previous two proceedings held to look at the use of local avails by BDUs: Canadian broadcasters are facing

² Structural Public Hearing, Public Notice CRTC 1993-74, 3 June 1993.

significant, immediate and alarming loss of advertising revenue due to the current economic climate.

17. The IBG/GDI now knows that conventional broadcasters have experienced a significant decline in revenue and profitability as of the end of the 2008 broadcasting year. It is widely understood, that the last four months of 2008, have been even more disruptive to the advertising market. The CRTC, of course, has delayed the renewal of conventional television licences due to the disruptive effect of the current crisis.
18. The proposal by BDUs to use local avails must be looked at now in a new and harsh light. Every advertising dollar that is diverted from the broadcasting sector into the distribution sector undermines the broadcasting sector further. It is difficult to imagine a step that would be more injurious to the value of Canadian advertising for Canadian broadcasters, than the influx of new advertising inventory on popular non-Canadian services. Moreover, this new form of advertising, which is supposed to be “better” for the advertiser and more localized in nature than the kind of advertising that is currently available, must necessarily draw prime advertising dollars away from Canadian broadcasters at a critical time.

E. New Distribution Rules and Conflicting Incentives

19. The Commission’s new BDU regulatory framework has significantly expanded BDUs’ ability to package non-Canadian services. Under the new rules, for the first time, BDUs may offer a package of predominantly, or even exclusively, non-Canadian services to subscribers.
20. If BDUs have the right to sell advertising in non-Canadian services, then it is immediately apparent that BDUs will have a strong incentive to promote, improve the penetration and increase the viewing to these non-Canadian services at the expense of Canadian services, including offering non-Canadian only packages. Not only will BDUs benefit from subscription revenue (which has traditionally been the case, and which doesn’t depend as much on viewership as it does on packaging), but BDUs will also benefit from increased viewing which will enhance the value of the advertising contained in these services.
21. Overnight, non-Canadian services will become much more valuable services to BDUs in immediate, real economic terms, both in respect to penetration (subscription revenue) and viewing (advertising revenue). BDUs will be incented to promote non-Canadian services in a way that conflicts directly with the interests of Canadian services. This is one reason why BDUs have always been limited largely to fulfilling their distribution function rather than perform a programming function - the sale of advertising. The programming function places them in direct competition with Canadian programming services.
22. Moreover, the traditional role of non-Canadian services as packaging partners to strengthen Canadian services, which has already been weakened by the Commission’s ruling, will have been completely turned on its head. These services will not compete directly with Canadian services for *Canadian* advertising revenue.

F. Impact on Canadian Ethnic Broadcasters

23. In the 2005 review of the CCTA application to exploit local avails, the CRTC noted that Ethnic Channels Group Limited and Fairchild Television Ltd. had raised concerns

regarding the impact on Canadian ethnic services of the sale of local avails in third-language non-Canadian services. These concerns are especially relevant to the current proposal because it appears that the BDUs are seeking the ability to use local availabilities in any non-Canadian programming service, including third-language services.

24. As the Commission is aware, Canadian third language services do not enjoy genre protection from non-Canadian third language services. On a practical level, what this means is that Canadian ethnic broadcasters compete with BDUs to bring non-Canadian third language services into Canada. Ethnic broadcasters strive to bring these services in as Canadianized versions of the non-Canadian service. BDUs, on the other hand, strive to bring non-Canadian services in as foreign services, without regard to the presence of Canadian ethnic broadcasters.
25. The only advantage that Canadian ethnic broadcasters enjoy in this competition with BDUs is that Canadian ethnic broadcasters have the ability to exploit advertising in the third-language programming and, as a result, may offer better economic terms to the non-Canadian programming supplier. In comparison, BDUs offer almost guaranteed carriage, which is already a significant advantage.
26. Permitting BDUs to access local avails in third-language programming services will remove the single advantage that ethnic broadcasters have in bringing in new non-Canadian services. It is already very challenging for ethnic broadcasters to partner with non-Canadian services and launch them in Canada. Removing the advertising advantage will be highly damaging.

G. Alternative Approaches for Targeted Advertising

27. The primary reason put forward by BDUs to use local avails to their own advantage, as we understand it, is that absent direct access to advertising revenue, “BDUs do not have the incentive to incur the costs to upgrade their networks”. At the same time, BDUs suggest that “advertisers would receive substantially greater value from targeted advertising ... and would thus place a higher value on such advertising than on traditional advertising.”³
28. There is an important inconsistency here. If targeted advertising is better and more valuable to advertisers, then *broadcasters* should be stepping forward to take advantage of these opportunities. *Broadcasters* should be working co-operatively with BDUs to find the mechanism that will make targeted advertising economic for all players in the system. BDUs do not, and should not need a specific incentive to act on their own, if what BDUs say about the value of targeted advertising is true.
29. The existing marketplace, in which broadcasters have every conceivable incentive to maximize advertising value and exploit all new technologies, will address the issue if it is economic to do so. In other words, *if* the value of targeted advertising is sufficiently great to cover the costs of the technology and a reasonable return on investment to BDUs and result in an increased return to the broadcaster after compensating the BDU for the use of BDU facilities (on a reasonable basis), then market mechanisms will ensure that arrangements are put in place (with appropriate oversight by the Commission, of course). No additional incentive is required.

³ *Broadcasting Public Notice CRTC 2008-102* at paragraph 4.

30. The CRTC has contemplated this very scenario in *Broadcasting Public Notice CRTC 2008-100*:

Given that new forms of advertising represent new revenue opportunities for all parties and the Canadian broadcasting system in general, and will require, in most cases, cooperation between broadcasters and BDUs, the Commission is of the view that it may be appropriate to convene an industry working group that would be responsible for developing best practices to guide arrangements between broadcasters and BDUs regarding various matters. Such matters would include, among others, those relating to determining the party that would be responsible for selling the advertising inventory and the appropriate sharing of costs and revenues.

This cooperative framework for exploitation of new advertising opportunities presumes that all Canadian players will benefit. If this is the case, then there is no need for any further incentive for BDUs to exploit non-Canadian advertising spots.

31. Rather than encouraging BDUs to focus first on non-Canadian services, the CRTC should be insisting that BDUs work with broadcasters to develop the market for targeted advertising in Canada on terms that work for all players in the system. It is counterproductive to the establishment of a rational and economic Canadian market for targeted advertising to encourage the BDUs to “go it alone” with non-Canadian services. At a minimum, the co-operative approach outlined above should be given a real opportunity to succeed.

H. Conclusion

32. In light of the above, the IBG/GDI strongly urges the Commission to refrain from amending the local avails policy to allow BDUs to sell and place advertising in those spots. To do so will have a significant detrimental impact on Canadian programming services, and in turn on the presentation and creation of Canadian programming. Finite advertising revenues available in the system will be diverted from Canadian programming services, which will weaken their ability to offer Canadian programming. Amending the policy as discussed will also put BDUs in a position to favour non-Canadian services over Canadian services in order to generate a wider distribution of foreign services for which they have sold avails (and hence generate higher revenues). This is most certainly contrary to the spirit and intent of the *Broadcasting Act*.
33. Permitting BDUs to sell local avails will also have a particular negative impact on Canadian ethnic broadcasters, as the single advantage that these services have in bringing ethnic services as partners in Canada is the sale of advertising. Finally, BDUs do not and should not need a specific incentive to act to upgrade their services - particularly given their position with respect to the value of targeting advertising. As stated above, the CRTC should be insisting that BDUs work with broadcasters to develop the market for targeted advertising in our country.
34. Amending the local avails policy could thus fundamentally change the makeup of the Canadian broadcasting industry, significantly weaken existing players - particularly independent broadcasters, as well as reduce the amount and diversity of Canadian programming within the system. The Commission has twice rejected amending its local avails policy in the past four; it should do so again within this policy proceeding.

35. We thank you for the opportunity to provide these comments.

All of which is respectfully submitted.

Yours very truly,

M. Lafontaine
for:

The Independent Broadcast Group/

Le groupe de diffuseurs indépendants

APPENDIX A

INDEPENDENT BROADCAST GROUP (IBG) / LE GROUPE DE DIFFUSEURS INDÉPENDENTS (GDI)

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