

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

Filed electronically

April 2, 2009

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
1 Promenade du Portage  
Gatineau, Quebec  
J8X 4B1

Dear Mr. Morin,

**Re: Reply**  
**Broadcasting Public Notice CRTC 2008-101, *Call for comments on a proposed regulatory framework for video-on-demand undertakings***

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## A. Introduction

1. The Independent Broadcast Group (IBG)/Le groupe de diffuseurs indépendant (GDI) is filing these comments in reply to the first round submissions the Commission received in the above-mentioned proceeding. As noted in our initial filing, the IBG/GDI is made up of a group of small independent pay and specialty television licensees that includes the following participants: 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 Groups of Companies.
2. A review of the first round submissions indicates that there continues to be a clear dividing line among stakeholders with respect to the role that should be assumed by the VOD platform within the Canadian broadcasting system. On one side of this divide are the BDUs that have, for the most part, argued for a regulatory framework for VOD that is light-handed and negligible. On the other side of that divide are the broadcasters and independent producers, most of whom have proposed an appropriate level of regulatory safeguards for VOD services as a means to ensure that the evolution of this new platform promotes, and does not negatively impact the Canadian broadcasting system.
3. The IBG/GDI is concerned that the regulatory framework for VOD that is being proposed by BDUs would, if implemented, cause irreparable damage to the

Canadian broadcasting system and small and independent broadcasters, in particular. The traditional broadcasting system in Canada is in crisis and is under attack from all sides, as new platforms for the delivery of content emerge, even as the Commission backs away from more detailed regulation of the industry. In Broadcasting Public Notice CRTC 2008-100 (Public Notice 2008-100), the Commission announced a light-handed regulatory framework for BDUs that eliminated many of the regulatory support mechanisms that enabled broadcasters in this country to make significant contributions to the system. At the same time, the Internet is quickly becoming a threat to linear broadcasters. The availability of audio-visual content online is drawing viewership and advertising revenues away from linear services. And now, at a time when the country's economy is immersed in a deep recession and the advertising revenues of programming services have declined considerably, the Commission is proposing amendments to the regulatory framework for VOD undertakings and to the local availabilities policy that will further undermine the ability of linear broadcasters to remain financially viable and to contribute in an appropriate manner to the Canadian broadcasting system and the *Broadcasting Act*.

4. The support mechanisms that have historically been used by the Commission to grow and develop the Canadian broadcasting system are rapidly being eroded and we appear to be quickly moving to an environment where one set of stakeholders - the integrated BDU/VOD undertakings - will determine the fate of Canada's programming sector. These integrated undertakings have enormous power over the programming services they distribute and will be able to dictate the terms of carriage for these services on both the BDU and VOD platforms.
5. The IBG/GDI is very concerned about the proposals that are being made in this VOD proceeding. Even under the current rules, our members have little leverage in negotiations with BDUs that operate VOD services. If the BDUs' proposals to adopt a light-handed framework for the increasingly important VOD platform are implemented, small and independent broadcasters could be wiped out, as we would be forced to accept unfair terms of carriage for our VOD programming, to compete with VOD services for programming rights and to watch our advertising revenues shift to the on-demand offerings of these VOD services.
6. The IBG/GDI believes that the Commission must examine how it will regulate the VOD platform in the appropriate context. VOD operates in a closed system and it is no longer at the developmental stage. While licensed as a programming service, the VOD undertaking is evolving into a new on-demand distribution platform that is attracting more and more viewers away from linear services. It is no longer just a transactional service that is similar to a PPV undertaking. Today, the VOD platform is providing BDUs with the ability to create SVOD channels that compete directly with linear services. VOD services have become, therefore, an extension of a BDU - they act as a platform for the delivery of multiple "virtual" programming channels.

7. In making the case for appropriate regulation, we are not suggesting that BDUs should assume all the risks and receive none of the rewards for operating VOD services. But we believe that the framework needs to be more balanced. The VOD platform can be operated in a manner that is financially beneficial to both BDUs and Canadian programming services - but there must be an appropriate regulatory framework in place to ensure that the risks and rewards are shared by all stakeholders in the broadcasting system.
8. Most of the BDUs that filed comments in this proceeding simply fail to acknowledge to the CRTC that the VOD platform could, if not regulated properly, cause considerable harm to broadcasters. Small and independent broadcasters, who have no leverage in their negotiations with BDUs to obtain reasonable terms of access to the on-demand platform, are particularly exposed.
9. With these introductory comments in mind, the IBG/GDI will now provide specific replies to the comments filed in the first round of this proceeding.

#### **B. Access**

10. For the IBG/GDI, the critical threshold issue in this proceeding is to obtain reasonable access to the VOD platform. The Commission needs to ensure that the regulatory framework for VOD includes an obligation on VOD services to provide access to the on-demand platform to licensed Canadian linear programming services on reasonable terms. Many of the BDUs have submitted that there is no access problem for VOD. In fact, some have said that the problem is not access at all, but rather that not enough programming is being made available for the on-demand platform.<sup>1</sup>
11. It is simply not true that there is no access problem with respect to VOD. The members of the IBG/GDI recognize that VOD provides an opportunity to grow their services and to enhance the viewing experience of subscribers. We are eager to access this new platform. There are, however, some important issues that have yet to be resolved.
12. The key stumbling block is the terms under which access to the VOD platform is granted. It needs to be understood that the members of the IBG/GDI have minimal bargaining power when seeking to access the VOD platform. We serve niche audiences and offer specialized programming and are, therefore, well suited to on-demand modes of delivery (in the sense that an on-demand platform permits aggregation of niche audiences, in a similar manner to the “long tail” effect of the Internet). But, partly because of our niche programming, and partly due to our lack of bargaining power in comparison to large, integrated media groups, we do not have the leverage to access the VOD platform on fair and equitable terms.

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<sup>1</sup> Cogeco, for example, makes this point at paragraph 60 of its submission.

13. The terms of access are critically important to our well-being as broadcasters. Our members must be cautious and ensure that the VOD programming provided to BDUs does not cannibalize our linear offerings. The IBG/GDI does not believe that our members should just give the programming to BDUs for distribution on their VOD services in the hope that these BDUs will ensure that it is made available to subscribers in an appropriate manner. Programming services must maintain control over how their programs are made available on-demand as a means to ensure that they reap some benefit from the VOD platform.
14. The cost of acquiring VOD rights to programs aired on our linear services is another issue that has to be considered. The terms under which our programs are offered on a VOD basis must provide us with an adequate return on our investment, or there is no rationale for moving to the on-demand platform. At present, BDUs require small independent services to contribute programs to the VOD platform without any form of compensation. This business model is obviously not sustainable on a larger scale.
15. We are also concerned that VOD is a monopoly service that is evolving in a way that will enable BDUs to offer SVOD packages that compete directly with our linear programming services. Without adequate regulatory protections in place, we could be in a situation where we are providing programming to BDUs, which enables them to create SVOD channels that offer programming in the same genres as our services.
16. The IBG/GDI believes that regulatory intervention is needed to ensure that there is a more balanced relationship between linear programming services and VOD undertakings. By establishing an access right to the VOD platform, linear programming services will obtain some degree of leverage in the negotiations with VOD undertakings, in much the same way that linear services did in 1996 when the CRTC implemented access rules for BDUs.
17. The IBG/GDI proposes that all BDUs that operate VOD undertakings be required to grant access to the SVOD offerings of all licensed linear programming services. We would note that Bell expressed, in its first round comments, support for the notion that “licensed linear broadcasters should have access to the BDUs PPV/VOD platforms on a non-discriminatory basis.”<sup>2</sup>
18. The IBG/GDI does not believe that such an access right would cause any hardship to BDUs that operate VOD undertakings. On the contrary, and as noted above, a number of BDUs have indicated that capacity is not an issue and claim that they cannot obtain enough programming for the VOD platform. This point was made by Rogers in its first round comments:

As noted above, ROD and all other VOD licensees have ample server capacity from which to offer programming on an “on demand” basis. We

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<sup>2</sup> Bell submission at paragraph 35.

are anxious to obtain access to more programming with Canadian VOD exhibition rights, regardless of the source.<sup>3</sup>

19. In the absence of capacity concerns and in light of the BDUs' interest in obtaining more programming, the IBG/GDI cannot see any rationale for refusing to implement an access requirement that would apply to the SVOD offerings of licensed linear programming services.

#### C. Undue Preference Provision

20. The vast majority of parties to this proceeding support the concept of establishing an undue preference provision for VOD combined with a reverse onus provision. However, the IBG/GDI does not believe that this would, by itself, be sufficient to ensure all linear programming services that want to access the on-demand platform are treated in a fair and equitable and non-discriminatory manner. An access right is essential.
21. As noted, small and independent broadcasters have virtually no bargaining power and have experienced considerable difficulty accessing the VOD platform on fair, commercially reasonable terms and conditions. Moreover, it is important to emphasize that VOD is a monopoly or near monopoly service that is operated by terrestrial BDUs. If a linear broadcaster cannot obtain access to a cable BDU's VOD platform, there are no other alternatives to providing subscribers residing in that territory with an on-demand offering. BDUs have a clear responsibility under the *Broadcasting Act* to provide "reasonable terms for the carriage, packaging and retailing" of programming services.<sup>4</sup> An effective denial of access on reasonable terms cannot be consistent with this responsibility.
22. It also needs to be said that small and independent broadcasters do not have the resources to appeal to the CRTC for dispute resolution every time they are treated unfairly by a BDU or a VOD service. The cost of filing and pursuing such a complaint is prohibitive for many of the members of the IBG/GDI, and is viewed only as a last resort.

#### D. SVOD Packages as an Extension of the Linear Service

23. The IBG/GDI supports the proposals made by a number of parties that would authorize licensed Canadian programming services to offer packages of programs in an SVOD format. We believe there is considerable merit to the proposal made by Astral to allow every linear programming service to obtain a licence amendment authorizing them to provide an SVOD extension to their linear programming offering. We also believe, however, that Bell's suggestion that this could be done without requiring each linear service to apply for a licence amendment should be considered. As noted by Bell, the Commission could

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<sup>3</sup> Rogers submission at paragraph 105.

<sup>4</sup> *Broadcasting Act* (Canada), s. 3 (1)(t)(iii).

simply authorize the SVOD offering through the various regulations that apply to pay television, specialty and OTA broadcasters.<sup>5</sup>

24. In either case, and despite what some BDUs have said, the proposal to authorize licensed programming services to provide an SVOD offering would not be complicated or difficult to administer. The Commission has already implemented a similar proposal with respect to high definition television, and it has worked quite well. Under the Commission's framework for high definition television, licensed programming services apply for a licence amendment that allows them to provide a high definition version of their service.
25. The proposal to adopt a similar mechanism for SVOD would not, therefore, be complex. It would be a simple system whereby the same requirements, relating to things like Canadian content and program expenditures, would apply to the SVOD portion of the service.

#### **E. No Back-Door Entry**

26. The vast majority of broadcasters and independent producers who filed comments in this proceeding supported the notion that the Commission must establish criteria relating to SVOD packages to ensure that VOD undertakings are not able to provide an inappropriate "back-door" entry to the Canadian broadcasting system by foreign services that are otherwise not authorized for distribution in Canada. In our view, SVOD packages should not be offered in a manner that competes directly with the linear programming services provided by Canadian licensees. Criteria need to be put in place to ensure that the health of licensed Canadian service is not undermined by the advent of SVOD.
27. The simplest and most effective way to do this is to preclude VOD services from acquiring rights to programming from non-Canadian rights-holders.
28. Under this proposal, those BDUs that operate a VOD undertaking would still be able to offer transactional VOD services as well as SVOD packages that would contain programming offered by Canadian linear services and authorized services from the Eligible Lists. VOD undertakings would also have to continue to strip out advertising from the non-Canadian programming that is offered on an SVOD basis.

#### **F. Acquisition of Rights**

29. This is another issue upon which most BDUs and broadcasters profoundly disagree. The BDUs argue that a rule precluding them from acquiring programs from non-Canadian rights-holders would not be justified.
30. The IBG/GDI disagrees for the following reasons:

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<sup>5</sup> Bell submission at paragraph 24.

31. First, imposing restrictions on the acquisition of program rights would be designed to limit back-door entry into Canada by foreign services that are not authorized for distribution in this country.
32. It would also prevent BDUs from creating SVOD offerings that would compete directly with licensed Canadian programming services.
33. In addition, imposing restrictions on the acquisition of program rights would avoid the scenario where VOD services simply by-pass Canadian programming services and acquire the on-demand rights directly from non-Canadian sources. If the Commission were to allow VOD services to compete for the acquisition of program rights, it would limit the ability of Canadian services from acquiring those rights for their linear service, and would increase the cost of those program rights in the market. It would also place programming services in the invidious position of having to compete directly with BDUs to become programming and brand “partners” with popular non-Canadian services - a programming acquisition approach that the Commission has encouraged for third-language television services.
34. It needs to be understood that there is not an unlimited supply of programming in every genre. Programming is a finite resource and any additional competition from a VOD service to acquire rights to programs will drive up the cost and make it more difficult and expensive for Canadian linear services to obtain the programming. The suggestion by some BDUs that their VOD services could not compete for these rights because they cannot insert ads into these programs is disingenuous because they can still offer that programming on a subscription basis in direct competition with linear services. Moreover, BDUs have the ability to offer non-Canadian programming partners “access” to subscribers, which is something that Canadian programmers must negotiate with BDUs. Therefore, programmers already face a serious disadvantage compared to BDUs in negotiations for programming rights with non-Canadian programming services.
35. For these reasons, the IBG/GDI encourages the Commission to oblige VOD services to acquire program rights only from Canadian rights-holders.
36. Historically, when the Commission has licensed a new class of programming undertaking, it has established a regulatory framework that also ensures that this new type of undertaking does not undermine the viability of other licensed programming services. Each new class of undertaking has traditionally been regulated in a manner that complements other existing classes of licensees. This was the case when the CRTC first licensed pay television and specialty services in the 1980s, as well as PPV services in the 1990s. The licensing frameworks for each of these new types of undertakings were specifically designed to ensure that they would not result in the demise of other stakeholders in the broadcasting system.

37. For this reason, not all programming services have the same obligations or regulatory flexibility. With respect to advertising, for example, PPV undertakings have restrictions on advertising that are similar to VOD, pay television services are prohibited from airing advertisements, community channels are limited primarily to sponsorship advertising, specialty services are, for the most part, limited to airing national advertising and are only permitted to devote 12 minutes per hour to advertising, and OTA television broadcasters have no time restrictions on their advertising. A similar set of differences exists with respect to things like Canadian content and Canadian program expenditures requirements for each class of undertaking and, in some cases, for each undertaking within a given class.
38. The point is that just because the VOD services are licensed as programming undertakings does not mean that they are automatically entitled to have the same flexibility as specialty services or some other class of programming service operating in the Canadian broadcasting system. The regulatory framework for VOD services that is established as a result of this proceeding must ensure that VOD services remain a complement to the pay, specialty and OTA broadcasters that are licensed to operate in Canada, and not a direct competitor - operated and controlled primarily by BDUs.

#### **F. Buy-Through Requirement**

39. Under section 5 of the *Broadcasting Distribution Regulations*, BDUs are currently authorized to provide subscribers with access to PPV, VOD and exempt services without also requiring those subscribers to obtain the basic service. The IBG/GDI is of the view that this exception to the buy-through of the basic service should be eliminated, at least with respect to VOD.
40. All of the BDUs that filed first round comments argued that the current exception should be retained. Shaw even points out that in practical terms maintaining the buy-through exception is “not likely to result in any material decrease in the number of basic service subscribers”,<sup>6</sup> presumably because few customers actually avail themselves of this option today.
41. The reason that few subscribers today opt to subscribe only to VOD or PPV services is that, in the current environment, there are restrictions on what BDUs can do on the VOD platform, and VOD has not yet become a substitute to linear programming services.
42. However, if the VOD platform continues to evolve in the way that it has over the last eight or nine years, and the regulatory framework proposed by the BDUs is approved, VOD will soon become a substitute for the programming that subscribers obtain from linear broadcasters. If the Commission were to accept the arguments of the BDUs in this proceeding and amend the rules to allow VOD

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<sup>6</sup> Shaw submission at paragraph 29.

services to provide SVOD offerings that mirror linear services, there is no doubt that more and more Canadians will begin to rely on the VOD platform to obtain their programming. This would further erode the revenues of licensed Canadian programming services and would ultimately undermine the viability of these services. It will also have a serious impact on the ability of these services to invest in Canadian programming.

43. The IBG/GDI believes that the Commission should eliminate the current buy-through exception, before it begins to have a material impact on licensed Canadian programming services.

#### **G. Advertising Restrictions**

44. The BDUs have advocated for the removal of all advertising restrictions on the VOD platform where the programming is obtained from a Canadian rights-holder. Some have even suggested that this will benefit the system because it will grow the advertising pie.<sup>7</sup> Significantly, no evidence was provided by BDUs that would support this claim.
45. In fact, the only evidence on the record of this proceeding that addresses this issue was provided by the CBC. And as noted by the CBC, that evidence demonstrates that “the changes being considered to the advertising regime would be a zero-sum game which would benefit BDUs at the expense of broadcasters without providing any net benefit to the Canadian broadcasting system.”<sup>8</sup>
46. Allowing BDUs to insert advertising into programming that is offered on an on-demand basis will not grow the overall advertising pie in Canada. The advertising revenues that will be obtained from VOD platform will be taken from linear platform. At the end of the day, there will not be any net gain to the system, and only one stakeholder group, i.e. those BDUs that operate VOD undertakings, will gain from this at the expense of broadcasters.
47. If the Commission and BDUs are looking for a way to incent linear broadcasters to make more programming available for the VOD platform, the prospect of allowing BDUs to insert advertising into that programming is not the way to do it. There will be no incentive for linear broadcasters to participate on the VOD platform if a significant portion of the advertising revenues associated with that programming will end up flowing to the BDUs. In this respect, the IBG/GDI fully endorses the comments of CanWest which emphasized that “the inability to sell and retain revenues generated by advertising content supplied to VOD undertakings would simply provide a disincentive for broadcasters to provide VOD programming going-forward.”<sup>9</sup>

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<sup>7</sup> See, for example, Sasktel submission at paragraph 21.

<sup>8</sup> CBC submission at paragraph 8 and Appendix A.

<sup>9</sup> CanWest submission at paragraph 24.

48. As noted above, if the VOD platform is not managed properly by the Commission, its development could have a material negative impact on linear broadcasters. The fact that programs will be available on a VOD basis will result in fewer viewers watching them on linear channels. In addition, linear broadcasters will incur increased costs to obtain on-demand rights to programming. And linear broadcasters will be providing this programming to a VOD platform that is owned and controlled by BDUs, who will have every incentive to create SVOD packages that mimic the programming genres offered by linear broadcasters in order to directly compete with licensed programming services.
49. From our perspective, the prospect that BDUs will also have the ability to derive advertising revenues from the Canadian programming offered on a VOD basis would act as a further disincentive to accessing the VOD platform. Linear broadcasters will not make use of the on-demand platform if the result is a net loss in terms of revenues.
50. The IBG/GDI would also reiterate that this is not the time for the Commission to consider allowing VOD services to include commercial advertising in the programming they obtain from Canadian rights-holders. The current economic recession is having a devastating impact on advertising revenues of linear services. Most forecasters acknowledge that this will be a deep and long recession. The long-term impact on licensed Canadian broadcasters could undermine their ability to contribute to the broadcasting system and the achievement of the broadcasting policy objectives set out in the *Broadcasting Act*. At this point in time, the Commission needs to be considering regulatory support mechanisms that will shore up the broadcasting industry in this country, and not contribute to its demise. Allowing BDUs to include commercial advertising in VOD programming will fragment the system and harm linear broadcasters.
51. As a final comment on the advertising issues raised in this proceeding, the IBG/GDI would note that the Commission proposed in Public Notice 2008-101 that VOD services should continue to be required “to strip out existing advertising from non-Canadian programming acquired from non-Canadian sources.” The IBG/GDI fully supports this proposal and is pleased to see that a number of BDUs, including Sasktel, Telus and MTS, all agree that this continues to be an appropriate requirement for VOD services.

## H. Conclusion

52. The IBG/GDI strongly believes that the current regulatory framework for VOD has worked reasonably well and has allowed BDUs that operate VOD services to make an adequate return on their investments. It has also allowed consumers to benefit from gaining access to increasing amounts of programming on-demand. With the exception of some refinements and improvements to the current rules, which include implementing an access right to the VOD platform, establishing a reverse onus undue preference provision that would be applicable to VOD

services and ensuring that SVOD packages are offered as an extension to linear services, and eliminating the buy-through exception the IBG/GDI urges the Commission to maintain the current regulatory framework for VOD to ensure that these services continue to contribute in an appropriate manner to the Canadian broadcasting system.

53. We fear that a decision to adopt the “light-handed” regulatory framework proposed in this proceeding by a number of BDUs would cause material and unnecessary harm to the Canadian broadcasting system and would severely damage the small and independent broadcasters that are operating today. This in turn would be contrary to the spirit and letter of the *Broadcasting Act*.
54. We thank the Commission for the opportunity to provide these comments in reply to the first round submissions.

All of which is respectfully submitted.

Yours very truly,

**[filed electronically]**

The Independent Broadcast Group/  
Le groupe de diffuseurs indépendant

**Aboriginal Peoples’ Television Network**

Mr. Jean LaRose, CEO  
Toll Free: 888.278.8862  
M: 204.947.9331  
C: 204.470.4026 / 613.795.9664  
E: jlarose@aptn.ca

**Channel Zero Inc.**

Mr. Cal Millar, VP & General Manager  
Toll Free: 888-994-7233  
D: 416.492.1595 X 237  
C: 416.822.0520  
E: cal.millar@tvchannelzero.com

**Ethnic Channels Group Limited**

Mr. Slava Levin, President & CEO

D: 416.736.7577 X 307

E: slavalevin@ethnicchannels.com

**Fairchild Television Ltd.**

Mr. Joseph Chan, President & CEO

D: 604.295.1313

C: 604.219.2323

E: jchan@fairchildtv.com

Assistant: N/A

**TV5 Québec Canada**

Mme. Suzanne Gouin, President/Director General

D: 514.522.5322 X 112

C: 514.803.0980

E: Suzanne.gouin@tv5.ca

**Stornoway Communications**

Ms. Martha Fusca, President & CEO

Toll Free: 1.888.229.9921

D: 416.756.5501

C: 647.588.9159

E: mfusca@stornoway.com

**S-VOX Group (S-VOX)**

Mr. Bill Roberts, President & CEO

Toll Free: 1.888.321.2567

D: 416.368.3194 X 510

C: 416.571.4865

E: broberts@s-vox.com