

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

Filed via e-pass

February 26, 2009

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

Dear Mr. Morin:

Re: *Broadcasting Public Notice CRTC 2008-101 (the Public Notice)*
Call for comments on a proposed regulatory framework for video-on-demand (VOD) undertakings

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 appreciates the opportunity to provide these comments. As the Commission points out in the Public Notice, the current VOD policy was established when VOD was expected to develop primarily into a feature-film based service. Today, VOD services have become much more and provide a range of television programs - in addition to feature films - including newscasts, prime time drama and children's shows.
3. VOD services are also largely provided by terrestrial broadcast distribution undertakings, as the DTH services are not able to do so due to technological limitations. Thus, terrestrial BDUs, most of which are strong and integrated broadcast businesses, are operating with considerable market strength in the VOD market.
4. As we discuss below, a number of proposals in the Public Notice for a new regulatory framework for VOD/SVOD services could have a significant negative impact on the

Canadian broadcasting system, and in particular on small and independent broadcasting services. In particular, we are concerned about access to VOD platforms by Canadian programming undertakings, the potential for VOD/BDUs to compete with Canadian programming services, and the threat to Canadian linear television services if the advertising rules are relaxed for VOD services.

5. Please note that the IBG/GDI intends to comment in the second round of this proceeding. We look forward to reviewing the other submissions filed within this public process, and providing more details with respect to our policy position.
6. The following are our comments.

B. Access

7. The IBG/GDI is concerned with the Commission's proposal at paragraph 22 of the Public Notice, which states that "such SVOD offerings would have to negotiate distribution with VOD operators". Given the market dominance of BDUs including the lack of competition in the area of VOD/SVOD, we are concerned that smaller broadcasters with fewer resources would be in a disadvantaged position negotiating with the VOD services.
8. As stated, VOD services currently offer a range of television programming. Some programming services have access to VOD platforms, but not all. One way of ensuring access to VOD/SVOD platforms by linear programming services would be for the Commission to introduce non-discriminatory VOD access. The Commission could also establish an open and transparent procedure regarding access and require BDUs to publish a transparent schedule of fees.
9. Indeed, a critical element is for the flagship programs of linear services to be made available on VOD.

C. Undue Preference/Disadvantage Provisions

10. At paragraph 25 of the Public Notice, the Commission seeks comments on whether undue preference/disadvantage provisions of the Commission's regulations, including a reverse onus provision as announced in Broadcasting Public Notice 2008-100 are sufficient to govern the relationship between linear services and VOD licensees.
11. The IBG/GDI does not believe that the undue preference/disadvantage provisions are sufficient to govern the relationship between linear services and VOD licensees. Given the market dominance of BDUs/VOD services, at a minimum, clear and transparent rules for providing access will need to be established.
12. In an era where the market is changing rapidly, and the economic challenges are enormous, dispute resolution mechanisms are not the ideal way for resolving matters between parties, particularly when one party enjoys significant market strength. Clear, equitable and transparent rules are required.

D. No Back-door entry to the Canadian Broadcasting System

13. At paragraph 31 of the Public Notice, the Commission asks whether it should establish criteria with respect to SVOD packages to ensure that they do not provide an inappropriate “back-door” entry to the Canadian broadcasting system for unauthorized non-Canadian services.
14. Indeed the IBG/GCI is concerned that VOD licensees by-pass Canadian linear services and offer SVOD services that are in direct competition to linear broadcasting services. This of course could have devastating effects on Canadian linear programming services in terms of negotiating rights, selling advertising and attracting/retaining audiences.
15. Consequently, the Commission should, therefore, limit the programming provided by the SVOD services. One way of limiting back-door entry into the system would be to only permit SVOD services to carry content from foreign services that are on the CRTC’s lists of eligible services. Another way is to ensure that the programming of a broad range of Canadian linear services is also available on the SVOD services.

E. Acquisition of Rights

16. At paragraph 48 of the Public Notice, the Commission seeks comments on its preliminary view that VOD undertakings should not be obliged to acquire programs only from Canadian rights holders.
17. The IBG/GDI is opposed to this proposal. Permitting VOD undertakings to acquire program rights from non-Canadian rights holders would essentially allow BDUs to bypass Canadian programming undertakings, and compete directly with them. VOD platforms should compliment Canadian linear services, not hinder them. VODs should not be regulated in a way that puts increased competitive pressures on Canadian linear television services, and thereby limits their ability to bring the best programming from Canada and abroad to Canadian audiences.
18. BDUs are the conduits for bringing programming into the homes of Canadians. Granting BDU SVOD or VOD services the ability to negotiate programming rights from non-Canadian rights holders will again provide them with the ability to bypass Canadian programming services, and take on a more significant role as programmer through their VOD services, rather than as distributor.
19. This could have very damaging effects on the Canadian broadcasting system, even if the programming contributions of VOD services to production funds is increased from the current level of 5% of revenues. The strength of our system rests on its diversity: diversity of content and diversity of players. This includes specialty, pay, OTA and VOD services. Granting the current VOD undertakings the authority to program and negotiate rights would place significant and unwarranted pressures on the key components of Canada’s television broadcasting industry.

20. We also note that the Commission has recently expressed concern regarding the increasing costs of non-Canadian programming in comparison to Canadian programming¹. We believe that placing BDUs in the position where they would compete directly with Canadian programming undertakings to acquire rights to non-Canadian programming would increase pressure on the cost to acquire these rights. As a consequence, the trend of increasing expenditures on non-Canadian programming compared to Canadian programming would continue. It is not, therefore, advisable to permit BDUs to compete directly with Canadian programming services in the acquisition of rights for non-Canadian programming.

F. Buy-through Requirements for Video-on-Demand Undertakings - section 5 of the Broadcasting Distribution Regulations (BDU Regulations)

21. At paragraph 80 of the Public Notice, the Commission seeks comment on whether the exception to the buy-through requirements of section 5 of the BDU Regulations remains appropriate for VOD undertakings. Section 5 states that “no licensee shall provide a subscriber with any programming services, other than pay-per-view services, video-on-demand services on the programming services of exempt programming undertakings, without also providing the basic service of the licensee.” (the buy-through requirement)
22. In our respectful view, we do not believe that the exception to the buy-through requirement should remain in place. VOD services have and will continue to take on greater importance within the broadcasting system as we go forward. If BDUs are able to bypass Canadian licensed services in terms of (i) negotiating non-Canadian rights, (ii) providing the programming of non-Canadian services that are not on the eligible lists, (iii) and providing their subscribers with VOD services without the basic service, many Canadian television services may have to call it quits.
23. While it is important that the Commission update its regulatory frameworks, reviews should be done in such a way that ensures that the entire system will benefit. Maintaining the exception to the buy-through requirement leaves yet even greater strength in the hands of the dominant player within the Canadian broadcasting system.

G. Retain Current Advertising Rules

24. At paragraph 63 of the Public Notice, the Commission asked whether VOD licensees should be allowed to include commercial messages in programming purchased directly from Canadian producers, as well as in programming acquired from Canadian broadcasters. The Commission also asked whether there are ways that the use of new forms of advertising, specifically targeted advertising can, be encouraged in the VOD environment.
25. As stated, the IBG/GDI opposes any amendment to the Commission’s VOD advertising policy because there is a finite number of advertising dollars in the system. While the platform in this case for advertising may be new, the advertising dollars themselves are not. Advertising - as a percentage of GDP - has remained relatively constant over the

¹ *Broadcasting Notice of Consultation CRTC 2009-70.*

last forty years. And, new platforms for advertising do not grow the advertising pie; rather they divide it.

26. Moreover, we are facing the worst economic challenges in eighty years. The broadcasting sector is facing severe financial pressures; laying off staff, downsizing, with the possibility of having to sell assets. In a recent speech, Mark Carney, the Governor of the Bank of Canada could not predict how long this recession will last or how deep it will go.
27. It is also important to note, that even after the recession is over, there are indications that clearly point to a fundamental need for regulatory support for the Canadian Broadcasting system as a result of, among other things, fragmentation stemming from both conventional and new technologies.
28. Further, if VOD/SVOD services are permitted to sell advertising and thereby take advertising revenues from other broadcasting services, there will be a reduction in support of Canadian programming and Canadian expenditures within the system. As examples, IGB/GDI members Fairchild Television, ichannel, VisionTV and APTN respectively contribute 29%, 37%, 47% and 60% of revenues each year on Canadian programming. Conversely, VOD services are currently required to direct 5% of their revenues to a Canadian production fund.
29. Thus, an amendment to the Commission's VOD advertising policy will result in, a reduction in the diversity of voices within the Canadian broadcasting system, which runs counter to the Commission's Diversity of Voices Policy released January 15, 2008 (Broadcasting Public Notice CRTC 2008-4). This issue is especially important for Canadian third-language programming services. These services already compete directly with BDUs to acquire Canadian rights to non-Canadian programming under the Commission's relaxed entry rules for non-Canadian third-language services. The ability of Canadian programming services to sell advertising in connection with non-Canadian programming is the most significant advantage that Canadian broadcasters have in negotiating these rights in comparison to BDUs. Keep in mind that BDUs have the ability to offer non-Canadian programming services carriage, which is something that Canadian broadcasters have to negotiate with the BDUs. Clearly, Canadian programming services are already facing an uneven balance of power in comparison to BDUs in acquiring Canadian rights to non-Canadian third-language programming.
30. VOD is now established and is becoming a significant force in the Canadian broadcasting system. These services are largely owned by BDUs, who have extensive resources and extensive monopoly power within the system. These services are not, by any means, in need of regulatory relief in the area of VOD advertising.

H. Conclusion

31. In light of the above, the IBG/GDI urges the Commission to tread lightly in its review of the regulatory framework for VOD services. It is important given the economic and technological challenges that Canadian broadcasters face, to adopt policies and regulations that will allow all licensees to thrive and make meaningful contributions to the system.

32. We thank you for the opportunity to provide these comments, and very much look forward to providing further comments in the second round of this proceeding on April 2, 2009.

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 INDÉPENDANTS (GDI)

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