



Filed via epass

25 January 2008

Mr Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Gatineau, Quebec
K1A 0N2

Dear Mr. Morin:

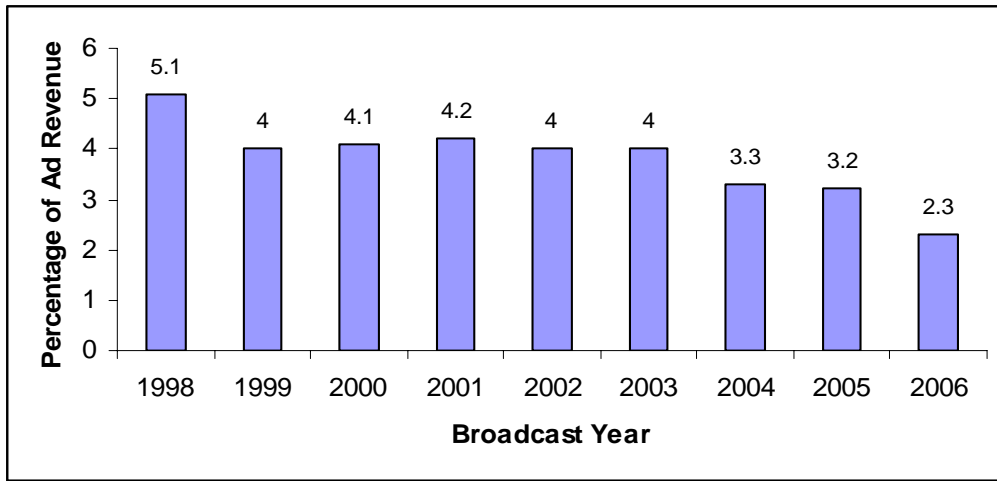
Re: Broadcasting Notice of Public Hearing (“BNPH”) CRTC 2007-10, 5 July 2007 as supplemented by BNPH CRTC 2007-10-1, 12 September, 2007; BNPH CRTC 2007-10-2, 26 September, 2007; BNPH 2007-10-3, 5 November, 2007; and BNPH CRTC 2007-10-4, 30 November 2007 (collectively, the “Notices”); Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services.

1. These comments have been prepared by the Coalition of Canadian Audio-visual Unions (CCAUC) in response to BNPH CRTC 2007-10-3, 5 November 2007 and BNPH CRTC 2007-10-4, 30 November 2007. The CCAUC has already made an extensive submission in the first round of this proceeding.
2. For the purposes of this submission, CCAUC represents the following Canadian audio-visual unions: ACTRA (the Alliance of Canadian Cinema Television and Radio Artists), the Directors Guild of Canada (“DGC”), the National Association of Broadcast Employees and Technicians, Local 700 CEP (“NABET”) /Communications, Energy & Paperworkers Union and the Writers Guild of Canada (“WGC”).
3. In this round, CCAUC will limit its comments to the issues of “fee for carriage” and distant signals, which were added to this proceeding in BNPH 2007-10-3. In the case of distant signals, CCAUC addresses the concept of non-simultaneous substitution (NSS) and explains why current agreements between U.S. producers and unions that treat Canada as part of the U.S. market present challenges for this concept in Canada.
4. CCAUC also intends to review the comments made by others in this and the previous round and to reply to those comments in the next round of comments due on February 22, 2008. And as noted in its first submission, CCAUC wishes to participate in the Commission’s public hearing scheduled to begin on April 7, 2008.

A) Fee for carriage

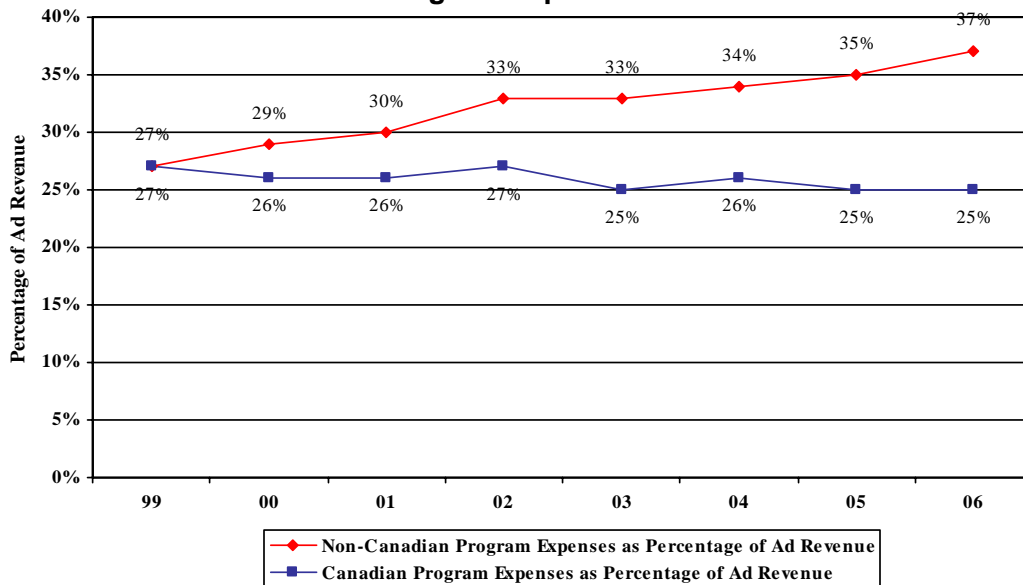
5. In BNPH CRTC 2007-10-3, the Commission asked parties the following questions concerning fee for carriage:
 - Whether the payment of a fee by BDUs is essential for the ongoing viability of conventional television stations and their ability to fulfil regulatory obligations.
 - Empirical evidence as to the impact such a fee would have on:
 - overall fees paid by subscribers and, in particular, fees for basic service;
 - the ability of discretionary services to fulfil their regulatory obligations;
 - broadcasting distribution undertakings.
 - Whether the introduction of such a fee should warrant changes in the distribution status of OTA television stations. For example, should stations receiving such a fee retain priority distribution status as part of the basic service of terrestrial BDUs.
 - If such a fee were to be implemented:
 - whether it should be a specific amount or a negotiated rate;
 - what proportion of the fee should be dedicated to incremental expenditures on Canadian programming, including local programming.
6. Most of these questions are best answered by those who advocate the introduction of fee for carriage, and CCAU expects that the OTA television stations will address these questions in their filings on January 25, 2008. In the absence of these filings, CCAU does not take a position in this submission as to whether there should or should not be a fee for carriage.
7. In that regard, CCAU wishes to reiterate its earlier position that the OTA broadcasters must meet their regulatory obligations regardless of whether fee for carriage is introduced. This includes the proposed introduction of a recommended 7% of revenue expenditure condition to be placed on OTA broadcasters in order to fund the creation and exhibition of top quality Canadian drama. Using CRTC statistics, we have shown in chart form below the plummeting percentage of revenue spent by the OTA broadcasters on Canadian drama since the abolition of the percentage of revenue condition in 1999.

Ratio of Expenditures on Canadian Drama of Private English OTA Broadcasters to Total Advertising Revenue 1998-2006



8. At the same time, the spending by Canadian private English OTA broadcasters on non-Canadian programming has soared compared with their spending on Canadian programming. This is graphically shown in the chart below. As will be seen, those broadcasters spent only 25% of their advertising revenues on all eligible Canadian programming in 2006, a reduction from 27% in 1999. However, spending on non-Canadian programming jumped from 27% of advertising revenues in 1999 to 37% of ad revenue in 2006, a new high.

**Private English TV Stations in Canada
Ratios of Program Expenses to Ad Revenue**



Source: CRTC Statistics

9. In its OTA decision last May, the Commission specifically drew attention to this disturbing development and stated that “the continuing reduction in the proportion of total programming expenditures allocated to Canadian programming is cause for concern.”¹ The CCAU will not reiterate all the points made in its previous submissions regarding the importance of Canadian drama. However, it is clear from the soaring expenditures made on U.S. drama productions by the private English OTA TV broadcasters that money exists in the system but is being allocated to items other than Canadian drama by those broadcasters.
10. It has been sufficiently demonstrated over the past ten years that if the Commission wishes to see more high quality indigenous drama on the television screens of Canadian viewers, it is not sufficient to rely on OTA broadcasters’ promises. The system requires that there be a re-imposition of an expenditure requirement. The introduction of fee for carriage could assist in accomplishing that objective, but is not a pre-requisite.
11. From a legal perspective, CCAU believes that the Commission does have the requisite authority to impose a fee for carriage should it wish to, and the Commission has so indicated in its OTA TV decision last May.² The Commission has broad powers in this regard, and CCAU notes in particular that section 3(1)(e) of the *Broadcasting Act* states that

“each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming.”
12. The ability of the Commission to withstand a legal challenge to its jurisdiction to introduce a fee for carriage regime will turn on the use of the resulting funds to further the goals of the *Broadcasting Act*. As noted above, the creation and presentation of under-represented Canadian programming is such a goal.
13. At the time of the TV policy consideration in 2006, the CCAU indicated its strongly held view that if the Commission did feel that OTA TV signals should attract a new subscriber fee, then significantly increased expenditures should be made on Canadian drama. The CCAU’s proposed requirement that OTA TV licensees expend 7% of their revenue on Canadian drama is absolutely fundamental and should not be dependent on any incremental subscriber fees derived from fee for carriage. If there is additional revenue from fee for carriage, most if not all of that incremental revenue – in addition to the 7% expenditure requirement we have urged elsewhere -- should be earmarked for the hardest genre of Canadian programming to produce and finance, namely, Canadian drama.
14. The CCAU provided to the Commission its understanding that since 1998, U.S. conventional TV stations have begun to receive significant fees for carriage, depending on their bargaining power. However, in Canada, it is hard to imagine the Commission dispensing with “must-carry” rules for local TV signals, given their fundamental role in the Canadian broadcasting system. Thus the two regimes are quite different.
15. In summary, the CCAU believes that if the Commission intends to establish a fee for carriage regime, then any incremental revenues should be put to work for the benefit of the Canadian broadcasting system, and more particularly for the creation of Canadian drama.

¹ *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, May 17, 2007, at para.91.

² *Ibid*, at para. 23.

The Commission has the requisite legal authority to introduce a fee for carriage regime, but should ensure that funds received from it are directed to the programming area of greatest need for financial support, namely that of Canadian drama.

B) Distant signals and non-simultaneous substitution

16. The Commission has also asked parties to address the impact of the importation of distant signals by BDUs on local TV stations. Currently, CRTC policy addresses this matter by requiring BDUs to implement “simultaneous substitution.”
17. Simultaneous substitution occurs when a Canadian broadcaster buys exclusive Canadian rights to a U.S. program and broadcasts it the same time as it is broadcast by a U.S. border station carried by a Canadian cable or satellite BDU. Under the *Broadcasting Distribution Regulations*, where a cable or satellite BDU carries the Canadian station and is given timely notice, it is required to substitute the Canadian signal (including the Canadian commercials) for the U.S. signal on the channel assigned to the U.S. station. Thus the revenue from the ads on the show is maximized for the Canadian broadcaster, and the U.S. border station is prevented from siphoning off ad revenue from a market for which it was never licensed.
18. The practice of “simultaneous substitution” was first required by the CRTC in 1975. The rationale for the adoption of this policy was to help conventional broadcasters generate sufficient revenues to support the presence of Canadian broadcasting in our system. The policy has, however, not worked with respect to broadcaster support for Canadian programming, as outlined above.³
19. Over the years, non-simultaneous substitution (NSS) has also been suggested as an alternative approach to simultaneous substitution for allowing Canadian broadcasters to fully exploit their program rights. Because the issue of NSS involves a consideration of agreements between U.S. producers and unions, CCAU considers that it may be useful to provide the following information to the Commission.
20. Since 1990, the retransmission by BDUs of local or distant signals, initially intended for free over-the-air reception, without the authorization of the copyright holder, has been permitted under the Canadian *Copyright Act*, subject to the payment of royalties set by the Copyright Board of Canada in the case of distant signals, and subject to the requirement that the

³ Interestingly, the U.S. has similar policies called the “network non-duplication” and syndicated exclusivity rules. Network-nonduplication rules bar U. S. cable operators from importing the signal of network affiliates from other markets. In the United States, upon the request of a local station which has the exclusive rights to distribute a network program, a cable operator generally may not carry a duplicating network program broadcast by a distant station. However, an otherwise distant station is exempt from the application of the network nonduplication rules if it is considered significantly viewed in a relevant community. Likewise, under the FCC’s cable television syndicated programming exclusivity rules, a cable system may not import duplicating syndicated programming which has been purchased by a local station on an exclusive basis. In both situations, the FCC’s rules in general provide stations such protection within a station’s 35-mile geographic zone. However, a local station may not exercise either right if an otherwise distant station is considered “significantly viewed” within the community served by the cable system. The significantly viewed exemption to the Commission’s exclusivity rules is based on an otherwise distant station establishing that it receives a “significant” level of over-the-air viewership in a subject community. These rules were expanded to satellite carriers by the FCC in 2000.

signal is retransmitted simultaneously and without alteration. This regime is set out in the *Copyright Act* and is consistent with Article 2006 of the *Canada-U.S. Free Trade Agreement*.

21. However, it is clear that the retransmission of broadcast signals on a non-simultaneous basis would require the authorization of the holder of the copyright in the program.⁴
22. Non-simultaneous substitution addresses the single most problematic aspect of simultaneous substitution, namely, that Canadian stations become tied to the schedules for the U.S. networks and U.S. border stations. The result is that Canadian programs are typically fitted into the prime-time schedule after the best spots have been taken.
23. How would NSS be implemented in Canada? The obvious approach would be for the Canadian networks or stations to seek authorization from their U.S. program suppliers to transmit the programs twice. One transmission would be a normal free-to-air broadcast (including Canadian commercials) which would be retransmitted by the BDU simultaneously on the cable channel assigned to the Canadian station. The second transmission would be a "cable run" which would occur at the time that the U.S. border station is running the program, and here the BDU would substitute the Canadian program for the U.S. signal going to its subscribers. The Canadian version of the program would either have been recorded by the BDU upon its original broadcast or the second transmission of the program would be sent directly to the BDUs head-end for retransmission to BDU subscribers in place of the U.S. signal.
24. This regime would be fully compliant with the Canadian *Copyright Act* and with the *Canada-U.S. Free Trade Agreement*. Given enhanced recording features employed by BDUs, there would be no technical impediment to this approach either.
25. However, the problem lies in obtaining authorization from the U.S. program suppliers. And here the problem lies in certain provisions of the current collective agreements between the Alliance of Motion Picture & Television Producers (AMPTP) and the writers, directors and performers unions. AMPTP represents more than 350 TV production companies in the U.S., including CBS Paramount Network TV, Universal Media Studios, Twentieth Century Fox Television, ABC and Warner Bros TV. Over the years, the agreements negotiated by AMPTP with the U.S. unions have consistently treated Canada as part of the U.S. market.
26. A good example is the AMPTP agreement with the Screen Actors Guild (SAG). The current version of this contract runs from July 1, 2005 to June 30, 2008, but the clause in question dates back to agreements entered into in the 1960's, 1970's and 1980's. Similar provisions are in the AMPTP agreements with the Directors Guild of America (Clause 11-101) and the Writers Guild of America (Article 15.B.1).
27. Under the agreement between AMPTP and SAG, a significant upfront fee is payable to performers upon the initial broadcast of a television program and it "constitutes payment in

⁴ There is a limited exception stated in paragraph 3(a)(vii) of Article 2006 of the *Canada-U.S. Free Trade Agreement* which allows Canada or the U.S. to "permit non-simultaneous retransmissions in remotely-located areas where simultaneous reception and retransmission are impractical". This exception reflected a provision in the U.S. copyright legislation allowing cable systems in Alaska to implement a system where programs could be taped off-the-air from TV stations in the continental US and then flown up to Alaska for later replay. However, no equivalent provision was put in the Canadian *Copyright Act* and the advent of satellite BDUs has rendered the section inapplicable.

full for one run in each city in the U.S. and Canada.” Additional compensation at prescribed rates is then paid for each subsequent run in network prime time. However, the key clause states that “A repeat in any city [in the U.S. or Canada] puts a motion picture in a subsequent run.”

28. The key question is whether an NSS “run” going only to Canadian cable subscribers would be viewed as a “subsequent run” for the purpose of the agreement. If it is so treated, the result is that if a Canadian TV station or network were to purchase the rights to an extra run for any city in Canada, it would trigger a rerun payment as if it was a rerun on every TV station in North America.⁵ Similar rerun payments would apply for writers and directors. Because these payments are based on the whole North American market, they would dwarf any benefits to be achieved from NSS in Canada and would offset any benefits to be achieved from NSS in Canada.
29. If the extra revenue from the NSS run were treated the same as the sale of the program to a cable network, the result would be quite different. In that case, under the part of the AMPTP agreement dealing with sales to cable networks like USA Network, the result would be that a simple percentage of the payment made by the Canadian station or network to the U.S. program supplier would be remitted as a residual payment to the unions. Under the current AMPTP agreements, the total percentage would be about 11%.
30. However, the current wording of the agreements does not support this approach. In that regard, the AMPTP has rejected in the past the notion of separating the Canadian and U.S. broadcast markets. Absent such a change, Canadian TV stations or networks would be liable for a North American rights payment for a single NSS telecast in Canada. The result is that NSS cannot be considered an option in Canada unless the agreements between AMPTP and the U.S. unions are renegotiated.
31. The implementation of NSS would have a significant benefit, namely it could free up Canadian stations to plan their own broadcast schedules and hopefully provide better placement for Canadian programs. However, there might also be some drawbacks to NSS. Apart from the added cost that would need to be paid to U.S. suppliers, one would also need to consider the impact on viewing of the added NSS runs of U.S. programs in Canadian markets.
32. That being said, CCAU recognizes that the importation of the signals of U.S. stations into the Canadian broadcasting system, whether subject to simultaneous or non-simultaneous substitution, has created complex policy problems that are not easy to resolve. Whatever the outcome of these policy discussions, however, the creation and funding of Canadian drama remains an overwhelming imperative if our broadcasting system is to be truly Canadian. That is why expenditure requirements for Canadian drama are absolutely essential.
33. We thank you for the opportunity to provide these comments.

⁵In 1973, AFTRA, a sister union to SAG, took the U.S. networks to arbitration over this clause, arguing that the fact that CHEK-TV, Victoria ran the same programs as CHAN-TV Vancouver and was receivable over-the-air in Vancouver, constituted a second run in the Vancouver market and thereby triggered a North American payment. In that case, the arbitrator held that Vancouver was a different market than Victoria and the U.S. networks prevailed.

34. All of which is respectfully submitted.

Yours truly,

COALITION OF CANADIAN AUDIO-VISUAL UNIONS,



Stephen Waddell
National Executive Director
Alliance of Canadian Cinema, Television
and Radio Artists



David Hardy
Business Agent
National Association of Broadcast Employees &
Technicians (NABET)/ Local 700
Communications, Energy & Paperworkers
Union



Brian Anthony
National Executive Director and CEO
Directors Guild of Canada



Maureen Parker
Executive Director
Writers Guild of Canada