

October 31, 2016

Filed via GCkey

Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

**Subject: Broadcasting Notice of Consultation CRTC 2016-385 Call for Comments on
Discretionary Services Regulations**

Dear Ms. May-Cuconato,

- 1 CBC/Radio-Canada is pleased to provide its comments on the Commission's proposal to merge the regulations for specialty and pay television services into a single set of regulations to be known as the *Discretionary Services Regulations*. Subject to our comments below, CBC/Radio-Canada supports the changes proposed by the Commission.
- 2 Our comments focus on the following issues:
 - a. the proposed wording in section 1 of the Discretionary Services Regulations which sets out the definition of *Commercial Message* for Discretionary Services; and
 - b. the proposed restrictions on exclusive programming rights.
- 3 These issues are discussed in greater detail below.

Definition of *Commercial Message*

- 4 Section 1 of the proposed *Discretionary Services Regulations* describes what constitutes a *Commercial Message*. The Commission has proposed that it read as follows:

Commercial Message means an advertisement that is intended to sell or promote goods, services, natural resources or activities, including by mentioning or displaying in a list of prizes the name of a person that is selling or promoting the goods services, natural resources or activities.

- 5 This wording appears to capture non-traditional advertising within a television program. This would be inconsistent with the Commission's policy determinations on the treatment of non-traditional advertising set out in Broadcasting Decision CRTC 2011-441 and in the current *Specialty Service Regulations*. This would also be inconsistent with the Commission's treatment of non-traditional advertising on conventional television set out in Broadcasting Public Notice 2007-98 and the *Television Broadcasting Regulations*.
- 6 The current definition of *Commercial Message* in the both the *Specialty Service* and *Television Broadcasting Regulations* makes it clear that only advertising that is "broadcast in a break within a program or between programs" is be counted as a commercial message.
- 7 The Corporation notes that the Commission's proposed language appears to be taken from section 2 of the *Pay Television Regulations*, which were developed for services that did not have the authority to broadcast advertising material. The Commission has eliminated the prohibition against commercial messages for pay television as the new streamlined licence class of discretionary services. Therefore, the Corporation submits that in light of the Commission's existing policy on non-traditional advertising, the following wording, which is consistent with both the current *Television Broadcasting* and *Specialty Service Regulations*, would be more appropriate for section 1 of *Commercial Message*:

Commercial Message means an advertisement that is intended to sell or promote goods, services, natural resources or activities, including by mentioning or displaying in a list of prizes the name of a person that is selling or promoting the goods services, natural resources or activities **and that is broadcast in a break within a program, or between programs.**

(emphasis added)

- 8 In addition, the logging section 7(1)(iii) of the current *Specialty Service Regulations* should be maintained for consistency since the proposed wording appears to impose a requirement

to log non-traditional advertising. This would require that discretionary services log *segments* of a program containing product placement as a commercial message which is inconsistent with existing policy as stated above. It would also create an undue administrative burden on discretionary services.

Restrictions on Exclusive Programming Rights

- 9 Section 11 of the proposed *Discretionary Services Regulations* describes what constitutes an undue preference or disadvantage. The Commission has proposed that it read as follows:
 - 11(1) A licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage.
 - (2) In a proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.
 - (3) If a licensee distributes an on-demand program for which it has acquired exclusive or other preferential rights it shall be considered to have given itself an undue preference.
- 10 This wording would appear to introduce a general prohibition on discretionary services acquiring exclusive rights for on-demand programming which is inconsistent with the current program acquisition practice for specialty and pay services.
- 11 Linear pay and specialty services commonly acquire exclusive rights to programming for both linear and on-demand platforms. This strategy gives them the opportunity to exclusively distribute their acquired programming as part of a brand offering on the on-demand platform in an orderly manner in conjunction with linear distribution. BDU-specific on-demand licensees have restrictions with respect to offering exclusive content. This is to ensure that consumers do not have to subscribe to a particular BDU to access exclusive programming.
- 12 The Corporation notes that the Commission's proposed language appears to be taken from section 6.1 of the *Pay Television Regulations*, which prohibits pay and on-demand licensees from acquiring exclusive rights to pay-per-view programming. This provision

does not apply to linear discretionary services because they do not broadcast pay-per-view programming.

- 13 We believe that the objective of the proposed language is to ensure that on-demand licensees do not acquire exclusive programming rights which was put in place to avoid direct competition with discretionary services and between BDUs.
- 14 As the Commission is aware, specialty and pay services are not themselves the on-demand licensee for on-demand content and that on-demand services are governed under a separate and distinct licensing regime. On demand services, which are typically operated by BDUs, are themselves subject to their own conditions of licence in relation to exclusivity. The standard conditions of licence for on-demand licensees¹ specifically state that “the licensee shall not acquire exclusive rights for any of the programming offered on its programming service.”²
- 15 In light of the above, it would appear that the undue preference section in the proposed *Discretionary Services Regulations* is unnecessary and redundant since the matter of on-demand exclusivity is dealt with under the standard conditions of licence for on-demand services. Furthermore, it is contradictory with the common practice of programming acquisition for pay and specialty services as it would restrict their ability to exploit on-demand rights for content. As a result CBC/Radio-Canada believes that the proposed paragraphs 11(2) and (3) should be removed.

¹ Current standards in Broadcasting Regulatory Policy CRTC 2015-355, and proposed standards in Broadcasting Notice of Consultation CRTC 2016-195.

² BRP CRTC 2015-355 (paragraph 11) and BNC CRTC 2016-195 (paragraph 14).

16 CBC/Radio-Canada appreciates the opportunity to submit these comments in this proceeding.

Yours truly,

A handwritten signature in black ink that reads "Bev Kirshenblatt". The signature is written in a cursive style with a large initial "B".

Bev Kirshenblatt
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