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By fax  
Original to follow

Mr. Michael Hennessy  
Acting President  
Canadian Cable Television Association  
360 Albert Street, Suite 1010  
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Dear Mr. Hennessy:

### Re: Addition of Services to the Lists of Eligible Satellite Services

#### *CCTA's Request*

By letter dated 18 June 2003, the Canadian Cable Television Association (CCTA) requested that the Commission add a number of non-Canadian programming services to the Lists of Eligible Satellite Services (the Lists), for distribution on a digital basis in Canada.<sup>1</sup> The services requested for distribution included, among others, Home Box Office (HBO), Showtime and ESPN.<sup>2</sup> CCTA proposed that these services be packaged with Canadian digital pay and specialty services as a condition of carriage.

CCTA acknowledged in its letter that the services requested may be partially or totally competitive with licensed Canadian programming services, or may hold exclusive rights to certain programming, and would therefore likely be ineligible to be added to the Lists under the Commission's current policies, set out in Public Notice CRTC 2000-173, 14 December 2000.<sup>3</sup> Accordingly, CCTA requested that the Commission review its existing policies with respect to the authorization of non-Canadian specialty and pay services in the movie, sports, news and children's programming genres.

CCTA submitted that non-Canadian programming services in these genres should be permitted to be added to the Lists in a streamlined process, specifically, without the need

<sup>1</sup> The most recent Lists are appended to *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2003-43, 5 August 2003.

<sup>2</sup> The non-Canadian services proposed for addition to the lists are Home Box Office (HBO) and HBO multiplexes, Showtime and Showtime multiplexes, Starz and Starz multiplexes, Sundance, Cinemax, The Movie Channel, Lifetime Movies, Flix, Fox Regional Sports Net Channels, The NFL Channel, ESPN, ESPN2, Fox News, FamilyNet, Noggin, Nickelodeon Kids and WAM!

<sup>3</sup> Entitled *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*.

for the formal sponsorship arrangement currently required, and notwithstanding that such services may, contrary to Commission policy, be (a) totally or partially competitive with existing licensed Canadian specialty or pay television services, or (b) hold preferential or exclusive rights in relation to the distribution of programming in Canada.

In support of its requests, CCTA submitted, among other things, that (a) consumers are demanding choice and are increasingly unwilling to accept restrictions on the ability to access non-Canadian services or content; and (b) unless and until Canadian distributors are able to offer increased choice among key programming genres, including familiar brands currently available to American viewers or Canadian black-market viewers, it will be virtually impossible to realize the transition to digital distribution or repatriate customers who are leaving the regulated system.

CCTA submitted that adding the services to the Lists would result in many benefits. Among other things, CCTA maintained that:

- a) choice could be enhanced and the penetration of Canadian services increased through the addition of these services for distribution on digital platforms only and subject to requirements for a preponderance of Canadian services;
- b) the addition of these services would result in an increase in the benefits of competition, including lower prices, greater quality, more innovative service offerings and increased supplier responsiveness;
- c) removal of restrictions on popular U.S. programming is an important element in combating the black market; and
- d) opening up the Lists for movies, sports, children's and news services would increase the attractiveness of digital tiers, making a "compelling case for digital", and thus contributing to the overall health of the Canadian broadcasting system.

CCTA recognized that there could be negative impacts for individual Canadian pay and specialty services as a result of increased competition and/or a reduction in the ability to acquire rights to non-Canadian programming. However, in CCTA's view, the impact on most Canadian programming services "should not be significant".

CCTA stated that the current regulatory restrictions effectively prevent any meaningful discussion of the benefits that these services could bring to the Canadian broadcasting system. It submitted that a public proceeding to consider their application would provide the Commission with an opportunity to objectively assess the benefits and risks of increasing competition and consumer choice.

### *The Commission's Determination*

The Commission's approach to the addition of non-Canadian services to the Lists reflects a number of policy objectives set out in section 3 of the *Broadcasting Act*, including that (a) programming should be varied and comprehensive, and drawn from local, regional, national and international sources, (b) the Canadian broadcasting system as a whole should encourage the development of Canadian expression by displaying Canadian talent and by offering information and analysis concerning Canada and other countries from a Canadian point of view, and (c) distribution undertakings should give priority to the carriage of Canadian programming services.

In furtherance of these objectives, the Commission has established an approach to the addition of foreign services to the Lists that gives priority to the distribution of Canadian services, while recognizing the choice, diversity and alternative perspectives that can be added to the Canadian broadcasting system by the availability of non-Canadian programming and programming services.

Specifically, the Commission requires that a request for authority to distribute a foreign programming service include, among other things:

- evidence that the non-Canadian service has agreed to be distributed in Canada;
- evidence of demand for the service in Canada;
- a statement from the service provider that it has the necessary rights for distribution of its programming in Canada; and
- an undertaking from the service provider that it does not hold, will not obtain, nor will it exercise, preferential or exclusive programming rights in relation to the distribution of its programming in Canada.

Further, the Commission's general policy with respect to such requests precludes the distribution of non-Canadian services that it determines to be either totally or partially competitive with existing Canadian specialty or pay services.

The Commission notes that, under its current policy, a range of foreign programming services is available for distribution in Canada. Moreover, a number of broadly-distributed Canadian programming services provide a wide variety of non-Canadian programming, including programming available within the services that CCTA requests be authorized for distribution. Thus, the Commission's approach results in at least two significant benefits to the Canadian broadcasting system.

First, it furthers the objective that programming be varied and comprehensive, and provides viewers with a wide choice of programming from various international sources.

Equally important, the Commission's approach ensures that Canadian programming undertakings will continue to have access to a wide variety of foreign programming to augment the Canadian programming on their schedules, and to generate revenues that allow them to contribute to the production and presentation of Canadian programming.

The Commission notes that the essence of CCTA's proposal is that the Commission should permit the distribution of competing non-Canadian services, without requiring that the non-Canadian service provide an undertaking that it does not hold, will not obtain and will not exercise, preferential or exclusive programming rights in relation to the distribution of its programming in Canada.

The Commission is concerned that acceptance of CCTA's proposal could undermine the benefits of the Commission's current approach, with little assurance that sufficient off-setting benefits would materialize.

Most significantly, the Commission is concerned that adoption of CCTA's proposal would make it more difficult for Canadian services to obtain the Canadian rights to broadcast foreign productions. The loss of the revenues generated by such foreign programs could result in a decrease in the production and broadcast of Canadian programming.

In the Commission's view, a non-Canadian service competing with a Canadian service would have little incentive to sell programming rights to the Canadian service, and indeed would likely have an incentive not to sell such programming rights. Further, independent program rights holders may be more likely to sell rights for the entire North American market to the non-Canadian service, rather than selling the Canadian rights separately to a Canadian service.

Furthermore, because Canadian services may not be able to acquire rights to certain programming, consumers might be obliged to subscribe to additional non-Canadian services in order to gain access to programming previously available on Canadian pay and specialty services. This could result in an overall increase in the charges consumers pay.

The Commission notes CCTA's arguments that the addition of these services would reduce signal theft. The Commission acknowledges that some of those engaged in signal theft may be motivated primarily by a desire for increased choice. However, the Commission also considers that CCTA's arguments fail to give adequate consideration to other incentives for the theft of signals, for example, the desire to obtain services without having to pay subscription fees.

In this context, the Commission is hopeful that other efforts will yield significant results in the fight against signal theft, including the commitments made by parties at the recent meetings of CEOs organized by the Commission's Chair, the *Theft is Theft* awareness campaign conducted by the Coalition against Satellite Signal Theft, police investigations and prosecutions, civil actions, and the government's recent announcement of its intention to amend the *Radiocommunication Act* to, among other things, increase penalties for such theft.

For the reasons set out in this letter, the Commission considers that CCTA has not raised sufficient question as to the validity of the existing policy, or sufficient argument or evidence as to the benefits of its proposed approach, to warrant a policy review at this time.

Finally, the Commission notes that CCTA has not provided the information generally required for the Commission to consider requests to add services to the Lists. Accordingly, the Commission is not in a position to examine whether it would be appropriate to authorize for distribution any of the specific services noted in CCTA's request. In this regard, the Commission notes CCTA's acknowledgement that the services in question would likely be ineligible for addition to the Lists under the existing policy.

Sincerely,

Diane Rhéaume