



## Broadcasting Public Notice CRTC 2005-116

Ottawa, 2 December 2005

### **Application of new distribution and linkage rules to non-Canadian third-language services authorized for distribution prior to 16 December 2004**

*In this notice, the Commission announces its determination that the new distribution and linkage rules contained in Improving the diversity of third-language television services – A revised approach to assessing requests to add non-Canadian third-language television services to the lists of eligible satellite services for distribution on a digital basis, Broadcasting Public Notice CRTC 2004-96, 16 December 2004, will not apply to non-Canadian third-language services that were authorized for distribution prior to the date of that notice.*

#### **Introduction**

1. In *Improving the diversity of third-language television services – A revised approach to assessing requests to add non-Canadian third-language television services to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2004-96, 16 December 2004 (Public Notice 2004-96), the Commission set out its revised approach to the assessment of requests to add non-Canadian third-language television services to the lists of eligible satellite services (the lists), for distribution on a digital basis. The Commission stated that, under the revised approach, it would generally approve requests to add non-Canadian general interest third-language services to the lists, for distribution on a digital basis, subject, as appropriate, to certain new distribution and linkage requirements.
2. Specifically, the Commission stated that, where a sponsored general interest, non-Canadian, third-language service offers 40% or more of its programming in any of the Cantonese, Mandarin, Italian, Spanish, Greek or Hindi languages, the Commission will be disposed to authorize its distribution, subject to the requirement that the non-Canadian service only be distributed to customers who also subscribe to the licensed analog service operating in the same language (i.e., the buy-through requirement). Under this requirement, while subscribers would have to subscribe to the Canadian analog service before they could subscribe to the non-Canadian service, they would not be required to subscribe to the non-Canadian service in order to obtain the Canadian one.
3. The Commission added that, where a sponsored general interest, non-Canadian, third-language service provides programming in a third language that represents 40% or more of the service's program schedule (a "principal language" of the service), the Commission will be disposed to authorize the distribution of the non-Canadian service. Such authorization would be subject to the requirement that a broadcasting distribution undertaking (BDU) choosing to distribute the service also distribute at least one third-

language ethnic general interest Category 2 service in the same principal language, provided that such a service has been launched and further, that the BDU make available at least one third-language ethnic general interest Category 2 service in the same principal language as part of a package with the general interest, non-Canadian, third-language service, again provided such a service has been launched. These requirements are in addition to distribution of any of the analog services as may be required under the buy-through provision described above.

4. The new requirements, as set out in Public Notice 2004-96, became applicable through amendments to the Commission's distribution and linkage requirements set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2005-98, 27 October 2005 (Public Notice 2005-98), and *Linkage requirements for direct-to-home satellite distribution undertakings*, Broadcasting Public Notice CRTC 2005-46, 11 May 2005 (Public Notice 2005-46).
5. In *Call for comments on applying new distribution and linkage rules to non-Canadian third-language services already on the lists of eligible satellite services*, Broadcasting Public Notice CRTC 2005-16, 25 February 2005 (Public Notice 2005-16), consistent with a preliminary view expressed by the Commission in Public Notice 2004-96, the Commission called for comments on the appropriateness of applying the new distribution and linkage requirements to non-Canadian third-language services that were authorized for distribution through their inclusion on the lists prior to the issuance of Public Notice 2004-96 on 16 December 2004. The services potentially affected by this proposal are those non-Canadian third-language services included in *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2004-88, 18 November 2004.

### **Positions of the parties**

6. Both the Canadian Association of Broadcasters (CAB) and Global Communications Limited<sup>1</sup> (Global) supported the Commission's proposal to apply the new distribution and linkage requirements to non-Canadian third-language services that were authorized for distribution prior to 16 December 2004. In their view, the proposal was consistent with the Commission's objective, as stated in Public Notice 2005-16, to "ensure regulatory consistency and equitable treatment for all such services." Ethnic Channels Group Limited (ECGL) also supported the Commission's proposal, stating that it would provide some protection for new Canadian Category 2 services entering third-language markets that may already be served by a non-Canadian third-language service. ECGL added that non-Canadian services already on the lists could be exempted from the application of the new distribution and linkage rules if there was a valid reason as to why the rules should not apply to them.

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<sup>1</sup> On 1 September 2005, Global Television Network Inc., Global Communications Limited, CanWest Media Inc. and certain other CanWest corporations amalgamated to continue as CanWest MediaWorks Inc.

7. Two individuals also supported the application of the new requirements to non-Canadian third-language services already authorized for distribution. One individual considered that it would promote the greater availability of Spanish-language services in Canada, while the other stated that such an approach would be well received by multicultural communities in general.
8. Rogers Cable Communications Inc. (Rogers), the Canadian Cable Telecommunications Association (CCTA) and Bell ExpressVu Limited Partnership<sup>2</sup> opposed the application of the revised distribution and linkage rules to non-Canadian third-language services authorized for distribution prior to 16 December 2004. Rogers and the CCTA submitted that the new rules were unnecessary and inappropriate. In their view, these authorized non-Canadian third-language services had been subjected to the Commission's onerous competitiveness test (i.e., they had already been assessed and found to be neither totally nor partially competitive with Canadian specialty or pay television services). In the view of these parties, it was thus reasonable to conclude that such services have not prevented Canadian services from remaining viable or from fulfilling their commitments and obligations under the *Broadcasting Act* (the Act).
9. Further, the CCTA and Rogers stated that BDUs, and the providers of non-Canadian third-language services that had passed the competitiveness test and had been authorized for distribution prior to 16 December 2004, were entitled to presume that the distribution of such services would continue notwithstanding any revisions introduced by the Commission with respect to its consideration of sponsored requests for the addition of new services to the lists. The CCTA added that the buy-through requirement was based on the assumption that a new non-Canadian service might be found to be partially or totally competitive with at least one Canadian pay or specialty service, and was thus intended to remedy the potential negative impact of adding that new non-Canadian service to the lists. In the CCTA's view, the new distribution and linkage rules are clearly tied to the assessment of new non-Canadian services under the revised approach, and not to those non-Canadian services that are already on the lists.
10. Rogers also noted that it distributes six of the ten non-Canadian, general interest, third-language services that appeared on the lists prior to 16 December 2004. It added that, for any launched Category 2 service that operates in the same principal language as any of these six non-Canadian services, it currently offers the Category 2 service despite the absence of any requirement that it do so.
11. In a joint filing, MTS Allstream Inc. (carrying on business as MTS TV), Saskatchewan Telecommunications (Sasktel) and TELUS Communications Inc. also opposed the application of the new distribution and linkage rules to non-Canadian services whose distribution had been authorized prior to 16 December 2004. These companies stated that they did not support the introduction of any further packaging or linkage rules that would limit the flexibility of BDUs to design a wide variety of digital packages of programming services.

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<sup>2</sup> Bell ExpressVu Inc. (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership.

## **Commission's analysis and determinations**

12. As of 16 December 2004, the Commission had authorized the distribution of several non-Canadian third-language services through their inclusion on the lists. These services were assessed in the context of the Commission's previous policy that precluded the authorization of non-Canadian third-language services that would be either totally or partially competitive with Canadian specialty or pay television services. Over half of these non-Canadian services are general interest services to which the new distribution and linkage rules would apply, should the Commission decide to expand the scope of the new approach adopted in Public Notice 2004-96.
13. As noted in Public Notice 2004-96, the Commission has used a case-by-case approach in assessing whether or not a non-Canadian service proposed for addition to the lists would be competitive with a Canadian specialty or pay television service. Among the factors included in the Commission's assessment of competitiveness have been the nature of the service and genre of programming provided by the relevant Canadian and non-Canadian services and the target audience, taking into account the language of the service. The Commission has also considered relevant the extent to which a proposed non-Canadian service may be a program supplier for an authorized Canadian service. The Commission compares these factors as they relate to the relevant Canadian services and the sponsored non-Canadian service in order to determine the amount of overlap between the services, and thus the extent to which they might compete with each other. The more significant the overlap in the nature of the two services, including the genre of programming, target audience, language and program source, the more likely it has been that the non-Canadian third-language service would be found to be competitive with the Canadian service.
14. In Public Notice 2004-96, the Commission noted that its competitiveness test had been effective in allowing the addition of non-Canadian services without threatening the continued viability of Canadian services or their ability to meet their obligations under the Act. The Commission adopted the new distribution and linkage rules for non-Canadian third-language services added to the lists after 16 December 2004, in part, in an effort to encourage a more open-entry approach to the addition of non-Canadian general interest third-language services, while continuing to foster Canadian third-language pay and specialty services, including third-language Category 2 digital services.
15. The non-Canadian third-language services that were authorized for distribution prior to 16 December 2004 were subject to the competitiveness test, and were found by the Commission to be neither partially nor totally competitive with Canadian pay or specialty services. The Commission therefore determined that the introduction of these services would not deprive Canadian third-language services of the ability to fulfil their conditions of licence and other regulatory obligations. Having considered the record of this proceeding, the Commission concludes that, since each of these non-Canadian third-language services was found to meet the competitiveness test at the time it was added to the lists, the application of new distribution and linkage rules is unnecessary.

## **Conclusion**

16. In light of the above, the Commission has determined that it would not be appropriate to apply the new distribution and linkage rules to those non-Canadian third-language services that were authorized for distribution prior to 16 December 2004. Specifically, the new distribution and linkage rules will not apply to third-language services on the lists contained in *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2004-88, 18 November 2004.

Secretary General

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*