Broadcasting Decision CRTC 2006-650

Ottawa, 28 November 2006

Rogers Cable Communications Inc.
Various locations in Ontario, New Brunswick and Newfoundland and Labrador

Application 2006-0196-5
Broadcasting Public Notice CRTC 2006-58
8 May 2006

Distribution of satellite subscription radio services

The Commission ***approves*** *an application by Rogers Cable Communications Inc. to amend the broadcasting licences for the cable broadcasting distribution undertakings serving various locations in Ontario, New Brunswick and Newfoundland and Labrador, in order to add a* ***condition*** *to each licence authorizing the licensee to distribute, at its option, the audio programming service of one or more licensed satellite subscription radio (SSR) undertakings on a digital basis, subject to the following provisions:*

- *the licensee is not permitted to use the signals of conventional radio programming undertakings, with the exception of those required to be distributed under section 22 of the* Broadcasting Distribution Regulations *(the Regulations), to fulfil the preponderance requirement set out in section 6(2) of the Regulations, unless a subscriber is already receiving at least 40 channels of one or more pay audio programming undertakings; and*

- *the Canadian-produced channels of the SSR undertaking being distributed will be considered Canadian programming services for the purposes of section 6(2) of the Regulations.*

The application

1. The Commission received an application by Rogers Cable Communications Inc. (Rogers) to amend the broadcasting licences for its cable broadcasting distribution undertakings (BDUs) serving various locations in Ontario, New Brunswick, and Newfoundland and Labrador. The licensee requested that it be authorized, by condition of licence, to distribute, at its option, the audio programming service of one or both licensed satellite subscription radio (SSR) undertakings on a digital basis. Currently, there are two licensed SSR services in Canada: Sirius operated by SIRIUS Canada Inc. (Sirius Canada),[1] and XM Canada operated by Canadian Satellite Radio Inc. (CSR).[2]

[1] *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-247, 16 June 2005 (Decision 2005-247)

2. Rogers submitted that the proposed carriage of Canadian SSR services would enhance the quality and diversity of the audio programming available on its cable BDUs on a digital basis, and enable it to respond to subscriber demand for more audio services. Rogers also argued that, if it offered a broader selection of high-quality audio services, it would be better able to attract the many Canadians who are currently tuning to new, unregulated sources of audio programming, including U.S.-based satellite radio and Internet radio services. Rogers further suggested that the ability to access SSR services by purchasing or renting a digital set-top box would motivate subscribers to make the transition from analog to digital services.

3. In a letter dated 28 March 2006, the Commission asked Rogers to provide information about its distribution of the pay audio programming undertakings, as well as additional information about its application.

4. Rogers responded that it currently distributes the two licensed national pay audio services, Galaxie and Max Trax, on a digital basis, taking advantage of their Joint Marketing Agreement, under which approximately 20 channels from each of the Max Trax and Galaxie services are offered in a combined package to distributors. Any Rogers' subscriber who rents or purchases a digital set-top box and pays a monthly digital access fee receives Galaxie and Max Trax at no additional charge.

5. Rogers stated that, since it had not yet concluded negotiations with either Sirius Canada or CSR, it could not indicate the terms and conditions it would seek for the distribution of the SSR services, or specify how it would price and package them. In addition, Rogers submitted that it could not accurately assess the impact that approval of its application would have on Galaxie and Max Trax without knowing the terms under which it and other BDUs would distribute the SSR services.

6. Rogers stated that, given the discretionary nature of the pay audio services, it could not make a commitment to continue distribution of Galaxie and Max Trax, either on their own or packaged with other audio services, as a pre-condition of approval of its present application, or as a condition of licence should its application be approved. Rogers opposed any packaging requirements for audio services, claiming that its subscribers would perceive such requirements as taking away their ability to choose.

Interventions

7. Telco Television Association of Canada (Telco TV), which represents MTS Allstream Inc., Saskatchewan Telecommunications and TELUS Communications Inc., contended that the SSR services fall within the definition of a pay audio service set out in the *Broadcasting Distribution Regulations* (the Regulations), namely, a "programming service provided by person licensed to carry on a pay audio programming undertaking." Accordingly, in Telco TV's view, Rogers' application was unnecessary because BDUs are already authorized to distribute SSR services, pursuant to section 23 of the Regulations.

[2] *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-246, 16 June 2005 (Decision 2006-246)

8. Sirius Canada fully supported Rogers' application. CSR indicated that, while it generally supported the application, it could not accurately assess the impact of the proposed carriage on its own business plan until it had concluded an agreement with Rogers or any other BDU.

9. Rogers' application was supported by Shaw Communications Inc. and its wholly-owned subsidiary, Star Choice Television Network Incorporated. Bell Video Group (BVG), which comprises Bell ExpressVu LP, a national direct-to-home (DTH) satellite BDU, and the Class 1 terrestrial BDU operated by Bell Canada, also supported the application, provided that the Commission confirm its willingness to approve applications by the licensees of other Class 1 BDUs seeking similar authority.

10. BVG also expressed the view that DTH distributors already have the authority, under section 39 of the Regulations, to distribute any licensed programming service, including the two licensed SSR services.

11. Rogers' application was opposed by the owners of the two licensed pay audio services, namely, the Canadian Broadcasting Corporation (CBC), which owns Galaxie, and Corus Entertainment Inc. (Corus), which owns Max Trax. Canadian cultural organizations, including the Society of Composers, Authors, and Music Publishers of Canada, the Canadian Conference of the Arts, the Association québécoise de l'industrie du disque, du spectacle et de la video, the Canadian Independent Record Producers Association, the Union des Artistes, Friends of Canadian Broadcasting, and the Alliance of Canadian Cinema, Television and Radio Artists also opposed the application, as did Mr. Larry Landry of Balmoral, New Brunswick.

12. While not opposing the application, the Canadian Association of Broadcasters raised concerns that it asked Commission to address before authorizing the distribution of SSR services by Rogers or by BDUs in general.

13. The following sections address the specific issues and concerns raised by the interveners, as well as Rogers' replies.

Rationale underpinning the licensing of SSR services

Interveners' arguments

14. Many of the opposing interveners argued that the applications for SSR services were predicated and approved by the Commission in 2005 on the assumption that these services would be delivered by satellite to receivers designed specifically for that purpose. These interveners contended that more widespread distribution of SSR services by BDUs was not contemplated either in the original licensing applications or in the Commission's decision to impose lighter Canadian content obligations on those services than on pay audio services or conventional radio stations.

Licensee's reply

15. In response, Rogers claimed that the arguments raised by these interveners were virtually the same as those presented by the same parties against the licensing of SSR services. Rogers noted that those arguments were rejected by both the Commission and the Governor in Council.[3] In Rogers' view, these interveners "appear to want to turn the clock back to an era when market forces played little or no role in the Canadian broadcasting system and Canadian consumers were given few programming choices."

16. Rogers submitted that, when the Commission originally licensed radio stations, it did not contemplate that they would be distributed by cable. Rogers noted that, in time, radio stations were distributed by cable as an alternative to over-the-air reception. According to Rogers, a similar situation currently exists with respect to the distribution of SSR services by digital cable, and the Commission must continue to demonstrate a flexible approach to the distribution of existing services in response to consumers' changing preferences.

Impact on pay audio services

Interveners' arguments

17. Both the CBC and Corus opposed Rogers' application because of their concerns about its impact on the financial viability of the pay audio services. Corus expressed concern that, since the business models for Sirius and XM Canada do not depend on BDU distribution, Sirius Canada and CSR could offer their services to distributors at a discount, making them more attractive to distributors than Galaxie or Max Trax and effectively forcing the pay audio services to lower their prices.

18. The CBC and Corus further contended that approval of Rogers' application would make the SSR services directly competitive with the pay audio services, even though the latter's Canadian content requirements are more stringent than those of the SSR services. According to the CBC and Corus, the lack of regulatory equity between pay audio and satellite radio would make it difficult for Galaxie and Max Trax to compete with Sirius and XM Canada. The interveners contended that, if the Commission were to approve Rogers' application, the Commission should reconsider the licensing frameworks for pay audio services and SSR services in order to make their regulatory requirements consistent.

Licensee's reply

19. In response, Rogers submitted that, in *Licensing of four new pay audio programming undertakings*, Public Notice CRTC 1995-218, 20 December 1995 (Public Notice 1995-218), the Commission determined that a competitive environment was

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[3] Decisions 2005-246 and 2005-247 were appealed to the Governor in Council by several parties. In P.C. 2005-136, 9 September 2005, the Governor in Council declined to set aside or refer those decisions back to the Commission for reconsideration and hearing.

appropriate for the pay audio services because they were discretionary in nature, and adopted an open-entry licensing model for these services. Rogers further argued that pay audio services and SSR services have distinct qualities that enable them to compete effectively for cable listeners. According to Rogers, pay audio services appeal to subscribers who want to receive music programming without any spoken word content, while the SSR services appeal to subscribers who want a wider range of audio services that include news and sports as well as music.

Cultural contributions of pay audio versus those of satellite radio

Interveners' arguments

20. Many interveners, particularly those representing Canadian cultural organizations, reiterated the arguments presented by the CBC and Corus about the negative impact of Rogers' proposal on the viability of the pay audio services. These interveners focused their concerns on the potential loss of airplay for Canadian music if the SSR services replaced the pay audio services. Some of these interveners pointed out that the pay audio services fulfil their Canadian content requirement of 35% overall entirely through Canadian musical selections because they are not permitted to provide spoken word programming. The interveners noted that, in contrast, only five of Sirius' 110 channels and three of XM Canada's 100 channels provide Canadian musical selections.

21. Several interveners noted that, while the pay audio services must adhere to a linkage ratio of one Canadian channel to one non-Canadian channel, the SSR services must adhere to a linkage ratio of only one Canadian channel to nine non-Canadian channels. These interveners argued that, if Rogers were authorized to distribute the SSR services, the linkage ratios applicable to these services could result in a predominance of non-Canadian audio signals on Rogers' cable BDUs, contrary to section 6(2) of the Regulations.

22. For its part, Sirius Canada submitted that the Canadian content requirements of the SSR services exceed those of the pay audio services. Sirius Canada maintained that its 11 Canadian channels, which must provide 85% Canadian content, offer 224 hours of Canadian programming daily. Sirius Canada noted that, in contrast, Galaxie and Max Trax have a 20-channel Canadian content offering on Rogers that airs 168 hours daily. Accordingly, Sirius Canada contended that the Canadian content offered by its service is 34% higher than that offered by the pay audio services.

23. Sirius Canada also noted that it must expend a minimum of 5% of its revenues on Canadian talent development (CTD) making its CTD expenditures 25% higher than those of the pay audio services, which must expend a minimum of 4% of their revenues on CTD. Sirius Canada added that, because its CTD requirements are calculated on its retail sales rather than on wholesale sales, it will have contributed more to CTD in its first year of operation than Galaxie and Max Trax together.

Licensee's reply

24. In response to the opposing interveners, Rogers maintained that its application is consistent with the policy objectives of the *Broadcasting Act* (the Act) because the proposal responds to market forces and is aimed at providing subscribers with greater choice and programming diversity. Rogers argued that the distribution of SSR services by BDUs would fulfil the objectives set out in sections 3(1)(*i*)(i),(ii),(iii) and (iv) of the Act, which require the Commission to ensure, among other things, that Canadians have access to a diverse range of programming that addresses the programming needs and interests of all Canadians. Rogers also contended that the distribution of SSR services by BDUs would satisfy the objective set out in section 5(2)(f) of the Act, which provides that the Canadian broadcasting system should be regulated and supervised in a flexible manner that "does not inhibit the development of information technologies and their application or the delivery of resultant services."

25. In Rogers' view, the Canadian content requirements of the SSR services should not be a significant factor in the Commission's evaluation of the present application. Rogers noted that the Commission has authorized the distribution in Canada of numerous foreign television services that have little or no Canadian content, including the services set out in the *Lists of eligible satellite services* as well as the "U.S. 4+1 signals." Rogers added that the requirement that 10% of the channels offered by SSR services must contain 85% Canadian content ensures that a significant number of hours are devoted to Canadian programming in each week.

26. Rogers confirmed that it is fully aware of its obligations under the Act, as well as the requirement under section 6(2) of the Regulations that each of its cable BDUs ensure that a majority of the audio channels received by a subscriber are devoted to the distribution of Canadian programming services. Finally, Rogers submitted that all of the objectives of the Act would be compromised if subscribers abandon cable BDUs to seek audio services from the unregulated distribution market.

Satellite-use policy

Intervener's arguments

27. The CBC submitted that, until very recently, the Government of Canada's *Satellite-use Policy to accommodate Broadcasting Services to the Canadian Public* (the Satellite-use Policy), expressly prohibited the Commission from licensing a broadcasting undertaking that made exclusive use of non-Canadian satellite facilities. The CBC noted, however, that, in September 2005, the Government of Canada amended its Satellite-use Policy to permit the use of foreign specialized satellite facilities for the transmission of Canadian SSR services. In the CBC's view, this narrow exception does not permit the exclusive use of non-Canadian satellite facilities for other purposes and particularly does not permit the distribution of programming on a cable BDU in a

manner that is directly comparable to a licensed pay audio service since, according to the CBC, this latter of type of service is "achievable by conventional Canadian satellite facilities." The CBC argued that, if the Commission were to approve Rogers' application, it would be modifying the nature of SSR services in a manner that would be directly contrary to the Satellite-use Policy.

Licensee's reply

28. In response, Rogers claimed that the CBC had misinterpreted the Satellite-use Policy. Rogers maintained that the policy authorizes SSR services to use foreign satellite facilities to provide Canadian programming services, and does not prohibit SSR services from allowing their Canadian programming services to be retransmitted to the public using BDU networks.

Commission's analysis and determinations

29. With respect to BVG's contention that DTH distributors are already authorized to distribute SSR services, the Commission notes that *Distribution of satellite subscription radio services by direct-to-home broadcasting distribution undertakings*, Broadcasting Decision CRTC 2006-615, 3 November 2006, sets out its determination on a request for clarification regarding the carriage of SSR services. The Commission stated that SSR undertakings are not programming undertakings and that, in the absence of a specific condition of licence allowing such distribution, DTH distributors do not have authority under section 39 of the Regulations to distribute the programming of SSR undertakings.

30. The Commission does not agree with Telco TV's contention that the SSR services are included in the definition of "pay audio service" set out in the Regulations. Under that definition, a pay audio service is clearly defined by the fact that it has been licensed as a pay audio service. The programming services offered by Sirius and XM Canada are not pay audio services, as they have not been licensed as such. Accordingly, they are not authorized for distribution by BDUs under section 23 of the Regulations.

31. With respect to the concerns raised by the CBC regarding the Satellite-use Policy, the Commission notes that the policy simply allows the use of non-Canadian satellites to deliver SSR services for purposes such as for vehicular reception. Rogers' application proposes a secondary and ancillary use of SSR signals. Accordingly, in the Commission's view, the transmission of SSR signals does not contravene the Satellite-use Policy.

32. The Commission notes that the Canadian SSR services were built on services provided using U.S. satellite facilities that already carried extensive multi-channel services for the U.S. market. Consequently, the bandwidth available for the delivery of Canadian channels was limited by the relative sizes of the Canadian and U.S. markets and by the commercial considerations of the U.S. satellite operators. The Commission determined that, as a result of these factors, the nature of the Canadian SSR services rendered the predominant use of Canadian creative and other resources impracticable. The

Commission therefore turned its attention to what the greatest use of Canadian creative resources might be, under the circumstances. Thus, the SSR services are subject to different requirements with respect to Canadian content than the pay audio services. Specifically, the SSR services must provide only one Canadian channel for every nine non-Canadian channels, while the pay audio services must provide one Canadian channel for each non-Canadian channel. However, the SSR services must also fulfil a higher Canadian content requirement for their individual Canadian-produced channels than the pay audio services: i.e., 85% for the SSR channels compared to 35% for the pay audio channels. Accordingly, the overall regulatory requirements applicable to the pay audio services specify a higher level of Canadian content in terms of the average amount of Canadian content per channel within the service offering.

33. The Commission also notes that, by condition of licence, the pay audio services must fulfil their Canadian content requirements entirely through music programming, because they are not permitted to broadcast spoken word programming, with the exception of identification of musical selections, promotion of the service, and programming directed to children. In contrast, the SSR services have greater flexibility in that they can broadcast both spoken word and music programming.

34. The Commission notes that, in practice, under their Joint Marketing Agreement, Galaxie and Max Trax are offered together on Rogers and provide 40 Canadian-produced channels with a minimum 35% Canadian content, or a minimum of 336 hours of Canadian music daily. In contrast, Canadian music is offered on only five of Sirius' 110 channels and on only three of XM Canada's 100 channels while their other Canadian-produced channels are devoted to news and information, sports and weather.

35. The Commission places considerable importance on the airplay of Canadian music. In *Commercial Radio Policy 1998*, Public Notice CRTC 1998-41, 30 April 1998, the Commission stated that it considered playing Canadian music to be a vital contribution that radio makes toward fulfilling the cultural goals set out in the Act. The Commission also stated that the minimum levels of Canadian music stipulated under the *Radio Regulations, 1986* were important elements in bringing the Canadian music industry to its current level of success. More recently, in *Review of the Commercial Radio Policy*, Broadcasting Notice of Public Hearing 2006-1, 13 January 2006, the Commission reaffirmed the importance of airplay of Canadian music.

36. At the same time, based on its examination of the record of the present proceeding, the Commission considers that the distribution of the SSR services could offer positive benefits to Rogers' subscribers. In particular, the Commission finds that distribution of the SSR services, which provide over 100 channels combining music and spoken-word programming, would offer Rogers' subscribers a wider range of audio programming than the pay audio services alone, which on their own provide about 40 channels of music only.

37. The Commission notes that Sirius Canada and CSR did not suggest the possibility of distribution of their services by BDUs in their original licensing applications, which included their business plans, nor was that possibility discussed during the public proceeding that considered their applications. In fact, in *Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings,* Broadcasting Public Notice CRTC 2005-61, 16 June 2005, the Commission stated that the "programming of the CSR and Sirius Canada undertakings will be delivered primarily by satellite, with terrestrial transmitters as required to fill in gaps in coverage."

38. In the Commission's view, approval of Rogers' application, as proposed, would make SSR services directly competitive with the existing pay audio services. In Public Notice 1995-218, the Commission determined that, since the pay audio services were clearly discretionary in nature, a competitive environment was appropriate for them in order to provide distributors and consumers with choice in this type of service. However, the Commission's determination was based on the assumption that the pay audio services would be competing against other pay audio services, subject to the same regulatory obligations, not against services, such as the SSR services, for which the Commission has determined that the predominant use of Canadian creative and other resources is impracticable. Further, SSR services, as originally licensed, are sold directly to subscribers, with BDU distribution constituting a second market for these services. In contrast, the business plans of the pay audio services are entirely dependent on their distribution by BDUs. The result is that SSR services may be in a position to provide their services to BDUs at rates that the pay and audio services are unable to match.

39. In light of the above, the Commission finds that it is appropriate to authorize Rogers to distribute SSR services, but under provisions that will place those services on a relatively equal competitive footing with pay audio services in respect of such distribution. The Commission further finds it appropriate that the applicable provisions offer some incentive to distributors to continue to distribute pay audio services, as well as the SSR services. In this way, both subscribers and the Canadian broadcasting system can potentially benefit from a greater diversity in audio services. At the same time, the use of Canadian creative and other resources in the provision of audio programming on BDUs can be maximized.

40. In its reply to the interveners, Rogers made a commitment to abide by section 6(2) of the Regulations, which states that "a licensee shall ensure, in respect of each of analog and digital technology, that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services … ." However, Rogers did not provide details as to how it would fulfill this commitment with respect to the distribution of audio channels, nor did it specify whether it would distribute all or just a portion of the satellite radio channels or whether it would continue to distribute the pay audio services.

41. The Commission would be concerned if Rogers or any other BDU were to rely solely on the use of conventional radio stations to fulfil the preponderance requirement for audio channels set out in section 6(2) of the Regulations. The Commission notes that the primary means of reception for radio is over-the-air while, in direct contrast, the pay audio services are entirely dependent on BDU distribution to reach their audiences. In the Commission's view, if a distributor were to rely substantially on conventional radio to fulfil the preponderance requirement and cease distributing the pay audio services, the Canadian broadcasting system would lose the significant amount of airplay of Canadian music and the CTD revenues that are currently provided by the pay audio services. In addition, subscribers could be deprived of the full array of choices envisaged by the Commission in authorizing BDU distribution of the SSR services.

42. Taking all the above into consideration, the Commission authorizes Rogers to distribute the SSR services on a digital basis subject to the following provisions. The Commission is imposing a **condition** on each licence, as set out below, specifying that conventional radio signals, with the exception of those required under section 22 of the Regulations,[4] may not be used to fulfil the preponderance requirement set out in section 6(2) of the Regulations, unless a subscriber is already receiving at least 40 channels of pay audio.[5] The Canadian-produced channels of the SSR service being distributed may also be used to fulfil the requirements set out in section 6(2) of the Regulations; that is, the Canadian-produced channels of the SSR service being distributed will be considered Canadian programming services for the purposes of section 6(2) of the Regulations.

43. In light of the above, the Commission **approves**, with the provisions described above, the application by Rogers Cable Communications Inc. to amend the broadcasting licences for its cable broadcasting distribution undertakings serving various locations in Ontario, New Brunswick, and Newfoundland and Labrador, in order to add the following **condition** to each licence:

> The licensee is authorized to distribute, at its option, the audio programming service of any licensed satellite subscription radio undertaking on a digital basis. The distribution of satellite subscription radio signals is subject to the following provisions:
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> (i) Subject to the exception outlined in (ii), the licensee may not count the signals of conventional radio programming undertakings for the purpose of fulfilling the preponderance requirement set out in

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[4] Under section 22 of the *Broadcasting Distribution Regulations* (the Regulations), broadcasting distribution undertakings must distribute local community, campus and native radio programming undertakings as well as at least one Canadian Broadcasting Corporation radio programming undertaking operating in English and one operating in French.

[5] The Commission notes that the requirement set out in section 6(2) of the Regulations applies to each of analog and digital technology, as well as to audio and video channels, separately. Thus, conventional radio stations, whether or not they must be distributed pursuant to section 22 of the Regulations, can only be taken into account for these purposes if they are distributed on a digital basis.

section 6(2) of the *Broadcasting Distribution Regulations* (the Regulations) unless a subscriber is already receiving 40 channels of one or more licensed pay audio programming undertakings.

(ii) A licensee is entitled to count the signals of conventional radio programming undertakings that a licensee is required to distribute under section 22 of the Regulations for the purpose of fulfilling the preponderance requirement set out section 6(2) of the Regulations.

(iii) The Canadian-produced channels offered by the satellite subscription radio undertaking are deemed to be "Canadian programming services" for the purposes of section 6(2) of the Regulations.

Secretary General