



## Broadcasting Public Notice CRTC 2007-36

Ottawa, 3 April 2007

### **Request to add XXL to the lists of eligible satellite services for distribution on a digital basis**

*The Commission **denies** a request to add XXL to the lists of eligible satellite services for distribution on a digital basis.*

#### **The request**

1. The Commission received a request dated 29 May 2006 from Videotron Ltd. (Videotron) for the addition of XXL, a non-Canadian service, to the lists of eligible satellite services for distribution on a digital basis (the digital lists).
2. Videotron described the service as follows: [translation]

XXL is a non-Canadian service from France, entirely in the French language and offering adult content. Programming comprises mainly erotic films, series and magazine programs distributed over a four-hour block that will be repeated throughout the broadcast day, seven days a week.
3. The Commission subsequently issued a *Call for comments on the proposed addition of XXL to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2006-114, 8 September 2006 (Public Notice 2006-114). In Public Notice 2006-114, the Commission noted that its approach to requests for the addition of non-Canadian English- and French-language services generally precludes the addition of a non-Canadian satellite service that could be considered either totally or partially competitive with Canadian specialty or pay television services, taking into account all specialty and pay television programming services whose licence applications have been approved by the Commission, including launched and unlaunched Category 1 and Category 2 specialty and pay television services.<sup>1</sup>
4. Because Videotron identified the service as an adult service, the Commission specifically sought comment on whether it should apply the same distribution requirements as those applied to the non-Canadian satellite service, Playboy TV.<sup>2</sup>

<sup>1</sup> See *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*, Public Notice CRTC 2000-173, 14 December 2000.

<sup>2</sup> Playboy TV is only authorized for distribution at the specific request of a subscriber. Distributors are not permitted to package Playboy TV in such a way that subscribers are obligated to purchase Playboy TV in order to purchase any other programming service. Distributors are required to take measures to fully block the reception of both the audio and video

## Comment by AOV TV

5. There were no comments in support of the request and only one comment, by AOV TV (AOV), opposing the addition of XXL to the digital lists. AOV objected for the following reasons:

- XXL would be totally competitive with Canadian specialty services, more specifically, with Le Canal Érotique AOV and XXX Clips AOV, which are unlaunched Category 2 services.<sup>3</sup> The addition of XXL to the lists could preclude these services from launching.
- The proposed service would compete with these Canadian services for similar or identical programming. Specifically, the programming advertised on XXL's website consists of films acquired from the same adult studios from which the Canadian channels acquire programming. Further, since some of these studios have exclusive geographical distribution agreements with Canadian distributors, allowing this service to be distributed in Canada may give rise to rights litigation between the Canadian distributors, the non-Canadian studios, and the French satellite service.
- Adult programming aired on Canadian services must be approved by the appropriate provincial film review board. A non-Canadian satellite service would not have to meet this requirement, which would clearly provide an economic advantage for the non-Canadian service over Canadian specialty services in terms of both the costs of the approvals and time-to-market with new programming.
- The distribution requirements applicable to Playboy TV do not address unregulated distribution of adult programming. That is, they do not require non-Canadian services to submit adult programming for review by the appropriate authorities. As such, it would be impossible to determine whether such programming would be approved for distribution in Canada by a board of competent jurisdiction. This creates the possibility for inappropriate or illegal programming to be viewed by Canadians. AOV argued that this "should not be compounded by adding an additional channel on which Canadian consumers may well view unregulated adult programming." In AOV's view, adding conditions of eligibility that would, among other things, require the non-Canadian service to submit all programming to the appropriate classification authorities would better support the mandate of the Commission and its responsibilities to the Canadian viewer.

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portions of Playboy TV to subscribers that request that it not be receivable in their home (in either unscrambled or scrambled analog form).

<sup>3</sup> A number of AOV Category 2 adult services have been authorized. These include the two unlaunched services (Le Canal Érotique AOV and XXX Clips AOV) and three that have been issued licenses and have launched.

- The application does not stipulate whether the programming would be received via a satellite signal that repeats the programming block (four-hour block repeated to fill a 24-hour broadcast day), or would be received as data from a satellite transmitted to internal equipment located in Canada. Since receiving a continuous signal from a satellite transponder is more expensive, AOV submitted that the application is in reality an application for a Canadian adult service presented in a manner that is attempting to circumvent Canadian content requirements, ownership requirements, and Canadian film approval processes.

#### **Videotron's reply**

6. Videotron pointed out that, since the two AOV channels have not yet been launched, it cannot compare the specific programs to assess the degree of competitiveness or to determine whether there would indeed be identical programming on XXL and on the Canadian services. However, it noted that, even if the adult film studios providing content to XXL are the same studios from which the Canadian channels acquire content, the actual programs would not necessarily be identical. Videotron stated that XXL would not retain exclusive rights to any of its programming.
7. Videotron also indicated that the signal of XXL would be packaged in France and would be broadcast in Canada as received. Therefore, there would be no use of internal equipment located in Canada.
8. Videotron added that XXL would be authorized for distribution at the specific request of the subscriber, and that Videotron would not package the service in such a way that subscribers are obliged to purchase XXL in order to purchase any other programming service.

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

9. The Commission agrees with AOV that the imposition of a packaging limitation such as that applicable to Playboy TV does not address the possibility of the broadcast of illegal or inappropriate content by non-Canadian services authorized for distribution in Canada. Further, the Commission considers that there is a strong public interest, in terms of the attainment of the objectives of the *Broadcasting Act*, in the application and enforcement of standards pertaining to adult services.
10. The Commission notes that Canadian adult services are subject to specific conditions as to the adult content that they air. For example, such services are subject to a condition of licence requiring that they adhere to sections of the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, Broadcasting Public Notice CRTC 2003-10, 6 March 2003 (the Code). This Code requires, among other things, that all adult programming comply with the *Pay Television Regulations, 1990*, and with the *Pay Television and Pay-Per-View Programming Code Regarding Violence* and the *Sex-Role Portrayal Code for Television and Radio*

*Programming.* All adult programming must also possess a certification number and classification from the applicable Review Board. This classification must be displayed, in both written and spoken form, immediately prior to the broadcast of each adult program, along with the appropriate advisories.

11. Canadian licensees are also required by condition of licence to have an internal policy for adult programming, filed with the Commission, and to adhere to that policy. Such policies deal with the acquisition and broadcast of adult programming, and include, among other things, requirements that all adult programming acquired by the services be screened prior to broadcast.
12. With respect to the possibility of applying similar requirements to non-Canadian adult services such as XXL, the Commission notes that non-Canadian services are generally targeted at their home markets or, in some cases, to international markets. Consequently, they are not necessarily influenced in their programming choices by standards that generally prevail in Canada. Further, with respect to non-Canadian services, the Commission does not have at its disposal the full range of enforcement mechanisms applicable to Canadian licensees, such as the imposition of a mandatory order to ensure compliance with conditions of licence or regulations. Therefore, the Commission does not consider it practicable to approve the addition of XXL to the digital lists subject to the same conditions applicable to licensed Canadian adult services.
13. In addition to the above, the Commission does not consider that the addition of XXL to the digital lists would make other contributions to the attainment of the objectives of the *Broadcasting Act* so as to warrant the risk that the service would violate the otherwise generally applicable standards for adult programming.
14. In light of the above, the Commission **denies** Videotron Ltd.'s request to add XXL to the digital lists.
15. Having concluded that Videotron's request should be denied for the reasons set out above, the Commission finds it unnecessary to consider whether XXL would be totally or partially competitive with a Canadian pay or specialty service.

Secretary General

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