

September 27, 2005

Ms. Diane Rhéaume  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, ON  
K1A 0N2

Dear Ms. Rhéaume:

**RE: Broadcasting Public Notice CRTC 2005-82: Call for comments on a regulatory framework for mobile broadcasting services.**

1. These reply comments are filed on behalf of the Canadian Wireless Telecommunications Association (CWTA) in accordance with the procedure outlined in Broadcasting Public Notice CRTC 2005-82 (the Notice).
2. CWTA is the authority on wireless issues, developments and trends in Canada. It represents cellular, PCS, messaging, mobile radio, fixed wireless and mobile satellite carriers as well as companies that develop and produce products and services for the industry.
3. CWTA generally disagrees with all interveners that argue that the New Media Exemption Order (NMEO) does not apply, or that a separate order should be adopted. Failure to comment on any particular aspect of an intervention should not be construed as implicit agreement.

### **Summary**

1. The mobile broadcasting services offered by several of Canada's wireless carriers are delivered and accessed over the Internet through a browser specifically designed for wireless devices, and therefore fall squarely under the New Media Exemption Order. Furthermore, in the context of Internet retransmission, the Commission has

already concluded that delivery of video to handheld devices such as PDAs would be covered by the New Media Exemption Order.

- ? Only a small fraction of wireless handsets are capable of accessing the service. The viewing experience does not rival that currently available through personal computers or regular off-air or cable/DSL/satellite systems. Accordingly, at these early stages of development, licensing would not materially advance the objectives of the *Broadcast Act*.
- ? Licensing wireless carriers like broadcasting distribution undertakings would stifle the development of such services. Time and regulatory flexibility is needed to allow these services to find their market niche and for the wireless carriers to justify their investments.

#### **The Nature of the Service**

4. Several of Canada's wireless carriers recently introduced mobile broadcasting services, enabled through the web browser on certain handsets. The handsets capable of receiving such services were only recently introduced in the market, meaning that only a small proportion of the wireless carriers' subscriber bases have the capability to access the service, and only a subset of those actually do. The handsets are primarily designed as mobile communications devices for voice and data. They have tiny screens, and limited battery life. The video is delivered at a low refresh rate. This novel-to-watch application is primarily suited for persons away from their homes, sitting in waiting rooms or riding on busses who seek to view programming in short bursts, perhaps for a few minutes at a time. Observers in the United States, where the service has been available slightly longer, have described the experience as "snacking" on TV. In the UK, the service has been referred to as a "boredom buster". To the extent that the content can be sourced from or identified with a broadcaster, these services complement, rather than compete with licensed programming and distribution undertakings. CWTA believes mobile multimedia services will provide Canadians with a new means to access media content and will offer suppliers a new opportunity to develop and deliver both new content and content that complements conventional and specialty broadcast services. This would strengthen the loyalty of existing viewers to these broadcasters and help to

create new audiences for these programs and programming undertakings. Even if there is substantial growth over a number of years, the service is unlikely to have any noticeable impact on the broadcasting system, which is dominated by reception of hundreds of signals and services either free over the air or through subscription cable, DSL or satellite service providers. Even in a New Media environment, the number of programs distributed and accessed through mobile handsets would be extremely small relative to the viewing of programming on personal computers.

### **CWTA's Position on Applicability of the NMEO**

5. In May 2005, the Commission requested that certain wireless carriers provide details of their plans to introduce multimedia services, and to comment on the applicability of the NMEO. In response, Bell Mobility, Rogers Wireless, and TELUS Mobility (the wireless carriers) each explained how the video content is accessed and delivered to mobile handsets over the Internet, consistent with the terms of the NMEO.
6. In August 2005, the Commission issued the Notice to obtain further public comment, and included the prior responses to the record of the proceeding. In response, CWTA provided an expert technical report (the Lemay-Yates Report) which describes the nature, design, and functioning of these mobile multimedia services. As described fully in the Lemay-Yates Report, to the extent that the mobile multimedia services constitute broadcasting, they are delivered and accessed over the Internet. Among Lemay-Yates' key findings were:
  - ? Mobile TV services use the same streaming video technology that has been in place for years to deliver video content over the public Internet. The public Internet network is being used to access and deliver video content channels specially compressed and formatted to fit the screens of mobile handsets.
  - ? Mobile TV services are being offered as a client server application running on the public Internet. Therefore, as demonstrated, each individual subscriber accesses the mobile video channels using the Internet for live broadcasts or other applications via an IP address and using standard TCP/IP Internet protocol to reach the MobiTV server after having downloaded the Java applet supporting the application on the handset.
  - ? Each end user communicates directly with the MobiTV server as part of MobiTV's client server platform.

- ? There is no hardware or software added to mobile networks to enable mobile TV applications and the Mobile TV Internet applications run independently of the mobile networks.
- ? The network of each mobile carrier provides the wireless last mile transmission to reach the end user handset.
- ? The structure of the pricing plans and price points offered by Canadian carriers are similar to those offered for other mobile data/Internet applications.
- ? Bandwidth requirements for mobile TV services are per user and not shared between users, in opposition to traditional broadcasting.

7. Accordingly, CWTA submits it has clearly established that the wireless carriers' prior submissions — that the multimedia content is both accessed and delivered over the Internet — were correct, and therefore remains firmly of the view that the mobile multi-media services, including video, fall within the scope of the NMEO.

#### **Others' comments on applicability of the NMEO**

8. A number of other interveners argued that the NMEO does not apply. The Canadian Association of Broadcasters (CAB) argued that the wireless carriers employ a closed system, which invalidates application of the NMEO. In a legal opinion submitted by L'ADISQ, Pierre Trudel made a similar argument. In response, CWTA notes that there are many "walled gardens" on the Internet that offer multimedia content that require a form of authentication and/or subscription. For example ISPs such as AOL Canada, MSN/Sympatico, Rogers, and TELUS offer television content through portals only available to their subscribers. Similarly, the web sites for Major League Baseball, the National Basketball Association, the National Hockey League, World Wrestling Entertainment, Disney ("Blast", "Toontown"), and the New York Times all offer additional video content through their web portals to those that pay for a subscription. Countless other domestic web portals require a specific authorization in order for a viewer to access the multimedia content, including those designed for video surveillance, or for suppliers to provide product information to retailers. Indeed, in its initial consideration of a New Media Exemption Order (Broadcasting Public Notice CRTC 1999-84), the Commission specifically included a definition of

“portal” in its glossary.<sup>1</sup> Contrary to the comments of a number of interveners, the Commission fully expected New Media service providers to aggregate content and charge for their services. To the extent that multimedia available through Internet portals constitutes broadcasting, they remain exempt from licensing under the NMEO.

9. Lemay-Yates verified that, beyond the existing data transmission capabilities built to provide access to Internet services, no new hardware or software was added to the mobile networks to enable the mobile TV applications. The mobile broadcasting component of a carrier’s mobile multimedia service is simply a portal designed to allow access to content that can be viewed by the mobile browser employed by the handset. Thus the CAB and others are incorrect to assert that it is necessary for access to be open to a non-paying Internet user in order to qualify as “delivered and accessed over the Internet”.
10. CWTA notes that Mr. Trudel’s arguments are based on the flawed assumption that the mobile handsets are not accessing the Internet. This assumption is incorrect, as the Lemay-Yates report clearly confirms that the multimedia content available through the mobile broadcasting portal is accessed through the mobile handset’s web browser, and the same web browser can be used to access a broad array of Internet addresses. Indeed, the user can input a URL of his/her choice to obtain any content on the world-wide web designed for viewing on the mobile browser. One can access the Internet through a mobile handset browser without being a subscriber to the wireless carrier’s mobile broadcasting portal; but one cannot access the carrier’s mobile broadcasting portal without accessing the Internet through the mobile browser.
11. Consequently, the Commission should dismiss any notion that that the portal approach used by the mobile carriers would exclude the application of the NMEO. To do so would similarly disqualify an indeterminate number of other applications that currently offer service only to subscribers.
12. Mr. Trudel also argues that the NMEO needs to be construed restrictively based on the statutory interpretation that a delegated body cannot defeat its enabling

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<sup>1</sup> Broadcasting Public Notice CRTC 1999-84, paragraph 23.

legislation and where vagueness exists, it should be resolved by limiting the category. However, CWTA submits that there is no vagueness in the NMEO criteria. The criterion that the service be “delivered and accessed over the Internet” is a clear category of services, and can be demonstrated with engineering certainty. In this case, the Lemay-Yates report has clearly established that the services in question meet these criteria. Any vagueness regarding the operation of these services has been eliminated.

13. Some interveners argued that the Commission did not previously consider that mobile devices would be covered by the NMEO. For example, Quebecor Media Inc. (QMI) submitted that the NMEO “n’a pas été conçue pour les services proposés aujourd’hui.” CWTA disagrees. As pointed out in CWTA’s first round submission, in Broadcasting Public Notice CRTC 2003-2 the Commission specifically identified “portable devices such as ... handheld PDAs” as devices capable of accessing the Internet to view programming. The Commission further agrees with parties who considered that Internet retransmission would foster technological innovation consistent with s. 3(d)(iv) of the *Broadcasting Act*.<sup>2</sup> It concluded that Internet retransmission undertakings, which would include those that employed mobile handheld PDAs, should remain exempt from licensing under the NMEO. Thus, contrary to the assertions of some interveners, the Commission has previously specifically considered that the NMEO would apply to delivery of video to mobile wireless handsets.
14. A number of interveners from the production or cultural sectors call for a complete review of the NMEO. In reply, CWTA notes that some of the arguments remain unchanged from those put forward in the New Media proceeding in 1998-99. Despite the grave forebodings by such parties at the time, the Canadian broadcasting system and the cultural sector have flourished in the interim, and broadcasters and content providers have been quick to employ the Internet to broaden their reach and enrich the experience of those that access their content. CWTA submits that the same will continue if mobile multimedia services gain a degree of consumer interest.

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<sup>2</sup> Broadcasting Public Notice CRTC 2003-2, paragraphs 65-66.

15. Furthermore, mobile multimedia should be considered relative to other multimedia developments on the Internet. CWTA submits that it would be inappropriate for the Commission to suspend or restrain the development of mobile multimedia, while other Internet-based services, with far greater reach and higher quality, are able to continue to innovate and evolve under the NMEO.

### **Proposals for a New Exemption Order**

16. CWTA reiterates its position that the NMEO applies to mobile multimedia services, and that no unique new exemption orders (EO) should be issued for mobile multimedia services. The CAB and a number of its members and supporters, however, argue that the Commission should make amendments to the NMEO to specifically exclude mobile broadcasting, and issue a new EO with specific conditions.

17. In reply, CWTA would first note that that this Notice did not seek comments on whether or not the NMEO should be opened and subdivided. CWTA submits that it would be out of process for the Commission to conclude that mobile broadcasting is a special case of broadcasting delivered and accessed over the Internet that should be singled out for special treatment. In CWTA's view, the Commission has a black-and-white decision to make: the services in question, as described by the Lemay-Yates Report, are either broadcasting services "delivered and accessed over the Internet" or they are not. If they are, then they meet the criteria of the NMEO. If the Commission determines, at some future time, that it wishes to review the NMEO then it should do so in a separate proceeding at which time all Internet applications, including this one, could be examined.

18. CWTA further submits that it would be extremely cumbersome and challenging for the Commission to subdivide various forms of content delivered and accessed over the Internet into various exemption orders, each with its own conditions. To do so in this case would open the door to a plethora of exemption orders for other Internet broadcasting applications, which would effectively constitute a review of the NMEO in a piecemeal process.

19. The CAB also argues that it would be inappropriate to adopt a regulatory approach free of constraints, in part because "at this early stage of development it is

impossible to forecast with any degree of certainty exactly how these services will evolve, the degree to which customers will take up and use such services, or the ultimate impact they will have on existing players in the Canadian Broadcasting System<sup>3</sup>". CWTA agrees that the prospects for this service are uncertain, but disagrees with CAB's conclusion that such uncertainty calls for constraints. Rather, it is precisely this uncertainty that calls for the application of a broad exemption order. That is, it is *because* these services are at the early stages of development that regulation would hinder its growth and evolution. The CAB's approach is to regulate first, stifling innovation and growth. QMI doubts that the impact of mobile multimedia services would be substantial, and proves the point by noting that mobile subscribers in France use mobile broadcasting services, on average, only one and-a-half minutes daily<sup>4</sup>. Similar results might be achievable in Canada. This amount of daily use is far less than currently observed among Internet users, who have unconstrained access to multimedia content. Further, it is considerably less than the average of more than three hours per day of per capita broadcast viewing<sup>5</sup>.

20. CWTA also submits that the conditions suggested by the CAB for the new EO would be inappropriate and impossible to implement. The CAB proposed that subscribers should receive a preponderance of Canadian services, and the wireless carriers should restrict access to any content that is not sourced from services previously authorized by the Commission. Such a condition could not be implemented. As previously described, the wireless carriers act like ISPs, allowing their subscribers to access the Internet using their mobile browsers. The users could therefore go to any site in the world that offered content formatted for viewing on multimedia browser software. The wireless carriers cannot reasonably be expected to keep track of which web sites offer Canadian content and which do not, and restrict their subscribers accordingly. The carriers' mobile broadcasting portals are simply one part of broader mobile multimedia Internet services through which a vast array of Internet content can be accessed. The wireless carriers are anxious to obtain Canadian programming for their broadcasting portals because they believe that their subscribers want content that is relevant to them. For that reason, they have worked

<sup>3</sup> CAB comments, paragraph 5

<sup>4</sup> QMI Comments, paragraph 4.3

<sup>5</sup> Broadcasting Policy Monitoring Report 2005, Table 3.1

with Canadian broadcasters to develop the services that appear in the portals today, and will continue to work with them in the future.

21. The CAB proposes that all programming be sourced from licensed Canadian broadcasters or non-Canadian services previously authorized for distribution in Canada. Global goes one step further, proposing that the content be sourced only from licensed Canadian broadcasters. CWTA submits that either of these proposals would be an inappropriate constraint. First, it would be impossible for the wireless carriers to determine the source of multimedia content delivered and accessed over the Internet through the mobile browsers because the user has unlimited access to the Internet. In respect of the carriers' mobile broadcasting Internet portals, the content aggregator could obtain only programming for which Internet rights had been secured. While Canadian and authorized broadcasters undoubtedly have highly desirable content that fits that description, they are not the only source. Many web site owners that are not affiliated with broadcasters have multimedia content that might be suitable for the mobile market and the carriers' mobile broadcasting portals. Also, undertakings unrelated to broadcasters may choose to gather or create content explicitly for the mobile market.
22. As the CWTA stated in its prior submission, like the video content available from Canadian-based Internet portals commonly accessed via personal computers, market forces will ensure that Canadian content will have a significant presence on the carriers' mobile broadcasting portals accessed through handheld devices. For these services to be successful, the content must be relevant to Canadians. As such, the carriers intend to offer substantial Canadian content. Indeed it is anticipated that many Canadian broadcasters and other Canadian content providers will develop made-for-mobile content that will reflect, and therefore promote, their conventional programming
23. Global also proposes that the Commission establish a "no undue preference" rule to prevent the mobile carriers from unreasonably denying access. CWTA first notes that its members seek content from as broad a set of sources as possible. Second, as stated earlier, there will not be a single Internet source from which all video can be accessed. Any person, including Global, could create their own portal and offer content formatted for display on mobile handsets. Further, as consistently

acknowledged by the Commission, Canada's wireless carriers operate in a dynamically competitive market, and if they refused content from any source, it might give their competitors a competitive advantage. CWTA also observes that there is no such constraint placed on any Internet service provider that is broadcasting pursuant to the NMEQ, and that viewing on mobile telephones is likely to be an insignificant proportion of total Internet video viewing. Finally, CWTA notes once again that the wireless carriers seek Canadian programming. Some could have launched their services earlier without Canadian programming, but deliberately held off until they could obtain it. Accordingly, Global's proposal for a "no undue preference" condition is unnecessary and should be rejected.

24. Some broadcasters appear to wish to impose conditions on other broadcasters such that any content they provide to mobile broadcasters must be related to the programming service in question. CWTA submits that no such constraints are necessary. First, it is likely that broadcasters would secure the Internet rights primarily for the programs that they obtain for their licensed programming services. Further, to the extent that the broadcasters wish to reinforce their brand through the wireless carriers' mobile broadcasting portals, they are likely, out of self-interest, to stay consistent with their programming genre.
25. The CAB and other interveners propose that the Commission require the wireless carriers to contribute 5% of their gross annual revenues derived from mobile broadcasting services, including airtime charges for reception of the service, to a Canadian Talent development fund. CWTA notes that this would be significant precedent, as no other distributor of programming delivered and accessed over the Internet is required to make such financial contributions. Many web sites, including those of licensed television and radio services, offer audio or video programming; most of these sites obtain advertising revenues. Yet the CAB has never targeted these sites for such contributions. CWTA therefore objects to an explicit levy on principle. Further, given the flat rate that the carriers charge for use of the mobile browser, it would not be possible to determine what proportion was used to view a video service, making calculation impossible. As well, the revenues (and margins, if any) in the early stages of developing this service are likely to be very low and so the carriers should not be further burdened with contribution obligations. Finally, given that the wireless carriers will be generating new revenues for the content suppliers

through acquisition of rights to access their programming, CWTA submits that it will already be contributing indirectly to the development of new content. Accordingly, CWTA submits that it would be inappropriate at this time for mobile carriers to contribute to such a fund.

26. The CAB and others further submitted that any exemption order should be of a limited duration only, and that in the meantime the Commission should move expeditiously to a licensing regime. Others called for licensing immediately, using the broadcasting distribution undertaking framework. In reply, CWTA notes that any exemption order is transitory, and all are reviewed periodically by the Commission. Given the *de minimus* amount of viewing of these services relative to other viewing of programs on the Internet, it would seem inappropriate to single these services out for reconsideration after only a short period. Further, it would be counterproductive in that it would limit the ability to innovate and seek long term investments. Time is needed to allow the services to find their niche in the market.

### **Copyright Issues**

27. A number of the interveners raised copyright issues, expressing concern that the wireless carriers may not respect the rights held by various parties. CWTA wishes to reiterate that its members fully intend to acquire the appropriate rights for the content offered through their portals.
28. Some interveners appear to inaccurately assume that the wireless carriers intend to retransmit broadcasting signals, and demand that the wireless carriers obtain consent. In reply, CWTA notes that Internet retransmitters operating pursuant to the NMEO are specifically excluded from the compulsory licence granted by s.31 of the *Copyright Act*. Accordingly, the wireless carriers or their content aggregators that they employ would have to deal individually with the rights holders of each program they wish to offer through their service. The wireless carriers are therefore focusing their attention on programming carried by specialty services for which the broadcasters own the Internet rights. This would appear to further limit the content available on the mobile services and minimize the potential impact on the Canadian broadcasting system.

### **Other Issues**

29. Some interveners have suggested that the application of the NMEO would allow the services to bypass the provisions of the *Broadcasting Act*. CWTA notes that the *Act* specifically provides for exemptions from licensing where the Commission deems licensing would not contribute in a material manner to the implementation of the broadcasting policy of Canada. Given the nature of the services as described in this and prior submissions, the materiality of the services relative to other broadcasting activities, the wireless carriers and CWTA have provided sufficient evidence that an exemption is appropriate.
30. The CAB proposes that the role of MobiTV be examined, suggesting that it may be acting as terrestrial relay distribution undertaking (RDU). In reply, the CWTA notes that RDUs, by definition retransmit signals, *i.e.* over-the-air signals. As noted previously, the wireless carriers do not seek to retransmit signals because such retransmission would not be subject to the compulsory licence under s.31 of the *Copyright Act*. Rather, the wireless carriers seek to distribute content sourced from the various specialty services. Consequently, any reference to RDUs is not applicable.
31. The Canadian Association of the Deaf request that the mobile carriers consider their needs. CWTA notes that most handsets are designed for use with headphones, which may be of assistance to many persons with hearing disabilities. Given the size of the screen on mobile handsets, closed captioning would not be practical.
32. The Commissioner of Official Languages reminds the Commission that the mobile services should reflect Canada's linguistic duality. In reply, CWTA notes the wireless carriers, in their efforts to make their services relevant to their subscriber bases, have already included both English and French language services in their mobile broadcasting portals.

### **Conclusion**

33. The mobile broadcasting services provided by the wireless carriers are delivered and accessed over the Internet, and as such, they fall squarely under the *New Media Exemption Order*. The role of the wireless carrier is that of an ISP offering an Internet portal that is accessible on a subscription basis. The carrier's new mobile service serves as a complement to the broadcasting services available through the

Internet and cable, DSL and satellite distributors. There is relatively little content currently available and few persons have handsets capable of receiving the service. Those that do view the service are likely to do so for very short periods of time. Licensing of these services, particularly at this early stage of development, would not contribute materially to the implementation of the objectives of the *Broadcasting Act*. Regulatory flexibility for an extended period would allow the service to develop and find its niche, without precluding reconsideration of the regulatory framework, if necessary, in the future.

34. CWTA appreciates the opportunity to provide these reply comments and wishes to acknowledge all of the interveners for their interest in this innovative new service.

Sincerely,

*Electronic filing*

J. David Farnes  
Vice President  
Industry and Regulatory Affairs

cc: Intervenors

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