

June 23, 2006

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

Dear. Ms Rhéaume:

**RE: Broadcasting Public Notice CRTC 2006-48: Call for comments on a proposed exemption order for mobile broadcasting undertakings**

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 (BPN 2006-48) as modified by Broadcasting Public Notice CRTC 2006-48-1.
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 supports the comments filed by Shaw Communications Inc. and by MTS Allstream.
4. Other interventions generally raised one or more of the following points:
  - Mobile broadcasting services should not be exempted;
  - The CRTC should review the New Media Exemption Order;
  - The proposed Exemption Order should include various regulatory obligations similar to those borne by licensed broadcasting distribution undertakings;
  - The proposed Exemption Order should be reviewed within 2 or 3 years;
  - The proposed Exemption Order should require mobile broadcasting undertakings to obtain the prior consent of a broadcaster and/or program rights holder for the retransmission of its signal or program, as the case may be; and
  - The scope of the proposed Exemption Order should be narrowly construed.

5. In the following comments, CWTA addresses each of these positions rather than responding to each individual intervention. Failure to comment on any particular aspect of an intervention should not be construed as implicit agreement.

**Positions:      Mobile broadcasting services should not be exempted;  
The CRTC should review the New Media Exemption Order;  
The new Exemption Order should include various regulatory obligations similar to those borne by licensed broadcasting distribution undertakings.**

**CWTA Response:**

6. Each of these arguments were forcefully made in the extensive proceeding leading up to the CRTC's issuance of Broadcasting Public Notice CRTC 2006-47 ("Regulatory framework for mobile television broadcasting services") and the Commission thoroughly reviewed and completely addressed each of them in that Notice. Specifically, the Commission
- Determined as a matter of fact that the mobile television broadcasting services described therein and operated by Bell Mobility Inc., TELUS Mobility and Rogers Wireless Inc., in conjunction with MobiTV Inc., are "delivered and accessed over the Internet" and thus fall within the Commission's existing New Media Exemption Order;
  - Acknowledged that mobile broadcasting services can offer additional benefits to Canadian broadcasters by expanding the audiences for Canadian programming and to Canadian producers by expanding the opportunity to create and license new content;
  - Encouraged the industry to explore creative and innovative means to deliver mobile broadcasting services to people with disabilities and to address the practical difficulties that can be associated with providing related features such as closed captioning;
  - Concluded that mobile broadcasting services, whether or not delivered and accessed over the Internet, are unlikely in the near future to become substitutes for conventional broadcasting services or impede the ability of traditional broadcasters to fulfill their obligations under the *Broadcasting Act* (the Act);
  - Determined that there is no need to review the New Media Exemption Order at this time; and
  - Confirmed that it will continue to monitor the broadcast of television programming over the Internet, and the impact, if any, that it might have on the Canadian broadcasting industry and on licensed broadcasters in particular.
7. Having reached the above conclusions and made the above determinations, the Commission issued BPN 2006-48 in which it announced its further determination that compliance with Part II of the Act, and any applicable regulations made thereunder, by persons carrying on mobile television broadcasting undertakings not delivered and accessed over the Internet will

not contribute in a material manner to the implementation of the policy objectives set out in section 3(1) of the Act. Accordingly, the Commission concluded that exempting such undertakings from licensing and regulation is warranted.

8. The purpose of BPN 2006-48 was thus to seek and obtain comments on the proposed wording for the new Exemption Order the Commission had decided to establish for mobile television broadcasting undertakings not delivered and accessed over the Internet. BPN 2006-48 did not, nor was it meant to, establish a proceeding for the review of the above-listed conclusions or determinations in BPN 2006-47. Accordingly, CWTA submits that the submissions repeating or seeking to advance the above-noted positions, which have already been thoroughly addressed by the Commission, are beyond the scope of this proceeding and should therefore be disregarded.

**Position:**           **The new Exemption Order should be reviewed within 2 or 3 years.**

**CWTA Response:**

9. The Commission always retains the right and power to review its exemption orders as circumstances require. As noted above, the Commission confirmed in BPN 2006-47 that it will continue to monitor the broadcast of television programming over the Internet, and the impact, if any, that it might have on the Canadian broadcasting industry and on licensed broadcasters in particular. The same undoubtedly holds true for mobile broadcasting not delivered and accessed over the Internet. Accordingly, CWTA submits there is no need to build a specific, short term review date into the new Exemption Order.

**Position:**           **The new Exemption Order should require mobile broadcasting undertakings to obtain the prior consent of a broadcaster and/or program rights holder for the retransmission of its signal or program, as the case may be.**

**CWTA Response:**

10. In its first-round submission, CWTA examined in some detail the question of whether the Commission should include in the new Exemption Order for mobile broadcasting undertakings not delivered and accessed over the Internet, and thus not subject to the New Media Exemption Order, a criterion requiring either signal or program retransmission consent. In that submission, CWTA opposed either form of retransmission consent for such undertakings on the basis it is unnecessary to protect rights holders' interests and since we believe including such a criterion would amount to the Commission acting beyond its jurisdiction to re-write existing copyright laws and establish a new copyright right not provided for in the *Copyright Act*.
11. CWTA notes that no party, including those representing broadcasters' interests, submitted any arguments during the first round supporting the need for, or justifying the inclusion of, a signal retransmission consent obligation in the proposed exemption order. We submit that

this is consistent with our argument that creating such a new and contentious obligation would be inappropriate, unnecessary and unjustified.

12. CWTA further notes that submissions from program rights holders seeking a program retransmission consent obligation instead of a signal retransmission consent obligation confirmed the fact that, as CWTA outlined in its first-round comments, the *Copyright Act's* distant signal retransmission compulsory licence regime will apply to mobile broadcasting undertakings not subject to the New Media Exemption Order. Accordingly, while their comments suggest they would be unsatisfied with this result, program rights holders will indeed be compensated through that regime for the retransmission of their programs by non-Internet mobile broadcasting undertakings, just as they are when their programs are retransmitted by other secure, closed network non-Internet retransmitters.
13. To the extent program rights holders believe they are not sufficiently compensated through the distant signal retransmission compulsory licence regime, the venue for seeking redress or alterations to such compensation is the Copyright Board, not the CRTC. To this end, CWTA notes that retransmitters and the various distant signal copyright collectives recently agreed unanimously to a settlement on the distant signal tariff which provides for annual increases for the length of its term. Copyright Board certification of that settlement agreement is expected shortly.
14. CWTA acknowledges that, in Broadcasting Public Notice CRTC 2003-2, the CRTC, in confirming application of the New Media Exemption Order to Internet retransmitters, supported the notion that such retransmitters would thus be excluded from the distant signal retransmission copyright regime. In doing so, the Commission noted that certain parties, for example, claimed that program suppliers did not yet “trust the Internet as a distribution mechanism”, questioned whether effective technical means for limiting the global reach of the Internet existed or would eventually be found, and expressed concerns regarding unauthorized, down-stream Internet reproductions, and how Internet retransmissions would impact on foreign markets for domestic programming and on domestic advertising revenues (should Internet retransmitters frame programs with Internet-style pop-up and banner ads). For its part, the Commission confirmed its own concern that a program retransmitted over the Internet would become available world wide and thus could significantly reduce the opportunities that a holder of rights in the program would have to license it for a number of territorially limited markets.
15. As is clear from the above paragraph, the parties’ and the Commission’s concerns about application of the distant signal retransmission regime to Internet retransmitters had everything to do with the role of the Internet in the undertakings’ operations. Without commenting on whether any of these concerns remain valid today, they were all tied to the unbounded, global reach and interactive nature of the Internet. None of these same concerns arise with respect to the subject of the new Exemption Order, namely domestic mobile broadcasting undertakings which offer services *not* delivered or accessed over the Internet; and we submit the Commission should not import previous Internet-focused arguments into the current non-Internet context.

16. CWTA submits that the CRTC must distinguish between concerns expressed about application of the distant signal retransmission regime to Internet based-retransmitters and concerns expressed about the nature of the distant signal retransmission regime itself and associated tariff rates. The former concerns were addressed by the government's amendments to the *Copyright Act* and the Commission's determinations in BPN 2003-2; addressing the latter concerns, we submit, is properly the role of the government and the Copyright Board, and the Commission should not attempt to address them by venturing into the realm of copyright law.
17. For these and the reasons set out in our first-round comments, CWTA submits that the CRTC should not require either signal or program retransmission consent as a term of the new Exemption Order for non-Internet mobile broadcasting undertakings.

**Position:            The scope of the new Exemption Order should be narrowly construed.**

**CWTA Response:**

18. In its first-round-comments, CWTA submitted that the new Exemption Order should apply to *all* non-Internet mobile broadcasting services.
19. Some parties in their first-round submissions argued that the new Exemption Order should prohibit exempt mobile broadcasting services from acting as substitutes for existing methods of distributing television or as set-top boxes. They wish to limit the exemption order to broadcasting to cellular telephones.
20. CWTA opposes these positions. The whole purpose of the new Exemption Order is to address the mobile distribution of broadcasting. Furthermore, the idea that mobile devices or personal digital assistants could also be used as set-top boxes strains credulity.
21. CWTA submits that concerns about the evolution of mobile broadcasting services have already been thoroughly addressed by the Commission in BPNs 2006-47 and 2006-48 and are therefore beyond the scope of this proceeding. As referenced earlier in this submission, the Commission has concluded that mobile broadcasting services are unlikely in the near future to become substitutes for conventional broadcasting services or impede the ability of traditional broadcasters to fulfill their obligations under the Act. As also noted earlier, the Commission always retains the right and power to review its exemption orders as circumstances require and it has confirmed that it will continue to monitor the impact, if any, that mobile broadcasting services might have on the Canadian broadcasting industry and on licensed broadcasters in particular.
22. The Commission has proposed exempting broadcasting services "delivered and accessed through mobile devices, including cellular telephones and personal digital assistants." CWTA has recommended this last phrase instead read "...including but not limited to cellular telephones, PCS telephones, and personal digital assistants." CWTA submits this is an appropriate definition given that the industry is in an embryonic state. Moreover, given that no one knows precisely what mobile broadcasting devices will look like in the future, it is

premature to put limitations on the devices consumers may use to receive the services provided by the undertakings subject to the new Exemption Order.

All of which is respectfully submitted.

Sincerely,

*Electronic submission*

J. David Farnes  
Vice President  
Industry and Regulatory Affairs

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