



Filed via ePass

6 April 2009

Mr. Robert A. Morin
Secretary-General
Canadian Radio-television and Telecommunications Commission
Gatineau, Quebec
K1A 0N2

Dear Mr. Morin:

**RE: Broadcasting Notice of Consultation CRTC 2009-104 (the "Notice")
Application ("Application") by Rogers Broadcasting Limited ("Rogers") to amend
the licence of Outdoor Life Network ("OLN")**

1. As the parent company to The Score Television Network ("The Score"), Score Media Inc. ("SMI") *opposes* the portion of the Application which seeks to amend OLN's condition of licence 1(c). The purpose of the proposed amendment would be to allow OLN to air "stick and/or ball sports, including hockey, baseball, basketball, golf, soccer and tennis."
2. In 2004, the Commission rejected a previous attempt by OLN to move into mainstream sports and the result should be no different this time. The rationales put forward by Rogers do not support the licence amendments that it now seeks for OLN. In fact, the arguments raised by Rogers in the Application itself are internally contradictory and invite denial.
3. In particular, Rogers has advanced the following arguments, each of which will be addressed by SMI in sequence.
 - (a) "These amendments will provide our service with the ability to provide a more well-rounded programming offering, in response to the expectations of our viewers."
 - (b) "The sports issue has changed significantly since OLN was first licensed. With the Commission's most recent specialty framework (PN CRTC 2008-100), all Canadian services will soon be able to carry up to 10% sports programming. Moreover, the Commission has begun a proceeding to open up mainstream sports services to competition."

A) “These amendments will provide our service with the ability to provide a more well-rounded programming offering, in response to the expectations of our viewers.”

4. The concept of specialty services versus general interest pay services is that the former are not supposed to be well-rounded - as their name implies, specialty services have defined, narrow niches.
5. In OLN’s case, its niche is programming which relates to outdoor recreation, conservation, wilderness and adventure. Its nature of service condition of licence reads as follows:
 - (a) The licensee shall provide a national English-language specialty television service devoted exclusively to programs that deal with outdoor recreation, conservation, wilderness and adventure.
6. When OLN applied for its licence renewal in 2003, it sought the ability to air Category 6(a) – Professional Sports for up to 15% of its broadcast schedule. OLN argued that certain professional sports, like *Tour de France* cycling, were consistent with its nature of service, and should thus be permitted.
7. The Commission agreed with OLN - however, the Commission did not give OLN the unfettered ability to broadcast programming from Category 6(a). Rather, the Commission prohibited OLN from airing professional “stick and ball” sports because the Commission did not consider these sports to be consistent with OLN’s nature of service:

While the Commission acknowledges The Score's concern that OLN could become a second sports programming window for its other Canadian shareholders, it notes that OLN's programming must deal exclusively with outdoor recreation, conservation, wilderness and adventure and, therefore, even with the addition of category 6(a), the service would not be permitted to broadcast many of the types of sports that The Score suggested should not be permitted on the service...

In light of the above, the Commission **approves** the licensee's request and adds program category 6(a) to the list of categories from which OLN may draw its programming, reminding the licensee that all such programming must be consistent with its outdoor recreation theme.... Nevertheless, the Commission has determined that the type of professional sports programming permitted on OLN should be defined. Accordingly, the service will not be permitted to broadcast professional sports programming that includes stick and/or ball sports, including hockey, baseball, football, basketball, golf, soccer and tennis. A **condition of licence** on the nature of service is set out in the

appendix to this decision, and incorporates the limitations on the use of material from category 6(a).¹

8. Rogers is now seeking the exact flexibility that was denied in 2004. Yet it has provided absolutely no evidence in support of its Application. No viewer surveys. No specific examples of the types of professional “stick and ball” programming that OLN would air. No rationale for how this proposed programming would now be consistent with OLN’s nature of service when it was determined by the Commission not to have been consistent in 2004. Nothing – other than a general assertion that the “expectations of our viewers” required more a “well-rounded” programming offering.
9. In fact, the Application itself is internally contradictory, and argues against providing OLN with amendments they are seeking:

In its 2004 licence renewal, OLN was granted authority to increase its flexibility to carry sports programming, including professional sports, to a maximum level of 15%. However, in response to arguments put forward by existing sports services, the Commission determined that OLN’s sports programming could not include any sports involving “sticks and balls”.

OLN has upheld this prohibition, and continues to carry sports events such as the *Tour de France* and the *Dakar Rally*. However, sports programming has not become a focus for the service and certainly not to the extent contemplated during its last licence renewal.

Instead, OLN has gradually moved to focus on other initiatives. As the service has evolved, OLN has created a number of very successful Canadian programs such as *Survivorman*, *Mantracker*, and *Angry Planet*. These programs have established OLN as the Canadian destination for recreation and adventure...

In our submission, the programming categories for OLN should better reflect the more recent direction of the service. While sports programming does comprise some of OLN’s schedule, our service provides a much wider variety of programming. Our audience has evolved with us. They now see our service as a destination for different types of recreation and adventure programming...

As outlined above, we believe the circumstances surrounding OLN to be unique. OLN has not become a sports-centric service. In fact, it now has sports programming flexibility that is otherwise available to all other specialty services. OLN has instead evolved to become a destination for a wide variety of recreation and adventure programming. However, in an effort to meet viewer expectations and demands, OLN needs to do more. We need the opportunity to also carry Category 7 programming, and establish a more well-rounded

¹ Paragraphs 36 and 37, emphasis in original.

service for our viewers, much like competitors in other genres like *Space and History Television*.

10. The behaviour of OLN in the years since its last licence renewal, as evidenced by the above quotes, reflect exactly what the Commission intended when it denied OLN the ability to broadcast professional “stick and ball” sports in 2004.
11. In SMI’s submission, the Commission should continue to require that OLN live within the scope of its promised nature of service and distribute programming which deals exclusively with outdoor recreation, conservation, wilderness and adventure. Accordingly, this Application should be denied.

B) “The sports issue has changed significantly since OLN was first licensed. With the Commission’s most recent specialty framework (PN CRTC 2008-100), all Canadian services will soon be able to carry up to 10% sports programming. Moreover, the Commission has begun a proceeding to open up mainstream sports services to competition.”

12. OLN makes two further assertions in support of its Application to broadcast mainstream sports. The first assertion depends on Rogers’ creative interpretation of portions of Broadcasting Public Notice CRTC 2008-100 relating to proposed programming category flexibility. The second assertion depends on the Commission’s current proceeding on allowing competition in mainstream sports. However, neither assertion provides support to OLN’s Application.

(a) Programming category flexibility

13. The Commission’s analysis in OLN’s licence renewal decision in 2004 produced the specific conclusion that allowing OLN to air unrestricted Category 6(a) Professional Sports programming (i.e. without any limitation regarding “stick and ball” sports) would be inconsistent with OLN’s nature of service.
14. In indicating in Broadcasting Public Notice CRTC 2008-100 that it would provide programming category flexibility, the Commission did not intend that services be permitted to air programs that are not consistent with their nature of service. No generic authorization to air programming was suggested that would override a nature of service that specifically precludes airing certain programming. Indeed, that is why an application to obtain an amendment to the condition of licence is required.
15. This approach was explicitly recognized in paragraphs 258 and 277 of Broadcasting Public Notice CRTC 2008-100 (emphasis added):

258. Currently, each discretionary service has a condition of licence relating to its **nature of service**. This condition of licence generally **includes three elements**: a narrative description of the nature of service, a list of program categories from which the service may draw

programming, and, in many cases, additional conditions limiting the broadcast of certain program categories or otherwise tailoring the nature of service...

277. The Commission has also decided to simplify and streamline the rules that govern **both nature of service definitions and program categories from which services may draw programming**. The Commission's intent in this respect is to ensure that the nature of service set out in the licensee's conditions of licence reflects, as specifically as possible, the unique characteristics of the service.

16. Rogers appears to read Broadcasting Public Notice CRTC 2008-100 as standing for the proposition that the Commission will rubber-stamp any application that proposes to ask for 10% flexibility in certain programming genres, provided the application cite that Notice. This reading is incorrect. As noted above, there was much more to that Public Notice than paragraph 278. For instance, the Commission also stated at paragraph 238 (emphasis ours) that

[w]ith respect to the programming obligations for pay and specialty services, the Commission considers it **more appropriate to discuss these in detail at their licence renewals**. This will give the licensees an opportunity to assess the impact of the new policies and regulations contained in this public notice and **formulate their commitments accordingly**.

17. In other words, services that seek to increase their programming flexibility might have their obligations increased in other areas. Licence renewal is the appropriate forum in which to perform that sort of calibration. At that point, the Commission could discuss whether to amend one element of the nature of service (the narrative description condition of licence) in order to reflect any changes it proposes to make in another element of the nature of service (the program categories condition of licence). This approach applies not only to OLN but to any other programming service that might seek relief of this nature. In particular, it would allow the Commission, where appropriate, to consider any new programming flexibility at the same time as possible new obligations and/or a review of the activities of the service over the past licence term.

(b) Opening up mainstream sports to competition

18. Rogers, the licensee of OLN, has an appropriate vehicle on which to air major league professional sports: Rogers Sportsnet. Should Rogers feel that it requires another, similar vehicle as the result of the opening of mainstream sports to other applicants, Rogers will presumably be free to put forward an application in this regard once the Commission has set out appropriate conditions of licence in the proceeding initiated by Broadcasting Public Notice CRTC 2008-103.
19. Rogers' interest in such a vehicle should have no bearing on OLN, which is not a mainstream sports service. Were this Application to be approved, however, Rogers would have been granted a vehicle with all of the advantages of a mainstream sports service, but few of the obligations. In particular, OLN would have guaranteed carriage, genre protection, deep

penetration, a CRTC-established maximum wholesale fee (albeit one that is being phased out), lower Canadian content exhibition and expenditure requirements than any yet-to-be-licensed mainstream sports services—and the ability to air for hours daily the same professional sports that such services will be able to air.

20. Notwithstanding the unusual reading of Broadcasting Public Notice CRTC 2008-100 set out in Rogers' Application, no rules allow Rogers to transform OLN into such a service by obtaining licence conditions that would allow it to air unrestricted mainstream sports.

C) Conclusion

21. In 2004, the Commission rejected a previous attempt by OLN to move into mainstream sports. The Commission determined that “stick and ball” sports were not consistent with OLN's nature of service condition of licence, which states that OLN's programming is to be devoted exclusively to programs that deal with outdoor recreation, conservation, wilderness and adventure.
22. Nothing has changed and Rogers has offered no evidence in support of this Application. No viewer surveys. No examples of proposed programming. No rationale for how this proposed programming would now be consistent with OLN's nature of service when it was determined by the Commission not to have been consistent in 2004. Nothing – other than a general assertion that the “expectations of our viewers” required more a “well-rounded” programming offering, and selective quotes from Broadcasting Public Notice CRTC 2008-100, without acknowledging the Commission's substantive commitment to continued nature-of-service conditions.
23. Accordingly, SMI submits that the Application should be denied.
24. SMI appreciates the opportunity to provide these comments. A copy of this intervention has been sent to the applicant at the address shown in the Notice.

All of which is respectfully submitted,

SCORE MEDIA INC.

Per: 

Benjie Levy
Executive Vice-President and Co-COO

c.c. Susan Wheeler, Rogers Media (susan.wheeler@rci.rogers.com)