



Filed Via Rapids

April 16th, 2009

Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

**Re: Application No. 2009-0228-0 by Rogers Broadcasting Limited to
amend the licence for Outdoor Life Network (OLN) – Reply to
interventions**

1. Rogers Broadcasting Limited (RBL) hereby responds to the nine interventions (listed at the end of this letter) that raised concerns about various elements of the above-noted application to amend OLN's licence. A copy of this reply has been provided to these intervenors.
2. For the purpose of organizing this reply, we have addressed specific concerns raised by intervenors under the following broad headings:
 - Issues relating to the broadcast of category 7 programming.
 - Issues relating to the broadcast of category 6(a) programming.
 - Procedural issues related to the timing of the application.

Issues related to the broadcast of category 7 programming

3. A number of intervenors raised concerns about RBL's proposal to amend condition of licence (COL) 1(b) to add subcategories 7(b), 7(e) and 7(f) to the list of categories from which it may draw programming, and to amend COL 1(d) to authorize OLN to devote up to 25% of its schedule to the broadcast of programming draw from category 7. These concerns focused on three main allegations:
 - (i) the proposed changes to the program categories from which OLN may draw programs are inconsistent with OLN's approved nature of service description;
 - (ii) allowing up to 25% of the schedule to be devoted to the broadcast of category 7 programming is inconsistent with the approved nature of service and with the Commission's new policy on programming flexibility as set out in Broadcasting Public Notice CRTC 2008-100, *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (BPN 2008-100); and
 - (iii) there will be insufficient Canadian content in the category 7 programming broadcast by OLN.
4. For the reasons discussed below, RBL submits that all of these allegations are unfounded and should be dismissed by the Commission.
 - (i) **The proposed amendment will not change, and is fully consistent with, OLN's nature of service**
5. Several intervenors take issue with our proposal on the grounds that such an increase would inevitably mean a departure from OLN's nature of service. Alternatively, the intervenors allege that further Category 7 programming flexibility would cause OLN to morph into some form of a generalist service. Some even go so far as to suggest OLN could increase or inflate the cost of US programming for other Canadian services.
6. All of these allegations are false. As we stated in our application, the increased ability to carry Category 7 programming on OLN would in no way impact our nature of service. On a consistent basis, we fulfill that nature of service and offer our viewers the very best in recreation and adventure-themed programming. However, we believe we are unnecessarily restricted in the categories of programming we can offer our viewers. Through approval of our application, OLN would simply be able to also provide scripted content. This ability would not detract from our nature of service. Quite the contrary, it would enhance our ability to fulfill it.

7. In making such an application, OLN is no different than a vast number of other specialty services. Much like OLN, they operate their services within their pre-determined nature of service. Unlike OLN, however, they may have already obtained Category 7 flexibility (many of them to a very significant degree). No one would suspect them of not meeting their nature of service obligations by the simple fact that they can offer Category 7 programming. Instead, they meet their nature of service by offering a diversity of programming options that is consistent with their focused programming mandate.
8. Within that context, a number of the interventions are disingenuous and seem to be deliberately trying to misguide the Commission's examination of our application. Their interventions are only grounded on the basis of competition, and trying to ensure that only their services have any degree of programming flexibility in trying to meeting their service niche.
 - While Canwest argues that Category 7 programming on OLN would compete with Showcase, it fails to acknowledge the significant degree of flexibility afforded to services like History and Movietime, for example. Showcase is very dissimilar to OLN. It is dedicated to drama programming, and skews more to female audiences. We cannot understand how (or why) any comparison should (or could) be made with OLN. History and Movietime, on the other hand, are much more similar to OLN. A good portion of their nature of service orientation is geared towards adventure-based programming, and, as result, to more of a male audience. Both of these services can carry much more Category 7 programming than is being proposed by OLN. Of interest, History carries many documentary- reality programs (e.g. *Ice Road Truckers*) that could just as easily fit very well with OLN's nature of service. Movietime re-branded from LoneStar, and is now focused on action and adventure movies.
 - The same can also be said of CTVglobemedia. Many of its services (e.g. MuchMoreMusic and Bravo!) offer a wide variety of programming from many different categories. However, such variety is entirely consistent with their overall nature of service. We are only asking for the authority to do the same with OLN.
 - TELETOON has submitted an intervention opposing our application when its co-owner Astral has sought and obtained very similar regulatory changes on a number of occasions. In January 2009, Astral obtained an amendment to its MPix licence, thereby allowing its movie service to carry more series-based Category 7 programming.¹ We fail

¹ Broadcasting Decision CRTC 2009-12, dated January 16, 2009.

to see why a movie service like MPix should be afforded greater Category 7 flexibility than a service like OLN.

9. Irrespective of the specific category from which it is drawn, programming on OLN will be consistent with our narrative nature of service description. Any increase in the amount of Category 7 content will not change our overall mandate. We will continue to deliver on programming that tries to fulfill our audiences' expectations and demands for recreation and adventure-themed programming.

(ii) The amendment to COL 1(d) is fully justified pursuant to the Commission's new policy re programming flexibility

10. Several intervenors also took issue with RBL's proposal to increase the amount of programming that can be drawn from category 7 from 5% of the schedule to 25% on the grounds that such an increase is inconsistent with the Commission's policy regarding programming flexibility.
11. We disagree. The Commission's new policy itself recognizes the objective of increased programming flexibility for all Category A services. While providing complete flexibility in most categories, the new policy also more specifically provides a minimum 10% for certain key categories. They include Category 7 *Drama and comedy*, as well as two specific subcategories: Category 7(d) *Theatrical films aired on television* and Category 7(e) *Animated television programs or films*.
12. In seeking to establish greater programming flexibility, the Commission recognized that nature of service descriptions were sufficient to ensure that services remain true to their programming mandate. It only set the limitation at 10% to ensure that these changes would not permit services to morph into other established genres, and thus become directly competitive. Rogers submits that the changes it has requested will in no way make OLN directly competitive with other Category A services.
13. As we argued in our application, the Commission must continue to consider applications for greater flexibility on a case-by-case basis, taking into consideration the particular or unique circumstances of any given service. That's because the Commission's fundamental objective is one based on fair competition. Should it be precluded from considering individual applications, then existing services could potentially continue to take advantage of unnecessary regulatory advantages.

14. Case in point is the context in which OLN is operating. Being an adventure-themed service, other services (non category A services) actually have greater programming flexibility than we do.
- As stated above, Movietime has complete Category 7 programming flexibility in filling its adventure-based service niche.
 - Now also available as a standard definition service,² Rush HD can also offer more Category 7 programming than can OLN.
15. Even in applying the Commission's basic 10% flexibility threshold, the intervenors also misinterpreted the Commission's new policy. We believe the new programming flexibility is not limited to a total of 10% in all category 7 programming, including all Category 7 subcategories. Instead, the 10% can also apply to existing subcategories as well.
16. Commission staff addressed this issue in a letter dated January 12, 2009 to the Canadian Association of Broadcasters (CAB), in response to a request by the CAB seeking clarification on a number of policy determinations made in PN 2008-100. In that letter, Commission staff clarified the application of the programming flexibility policy as follows:
- If a service is requesting category 7 for the first time, it will be permitted only 10% from category 7 as a whole (i.e. it is not cumulative – it is not 30%). Where a service already has some subcategories of 7 but is requesting 7d and/or 7e for the first time, it will get 10% of each.*
[emphasis added]
17. Within this context, it is clear that the Commission's focus is still that of programming flexibility, and that the Commission is willing to consider Category 7 flexibility for Category A services that will exceed the base threshold of only 10% overall.
18. More specific to our service, OLN is currently authorized to draw programming from several subcategories of Category 7, specifically 7(a), (c), (d) and (g). This application is to add category 7(e), as well as other categories, for the first time. In accordance with the Commission's policy on programming flexibility, as clarified by the staff letter, RBL submits that OLN should be entitled to a limit of 10% with respect to Category 7(d), a further 10% with respect to Category 7(e), and an additional 10% with respect to the rest of Category 7 combined.

² Broadcasting Decision CRTC 2009-44, dated February 3, 2009.

19. Thus, if OLN were to make maximum use of the flexibility to which it is entitled under the Commission's new policy, it could schedule up to 30% of its broadcast schedule with programming drawn from Category 7 overall. Our application proposes that a maximum of 25% of our schedule be devoted to such programming, which falls well within the bounds of the Commission's policy.

20. RBL acknowledges that the proposed language of COL 1(d) could be interpreted to allow OLN to draw all of its category 7 programming from a single subcategory. This is not RBL's intent, and we agree that to do so with respect to either category 7(d) or category 7(e) would be inconsistent with the 10% limit on each of those subcategories.

21. In order to eliminate any question as to the correct application of the program flexibility policy to OLN, RBL would be prepared to accept the following language for COL 1(d):

The licensee shall devote not more than 10% of all programming broadcast during the broadcast year to programming drawn from category 7(d) and 10% of all programming broadcast during the broadcast year to programming drawn from category 7(e). Furthermore, the licensee shall devote not more than 25% of all programming broadcast during the broadcast year to programming drawn from all subcategories of category 7 combined.

22. We submit that the ability to program up to 25% of OLN's schedule with such programming, with appropriate safeguards to ensure that no more than 10% of the schedule is drawn from either category 7(d) or category 7(e), provides an opportunity to better serve OLN's viewers while ensuring that the nature of the service retains its essential unique characteristics.

23. RBL believes that the proposed revision to the language of COL 1(d) would ensure that OLN's broadcast of programming drawn from category 7 is consistent with the Commission's policy on programming flexibility. Nevertheless, if the Commission were to determine that the new policy should be interpreted as generally contemplating something less than the 25% limit proposed in this application, then RBL submits that approval of the revised amendment to COL 1(d) as proposed above is justified as an exception to policy, for the reasons cited in the application.

(iii) Canadian content in Category 7 programming

24. Some intervenors expressed the concern that, in the absence of a specific requirement to the contrary, OLN would not provide a sufficient amount of Canadian content in its Category 7 programming. ACTRA, for example, took the extreme position that OLN should be allowed to increase the limit on Category 7 programming only if all Category 7 programs are Canadian.
25. RBL submits that additional obligations respecting the broadcast of Canadian content in Category 7 programming are unnecessary, for several reasons.
26. OLN's overall service is already subject to a Canadian content requirement of 50% over the broadcast day and 40% in the evening broadcast period. RBL submits that to layer onto this requirement a further requirement for a specified percentage of Canadian programming in a given program category is contrary to the principles of streamlining and simplicity, and creates a much more complex regulatory framework.
27. RBL further submits that to impose a 100% Canadian content obligation, as proposed by ACTRA, is unreasonable and punitive, and would render meaningless the flexibility that RBL is seeking with this application. There is nothing in the Commission's new policy on programming flexibility, as set out in PN 2008-100, that suggests that the authorization to broadcast programming drawn from other categories would be accompanied by a new regulatory requirement mandating that a specified percentage of such programming must be Canadian.
28. Finally, RBL has clearly demonstrated its commitment to Canadian content and has a proven track-record of success with popular Canadian adventure programs and series such as *Survivorman*, *Mantracker* and *Ed's Up*.

Issues relating to the broadcast of category 6(a) programming

29. Two intervenors, CTVglobemedia (CTV) and Score Media Inc. (SMI) oppose the removal of the current restriction in COL 1(c) that requires that programming drawn from category 6(a) *Professional sports* must not include stick and/or ball sports such as hockey, baseball, football, basketball, golf, soccer and tennis.

30. CTV's and SMI's apparent concern is that removing this restriction would somehow allow OLN to morph into a general interest sports service, reaping the benefits of a mainstream sports specialty service but sharing none of the obligations. SMI for example asserts that "...no rules allow Rogers to transform OLN to such a service by obtaining licence conditions that would allow it to air unrestricted mainstream sports."
31. RBL rejects the notion that the amendment to COL 1(c) would allow OLN to compete head-on with mainstream sports services such as TSN and The Score. OLN would continue to be restricted to a condition that not more than 15% of all programming broadcast during the broadcast day may be drawn from category 6(a).
32. In addition, RBL submits that the current restriction serves no purpose from a program acquisition point of view. CTV for example has raised the concern that approval of the various amendments would allow OLN to compete for programs and therefore drive up the prices of professional sports (and other types) of programming. On this point, RBL simply notes that a review of the modest revenues of OLN compared to a service such as TSN will quickly dispel any notion that OLN would be able to compete for the acquisition of mainstream professional sports.
33. RBL further notes that the Commission's new programming flexibility policy would allow any specialty service to devote up to 10% of its schedule to the broadcast of programming drawn from category 6(a), including "ball and stick" sports, provided that it was consistent with its nature of service. We submit that, given OLN's focus on outdoor recreation and adventure, it is reasonable to continue to provide OLN the flexibility to devote up to 15% of its schedule to category 6(a) programming, and without a restriction on "ball and stick" sports.
34. The amendment requested for OLN with respect to category 6(a) programming would have negligible impact on mainstream sports services, let alone headline sports services like The Score, but would provide OLN with the flexibility to design the best possible service consistent with our nature of service. We respectfully submit that there is no valid reason to continue to impose the "ball and stick" restriction on the programming drawn from category 6(a).
35. In an environment where the Commission is attempting to streamline and simplify its approach to regulation, such micromanagement of a programming service's schedule is unnecessary and ultimately detracts from the ability of a service to best address the needs of its audience.

Procedural issues relating to the timing of the application

36. In addition to the concerns addressed above respecting the substance of this application, CFTPA and SMI both raised questions concerning the timing of this application.
37. CFTPA suggested that, given the change of control of OLN approved last year by the Commission, dealing with an amendment application at this time calls into question the integrity of the licensing process. ACTRA submitted that it would be more appropriate to deal with this application at the next licence renewal, within the broader discussion of OLN's role and mandate and related conditions of licence, including those related to exhibition and expenditure requirements.
38. Similarly, SMI submitted that licence renewal is the appropriate forum to consider the programming flexibility, notwithstanding the fact that in PN 2008-100 the Commission adopted a new policy on programming flexibility that OLN is now proposing to implement.
39. In support of its position, SMI cites paragraph 238 of PN 2008-100, in which the Commission states that it is more appropriate to discuss in detail the programming obligations for pay and specialty services at their licence renewals.
40. RBL submits that SMI has misread paragraph 238. This particular reference to programming obligations pertains primarily to exhibition and expenditure requirements, not programming flexibility in respect of individual program categories. Indeed, there is nothing in PN 2008-100 which suggests that applications for programming flexibility cannot be dealt with outside of the licence renewal process. Furthermore, over the years it has been common practice for the Commission to deal with specific licence amendment applications at any time during a licence term and to deal with such applications on their merits.
41. With regard to the CFTPA's comment regarding the integrity of the licensing process, RBL submits that this comment is unfounded. In its application to acquire control of OLN, RBL talked about "...its desire to acquire full control of OLN with a view to building on the successful programming direction that has been adopted over the last few years." We went on to say that "[a]s the sole owner of OLN, we will ensure that it is in a position to build on the popularity of its Canadian programs, and continue to develop diverse and varied programming."

42. This application represents tangible evidence of action we are now undertaking to fulfil the commitments we made one year ago. Far from calling into question the integrity of the Commission's licensing process, we believe that this application demonstrates our respect for the process and our desire to provide the best service we can.

43. RBL urges the Commission to reject the arguments of CFTPA and SMI that this application for programming flexibility should be delayed until the time of licence renewal. We respectfully request the Commission to consider this application now, on its merits, and to approve the requested amendments.

44. We thank the Commission for the opportunity to respond to these interventions. Should the Commission have any further questions or concerns about our response, or our application in general, please do not hesitate to contact me directly.

Sincerely,

Susan Wheeler
Vice-President, Regulatory Affairs

c.c.: Stephen Waddell, ACTRA
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