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14 May 2010

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

Dear Mr. Morin:

Re: *Call for comments on the reporting requirements for new media broadcasting undertakings, Broadcasting Notice of Consultation CRTC 2010-97, 18 February 2010 (“BNC 2010-97” or the “Notice”)*

1. Sirius Canada Inc. (“Sirius”), one of two satellite subscription radio undertakings in Canada, is pleased to file this reply in respect of comments filed in the proceeding initiated by the Notice.
2. Our initial comments in this proceeding called for the Commission to mind the gap between audio and video media markets; set out three simple principles to minimize reporting burden and maximize utility; and asked the Commission to collect data relating to the number of unique Canadian users of streaming wireless point-to-point or Internet-based audio programming, a very close substitute for the programming of regulated undertakings, according to whether the programming is used through
 - *on-deck applications*, which are pre-approved by and, generally, provided through negotiated contractual arrangements with the end-user’s wireless service provider, ISP, or other network provider;
 - *off-deck applications*, which are downloaded through an application store whose proprietor generally pre-approves the application subject to standardized arrangements. However, the app store is not associated directly with the end-user’s wireless service provider, ISP, or other network provider; and
 - the Web.
3. Our reply addresses various points raised in the 26 comments filed in response to the Notice. However, it relates in particular to those submissions which addressed audio media. As noted in Sirius’ initial comments, the competitive landscape for mobile point-to-point and Internet-based audio media appears to differ significantly from that for video new media.

Purpose of Monitoring

4. A number of parties have submitted that the Commission need not actively monitor new media markets in the near-term. Sirius disagrees with these submissions. Audio media

clearly constitute a gap in the CRTC's review of broadcasting in new media. This is unsatisfactory for two policy reasons.

5. First, the Commission is required to exempt from regulation those audiovisual markets whose regulation would not advance the purposes of *Broadcasting Act*. It is not clear that the Commission has sufficient information to make this determination in respect of all audio media delivery technologies. The Commission must be in a position to compare the take-up of audio media delivered through the Internet, and to wireless devices through other point-to-point techniques, with audio media delivered through regulated platforms. It is not clear that that is presently the case.
6. Second, technological neutrality—the principle that similarly-positioned parties should be treated in a similar manner—is a basic tenet of Canadian communications regulation. Wireless point-to-point audio media services are increasingly close substitutes for subscription satellite radio. In the U.S., for instance, subscription streaming music services delivered over the Internet, including Pandora, Slacker, and last.fm, are now being integrated into in-car controls and devices:

[U]sing such a service on a phone in the car usually meant looking away from the road to switch channels or skip a song on the phone — a major distraction. So companies are marrying these services to existing in-car controls, essentially making it no different than switching between 1010 WINS and Q104.3....

So is the death of traditional radio ineluctable?

Joe Kennedy, chief executive of Pandora, says he thinks there will be a gradual migration in the car to services like Pandora, but he also says he believes it will not become a mainstream service until all new cars feature systems that can tap into apps. On the other hand, one player in this game of digital musical chairs may soon end up without a seat: Sirius XM Radio. Its satellite radio service is based on a monthly subscription model that few music fans may feel compelled to pay for, given the wider variety of genres available free on the Internet.¹

7. Sirius therefore concurs with the submissions of parties such as the Independent Broadcasters Group and Astral Media Inc. (“Astral”), with respect to the purpose of monitoring new media broadcasting undertakings. Up-to-date data will ensure that the CRTC is aware of the marketplace adoption and performance of audio media which are close substitutes for one another, and any regulatory or exemption responsibilities which flow from these. It will also enable the CRTC to better apply undue preference rules.

Securing Participation

8. Questions 7 and 8 of the Notice addressed the issue of who should be subject to reporting requirements.
9. In its initial comments Sirius simply suggested that, with respect to streaming audio media, the most-used audio NMBUs be required or asked to participate.

¹ John R. Quain, “Will the Internet kill traditional car radio?” *New York Times*, May 6, 2010. Online: <<http://www.nytimes.com/2010/05/09/automobiles/09RADIO.html>>.

10. However, a number of parties have raised questions as to the feasibility or appropriateness of seeking the participation of:
 - non-affiliated, as opposed to affiliated, NMBUs;
 - non-Canadian, as opposed to Canadian, NMBUs; and
 - NMBUs operating without the authorization of their content's rightsholders, as opposed to operating pursuant to Copyright Board tariffs.
11. The Ontario Media Development Corporation suggests in its submission that "[a]ffiliated NMBUS are already, by virtue of their role in the traditional broadcasting system, the beneficiaries of various advantages that the system confers upon participants. It is therefore reasonable to request from these players". With respect, Sirius cannot agree with this statement. The traditional broadcasting system is composed of tiers whose benefits and obligations differ. For video media, for instance, over-the-air and Category A television programming services benefit from placement on the basic service and from must-carry status, whereas Category B services do not. For audio media, this divide is even more pronounced. Multi-channel subscription radio services are simply not the beneficiaries of any advantage conferred by the regulatory system. We do not receive any funding, any carriage, any special spectrum rights, or any other particular benefit. Indeed, we provide a service that is increasingly similar to regulation-exempt pay subscription services provided to wireless devices, whether or not over the Internet, except that we have distribution costs that unaffiliated audio NMBUs do not, and meet regulatory obligations that unaffiliated audio NMBUs do not.
12. As a starting point, Sirius therefore agrees with submissions arguing that omitting non-affiliated NMBUs would lead to impartial information. Sirius similarly agrees with submissions arguing that the relevant criterion is a real and substantial connection with Canadian audiences as evidenced by targeted efforts to solicit Canadian advertising, sell Canadian subscriptions, or deploy Canadian content distribution infrastructure.
13. With respect to the practicalities of engaging otherwise-little-regulated NMBUs in the CRTC's monitoring exercise, however, Sirius proposes the following four observations by way of response.
14. First, any audio media undertaking that has "the appropriate legal rights in Canada to the content in question"² is engaged with a Copyright Board tariff, operates in Canada, and is not likely to take lightly any reporting requirements with which it is required by law to comply.
15. Second, coercive measures are not and should not be the Commission's sole approach to this issue. As most parties have advocated, including Sirius, the Commission must work closely with NMBUs, whose businesses are highly data-driven, to streamline any reporting process and tailor it to the data which NMBUs already measure.
16. Third, commercial market participants with significant, sustained activity are amenable to local compliance. For instance, the Office of the Privacy Commissioner has successfully

² BNC 2010-97, paragraph 8.

required non-Canadians, including a major non-Canadian social networking platform and a major non-Canadian street-mapping provider, to undertake significant changes in how they do business to comply with Canadian law. To assume that non-Canadian digital media players will refuse to comply with incomparably less onerous requirements before the CRTC, particularly in the context of a dialogue with market participants as to industry evolution, is, with respect, cynical and unwarranted.

17. Fourth, it is not essential that every audio or video media undertaking participate. As advocated by various parties, including Sirius, the Commission must combine the results of its monitoring and data-gathering with third-party sources. Indeed, the Commission already does so in the existing *Communications Monitoring Report*, which provides financial information for terrestrial radio according to its own data collection, but provides radio tuning information using third-party data. The number of unaffiliated or non-Canadian market participants that are very significant to the consumption of professionally-produced content in Canada, but that do not have significant Canadian operations, will not be large. The handful of such participants is likely to be responsive to collaborative engagement. Approximations regarding the rest can be developed from third-party data.
18. With respect to the particular question of unauthorized content, Sirius agrees with ADISQ that such activity should be monitored, but does not agree that such data should be obtained from ISPs that do not otherwise track the distribution of unauthorized content. Although the CRTC clearly has the power under the *Telecommunications Act* to obtain data from ISPs and ought, generally, to conduct its telecommunications and broadcasting monitoring in a converged manner, the “*collect what is collected*” principle indicates that this activity is more efficiently undertaken by third-party research, such as the Canadian Internet Use Survey (CIUS) population surveys conducted by Statistics Canada.

Medium-Term: Working Group

19. Astral Media Inc., CTVglobemedia Inc. and Canwest Television LP have called for the formation of an industry working group, or for CRTC involvement and coordination, in order to address the absence of industry-standard methods for capturing tuning or audience data,
20. This is a reasonable approach, provided that it is representative and relevant, transparent, expedient, and does not delay interim activity.
21. In order to be representative and relevant, any working group established for this purpose must ensure that all relevant sectors are represented on it. In particular, one of the responsibilities of an NMBU Monitoring Working Group (NMBU-M WG) will be to develop standards for measuring audio NMBUs. These standards are specific to audio media and cannot be derived from or subordinated to video media reporting standards. There are a variety of perspectives within the audio media sector, as demonstrated by the comments submitted in this proceeding from parties such as ADISQ, CIMA, the NCRA, and Sirius. These platform distinctions must be taken into account.
22. In order to be transparent, the NMBU-M WG must publicly identify how to join it and maintain its minutes and study documents on a publicly-available website. That has not always been the case for broadcasting industry working groups in the past.

23. In order to be expedient, CRTC staff must take an active role in working with and leading the NMBU-M WG that differs markedly from the role it has played in certain other working groups. This will include setting specific terms of reference on an ongoing basis; acting as a resource to undertake more in-depth study; working closely with the CRTC's counterparts at Statistics Canada, among others; and liaising with industry participants to ensure that such sectors as advertising sales, video search, and audio market researchers are representative.
24. Finally, the NMBU-M WG must not delay interim activity, as outlined below.

Interim: Third-Party Sources

25. In the past, the CRTC's monitoring efforts have generally begun through outsourcing to third parties, followed by gradually bringing this work in-house in order to improve quality, maintain and enhance internal knowledge, address confidentiality issues, and benefit from efficiencies of scope.
26. As agreed in Sirius' initial comments and in the initial comments of various other parties, with which the opening paragraphs of this reply concurred, it is important that the Commission monitor and make available information as to the growing importance and significance of broadcasting in new media in the Canadian broadcasting system. While the working group and standardized indicators advocated by various parties are an important medium-term goal, the CRTC should not abandon its efforts in the interim. Rather, it should work with third-party partners to incorporate, as soon as possible, new media monitoring information in the *Communications Monitoring Report*, preferably with the draft comment period advocated in Sirius' initial comments.
27. As such, Sirius urges the Commission to simply review how to extend the fields and indicators currently tracked in the *Communications Monitoring Report* to streaming audio NMBUs and any other media which are direct substitutes for non-exempt media undertakings. We respectfully submit that by
 - putting existing monitoring questions to non-exempt undertaking's NMBU affiliates, segment according to on-deck, off-deck, and web platforms;
 - incorporating relevant questions into Statistics Canada's currently-biannual Canadian Internet Use Survey;
 - undertaking outreach to engage a small number of very large providers with a complete Canadian presence; and
 - relying on other third-party research for market sizing,the Commission would provide greater transparency and predictability into the competition posed by audio and other NMBUs in the near-term.

Yours truly,

(signed in original)

Sherry Kerr
Vice President & General Counsel
Sirius Canada Inc.