Canadian Radio-television and Telecommunications Commission | Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Regulatory Policy CRTC 2011-289

PDF version

Route reference: 2010-664

Ottawa, 3 May 2011

Addition of FUEL TV to the lists of eligible satellite services for distribution on a digital basis

*The Commission **denies**, by majority vote, a request to add FUEL TV to the lists of eligible satellite services for distribution on a digital basis.*

Dissenting opinions from Commissioners Timothy Denton and Michel Morin are attached.

Introduction

1. The Commission received a request from Rogers Communications Inc. (Rogers) dated 16 June 2010 to add FUEL TV, a non-Canadian English-language satellite service originating in the United States, to the lists of eligible satellite services for distribution on a digital basis (the digital lists).

2. Rogers described FUEL TV as an English-language programming service that offers a range of action sports programming portraying the lifestyle and culture of non-mainstream action sports and the underlying social relationships and communities of interest of the individuals who participate in those sports.

3. In Broadcasting Notice of Consultation 2010-664, the Commission called for comments on the proposed addition of FUEL TV to the digital lists.

4. The Commission received one comment opposing this request from High Fidelity HDTV Inc. (High Fidelity), which owns the Category B[1] specialty programming undertaking radX.[2] The public record for this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

---

[1] As set out in Broadcasting Public Notice 2008-100, Category 2 services will be renamed Category B services effective 31 August 2011. The term "Category B" is used in this regulatory policy to encompass Category 2 services.

[2] This service is devoted to programs that focus on the impact of high definition imagery on high-octane, limit-defying human activity and adventure that tests individual personal limits, both physical and mental. It was originally licensed as AHD in Broadcasting Decision 2006-172, and launched later that year as Rush HD. In 2010, the service rebranded as radX.

Commission’s analysis and determinations

5. The Commission set out its general approach to the addition of non-Canadian English- and French-language services to the digital lists in Public Notice 2000-173. Under this approach, the Commission assesses such requests in the context of its general policy, which, among other things, precludes the addition of a non-Canadian satellite service that can be considered either totally or partially competitive with Canadian specialty or pay television services. The Commission relies primarily on the comments filed to identify the Canadian pay and specialty services with which the non-Canadian service might be totally or partially competitive and which therefore should be included in the assessment of its competitiveness.

6. The Commission uses a case-by-case approach to determine whether or not a non-Canadian service proposed for addition to the digital lists would be competitive with an authorized Canadian service. Factors considered by the Commission in its assessment of the competitiveness of a non-Canadian service include the service’s nature of service, the language of operation, the genres of programming provided, and the target audience. The Commission also considers the extent to which a proposed non-Canadian service may be a program supplier for an authorized Canadian service.

7. The Commission assesses the factors noted above in order to determine the amount of overlap between the sponsored non-Canadian service and the relevant Canadian services, and thus the extent to which the non-Canadian service might compete with a Canadian service. In general, the more significant the overlap, the more likely it is that the non-Canadian service will be found to be competitive with a Canadian service.

Comment by High Fidelity

8. High Fidelity submitted that FUEL TV is at least partially competitive with radX and, accordingly, asked that the Commission deny Rogers’ request to add FUEL TV to the digital lists.

9. In this regard, High Fidelity submitted that, based on the nature of service and program schedule for FUEL TV, one could only conclude that the programming on both radX and FUEL TV are devoted to the same programming genre and target audience. Noting, for example, that Rogers described FUEL TV as “the television destination for action sports enthusiasts from 13 to 34 years of age,” High Fidelity argued that radX targets the same audience group targeted by FUEL TV, that is, audiences that enjoy programming featuring individuals and groups or teams engaged in high risk, adventurous and/or dangerous activities or sports.

10. High Fidelity further submitted that several programs highlighted by Rogers as examples of unique offerings on FUEL TV were either identical or very similar to programs offered by radX.

11. Finally, High Fidelity expressed its concern that granting Rogers' request would have serious financial implications for radX, in particular, significantly affecting radX's ability to grow and prosper and to increase its contributions to the Canadian broadcasting system. High Fidelity noted that it is required by condition of licence to air at least 35% Canadian content whereas FUEL TV, if permitted to be added to the digital lists, could operate in Canada without making any such contribution to the Canadian broadcasting system.

Reply by Rogers

12. In its reply, Rogers stated that comparing radX's and FUEL TV's nature of service descriptions, program categories, program schedules and target audience demonstrates that these programming services are not competitive. It argued that what most differentiates the two services is that FUEL TV is an action sports service devoted to programming about the lifestyle and culture of six core youth non-traditional sports, whereas radX has no mandate to broadcast sports programming, focussing instead on programming devoted to high definition imagery of limit-defying human activity and adventure. In this regard, Rogers noted that when High Fidelity applied in 2005 for a broadcasting licence to operate a Category 2 specialty service, it emphasized that the proposed service was not a sports service in order to avoid the service being considered competitive with the now defunct Canadian specialty service known as X-treme Sports.[3]

13. Rogers concluded that since only a small part of the programming aired on radX relates to action sports, and in particular to the six sports featured on FUEL TV, adding FUEL TV to the digital lists would add diversity to the Canadian broadcasting system, without causing radX any harm.

Analysis and determinations

14. The Commission notes Rogers' view that radX and FUEL TV are different because FUEL TV provides sports programming and radX does not. While this is partially correct, the Commission's examination of these services indicates that nearly 20% of radX's programming is, in fact, composed of the six core sports that occupy more than 60% of FUEL TV's programming schedule.

15. Moreover, the Commission notes that X-treme Sports ceased operations in 2008 due to limited growth potential and profitability issues. As such, the Commission is concerned that the Canadian market for such services may not be sufficient to sustain a Canadian service focussed solely on such sports. In regard to radX, which broadcasts this and other related types of programming, the Commission considers that the attractiveness of the programming it offers and, consequently, the size of its potential audience could be reduced substantially as a result of the authorization of a service such as FUEL TV. The Commission is therefore of the view that, should Rogers' request be approved, the potential level of competitiveness between

---

[3] X-treme Sports was first licensed as Extreme Sports in Decision 2000-566.

FUEL TV and radX is great enough to cause radX direct material harm, which would make it more difficult for that service to meet its obligations to contribute to the Canadian broadcasting system.

Conclusion

16. In light of the foregoing, the Commission **denies**, by majority vote, the request by Rogers Communications Inc. to add FUEL TV to the digital lists.

17. The Commission notes, however, that if Rogers is of the view that the market can sustain an additional television service dedicated to extreme sports, it is open to Rogers to apply to the Commission for a licence to operate a new Canadian Category B digital specialty service. Any application of this sort would be considered by the Commission based on its merits.

Secretary General

Related documents

- *Call for comments on the proposed addition of FUEL TV to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Notice of Consultation CRTC 2010-664, 7 September 2010

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *AHD – Category 2 specialty service*, Broadcasting Decision CRTC 2006-172, 27 April 2006

- *Extreme Sports*, Decision CRTC 2000-566, 14 December 2000

- *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, Public Notice CRTC 2000-173, 14 December 2000

Dissenting Opinion by Commissioner Timothy Denton

1. In the world outside of broadcasting regulation, it is normal for those concerned with consumer welfare to support more competition, not less. In the partially regulated world of telecommunications, regulators try to figure out whether the play of market forces alone is sufficient to promote more consumer welfare, or whether a degree of regulation would enhance it. For instance, debates go back and forth about whether regulation of the terms of access to underlying facilities promotes or retards real competition. Should smaller ISPs go out of business? Should larger carriers vertically integrate? Should regulators intervene, and if so, where and how? This uncertainty as to how best to proceed makes telecommunications regulation a matter of serious and unending debate about how best to achieve the public interest.

2. Inside the broadcasting regime, however, all is different. Here the mandate is to protect and promote the producers of Canadian programming against all other interests. The debates that are never settled in telecommunications regulation have been authoritatively settled by the statute itself in broadcasting regulation, in favour of the producer, and more particularly, in favour of the Canadian licensee.

3. Not merely do we act to prevent competition; we use the opinion of those with a vested interest to help us determine whether their interests are adversely affected. I quote from paragraph 5 of the majority opinion above:

   > "Under this approach, the Commission assesses such requests in the context of its general policy, which, among other things precludes the addition of a non-Canadian satellite service that can be considered either totally or partially competitive with Canadian specialty or pay television services. The Commission relies primarily on the comments filed to identify the Canadian pay and specialty services with which the non-Canadian service might be totally or partially competitive and which therefore should be included in the assessment of its competitiveness."

4. Imagine if the same approach were used in any other sphere of economic life. The incumbent would be asked whether he apprehended a potential competitive threat and the regulator would heed the warnings of the incumbent to deny a licence to the potential competitor. So if a licensee of canned tomato production felt that imported tomato paste threatened the value of its licence, the tomato paste importer would be denied the licence to import his product, unless he was sponsored by the Canadian licensee. (See CRTC Public Notice 2000-1973). If all of Canadian economic life were organized that way we would be living in the purest expression of the planned economy. Yet what seems wildly dirigiste in any other sphere of economic life is standard operating procedure in broadcasting regulation. And we Commissioners are asked and quite often duty-bound to enforce it.

5. The argument for protection of broadcasting licensees is less absurd than I have made it look. For example, there are reasonable arguments for the limiting the number of radio licences in a given market, based on the population and potential advertizing revenues for a given district. There may be others equally reasonable.

6. Nevertheless, it strikes me as particularly galling that, in telecommunications, we are admonished and directed always to cleave to the minimum level of regulation necessary to achieve the public welfare, and in broadcasting, there seems to be no limit to the level and intensity of regulation we are expected to engage in to protect the always fragile domestic television production industry, and the carriers of broadcasting content, who are in somewhat more robust condition.

7. Consequently I see no merit in continuing what the Commission calls “genre protection”. At some point in time, on some issues, Commissioners have to depart from the consensus, the precedents, or the staff position – no matter how apparently reasonable - and cease to be compliant with what has gone before. The whole apparatus of Canadian broadcasting regulation is built on these apparently reasonable policies, which require Commissioners logically to approve decisions that produce increasingly absurd results. Policies like “genre protection” will not change unless more and more Commissioners refuse to go along with the policies of the past.

8. I have called for the need for a rethinking of the Broadcasting Act before, when we wisely decided not to try to apply the Act and its licensing regime to the Internet. I renew my plea that someone higher up in government heed my supplication. In the meantime we Commissioners can start by ceasing to enforce policies such as “genre protection”.

Dissenting opinion by Commissioner Michel Morin

In denying the request to add the U.S. specialty sports service FUEL TV, which is owned by Fox Cable Networks (Fox), to the list of 98 non-Canadian services authorized by the Commission for distribution by Canadian broadcasting distribution undertakings (BDUs), the Commission is displaying an unjustified overcautiousness towards a new non-Canadian service that would have complemented the Canadian offering. The distribution of this unique extreme sports service could have been part of the move toward "the more general opening up of the sports genre," as in the case of the specialty services TSN, RDS and Rogers Sportsnet, which will become discretionary services without mandatory access or distribution for BDUs as of 1 September 2011.

In my opinion, the decision not to add FUEL TV to the list of services eligible for digital distribution is inconsistent with the general philosophy of "genre deregulation" that led the Commission, in 2008, to allow for competition between news and sports specialty services. Since Broadcasting Public Notice 2008-100 (to which I was a party as a member of the hearing panel), it seems to me that the Commission has come to a standstill about the deregulation of genres in our broadcasting system, which is – and no doubt will continue to be for a long time – the most regulated in the world.

DEFINITION OF THE SERVICE

FUEL TV's proposed service targeted "action sports enthusiasts from 13 to 34 years of age." It was a unique foreign service that was distinct from the Category 2 Canadian service radX (r for *Risk*, a for *Adventure*, d for *Danger* and X for *Extreme*), initially known as Rush HD and offered by High Fidelity HDTV. These two services would have had different programming, would not have enjoyed any access rights and would not have been protected by any particular genre, as is the case for Category 1 services in the current system, which will become Category A services as of 1 September 2011. The Commission's decision thus gives a Category 2 service (Category 2 in the current system, B in the new system) with minimum Canadian content greater protection from foreign competition than it will be giving, as of September, to Category C sports services, which broadcast traditional live sports with considerably more Canadian content and greater financial risks.

It does not take a crystal ball to predict that this foreign service could have potentially competed with all of the other sports services or even marginally attracted viewers from other specialty or general-interest services, whether Category A, B, C or non-Canadian (new categories as of 1 September 2011). The more extensive the offering, the more fragmented the audience and the more consumers benefit from an expanded offering at reasonable prices. This is what happens when market forces are at play. It's a simple case of supply and demand.

That being said, the Commission has never set thresholds for determining whether a Canadian or foreign service is "too" competitive with already approved services. The Commission has absolute discretion that is not based on any criteria or mathematical formula, as I myself proposed with what was dubbed the "Morin model."

Now, what do we have before us? To avoid any bias, I took the entire table submitted by radX, which is shown here for the two services and for the 11 program categories defined by the Commission. radX, whose conclusions I do not share by the way, was the sole intervener from the Canadian system to oppose FUEL TV's distribution by satellite.

Program category	**FUEL TV**	**radX**
1, 2*a*) and 3 – News	5%	11%
2*b*) Documentary	22%	32%
5*b*) and 11 – Lifestyle/general interest/recreation and leisure	18%	55%
6 – Sports	22%	0%
7 – Drama/fiction/comedy	23%	2%
8 and 9 – Music/variety	5%	0%
12 – Interstitials	5%	0%

As we can see, even though both services potentially target the same audiences, their content, based on the categories, is weighted differently.

The three heavily weighted categories of documentaries (2(*b*)), lifestyle and culture associated with extreme sports (5(*b*) and 11) account for only 40% of the programming of the U.S. service FUEL TV, as compared to close to 90% for the Canadian service radX. Here is a difference that speaks volumes right from the outset! We can easily deduce that radX's Canadian offering as compared to that of FUEL TV can be only minimal in the other eight categories, which in total represent 60% of the U.S. service's programming! Before even analyzing the contents of the categories (which we will do further on), we can already see that what we have here is different programming. It stands to reason that programming can be the same in nature without being identical. Given the above information, I fail to understand how the Commission can justify its decision to deny the request to import a foreign service to the benefit of both Rogers and Canadian consumers under the pretext that the competition "is great enough to cause radX direct material harm."

Based on this initial overview, it is difficult for me not to side with Rogers, which sponsored the importing of this new American service to Canada, in accordance with the policy set out in Public Notice 2000-173. Rogers, just like High Fidelity HDTV, identified only a few similar programs. Indeed, only two programs, namely *Drive* (skateboard pros) and *Red Bull X-fighters* (motocross competitions) are distributed by both services. Although my calculations did not include reruns, I assume that they represent less than 2% of the programming. Under these circumstances, it is difficult to see these services as "directly competitive." And who is the biggest loser in this decision by the Commission? Canadian consumers, of course, who with the arrival of FUEL TV could have accessed more diverse programming relating to extreme sports.

Fostering competition

Who, in the final analysis, should decide which service bests suits his or her needs? The consumer, not the Commission! I have repeated this constantly since my appointment in August 2007. In my opinion, no system can survive in the medium term in our digital universe if it tries to protect Canadian programming every which way, as is the case here. The arrival of a new competitor with a different offering would only have encouraged the management of the competing Canadian service to monitor their business closely and perhaps enhance their offering to their customers.

Now that we have analyzed category by category the programming offered by these two services that the Commission deemed "too competitive," let's take a look at what they were offering to subscribers from a diversity perspective for two different weeks in May and October 2010.

FUEL TV	**radX**
Week of 3 May 2010	*Week of 25 October 2010*
At least 60% of the programming deals with the sports or personalities involved in the sports of skateboarding, motocross, surfing, BMX, snowboarding and wakeboarding.	*At least 37% of the programming deals with the sports or personalities involved in the sports of skiing (15%), car/motorbike racing (12%) and mountain biking (10%).*
Of the remaining sports-related programming, less than 5% includes airplane racing and stunts, free-base jumping and other extreme sports.	*The remaining programming relates to various subject matters involving the sports and personalities practicing the sports of BMX (5%), rodeo/horseback riding (5%), snowmobiling (5%), surfing (4%), snowboarding (4%), power water crafting (4%), motocross (3%), sailing (2%), air racing (2%), skateboarding and wakeboarding (<1%) and others (18%).*
Interstitial programming included music videos, skateboarding tricks, unusual sports shorts and comedic sporting situations.	*About 10% of programming is dedicated to action films, epic documentaries and adventure films.*

What the above table shows is that both services offer clearly distinct programming. I repeat: even though the programming can be associated with a given Commission category, sports in this instance, it does not necessarily focus on the same sports. That is what we see here. Subscribers who are motocross or skateboarding fans would have been better served by FUEL TV's program offering, while those who prefer skiing or mountain biking could have found what they want on radX.

Finally, when we look at the last category in the table, we can see that 10% of radX's program offering (10%!) is devoted to action and adventure films, while FUEL TV does not even offer this category. What can we conclude, other than that the Canadian broadcaster was well positioned to resist the invader? Obviously we cannot expect it to get excited about the entry of a new competitor!

It was up to the Commission, in the interest not only of the consumer but of the system, to draw on the same principles that guided it in 2008 (Broadcasting Public Notice 2008-100) when it decided to open up news and sports specialty services to competition. In the wake of that regulatory policy, the Commission had retained two quantitative criteria for determining whether or not to protect a Canadian specialty service: its popularity and its economic health. Well, we know that radX signed on 135,000 subscribers in its first year of operation in 2007 and that it has three times as many today. As to its profitability, its average EBIT in 2008 and 2009 was 16%. (Compare this to the EBIT of 18% for TSN, 16% for RDS and 21% for Rogers Sportsnet in 2009.) Not bad for a service that has been in operation for only three years and is already being distributed by Bell, Rogers, Eastlink, Sasktel, TELUS and members of the Canadian Cable Systems Alliance. In reality, this service is an unqualified success story, having only Shaw, Videotron and Cogeco left to conquer.

Even if, for lack of a better test, we were to apply the other criteria established in Broadcasting Public Notice 2008-100, which, I would like to clarify, did not specifically target foreign services, the Canadian service radX never stated in its intervention that FUEL TV's entry would diminish for it the supply of programs offered to the United States, nor that it would create a rights bidding war. In other words, both of these services, one a Category B service and the other a foreign service, belong to a genre that is completely suitable for competition, with no apparent risk that the entry of the U.S. service would cause a rush to the mainstream.

Since Broadcasting Public Notice 2008-100, it is clear that RDS, Rogers Sportsnet and TSN, as well as services that are currently Category 2, such as Fox Sports World Canada, Gol TV, HPItv and NHL Network, for soccer, hockey, baseball, basketball and football, will have equal footing as of 1 September 2011. None of them will have regulated access to the system any longer, and all will become discretionary for the distributors. If the Commission has decided that market forces are to prevail for traditional sports, why raise additional barriers for the extreme sports proposed by FUEL TV? What inspires this visceral fear of foreign competition for a Category B service that has never enjoyed the same privileges and has barely 35% Canadian content?

And speaking of foreign services, please allow me an aside. Could we say that our Canadian news services (CTV NewsNet, CBCNN Net, LCN, RDI and BNN) perform less well since the entry of satellite service Al Jazeera, the coverage of which, by all accounts, was simply exceptional during recent revolutions in the Near and Middle East? Yet, in 2004, the Commission (of which I was not a member at the time) made this new competitor's entry extremely difficult. It was not until 2009 that the distribution of this service, whose motto is "The opinion and the other opinion," was authorized without reservation. The Canadian BDUs – unlike their U.S. counterparts – started offering the channel immediately. And who benefits during the crises that are shaking the Arab world? Canadian consumers of foreign channels! The Commission can only be congratulated for daring to look past the prejudice that might have surrounded this channel's distribution. It let Canadian consumers decide on the coverage they wanted, whether that coverage is Canadian or foreign. It's quite an example, I agree, but I chose it on purpose because never had a foreign service faced such large opposition. Let's acknowledge that the Commission and the BDUs (Bell TV, Videotron, Rogers, Shaw and Cogeco) made the right decision and set an example for all of North America.

But to get back to the subject at hand, as I was saying, both tables convinced me that the services in question were very different. And even if other weeks had been selected for sampling, I strongly doubt that the results would have been very different. Given my history of supporting the consumer (as evidenced by my 13 dissenting opinions totalling over 250 pages of text since I began my term in August 2007) and supporting Canadian content (as evidenced by the Morin model), I do not see any need – at this stage of the Canadian system – to protect a Canadian sports service that programming different from that of the U.S. service.

VAGUE AND UNQUANTIFIABLE CRITERIA

The criteria used to justify the refusal to add FUEL TV to the digital lists are vague and based on subjective assessments. The Commission does not provide numbers, thresholds or evaluation grids but rather "relies primarily on the comments filed," as it states in paragraph 5 of its decision. As I have already stated a number of times, it would be in its interest to set objective criteria and not rely solely on its "inherent wisdom." In the interest of the parties involved, the Commission should be as transparent as possible in its decisions and give priority to criteria that are more objective than those used in this instance. Denying subscribers access to services that offer fundamentally different programming under the pretext that a Canadian service must be protected is in my opinion simply unacceptable.

If the Commission intends to deny any service that could be competitive with a Canadian service, be it only partially (Public Notice 2000-173 effectively uses the word "partially"), the Commission should say so clearly and tell the BDUs to stop asking for approval to import foreign services. Given the degree of maturity our system has achieved over the last 10 years, I have no problem accepting protection for the content of Canadian services, as provided for in the *Broadcasting Act*, when foreign services are "directly" competitive. However, I cannot subscribe to this position when the issue, as is the case here, is a service whose programming is not directly competitive, as shown above, and which is even substantially different and enhances the existing offering to consumers.

In other words, I believe that it is possible under a regulated system and without compromising the objectives of the *Broadcasting Act* to prudently allow the entry of foreign services that do not compete directly with existing services. In this instance, a sports service associated with lifestyle and culture is not in any way comparable to a “strategic or critical” service such as service featuring documentaries or children’s programming, which are at the core of “the Canadian expression” cited in the *Broadcasting Act*.

Let’s not forget the highly protectionist rule that the Commission adopted in Broadcasting Public Notice 2008-100, which requires our cable and satellite distributors to offer to all of their subscribers on an individual basis a majority of Canadian services (50% +1). For the time being, this Canadian content has nothing “imposed” or “forced” about it, since in practice, even in the Toronto market (perhaps the world’s most multiethnic city), over 75% of the services chosen by consumers are Canadian services, that is, having a foreign component that can easily reach the 65% maximum in the case of a Category B service, as per the Commission’s definition. This is exactly the case of radX, which presents itself as a “Canadian service” as per the Commission’s definition but of which two-thirds of the programming is IN ACTUAL FACT imported! It is within this framework adopted by the Commission, with half-American and half-Canadian services, that so-called “Canadian” services continue to grow and increase their market share. In short, the competition, in this case, is between a U.S. service (FUEL TV) with 100% foreign content and a “Canadian” service with 65% foreign content.

Moreover, Canada’s large cable or satellite distributors now have purely corporate reasons to promote Canadian content themselves on their platforms. Videotron, with TVA Group, and Rogers, with Citytv and its other broadcasting services, are no longer the only ones at the forefront of Canadian content partnering. In the last few months, Shaw and Bell have become major Canadian content partners, the first as a result of the Canwest acquisition and the second following the acquisition of CTV and its specialty services.

In short, although we are a “small country” with a population the size of California’s, under our regulated system we have earned our stripes over the years. We have reason to be proud of our broadcasters, who have successfully exported televised series to foreign markets, including the U.S. In this context, I am the first to agree that we need to protect “Canadian” services to ensure that our directors, our artists, our writers and the members of all trades associated with the production and broadcasting industry can find distribution platforms here in Canada that will allow them one day to tackle international markets individually or in the form of co-productions. But in the case of two different offerings in the sports genre that the Commission has started opening up to competition, I believe that there should be no hesitation in approving the service for distribution. Eating whets the appetite: the more abundant the offering, the more dynamic the regulated Canadian system will be and the more sustainable it will be.

Has the Commission not already authorized other sports services with 100% foreign content, like Speed Channel, NFL Network, College Sports TV, Eurosportnews, The Golf Channel and Big Ten Network? There seems to be somewhat of a double standard at work, given the maturity of our system. As for program rights, did Fox not confirm in writing that it could provide Canadian undertakings with access to its programming, despite the fact that Fox does not hesitate to present some of its programs as "exclusive" to the U.S. market? This is an intention that the Commission should have verified, consistent with the policy established 11 years ago (Public Notice 2000-173).

I mentioned above that the number of radX subscribers has tripled in the last three years and is now 450,000. Moreover, this would represent actual viewership numbers according to the latest results using PPM, or Portable People Meters, which are highly accurate audience measurement devices. Although PPM technology is different from that of BBMs, the latest PPM results nonetheless confirm the exceptional growth of radX as compared to other sports services and the existence of real demand for the service, whether at home or in the pub. On the basis of these numbers, radX can justify and negotiate its inclusion in a BDU's theme package because it can easily show that it is not dead weight, that its subscribers really do watch it and that it is growing faster than all sports services combined. I repeat: radX is an exemplary case of a service that does not need protection, particularly from a complementary service like FUEL TV. I'll add also that we are now witnessing a general shift in viewer interest toward specialty sports services. For example, TSN is adding TSN2 to its sports offering and Sportsnet is offering separate services for the East, Ontario, the West (Manitoba, Saskatchewan and Alberta) and the Pacific. Even though their ratings are not at all comparable, thanks to theme packages the niche services can only benefit from steadily growing consumer interest. In the last three years, radX, along with HDNet, Treasure HD, Oasis HD and Equator HD in the Rogers package, has proven eloquently that its service is giving consumers what they want.

AVERAGE MINUTE AUDIENCE (in thousands)
BY SERVICE AND BROADCAST YEAR
ALL PERSONS 2 YEARS+, CANADA
MONDAY TO SUNDAY, 2 A.M TO 2 A.M.

Services	Broadcast Year				
	2006-2007	2007-2008	2008-2009	2009-2010	Increase
	AMA(000)	AMA(000)	AMA(000)	AMA(000)	
TSN+	98.3	96.4	108.7	187.1	90%
RDS+	62.6	73.0	69.3	84.1	34%
Sportsnet Ont+	2.2	28.9	26.3	46.1	58%
The Score	22.9	22.2	20.9	32.0	
Speed+	16.9	12.9	11.7	18.3	8%
Sportsnet Pac+	16.4	13.2	13.9	23.0	40%
Sportsnet West+	14.0	11.5	12.1	21.4	53%
Sportsnet East+	7.4	8.5	8.6	17.5	136%
Golf+	4.7	7.0	7.6	3.3	-30%
Fox Sports Canada	3.3	2.1	1.2	1.0	-70%
NFL Network	1.5	1.4	1.7	0.0	
NHL Network+	1.0	1.4	0.7	2.5	150%

GolTV+	0.3	0.6	1.0	0.9	200%
Horse Player Interactive	0.1	0.1	0.3	0.0	
radX	0.0	0.0	0.1	0.3	200%
Fox Sports US	Data not available				
Euro World Sport					
Big Ten Network					
Classic Sports Network					
CBS College Sports Network					
New England Sports Network					
Empire Sports					

Note: The data for the 2009-2010 broadcast year was, for the first time, based on PPM results. The Canadian English-language market adopted PPM technology on 31 August 2009. Prior to that, it used the Mark II technology (device connected to the television). This change may have caused variations in the data.

Sources: BBM Nielsen (2006-07 to 2008-09 – Mark II technology)
BBM Canada (2009-10 – PPM data)

For the sake of argument, I tested the "Canadian-ness" of radX (Rush HD in the classification below) using the Morin model. And how did the service the Commission wants to protect fare against the Morin model's three variables? Of the 119 Commission-authorized services subjected to the Morin model, it placed 106th! It scored -20 because of its subscription price of 35 cents per month, its low 35% Canadian content (clearly a disadvantage compared with 60% and 65% for TSE and RDS, respectively), and its extremely low Canadian programming expenditures (CPE) of 9% (compared to 44% and 50% for TSN and RDS). This was also the case for popular services such as TSN and RDS, which were adversely impacted by the high price of their services, since the Morin model assesses accessibility as well as Canadian content. This, in my opinion, is an objective and measurable criterion: the Morin model classifies (which the Commission has never done in its 42 years of existence) and ranks all services in the Canadian broadcasting system on the basis of three fundamental criteria. RadX is not exactly a model for Canadian content and CPE and despite its low score, its subscription price remains within the average range. In short, this is a model that could be applied before deciding to protect a specialty service "in the name of Canadian content." For now, the Commission does not have any model and everything is left up to the discretion of the Commissioners and staff.

Type	English	French	Service	Canadian content (%)	CPE (%)	Rate (¢)	Morin score	Revenues from market
	*		HPItv Canada	35	0 (e)	29 (e)	6.42	**1%**
2	*		Raptors NBA	35	23 (e)	53 (e)	4.82	**31%**
2	X		**Wild TV**	35	1 (e)	34 (e)	**1.93**	79%
A	X		**TSN**	60	44	107	**-3.00**	45%

A		X	**RDS**	65	50	121	**-6.00**	49%
2	*		Silver Screen Classics (data: 2006)	35	13 (e)	65 (e)	-16.83	**0%**
2	*		Rush HD	35	9 (e)	65 (e)	-20.97	**0%**
2	*		Oasis HD	35	8 (e)	66 (e)	-22.59	**0%**
2	*		Equator HD	35	4 (e)	65 (e)	-26.03	**0%**
2	*		Treasure HD	35	4 (e)	66 (e)	-26.72	**0%**
2	X		**AOV Clips**	35	9 (e)	99 (e)	**-54.81**	84%
2	*		Discovery HD	35	48 (e)	198 (e)	-115.15	**2%**
2	*		ATN Cricket Plus	15	20	166 (e)	-131.47	**0%**
2	X		**Red Light District**	35	29 (e)	276 (e)	**-211.57**	87%
2	*		The Hustler Channel	35	18 (e)	372 (e)	-318.69	**26%**

(For more information on the Morin model, see my dissenting opinion on 9(1)(*h*) services: http://www.crtc.gc.ca/eng/archive/2010/2010-629.htm. For a more detailed demonstration of the model, see my dissenting opinion on distribution regulations: http://www.crtc.gc.ca/eng/archive/2008/pb2008-100.htm.)

In the medium term, if the Commission wanted to really get a handle on the level of protection to be granted to the so-called "Canadian" services, it could (for the purposes of the example) include in the Morin model a 30-point threshold below which no discretionary services would be protected from competition by a foreign service. It could, following hearings on the issue, grant a three-year grace period to all services that want to retain this protection, either by increasing their Canadian content or CPE, or by reducing the price charged to the consumer, as the model's equation proposes. The decision would then rest with the broadcasters. The Commission could subsequently move the threshold to 50 points. If the Commission was serious about deregulating all while encouraging an increase in Canadian content, it could go forward using measurable criteria such as these. (In addition to this example, which aims to calibrate protection against foreign services, we could also, after discussions and hearings, use the Morin model in regard to access (Category 1 or A) if the service obtains a score of 70 points, and mandatory distribution pursuant to section 9(1)(*h*) if it obtains a total score of, say 100 points in the Anglophone market.)

If the Commission of the future wants to be less timid about foreign content, it must not only adopt objective and measurable criteria but also be more transparent about the criteria it uses to protect a service or to approve or deny a service. Otherwise its decisions will always seem tinged with subjectivity and highly discretionary.

The challenge for a regulated system

A few months ago in my opinion in support of opening up the French-language general-interest pay service genre with a monopoly position in the French-language market (Broadcasting Notice of Consultation 2010-860), I wrote the following:

> … thanks to new platforms and high-speed Internet access, people no longer need to be one of the eleven million subscribers to the Canadian broadcasting system to be able to access cultural, television and film content. All you need is an Internet connection! Sony's Playstation Video Store (for Playstation 3), Microsoft's Zune Video Marketplace (for Xbox 360), Netflix (compatible with both of the aforementioned consoles as well as computers) and Apple TV all enable users to legally download movies and television shows using distribution platforms that are not regulated by the Commission. To this first, non-exhaustive list, we could add Blink.TV and the consoles Boxee and Roku with Google TV and Amazon TV.

Clearly, the sports offerings of our regulated Canadian system are equally threatened by other platforms that can be accessed through the Internet. Information is accessed at Internet speed on broadband. For example, the Maple Leafs hockey club has just launched a new application for iPhone, iPod Touch and iPad. For only $19.99 a year, subscribers can watch 10 games for which the CBC and TSN have not purchased rights. Another example: the CBC is rebroadcasting on its website games broadcast on *Hockey Night in Canada*. And when you consider the growing number of televisions connected to the Internet, you can see why! In this respect, it is in the BDUs' interest to increase the space they give to foreign services that are different from Canadian services, and FUEL TV is a perfect example! We should have been more accommodating in order to enhance the Canadian broadcasting system's current offering.

Over the last year I have written no fewer than two dissenting opinions supporting the opening-up of services that up to now have been protected under Canadian regulations limiting competition. This is the third! The first was for AUX TV, a Category 2 service devoted to emerging music, when the Commission decided to protect MusiquePlus, a general-interest service owned by the Astral Broadcasting Group (see http://www.crtc.gc.ca/eng/archive/2010/2010-223.htm). The second, more recent, was for Super Écran, the pay television service protected from direct competition, but also the most profitable of Canada's general-interest pay television services (see http://www.crtc.gc.ca/eng/archive/2010/2010-860.htm). Fortunately, a few weeks after its decision, on February 8th the Commission issued an amendment to its call for applications for a licence to operate a new pay television service (see http://www.crtc.gc.ca/eng/archive/2010/2010-860-1.htm), in which it announced that it was prepared to receive comments on its preliminary view that the new service could not be "directly competitive" as set out in the November 19 call for applications. The Commission thus clarified its position that if its preliminary view could not be sustained, it was willing to entertain applications that were in direct competition with Super Écran, an important step toward the deregulation of the pay television genre in the French-language market. It was about time! In my opinion, the Commission should have used the same reasoning in considering Rogers' request to import the U.S. sports-based service. Regulation that favours Canadian content should not be used as a crutch for protecting half-Canadian/half-American services rather than encouraging them to develop more Canadian than foreign content (see the list of foreign services available in Canada at http://crtc.gc.ca/eng/archive/2011/2011-65.htm).

As for the argument that radX is required to air 35% Canadian content, but FUEL TV is not, it does not move me at all. If this requirement is perceived as a disadvantage or a burden for a specialty service, there is something wrong! On the contrary, Canadian content should be seen as a comparative advantage, as a distinctive Canadian trademark because it tells our stories, not those of our neighbours. I do not see how it could be seen as a disadvantage or penalty since we have already established that the programming offered is fundamentally different from that of FUEL TV, which leaves room for programming that is truly different and competitive. It is this perception that Canadian content is an obstacle (which we can read between the lines of radX's opposition) that must be changed. Broadcasters should not use Canadian content as a means of blackmailing the Commission. If coverage of our own achievements is not an advantage, then it will be increasingly difficult to justify protecting Canadian content. The model that I proposed was designed precisely to encourage directors to produce more Canadian content with the ultimate goal of earning a slot on the basic service. I have trouble understanding the decision of the Commission, which writes that "High Fidelity [radX] noted that it is required by condition of licence to air at least 35% Canadian content," as if such a low Canadian content requirement (35%) was a handicap! Far from being a disadvantage, the minimum Canadian content requirement should be seen as an opportunity for this so-called "Canadian" specialty channel to attract even more viewers and differentiate its product from foreign programming.

Conclusion

I also note the Commission's observation that "the Canadian market for such services may not be sufficient to sustain a Canadian service focussed solely on such sports." I recall that in 2008 X-treme Sports, a Category B service owned by Canwest and aimed directly at this market, ceased operations because it was not profitable. On the other hand, radX – which in 2005 insisted that it was not a sports service to avoid competing with X-treme Sports – is growing and is distributed in Rogers' $5.99 *HD Nature and Adventure Pack* at $1.20 per station and in Bell TV's $10 monthly package at $0.67 per station.

Today, at the very moment when FUEL TV shows interest in the Canadian market, the Commission expresses doubts about this market's ability to accommodate it given the failure of X-treme Sports. Why not let the Americans and the Canadian distributors take the risks? And by the way, since X-treme Sports disappeared, the market itself has confirmed its lack of appetite for this service: no Canadian service has attempted to replace it in three years. Why wait for a Canadian service when there is an American service offered on Dish Network in a $44.99 package at $0.38 per station and on Direct TV in a $64 package at $0.32 per station? The opportunity was there but Canadian broadcasters failed to seize it to propose hybrid programming (65% U.S./35% Canadian) for this sports genre. How many years will we now have to wait for a proposal for a new specialty service "composed of the six core sports that occupy more than 60% of FUEL TV's programming schedule" compared to "20% of radX's programming," to cite the Commission? Even in the United States, no other televised extreme sports service similar to FUEL TV is available to cable and satellite subscribers. How and on what basis could the Commission anticipate the entry of a similar service in Canada in the medium term? In any event, it is clear that so far no one has stepped forward to offer programming of the same nature as X-treme Sports or FUEL TV. Under these circumstances, why not give a U.S. service with 30 million subscribers the opportunity to offer Canadians programming that complements our own specialty services and thus enhance the system's overall offering? Why turn down the opportunity to include our neighbour's unique programming within our system?

On reading paragraphs 14 and 15 of the decision, we see the inherent subjectivity that governed the Commission's decision. The Commission, in paragraph 15, writes:

> ...the Commission considers that the attractiveness of the programming it [radX] offers and, consequently, the size of its potential audience could be reduced substantially as a result of the authorization of a service such as FUEL TV. The Commission is therefore of the view that, should Rogers' request be approved, the potential level of competitiveness between FUEL TV and radX is great enough to cause radX direct material harm, which would make it more difficult for that service to meet its obligations to contribute to the Canadian broadcasting system.

- How could the different programming of a 100% foreign service reduce the attractiveness of complementary programming that is also 65% foreign? Is Canadian programming really that bad? I have difficulty subscribing to this type of argument.
- Obviously, as in numerous other decisions by the Commission, the word "consumer" is absent. If the Canadian service has successfully offered quality, depth and diversity of programming at a competitive price for three years, why would it suddenly be abandoned in favor of FUEL TV? The decision makes no attempt to answer this question.
- The decision contains no quantitative criteria that could help us make an objective decision. The Commission uses terms such as ***is of the view*** (twice in the text) and *present a* **risk**, and uses the conditional (***would make it more difficult***).

After 11 years, is it not time to revisit our policy, as set out in Public Notice 2000-173, which "precludes the addition of new non-Canadian satellite services if the Commission determines them to be either totally or partially competitive with Canadian specialty or pay television services"? I repeat: the Commission has a duty to be transparent with Canadian subscribers. It should not be satisfied with terms as vague as "partially" and to rely "primarily on the comments filed" as it has done in this decision. In this dissenting opinion, I have listed criteria that could be considered in determining the merits of approving or denying a request for a foreign service. The comparison of program categories and their content, the popularity, profitability and distribution of existing services, the availability of foreign content for Canadian services, the Morin model's fact-based assessment of CPE, the broadcast of such content and the price charged to consumers to rank services within the system and the potential market for the Canadian service are all criteria that could advantageously replace the highly discretionary nature of the Commission's current policy, a policy that serves neither the subscribers nor the system.

I have never hesitated to oppose the distribution of foreign services when I believed that they were in direct competition with Canadian services. In this case, however, the possibility of competition is too remote for me to agree with the Commission's determination. The two services are distinct and complementary, not identical, in their programming.

For these reasons, I am submitting this dissenting opinion (the fourteenth since my appointment) concerning the Commission's decision to deny the request by Rogers to add FUEL TV to the lists of eligible satellite services for distribution on a digital basis. As in my 13 other dissenting opinions (listed below), I am guided by the principles of competition, transparency, the interest of consumers and Canadian content.

<u>List of 13 dissenting opinions</u>

- *Call for applications for licences to operate a French-language general interest pay television service*, Broadcasting Notice of Consultation CRTC 2010-860, 19 November 2010

- *Criteria for assessing applications for mandatory distribution on the digital basic service*, Broadcasting Regulatory Policy CRTC 2010-629, 27 August 2010

- *Community television policy*, Broadcasting Regulatory Policy CRTC 2010-622, 26 August 2010

- *AUX TV – Category 2 specialty service*, Broadcasting Decision CRTC 2010-223, 21 April 2010

- <u>The implications and advisability of implementing a compensation regime for the value of local television signals</u>*: A report prepared pursuant to section 15 of the* Broadcasting Act, 23 March 2010

- *Reconsideration of Broadcasting Decision 2008-222 pursuant to Orders in Council P.C. 2008-1769 and P.C. 2008-1770*, Broadcasting Decision CRTC 2009-481, 11 August 2009

- *Video-on-demand service*, Broadcasting Decision CRTC 2008-366, 23 December 2008

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *Licensing of new radio stations to serve Ottawa and Gatineau*, Broadcasting Decision CRTC 2008-222, 26 August 2008, as corrected by *Licensing of new radio stations to serve Ottawa and Gatineau – Correction*, Broadcasting Decision CRTC 2008-222-1, 28 August 2008

- *Change in the effective control of TQS inc. and licence renewals of the television programming undertakings CFJP-TV Montréal, CFJP-DT Montréal, CFAP-TV Québec, CFKM-TV Trois-Rivières, CFKS-TV Sherbrooke, CFRS-TV Saguenay and of the TQS network*, Broadcasting Decision CRTC 2008-129, 26 June 2008

- CRTC Report to the Minister of Canadian Heritage on the Canadian Television Fund (Appendix 2), as announced in *CRTC submits report on the Canadian Television Fund*, News release, 5 June 2008

- *Licensing of new radio stations to serve Kelowna, British Columbia*, Broadcasting Decision CRTC 2008-62, 14 March 2008

- *CIGR-FM Sherbrooke – Acquisition of assets*, Broadcasting Decision CRTC 2007-435, 24 December 2007