Canadian Radio-television and Telecommunications Commission
Office of the Secretary General to the Commission
Ottawa, Ontario
K1A 0N2

Conseil de la radiodiffusion et des télécommunications canadiennes
Bureau du Secrétaire général du Conseil
Ottawa (Ontario)
K1A 0N2

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Our file: 1000-121

Mr. Christopher K. Leafloor
Barrister & Solicitor
347 Bay Street
Toronto, Ontario
M5H 2R7

Dear Mr. Leafloor:

**Re: Complaint filed by Cable Watch**

This is in reference to your letter of 28 November 1995, in which your client, Cable Watch, filed a complaint concerning the enactment and subsequent application of subsection 18(6.3) of the *Cable Television Regulations, 1986* (the regulations).

In its complaint, Cable Watch raises four general points of contention. In essence, Cable Watch alleges that:

(1) the Commission did not have the statutory authority to enact subsection 18(6.3) of the regulations;

(2) the Commission failed to provide adequate notice to cable subscribers of its intention to add subsection 18(6.3) to the regulations and failed to fully inform cable subscribers of the cost consequences that would result therefrom;

(3) the cable companies that have contributed to the Cable Production Fund pursuant to subsection 18(6.3) have significantly altered their subscriber fees without providing proper advance notice to their subscribers; and

(4) the Commission generally does not use the most effective methods to ensure that cable subscribers are fully informed of all Commission and cable company decisions that affect the rates charged to subscribers.

Cable Watch has requested specific relief from the Commission to address its concerns, including a request for a public hearing to consider the matters raised in the complaint.

As Cable Watch's complaint was directed both at the Commission and at certain cable companies, in a letter dated 8 March 1996 the Commission invited Rogers Cablesystems Ltd. (Rogers) and the Canadian Cable Television Association (CCTA) to file responses to Cable Watch's complaint. Rogers and CCTA filed their comments on 29 March 1996. Cable Watch filed its reply comments on 15 April 1996.

The Commission has carefully considered the submissions received, including all of the grounds raised by Cable Watch in support of the relief requested. Prior to rendering its determination in this matter, the Commission offers the following comments in respect of the specific allegations raised by Cable Watch.

The Commission's Jurisdiction to Enact Subsection 18(6.3) of the Regulations

Subsection 18(6.3) of the regulations was enacted by the Commission following an oral public hearing in March of 1993 and came into force on 25 January 1994. The provision permits a cable operator to retain 50% of its capital expenditure increases beyond the "sunset" date provided that the other 50% is remitted to an independently administered fund for the production of Canadian programming.

Cable Watch contends that the Commission did not have the authority to add subsection 18(6.3) to the regulations.

The Commission's objects and powers in relation to broadcasting are set out in Part II of the *Broadcasting* Act (the Act). Subsection 5(1) of the Act provides that "the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2)". Subsection 3(1) provides as follows:

> 3.(1) It is hereby declared as the broadcasting policy for Canada that
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> ...
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> (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
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> ...
>
> (d) the Canadian broadcasting system should
>
> (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

> (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view...;
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> (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;...

Subsection 5(2) of the Act further provides that:

> 5. (2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that
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> ...
>
> (e) facilitates the provision of Canadian programs to Canadians.

The Commission's authority to enact regulations is contained in subsection 10(1) of the Act. That section provides as follows:

> 10(1) The Commission may, in furtherance of its objects, make regulations
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> ...
>
> (k) respecting such other matters as it deems necessary for the furtherance of its objects.

The Act clearly gives the Commission expansive authority to implement the broadcasting policy set out in subsection 3(1) of the Act. The broad scope of this authority has been confirmed by Canadian courts on many occasions.

The Commission commenced a proceeding in September of 1992, leading to an oral public hearing in March of 1993, to conduct a review of the evolving communications environment and its impact on the existing and future structure of the Canadian broadcasting system. Among the issues considered by the Commission in that proceeding was the question of financial support for Canadian programming and the matter of fee increases related to capital expenditures for the purpose of financing the implementation of digital technology and universal addressability.

Following the oral hearing, the Commission issued Public Notice CRTC 1993-74, 3 June 1993, entitled *Structural Public Hearing* (PN 1993-74). In its decision, the Commission emphasized that, "consistent with section 3 of the Act, not only must the

Commission see to it that there are Canadian undertakings in operation, it must also ensure that those undertakings are distributing a diverse range of quality Canadian programming that is attractive to Canadian viewers". The Commission further noted that most parties to the proceeding agreed that more money needs to be raised within Canada for the production of Canadian programming if such programming is to compete in the emerging multi-channel environment.

After considering the various proposals submitted by parties to the proceeding, all of which were a part of the public record, a majority of the Commission in PN 1993-74 concluded that the most appropriate manner in which to meet the objectives of the Act with respect to the contribution to Canadian programming was through the creation of a new production fund that would provide approximately $300 million over 5 years to the production of Canadian programming. The Commission announced that this new fund would be financed through changes to the capital expenditure "sunset" provision contained in subsection 18(6) of the regulations. This aspect of the decision was set out as follows:

> [T]he Commission, by majority vote, intends to make certain changes to its cable rate regulation mechanisms, the purpose of which is to provide significant financial support for Canadian programming. Specifically, the Commission intends to link contributions by cable licensees to a production fund to the capital expenditure (CAPEX) component of the cable fee structure... The Commission considers that this fund will be effective in increasing the amount of attractive Canadian programming available to Canadians....
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> [I]n consideration of the need to provide additional funding for the production of Canadian programming, the Commission, by majority vote, intends to suspend implementation of the reductions required by the "sunset" provision for those licensees who contribute 50% of the amount by which the monthly fee would otherwise be reduced to a new fund for Canadian programming.

In announcing its decision to amend the regulations, the Commission stated that it "is satisfied that its jurisdiction to require each element of the broadcasting system to contribute to Canadian programming is clear, and that the nature, extent and mechanism of that contribution is entirely within its discretion".

In light of the broad statutory authority granted to the Commission by Parliament, the Commission remains of the view that it acted well within its jurisdiction when it introduced subsection 18(6.3) into the regulations. In enacting subsection 18(6.3), the Commission was acting to implement the broadcasting policy set out in section 3 of the Act and the regulatory policy set out in section 5 of the Act. Clearly, there is ample statutory authority for the Commission's decision to introduce subsection 18(6.3).

The Commission notes that there is an established body of Canadian jurisprudence that gives a broad and generous interpretation to the Commission's powers and the exercise of its discretion under the Act. Moreover, Canadian courts have repeatedly stated that, as a specialized tribunal, the Commission is entitled to a high degree of curial deference when acting in its area of expertise.

In light of all of the above, the Commission finds Cable Watch's first contention to be without merit.

Notice by Commission to Subscribers

The second contention raised by Cable Watch's complaint is that the Commission failed to provide adequate notice to cable subscribers of its intention to introduce subsection 18(6.3) of the regulations and failed to fully inform subscribers of the rate impact of the decision to add subsection 18(6.3) to the regulations.

The Commission notes that it is required by statute to provide public notice of its hearings and proposed regulations. Section 19 of the Act provides as follows:

> 19. The Commission shall cause notice of
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> ...
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> (c) any public hearing to be held by it under section 18
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> to be published in the *Canada Gazette* and in one or more newspapers of general circulation within any area affected or likely to be affected by the application, decision or matter to which the public hearing relates.

Subsection 10(3) of the Act further directs the Commission to provide notice of proposed regulations:

> 10(3) A copy of each regulation that the Commission proposes to make under this section shall be published in the *Canada Gazette* and a reasonable opportunity shall be given to licensees and other interested parties to make representations to the Commission with respect thereto.

Finally, section 11 of the *Statutory Instruments Act* requires that regulations, once made by the Commission, be published in the *Canada Gazette* within 23 days of the regulations being registered:

> 11. (1) Subject to any regulations made pursuant to paragraph 20(c), every regulation shall be published in the Canada Gazette within twenty-three days after copies thereof are registered pursuant to section 6.

The various statutory provisions are meant to ensure that matters that affect the public interest receive broad public dissemination. Clearly, in enacting these provisions, Parliament considered that the publication in the *Canada Gazette* and in newspapers of general circulation constitutes a fair and effective method of providing notice to the general public. A review of the events leading to the addition of subsection 18(6.3) to the regulations will illustrate that the Commission did not fail to meet its obligation, statutory or otherwise, to provide adequate public notice of its intention to enact subsection 18(6.3).

On 3 September 1992, the Commission issued CRTC - Notice of Public Hearing 1992-13 (NPH 1992-13), which was published in the *Canada Gazette* on 12 September 1992 and in major Canadian newspapers across the country as required by section 19 of the Act. In this notice, the Commission sought public comment on the review of policies and regulations then governing the distribution, packaging and carriage of programming services. The scope of the proceeding was broadly defined, although comments were also sought on a number of specific issues, including the criteria, if any, that should govern the amount and the access of new Canadian programming services to revenues derived from cable subscriber fees. The Commission established a process in NPH 1992-13 consisting of two rounds of written comments and an oral public hearing. Among the issues raised in the written submissions was the question of how to ensure adequate funding for Canadian programming. Copies of the written submissions received by the Commission pursuant to NPH 1992-13 were placed on public examination files for viewing at each of the Commission's central and regional offices, as well as at offices of the Department of Communications located in 27 cities across Canada.

On 1 March 1993, the Commission commenced the oral phase of its "Structural Public Hearing", in which there was participation by members of the public, consumer groups, industry members and government representatives. In the course of this proceeding, the Commission heard oral submissions from 126 parties and considered 438 written submissions on matters relating to the regulatory framework for distribution and programming undertakings in Canada. Among the issues discussed at the hearing was the establishment of a funding mechanism for Canadian programming. This discussion followed up on the submissions that had been received during the written stage of the proceeding, which, as noted earlier, had been available for viewing by interested parties prior to the commencement of the oral hearing.

Following the hearing, the Commission issued PN 1993-74, which set out the Commission's decision to establish a funding mechanism for Canadian programming. The public notice explained the purpose and effect of its decision, expressly stating that "for the initial five-year period, contributions to the fund will be generated by revenues currently included in the existing basic monthly fee". For information purposes, the Commission attached as an appendix to PN 1993-74 a first draft of the proposed amendments to the regulations, including a draft of the proposed subsection 18(6.3). In accordance with section 19 of the Act, this public notice was published in newspapers across the country, as well as in the *Canada Gazette* on 12 June 1993.

On 7 October 1993, the Commission issued Public Notice CRTC 1993-137 (PN 1993-137), in which it set out the proposed amendments to the regulations resulting from the *Structural Public Hearing* decision. In accordance with subsection 10(3) of the Act, the Commission published a copy of the proposed amendments in the *Canada Gazette* on 16 October 1993. The Commission received and considered 113 written submissions in response to PN 1993-137. Subsequently, in Public Notice CRTC 1994-7, dated 3 February 1994, the Commission announced its decision on the proposed amendments to the regulations, which included the adoption of subsection 18(6.3). The amended regulations were published in the *Canada Gazette Part II* on 9 February 1994.

In light of the above chronology, it is evident that the Commission fully met its obligation to provide adequate public notice of its intention to introduce subsection 18(6.3) of the regulation and of the potential rate impact on subscribers resulting therefrom. The Commission notes that individuals and consumer groups participated in the proceeding leading to the *Structural Public Hearing* decision, and further notes that the CCTA's proposal to contribute to a production fund was a matter of public record in that proceeding. As evident in the discussion above, interested parties were provided with a number of opportunities to offer comments and submissions with respect to the issue of funding for Canadian programming.

The Commission is satisfied that its notice procedures were appropriate and adequate in the circumstances. Accordingly, the Commission dismisses this element of Cable Watch's complaint.

Notice by Cable Companies to Subscribers

Cable Watch alleges that cable licensees that have invoked subsection 18(6.3) have significantly altered their fees without providing proper advance notice to their subscribers.

In response to this allegation, Rogers and CCTA submitted that there is nothing in subsection 18(6.3) or elsewhere in the regulations requiring a cable licensee to notify its subscribers of its intention to contribute to the Cable Production Fund pursuant to subsection 18(6.3). According to Rogers and CCTA, subsection 18(6.3) is intended to operate automatically; unlike the fee increase provisions in the regulations, no further approval of the Commission is required for a cable licensee to invoke subsection 18(6.3). Rogers and CCTA also contended that since there is no actual change in the fee charged to subscribers as a result of a cable licensee's contribution made pursuant to subsection 18(6.3), there is no regulatory or legal obligation to provide subscribers with notice of such contribution.

The Commission considers that neither subsection 18(6.3) nor any other provision in the Act or regulations obliges a cable licensee to provide advance notice of its intention to make a contribution to the Cable Production Fund pursuant to subsection 18(6.3). A

cable licensee must provide advance notice to subscribers of rate increases, but as Cable Watch itself pointed out in its reply submission, Rogers properly provided advance notice to its Toronto subscribers of increases taken pursuant to subsection 18(6) of the regulations. When Rogers subsequently chose to invoke subsection 18(6.3) to make a contribution to the Cable Production Fund, its subscribers had already been notified of increases previously taken by the licensee pursuant to subsection 18(6).

The Commission disagrees with Cable Watch that a cable licensee significantly alters subscribers' rates by invoking subsection 18(6.3). The effect of invoking subsection 18(6.3) is neither to increase nor to decrease subscriber rates, but to suspend the decrease in rates that might have otherwise occurred in the absence of subsection 18(6.3). Accordingly, there was no additional requirement for Rogers, or any other cable licensee that had properly given previous notice of increases taken pursuant to subsection 18(6), to provide additional notice to subscribers of the licensee's intent to contribute to the Production Fund through subsection 18(6.3).

The Commission is not persuaded that Rogers, or any other cable licensee, breached any provision of the Act or regulations in respect of contributions to the Cable Production Fund made pursuant to subsection 18(6.3). Accordingly, the Commission is unable to conclude that any further regulatory action is required with regard to this aspect of Cable Watch's complaint.

The Commission's General Notice Procedures

Cable Watch's final contention is that the Commission generally does not use the most effective methods of ensuring that cable subscribers are fully informed of all decisions made by the Commission and cable licensees that might affect subscriber rates.

As noted above, the Commission's notice requirements are set out in sections 10(3) and 19 of the Act and section 11 of the *Statutory Instruments Act*. As a matter of practice, the Commission arranges for notice of announcements or decisions of national importance to be published not only in the *Canada Gazette*, which is available in most public libraries across Canada, but also in 29 newspapers of general circulation located in every province and territory. In addition, any individual or group may obtain Commission documents on a regular basis through a paid subscription service. Moreover, the Commission now publishes most of its notices and decisions at its Internet site on the World Wide Web.

The Commission agrees with Cable Watch that cable subscribers should have the opportunity to be aware of and participate in Commission proceedings that affect subscribers. However, unlike Cable Watch, the Commission is satisfied that this goal is met through the Commission's current notice procedures. The Commission considers that its notification process meets the requirements of the Act and provides an effective manner of communicating its notices and decisions to the general public.

Accordingly, the Commission dismisses this element of Cable Watch's complaint.

Conclusion

In light of the above discussion, the Commission considers that Cable Watch's complaint is without merit. The Commission has concluded that it had the authority to enact subsection 18(6.3) of the regulations and that it met its statutory notification obligations with respect to the introduction of the provision. Moreover, the Commission is not persuaded that Rogers or any other cable company breached any statutory or regulatory obligation in invoking subsection 18(6.3). Finally, the Commission is satisfied that its current notification procedures are adequate and effective. Accordingly, the Commission denies the relief requested by Cable Watch in its letter of complaint, including the request for a public hearing for the purpose of considering the allegations raised in the complaint.

The Commission notes that it recently issued Public Notice CRTC 1996-69, dated 17 May 1996, in which the Commission called for comments on a new approach to the regulation of broadcasting distribution undertakings. In this notice, a copy of which is attached, the Commission specifically noted its intention to repeal the capex and sunset provisions of the regulations. The proceeding will consist of two rounds of written submissions, with the first round of submissions due by 16 July 1996, as well as an oral public hearing commencing 7 October 1996 in the National Capital Region. The Commission invites Cable Watch to provide its views on the Commission's proposals in the context of this proceeding.

Thank you for bringing Cable Watch's concerns to the attention of the Commission.

Sincerely,

Allan J. Darling
Secretary General

Att.

c.c.: Rogers
CCTA
Rosalie Daly Todd (Consumers' Association of Canada)