



## Broadcasting Public Notice CRTC 2004-19

Ottawa, 31 March 2004

### **Introductory statement to Broadcasting Decisions CRTC 2004-129 and 2004-130, which renew the licences of the ExpressVu and Star Choice direct-to-home satellite distribution undertakings**

#### **Summary**

*This public notice sets out the Commission's analysis and determinations on common issues related to renewal of the broadcasting licences for the ExpressVu and Star Choice direct-to-home satellite distribution undertakings. In ExpressVu – Licence renewal, Broadcasting Decision CRTC 2004-129, 31 March 2004, and Star Choice – Licence renewal, Broadcasting Decision CRTC 2004-130, 31 March 2004, the Commission has **renewed** the licences of each of these undertakings, from 1 April 2004 to 31 August 2010.*

#### **Introduction**

1. At the 20 October 2003 public hearing in the National Capital Region (the public hearing), the Commission considered an application by Bell ExpressVu Inc. (the general partner), and BCE Inc. and 4119649 Canada Inc. (the partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership (ExpressVu), and an application by Star Choice Television Network Incorporated (Star Choice), for the renewals of the broadcasting licences for their respective national direct-to-home (DTH) satellite distribution undertakings (DTH undertakings).
2. A licence to operate a national DTH undertaking was awarded in *New, national, direct-to-home satellite distribution undertaking – Approved*, Decision CRTC 95-901, 20 December 1995 (Decision 95-901). This undertaking is now operated by ExpressVu. Star Choice received a similar licence in *New, national, direct-to-home satellite distribution undertaking – Approved*, Decision CRTC 96-529, 27 August 1996 (Decision 96-529). The licences for both the ExpressVu and the Star Choice DTH undertakings were subsequently administratively renewed.<sup>1</sup>

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<sup>1</sup> See *One-year administrative renewal*, Broadcasting Decision CRTC 2002-162, 2 July 2002, *Administrative renewal*, Broadcasting Decision CRTC 2003-159, 20 May 2003, and *Administrative renewal*, Broadcasting Decision CRTC 2004-85, 18 February 2004, for ExpressVu, and *One-year administrative renewal*, Broadcasting Decision CRTC 2002-163, 2 July 2002, *Administrative renewal*, Broadcasting Decision CRTC 2003-160, 20 May 2003, and *Administrative renewal*, Broadcasting Decision CRTC 2004-83, 18 February 2004, for Star Choice.

3. The public hearing provided an opportunity for the Commission to review with ExpressVu and Star Choice (the DTH licensees) their respective performance during their first terms of licence, and to discuss what terms and conditions would be appropriate for their next licence term.
4. This public notice sets out the Commission's analysis and determinations on issues common to the licence renewals of both the DTH licensees, as well as on conditions of licence related to certain of these common issues. The terms and conditions of licence for each DTH undertaking, as well as the Commission's determinations on issues particular to each undertaking, are set out in *ExpressVu – Licence Renewal*, Broadcasting Decision CRTC 2004-129, 31 March 2004, and *Star Choice – Licence renewal*, Broadcasting Decision CRTC 2004-130, 31 March 2004.

### **The DTH industry**

5. Since they began operation in 1997, the DTH undertakings have grown to the point where they have become the primary competitors to cable broadcasting distribution undertakings (BDUs) in the broadcasting distribution sector. In 2002, Canadian DTH undertakings reached approximately 2 million subscribers, an increase of 29 percent over 2001, and representing 21 percent of the subscribers to Canadian BDUs. At the public hearing, both Star Choice and ExpressVu indicated that approximately half of these two million subscribers were new subscribers to BDUs, as distinct from subscribers who had switched to DTH undertakings from cable.
6. The DTH licensees contribute to the Canadian broadcasting system in a number of ways. First, by virtue of their national coverage, they provide an opportunity for those living in areas not served by cable BDUs or multi-point distribution system BDUs to receive a wider range of broadcast signals. In areas where other BDUs operate, DTH undertakings provide consumers with additional choice. As well, since DTH undertakings distribute all of their broadcast signals in digital format, they have provided an initial potential subscriber base for digital-only Canadian pay and specialty services. The DTH licensees also support the production of Canadian programming through contributions to the Canadian Television Fund (CTF) and other independent production funds, and make payments to Canadian broadcasters in the form of affiliation fees.
7. The establishment of the DTH undertakings has required substantial capital investments by the DTH licensees. ExpressVu and Star Choice both distribute their services using transponders on two different satellites and require uplink and backhaul facilities. Both ExpressVu and Star Choice have also subsidized the costs of the DTH receiving equipment used by their subscribers.

8. The high initial capital costs incurred by the DTH licensees have contributed to a situation where neither ExpressVu nor Star Choice is yet profitable. While the growth in their total revenue has averaged 84 percent annually over the past three years, the aggregate profit before interest and tax (PBIT) margin of the DTH industry in 2002 was -17 percent. Both DTH licensees anticipated that they would attain profitability early in the next licence term.

## **Distribution of the signals of private conventional television stations**

### **Introduction**

9. The Commission set out a regulatory framework for DTH undertakings in *Introductory statement – Licensing of new direct-to-home (DTH) satellite distribution undertakings, and new DTH pay-per-view (PPV) television programming undertakings*, Public Notice CRTC 1995-217, 20 December 1995 (Public Notice 1995-217). In Public Notice 1995-217, the Commission stated that it was necessary to provide flexibility to new distribution competitors while establishing a competitive balance among new and existing distribution undertakings. It noted that a key challenge would be to implement a policy framework that maximized contributions to the Canadian broadcasting system, yet provided sufficient flexibility to support the competitive entry of satellite distribution technology.
10. Because the new DTH undertakings were to be national services, and in light of the expense of uplinking local and regional conventional broadcast signals to satellites, the Commission decided to limit requirements with regard to the basic service offered by the DTH licensees. DTH licensees were thus required to distribute a basic service consisting of the signals of the French- and English-language television networks of the Canadian Broadcasting Corporation (CBC, or the Corporation) and of at least one affiliate of each television network licensed on a national basis, which, at the time, effectively meant the CTV network.<sup>2</sup> Under the DTH licensing framework established by the Commission in Public Notice 1995-217, DTH undertakings were also obliged to distribute the signals of all Canadian English- and French-language pay and specialty services, subject to the availability of satellite capacity. Beyond that, the DTH licensees were free to determine which signals of additional conventional services they would distribute from among other licensed Canadian television services and eligible non-Canadian services, subject to certain distribution and linkage requirements and to the proviso that a preponderance of Canadian programming services would be delivered to every subscriber.

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<sup>2</sup> DTH undertakings, like cable BDUs, are now also required to distribute to all subscribers, as part of the basic service, the signals of the Aboriginal Peoples Television Network (APTN), the French-language TVA Network (TVA), the French- and English-language versions of the House of Commons service and the Cable Public Affairs Channel (CPAC). DTH licensees are also required to distribute the signal of the National Broadcast Reading Service, VoicePrint, on an audio channel, adjacent to CBC radio where possible, to all persons subscribing to any basic service package that has a preponderance of English-language services.

11. In Decision 95-901, the Commission required ExpressVu, by condition of licence, unless otherwise authorized, to perform certain program deletions in order to protect the program rights of local television stations. The Commission later imposed similar conditions of licence on Star Choice in Decision 96-529.
12. In 1997, the DTH licensees filed applications requesting that the Commission relieve them of their conditions of licence relating to program deletion, arguing that such requirements were inconsistent with the principle of fair and equitable treatment, given that other BDUs were not subject to similar requirements. The Commission announced the receipt of these applications in Public Notice CRTC 1997-60, 16 May 1997. In their interventions to these applications, television broadcasters acknowledged the possible need to limit the program deletion requirements, but requested that the Commission encourage the DTH licensees to negotiate with them to reach an effective agreement concerning these matters.
13. In *Proposed licence amendments affecting the program deletion and substitution requirements of the DTH satellite distribution undertakings*, Decision CRTC 97-576, 8 October 1997, the Commission temporarily suspended the conditions of licence of ExpressVu and Star Choice respecting program deletion. The Commission, however, stated the expectation that interested parties use the period during which the conditions of licence were suspended “to negotiate and reach an agreement on appropriate mechanisms that could be employed by DTH distribution undertakings to protect the program rights and advertising base of Canadian television stations.”
14. Subsequently, both ExpressVu and Star Choice reached agreements with the Canadian Association of Broadcasters (CAB) regarding a system of compensation for television licensees that would be implemented in lieu of program deletion. As a result, in Decision CRTC 98-500, 23 November 1998, and in *Application for temporary relief from the requirements of conditions of licence pertaining to identical programming deletion and for authorization to offer a second set of “4+1” U.S. signals as part of a discretionary package*, Decision CRTC 2000-39, 11 February 2000, the Commission again extended relief to ExpressVu and Star Choice from their conditions of licence related to program deletion, in each case, until the earlier of 31 August 2000 or the date upon which the DTH undertaking obtained 500,000 subscribers.
15. In the fall of 2001, in response to concerns expressed by small market television broadcasters related to the impact of the distribution of optional local television signals by the DTH licensees, the Commission issued *Call for comments – Carriage of local television stations by DTH undertakings in smaller markets*, Public Notice CRTC 2001-103, 28 September 2001 (Public Notice 2001-103). In August 2002, while the Commission’s deliberations were still ongoing with respect to the process initiated in Public Notice 2001-103, ExpressVu applied for a licence amendment to suspend conditions of licence that required it to perform program deletion. The application was

filed pursuant to a Memorandum of Understanding (the MOU) between the licensee and the CAB concerning measures that would serve as an alternative for the program deletion requirements of its licence. A similar application for a licence amendment was filed by Star Choice in the fall of 2002.

16. In *Licence amendment for ExpressVu – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-257, 16 July 2003 (Decision 2003-257), and *Licence amendment for Star Choice – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-258, 16 July 2003 (Decision 2003-258), the Commission approved applications by both DTH licensees to relieve them of their general obligations to perform program deletion. The licensees were relieved of these obligations by condition of licence until 12 August 2006, so long as they carried out a number of alternative measures set out in the decisions.
17. These alternative measures included a) the distribution of a number of the signals of certain independently-owned television stations that operate in small markets (small market stations);<sup>3</sup> b) the contribution of not less than 0.4 percent of their gross revenues from broadcasting activities during each broadcast year to a new, independently-administered fund to assist independently-owned television stations in small markets to meet their commitments to local programming (the small market fund); c) the “equitable distribution” of television stations owned by the large private broadcast groups;<sup>4</sup> and, d) the payment by each DTH licensee to the CAB of \$0.25 per month for each subscriber who purchases a second set of U.S. 4+1 signals.<sup>5</sup>
18. The Commission noted that both DTH licensees had made a commitment to consider the views of the broadcasters in question when selecting signals of conventional television stations that they would distribute. The Commission further noted that parties would have recourse to the Commission if they considered that the principle of equitable distribution was not being applied fairly in a particular case.
19. Interveners at the public hearing raised a number of issues related to the distribution of the signals of private conventional television stations, and these are discussed below.

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<sup>3</sup> Independently-owned television stations identified in these decisions are those owned by Jim Pattison Industries Ltd., Mid West Television Ltd., Norcom Telecommunications Limited, Radio Nord Communications inc., Télé Inter-Rives Itée, Standard Radio Inc. and Thunder Bay Electronic Limited.

<sup>4</sup> The large broadcast groups identified in these decisions are Bell Globemedia Inc. (CTV), CanWest Media Inc. (Global), CHUM Limited, Cogeco Radio-Télévision inc. (TQS), Quebecor Media Inc. (TVA), Craig Media Inc., Corus Entertainment Inc. and Rogers Media Inc.

<sup>5</sup> U.S. 4+1 signals are the signals of the television stations of the American commercial television networks CBS, NBC, ABC and FOX, and the non-commercial PBS network.

## **Application of the principle of equitable distribution**

### Positions of interveners

20. The CAB, Global Television Network Inc. (Global) and CTV Inc. (CTV) argued that the Commission should adopt additional measures to ensure the equitable distribution of the television signals of the large broadcast groups. The CAB was of the view that the DTH licensees should be required to offer comparable distribution among broadcast groups of similar size, both nationally and within individual markets. The CAB, supported by CHUM Limited (CHUM), submitted that, where a DTH licensee distributes one television signal from a local market, it should be required to distribute all signals from that market (a “carry one, carry all” requirement). The CAB, CTV and Global further argued that the DTH licensees should be required to distribute a minimum number of signals from each large broadcast group.
21. The CAB, CTV and Global were also of the view that the television signals to be distributed by the DTH licensees should be chosen by the large broadcast groups themselves, rather than by the DTH licensees.

### Positions of the DTH licensees

22. Both DTH licensees noted that Decisions 2003-257 and 2003-258 were released in July 2003, only months before the public hearing, and were of the view that it was too early to modify the approach to equitable distribution set out in those decisions. Star Choice pointed out that the approvals granted in Decisions 2003-257 and 2003-258 will expire in 2006, and submitted that the criteria for determining equitable distribution could be reviewed at that time.
23. ExpressVu submitted that, during negotiation of the terms of the MOU, many of which were included in Decision 2003-257, the parties had agreed upon an appropriate number of signals that must be distributed to ensure equitable distribution. ExpressVu further stated that, in line with commitments it had made, the number of signals from the large broadcast groups that it distributed had increased by eight since the MOU was signed.
24. Star Choice stated that it intends to ensure equitable distribution of the signals of the television stations of the large broadcast groups on the basis of the criteria agreed upon between the CAB and ExpressVu, and accepted by the Commission in Decision 2003-258. Star Choice indicated, however, that its implementation of equitable distribution would have to wait until the commercial deployment of the new Anik F2 satellite. Star Choice indicated that, once Anik F2 was in place, it would be able to make any adjustments necessary to achieve equitable distribution of the signals of the television stations of the large broadcast groups.
25. The DTH licensees were of the view that the approach established in Decisions 2003-257 and 2003-258, under which they choose the signals to be distributed after considering input from the large broadcast groups, remains appropriate.

## The Commission's analysis and determinations

26. The Commission notes that there is a limit to the capacity available on Canadian satellites for the delivery of DTH services. While digital compression allows the DTH licensees to make efficient use of the capacity available to them, their current capacity is insufficient to distribute all programming undertakings that might seek distribution. Further, the Commission considers that demands on DTH capacity are likely to increase over the next licence term with the licensing of high definition services, which currently use approximately five times as much capacity as standard definition services. In this environment, the Commission anticipates that the DTH licensees will find it difficult to increase the number of signals of conventional television stations that they distribute and may, in fact, be obliged to decrease that number.
27. Given the current practical limits on available capacity, choices must be made as to which signals of conventional television stations will be distributed by the DTH undertakings. The Commission's general approach has been to permit BDUs to select the signals they will distribute, once they have satisfied the provisions of the *Broadcasting Distribution Regulations* (the Regulations), the terms of the Commission's mandatory distribution orders, and any relevant conditions of licence. In addition, the DTH licensees are required, pursuant to the alternative measures to program deletion set out by condition of licence in Decisions 2003-257 and 2003-258, to distribute certain signals of small market stations and to provide equitable distribution of the television signals of the large broadcast groups.
28. In *Direct-to-home (DTH) broadcasting distribution undertakings – simultaneous and non-simultaneous program deletion and the carriage of local television signals in smaller markets*, Broadcasting Public Notice CRTC 2003-37, 16 July 2003 (Public Notice 2003-37), which accompanied Decisions 2003-257 and 2003-258, the Commission noted that both DTH licensees had undertaken to consider the following two factors in determining what constituted equitable distribution:
  - the local television programming assets owned and operated by each large broadcast group and the total revenue earned from these assets; and
  - the market share obtained by each large broadcast group for the television stations in their respective markets.
29. The Commission considers this approach to be appropriate for the reasons that follow.
30. First, while the Commission considers consultations with the broadcasters to be essential, the DTH licensees are, in its view, ultimately in a better position to assess the needs and demands of their subscribers, and to respond accordingly.
31. Second, the Commission is of the view that considering the assets, revenues and market shares of the different broadcast groups helps to ensure that the signals distributed by the DTH licensees are generally reflective of the presence of the large broadcast groups in the Canadian broadcasting system.

32. Finally, the approach affords the DTH licensees sufficient flexibility to manage the anticipated demands on their capacity, while taking into account subscribers' preferences, different time zones, both official languages, regional preferences and the needs of Canada's Aboriginal and ethnic communities.
33. With regard to the recommendation that each DTH undertaking be required to distribute a minimum number of signals from each of the large broadcast groups, the Commission considers that prescribing such a minimum would not afford the DTH licensees sufficient flexibility to either manage the anticipated demands on their capacity or to take into account the source, language and content of the various signals of private conventional television stations to be distributed. The Commission notes, moreover, that both Star Choice and ExpressVu currently offer a number of signals of conventional television stations that exceeds the minimum number required by the Commission.
34. As regards the CAB's recommendation that the DTH licensees be required to offer comparable distribution to broadcast groups of similar size, the Commission considers that the requirement for equitable distribution has generally been successful in ensuring a reasonable and comparable representation nationally among large broadcast groups of similar size, with the possible exception of the distribution of signals from TQS by Star Choice
35. In this regard, Cogeco submitted that Star Choice should be required to implement fair and equitable distribution of the signals of local TQS stations that matches the distribution provided to the signals of local TVA stations. In reply to Cogeco's concern, Star Choice indicated that it would meet all of its obligations with respect to the equitable distribution of the signals of conventional television stations once the Anik F2 satellite was commercially deployed. As an interim solution to Cogeco's concern, Star Choice made a commitment to immediately uplink the signal of an additional TQS station. The Commission considers that these commitments are an appropriate response to Cogeco's concerns.
36. As to the CAB's suggestion, supported by CHUM, that the Commission apply the concept of equitable distribution on a market-by-market basis, or apply a "carry one, carry all" rule to individual markets, the Commission considers that such an approach would reduce the ability of the DTH licensees to provide a suitable range and diversity of programming services, while managing the demands on their capacity. The Commission notes that such a requirement was examined and rejected in the proceeding leading to Public Notice 2003-37.
37. Finally, the Commission notes that the approach to equitable distribution set out in Decisions 2003-257 and 2003-258 and discussed in Public Notice 2003-37 has been in place for less than a year.



38. For reasons set out above, the Commission will not require the distribution of a minimum number of signals from each large broadcast group, nor will it institute a carry one, carry all requirement in respect of individual markets. The Commission considers, however, that the principle of equitable distribution remains an appropriate approach to the distribution of the signals of private conventional television stations by the DTH licensees. It will retain this principle as part of the alternative measures required for the continued suspension of the licensees' requirements under the Regulations to perform program deletion.

#### **Requests for the distribution of the signals of specific stations**

##### Positions of interveners

39. Intervenors at the public hearing raised concerns with respect to the carriage by the DTH licensees of the signals of specific television stations from particular local and regional markets.
40. Global and 44 other interested parties representing a variety of individuals, not-for-profit organizations, businesses, universities and other organizations, submitted that the DTH licensees should be required, by condition of licence, to distribute the signal of Global's Quebec television station CKMI-TV. These parties argued that CKMI-TV is the only private English-language regional television station licensed in Quebec and that its programming is of particular value to the province's English-speaking minority.
41. In reply, Star Choice stated that it currently distributes the signals of eight Global stations; as many or more stations as from any other large broadcast group with the exception of CTV. ExpressVu indicated that, although it intends to reduce the number of signals of Global stations it distributes from nine to eight by the end of 2004, it would still be distributing an equal or higher number of Global signals than from other large broadcast groups. In light of the above, the DTH licensees submitted that they were satisfying the requirement for equitable distribution, as it relates to the Global group.
42. CHUM was of the view that Star Choice should distribute the signal of its Victoria station CIVI-TV, given that it offers the competing signal of CTV's Victoria station CHEK-TV. In CHUM's view, the distribution of both signals would be in keeping with the principle of equitable distribution under a carry one, carry all approach.
43. Rogers Communications Inc. (Rogers) stated that it was at a disadvantage because Star Choice did not distribute the signal of CJMT-TV Toronto, commonly known as OMNI.2, even though it carried the signals of all other Toronto stations. Rogers further stated that ExpressVu carried the signal of CJMT-TV on the Nimiq 2 satellite, while the signals of all other Toronto stations are carried on Nimiq 1. Rogers was of the view that such distribution was contrary to the principle of equitable distribution since ExpressVu subscribers would have to upgrade their receiving equipment to receive signals from Nimiq 2.

44. In response to both the CHUM and Rogers complaints, the DTH licensees indicated that they did not believe that the principle of equitable distribution should be applied on a market-by-market basis. With respect to the Rogers complaint specifically, ExpressVu submitted that it was under no regulatory obligation to distribute the signal of CJMT-TV on the same satellite as the signals of other Toronto stations. ExpressVu indicated that its satellite placement of CJMT-TV reflected an approach under which it would distribute third-language services using the Nimiq 2 satellite. Star Choice did not address the distribution of CJMT-TV.

The Commission's analysis and determinations

45. As noted above, the Commission will not apply the principle of equitable distribution on a market-by-market basis, nor will it implement a carry one, carry all requirement. Further, with respect to CKMI-TV, the Commission notes that the DTH licensees currently distribute a number of Global signals comparable to the number of signals that they distribute from other large broadcast groups. It therefore does not consider that the DTH licensees should be required to distribute the signal of CKMI-TV. The Commission further considers that requiring the distribution of additional individual stations would impinge unnecessarily on the flexibility of DTH licensees to tailor the services to the needs and interests of their subscribers, and accordingly will not require the DTH licensees to distribute the signals of CIVI-TV Victoria or CJMT-TV Toronto.
46. As to the choice of satellite on which the signals of particular television stations are distributed, the Commission considers that this decision is best left to the DTH licensees and will therefore not require ExpressVu to distribute the signals of CJMT-TV on the same satellite that it uses to distribute the signals of other Toronto television stations.

#### **Financial compensation to broadcasters**

Positions of interveners

47. The CAB submitted, at the hearing, that the Commission should require the DTH licensees to increase the financial compensation that they pay to broadcasters by providing compensation for the carriage of out-of-market stations that are distributed in other markets, and by increasing the level of compensation provided to conventional television broadcasters for the carriage of a second set of U.S. 4+1 signals from the current \$0.25 per month to \$0.50 per month.

Position of the DTH licensees

48. The DTH licensees both argued that alternative measures with respect to program deletion, including the provision of financial compensation to broadcasters, had been fully considered in the proceeding that led to Decisions 2003-257 and 2003-258, and that it was inappropriate to revisit this issue at this time.

The Commission's analysis and determinations

49. The Commission notes that the CAB presented no compelling evidence to explain its rationale for an increase in the compensation paid for the carriage of a second set of U.S. 4+1 signals from \$0.25 to \$0.50 per subscriber per month. Further, the Commission notes that it only recently concluded a lengthy public proceeding where it imposed, in Decisions 2003-257 and 2003-258, the \$0.25 per subscriber per month level of compensation for the distribution of a second set of U.S. 4+1 signals, as well as other requirements on the DTH licensees as conditions for the suspension of requirements related to program deletion. The Commission remains of the view that these requirements strike an appropriate balance among broadcasters, the DTH licensees and subscribers. In light of the above, the Commission finds that it is not appropriate to make any adjustments to the financial compensation paid by the DTH licensees to conventional television stations, as recommended by the CAB.

**Approaches to providing the local programming of stations whose signals are not distributed in their entirety**

50. At the hearing, the Commission explored two approaches that would allow DTH subscribers to receive the local programming of their local television stations in cases where the signals of such stations are not distributed by the DTH licensee to which they subscribe. One solution was the installation of an A/B switch that would allow a subscriber to switch from the DTH undertaking, which provides satellite-delivered services, to a home antenna, which would pick up local over-the-air television stations. Broadcasters generally opposed this solution since, in their view, subscribers would find switching between two sets of signals confusing and unsatisfactory, particularly where implementation of an A/B switch required the purchase and installation of additional equipment.
51. The second possible approach was the offering of omnibus or partial channels. Omnibus channels would consist of compilations of the programming of several different stations. A partial channel would be devoted to specific excerpts of the local programming of a particular station. Omnibus and partial channels have the potential to make more efficient use of satellite capacity in that they would provide subscribers with non-duplicative local or regional programming. Broadcasters, however, generally considered omnibus and partial channels to be less than ideal solutions, since they would limit the ability of broadcasters to market their services and might exclude some local program inserts and announcements.
52. While not an ideal solution, the Commission considers that the A/B switch can facilitate access by subscribers to local television signals not distributed by the DTH licensees.
53. Regarding omnibus and partial channels, while the Commission acknowledges that neither approach fully addresses the concerns raised by broadcasters, it considers that they could provide access to local programming and conserve satellite capacity. The Commission accordingly encourages the DTH licensees and broadcasters to explore the use of omnibus and partial channels to ensure distribution of the widest range of local

programming without increasing program duplication. The Commission reminds the DTH licensees that omnibus or partial channels would require approval by the Commission before they could be distributed.

### **Distribution of the signals of the conventional television stations of the CBC**

54. Under section 37(a) of the Regulations, DTH licensees must distribute, as part of their basic service, “the programming service of at least one of each of the Corporation’s English-language and French-language television network affiliates or members.”
55. In *Achieving a better balance: Report on French-language broadcasting services in a minority environment*, Public Notice CRTC 2001-25, 12 February 2001 (Public Notice 2001-25), the Commission addressed the distribution of regional CBC television signals as follows:

... the Commission expects satellite service providers to offer regional signals of the CBC in both official languages. The Commission proposes to deal with this issue when it considers the licence renewal of satellite service providers and will take into account their efforts in this regard.

56. In Public Notice 2003-37, the Commission again indicated that it would deal with issues related to the distribution of the regional stations of the CBC’s English and French-language networks when it considered the licence renewal applications of the DTH licensees.

### **Position of the CBC**

57. The CBC proposed a two-stage approach that would ultimately lead to the distribution of the signals of all of its owned and operated English-language and French-language conventional television stations by the DTH undertakings. The CBC considered that the distribution of the signals of stations affiliated to the CBC should not be seen as a substitute for the distribution of the signals of CBC owned and operated stations since affiliates offer as little as 33 percent of the full CBC schedule.
58. The CBC argued that, as a first stage, each DTH licensee should immediately be required to distribute a number of signals of CBC owned and operated English-language conventional television stations that is at least as high as the number of signals of English-language conventional television stations owned by any of the private ownership groups that it distributes. Similarly, the CBC was of the view that each DTH licensee should be required to distribute a number of signals of CBC owned and operated French-language conventional television stations that is at least as high as the number of signals of French-language television stations owned by any of the private ownership groups, that it distributes.

59. As the second stage, which the CBC envisaged would be completed by the end of the licence term, each DTH licensee should be required to distribute the signals of all of the CBC's English- and French-language conventional television stations. Distribution would be phased in according to a predetermined schedule, with the CBC deciding the priority under which the signals of the regional stations would be added. The CBC proposed that the DTH licensees be required to distribute the signal of an additional CBC television station for every new non-Canadian station that they distribute.
60. With respect to Star Choice, the CBC recommended that the distribution of the signals of additional CBC stations begin after the Anik F2 satellite is in service and continue on the basis of a precise schedule.
61. As regards the use of an A/B switch and/or the provision of regional programming via partial or omnibus channels, the CBC argued that these were not suitable approaches to the provision of the signals of its regional stations.

#### **Positions of other interveners**

62. The Commissioner of Official Languages submitted that the Commission should require the DTH licensees, by condition of licence, to transmit the signals of all of the CBC French-language regional television stations. Impératif français made the same recommendation.
63. The Commissioner of Official Languages, the Fédération des communautés francophones et acadienne du Canada, the Association des Francophones du Nord-Ouest de l'Ontario, the Association canadienne-française de l'Ontario d'Ottawa inc., the Association canadienne-française de l'Ontario Région du Témiskaming, Impératif français and the Chambre économique de l'Ontario submitted that the DTH licensees should be required to distribute the signal of CBOFT Ottawa, in particular. Other interveners also identified particular CBC stations that they submitted that the DTH licensees should be required to distribute.

#### **Positions of the DTH licensees**

64. ExpressVu stated that it currently distributes the signals of eight CBC owned and operated English-language television stations and six English-language affiliates. ExpressVu also indicated that it distributes the signals of five CBC French-language owned and operated conventional television stations.
65. Star Choice stated that it currently distributes the signals of eight CBC owned and operated English-language conventional television stations, and six English-language affiliates, as well as the signals of the CBC French-language conventional television stations in Montréal and Moncton. Star Choice stated that the number of CBC signals that it distributes cannot be increased until the Anik F2 satellite is commercially deployed.

66. Neither DTH licensee agreed that it was appropriate to uplink the signals of all of the CBC's regional stations. Star Choice submitted that this would require an additional 1.3 transponders to accomplish. Instead, Star Choice suggested the use of omnibus channels that would distribute the local programming of CBC's English- and French-language conventional television stations. As an alternative approach, ExpressVu suggested that partial channels could be established that would provide the regional programming of the CBC's regional French-language and English-language conventional television stations. The programming would be scheduled so that it would be seen at an appropriate time in the originating station's time zone.

#### **The Commission's analysis and determination**

67. As indicated earlier, the Commission stated, in Public Notice 2001-25, that it expects the DTH licensees to offer regional signals of the CBC in both official languages. The Commission is of the view, however, that the CBC's position that the DTH licensees should distribute the signals of all of the CBC's English-and French-language conventional television stations raises the issue of satellite capacity, given that, as noted above, DTH licensees will be increasingly called upon to distribute high definition programming.
68. At the same time, the Commission considers that the full schedules of the CBC's French and English-language television networks should be available to DTH subscribers in the time periods in which they are intended for broadcast in each of the time zones across the country. The Commission notes that access to CBC regional programming has a particular importance for French-speaking viewers outside Quebec, since the CBC is the only television broadcaster outside Quebec that produces regional French-language programming.
69. The Commission further considers that each DTH licensee should distribute the signals of at least as many CBC owned and operated English-language conventional television stations as it does the signals of any of the private ownership groups that operate English-language conventional television stations, and at least as many signals of CBC owned and operated French-language conventional television stations as it does the signals of any of the private ownership groups that operate French-language conventional television stations.
70. In light of the above, the Commission has decided to adopt the following approach to the distribution of the signals of the CBC's English- and French-language conventional television stations by satellite. The DTH licensees will be required, as a **condition of licence**, to ensure that the number of signals of CBC English-language owned and operated conventional television stations that they distribute never falls below the number of signals of English-language conventional television stations distributed from any other individual broadcasting group. Similarly, the DTH licensees will be required, as a **condition of licence**, to ensure that the number of signals of CBC French-language owned and operated conventional television stations that they distribute never falls below the number of signals of French-language conventional television stations distributed from any other individual broadcasting group. Regardless of the number of signals of

private television stations distributed, the DTH licensees will be required to distribute a minimum of five signals of CBC owned and operated English-language conventional television stations and a minimum of five signals of CBC owned and operated French-language conventional television stations, including the signals of at least one English-language and one French-language conventional television station from each time zone. These requirements will become effective 1 September 2004, which is the beginning of the next broadcast year, to allow the parties time to make the arrangements necessary to meet the requirements.

71. Although the DTH licensees will ultimately determine the particular CBC television signals that they will distribute, the Commission expects the DTH licensees to make such decisions in consultation with the CBC.
72. In light of concerns raised by interveners, and Ottawa's position as the national capital, the Commission further encourages the DTH licensees to distribute the signal of CBOFT Ottawa. The Commission notes that, since the public hearing, Star Choice has made additions to its channel line-up and now distributes this signal. As well, given that the DTH licensees provide service to Canada's northern regions and territories, the Commission encourages the DTH licensees to distribute the CBC's northern television service.
73. While acknowledging the CBC's concerns about omnibus and partial channels, the Commission considers that such channels, if properly programmed and promoted on the DTH licensees' electronic programming guides, have the potential to increase the availability of the CBC's regional television programming without large-scale duplication of network programming. The Commission therefore encourages the DTH licensees and the CBC to explore these methods of providing local and regional programming from CBC English- and French-language television stations that are not distributed in their entirety. Such measures would be over and above those required under the conditions of licence set out above. As noted above, omnibus and partial channels would require approval by the Commission before they are distributed.

#### **Distribution of ethnic services**

74. The Canadian Diversity Network (CDN) recommended that, in light of Canada's multicultural nature, the DTH licensees should be required to distribute the signals of 23 ethnic services by the end of 2004, 30 ethnic services by the end of 2005, 40 ethnic services by the end of 2006, and 50 ethnic services by the end of 2008, with emphasis placed on the distribution of Canadian ethnic services. The CDN submitted that, for the purposes of its recommendation, ethnic services should include services with some proportion of third-language programming as well as services that reflect the diversity of Canada.

75. The DTH licensees did not specifically respond to the CDN's proposal.
76. The Commission notes that ethnic programming services serve to fulfill the objective set out in section 3(1)(d)(iii) of the *Broadcasting Act*, which provides, in part, that the Canadian broadcasting system should reflect the linguistic duality and multicultural and multiracial nature of Canadian society. To date, the Commission has licensed five conventional ethnic television stations, five analog ethnic specialty services and 44 ethnic Category 2 specialty services. Of the 44 Category 2 services, only six have launched. The Commission has also authorized the distribution of seven non-Canadian ethnic services. Achieving the distribution levels proposed by the CDN for the DTH licensees by 2008 would therefore require the short-term launch and successful operation of almost all Category 2 ethnic services.
77. Furthermore, a condition of licence that would require the distribution of Category 2 services would run contrary to the Commission's position, originally set out in *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000, that distribution of Category 2 services by BDUs would not be guaranteed.
78. The Commission notes that section 38 of the Regulations requires that, absent a condition of licence to the contrary, DTH licensees must distribute all licensed pay and specialty services with the exception of Category 2 services and single or limited point-of-view religious services. Under this requirement, the DTH licensees are generally required to distribute the five analog ethnic specialty services that the Commission has licensed. The Commission notes that, in addition to the five licensed analog ethnic specialty services, ExpressVu currently distributes the signals of all five licensed conventional ethnic television stations and all six of the Category 2 ethnic specialty services that have launched. Star Choice currently carries the signals of three of the five licensed conventional ethnic television stations and has stated its intention to distribute the signals of the remaining conventional ethnic television stations and to explore the possibility of offering Category 2 ethnic services following the commercial deployment of the Anik F2 satellite. Both DTH licensees also distribute the majority of the non-Canadian ethnic services authorized for distribution.
79. Given the current requirements set out in the Regulations to distribute analog specialty services and the willingness of DTH licensees to distribute the signals of conventional ethnic television services and Category 2 ethnic services without a specific requirement to do so, the Commission is not persuaded that additional requirements with respect to the distribution of the signals of ethnic services are necessary. The Commission, however, encourages the DTH licensees to continue to increase the distribution of ethnic services as they are launched and as capacity becomes available.

### **Distribution of APTN-North**

80. The Aboriginal Peoples Television Network (APTN) was of the view that the DTH licensees should be required to distribute the signal of APTN-North, which provides programming that reflects Northern Canadian communities. APTN-North's



programming includes coverage of the proceedings of the Legislative Assemblies of Nunavut and of the Northwest Territories.

81. In response, ExpressVu indicated that it currently distributes APTN-North. Star Choice indicated that, while it does not currently have plans to distribute APTN-North, it would respond to any market demand for such a service.
82. The Commission considers that it is not necessary to impose an additional requirement with respect to the carriage of the signal of APTN-North on ExpressVu, given that ExpressVu already carries the signal. With respect to Star Choice, the Commission notes the licensee's statement that it would be willing to respond to any market demand for APTN-North. The Commission encourages Star Choice to consider the distribution of the signal of APTN-North once the Anik F2 satellite is commercially deployed.

### **Signal theft**

83. In their interventions, Cogeco Cable Inc. (Cogeco Cable), Quebecor Media Inc. (QMI), Rogers and the Canadian Cable Television Association (CCTA) expressed concerns related to the theft of satellite services and the damage that it causes to the Canadian broadcasting system. These parties were generally of the view that the Commission should impose conditions of licence on the DTH licensees requiring them to implement specific measures to deter satellite theft. They argued that the imposition of conditions of licence would increase the accountability of the DTH licensees in this area.
84. In response, ExpressVu described measures that it had implemented to combat signal theft and outlined future plans in this area. It also noted commitments that it had made through meetings of the Chief Executive Officers (CEOs) of various parties involved in the broadcasting industry and the Chairman of the Commission. ExpressVu further confirmed that it was committed and accountable to the Commission with respect to initiatives to counter signal theft, and that it has submitted progress reports on these matters. ExpressVu was also of the view that measures to counter signal theft were, by their nature, dynamic, and that conditions of licence would not provide the flexibility required to address the theft of signals effectively.
85. For its part, Star Choice noted that there was no evidence that its services were being stolen. It was therefore of the view that there was no need for conditions of licence with respect to signal theft.
86. The Commission shares the concerns of the interveners about the damaging effect that signal theft has on the Canadian broadcasting system. Signal theft deprives the entire broadcasting system, including satellite and cable distributors, television broadcasters, producers, artists, technicians and program rights holders, of hundreds of millions of dollars of revenues annually. It notes that the Chairman of the Commission has initiated a multilateral process to deal with this matter. This process has included meetings of the Chairman and the CEOs of various companies and organizations involved in the broadcasting industry. Subsequent to these meetings, each of the parties participating in the process provided an update of activities that have been undertaken to combat signal

theft. The Commission considers that this process is a more responsive and efficient method of addressing signal theft at this time than the imposition of conditions of licence.

87. Further, since no distribution system is immune to signal theft, the Commission considers that the problem is best addressed on an industry-wide basis.
88. In light of the above, the Commission does not consider it appropriate to impose conditions of licence related to signal theft on the DTH licensees. The Commission, however, will monitor the extent to which the DTH licensees continue to develop methods and participate in efforts designed to combat signal theft.

### **Uplink fees for pay and specialty services**

89. The CAB and Stornoway Communications General Partner Inc. (Stornoway) submitted that pay and specialty services should not be required to pay fees to the DTH licensees to cover the transmission of their signals from terrestrial facilities to satellites (uplink fees). The CAB indicated that, when first licensed, ExpressVu did not charge uplink fees but began to charge such fees for digital specialty services when these services launched. The CAB further indicated that ExpressVu now also charges uplink fees for analog pay and specialty services.
90. ExpressVu acknowledged that it charges uplink fees, but argued that such fees were analogous to the fees that pay and specialty services pay Canadian Satellite Communications Inc. (Cancom) to distribute their services to cable BDUs using its satellite relay distribution undertaking (SRDU). Since the Cancom SRDU and the Star Choice DTH undertaking use the same satellite facilities, Star Choice is able to obtain these signals without incurring additional costs. ExpressVu argued that the actual cost to a DTH undertaking to distribute a specialty service is approximately \$300,000. In its view, Star Choice's arrangement through Cancom constitutes a direct subsidy and results in a competitive advantage for Star Choice. To offset this subsidy, ExpressVu indicated that it had negotiated contracts with Category 1 specialty services to pay "the lesser of \$240,000 or the difference between \$240,000 and the fee which the service charges Star Choice DTH to use the direct-to-cable feed."
91. Star Choice did not comment on this issue.
92. The Commission notes that it has not, as a rule, been involved in regulating uplink fees for specialty services that are distributed by DTH undertakings, with the exception of the mandatory distribution orders for the CPAC and APTN services. In these mandatory orders, the Commission provided that both CPAC and APTN must pay for the satellite uplink and transponder costs associated with the distribution of their services.<sup>6</sup>

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<sup>6</sup> See *Licence renewal for CPAC; and issuance of a distribution order*, Broadcasting Decision CRTC 2002-377, 19 November 2002, and *Order respecting the distribution of the Aboriginal Peoples Television Network*, Public Notice CRTC 1999-70, 21 April 1999.

93. With respect to the Cancom SRDU, the Commission has generally considered that it is the responsibility of specialty services to deliver their signals to cable head-ends. It considers it appropriate that the uplink costs of specialty services to an SRDU be borne by the specialty services.
94. The Commission considers that Star Choice's ability to distribute these signals without incurring uplink costs, due to its association with Cancom, while an operating efficiency, could place ExpressVu at a disadvantage. Based on the evidence available to it, the Commission does not consider ExpressVu's approach to the recovery of uplink costs to be unreasonable.
95. In light of the above, the Commission does not consider it necessary or appropriate to intervene in current contractual provisions related to the uplink fees for specialty services.

### **Audit framework for broadcasters**

96. The CAB submitted that its members have had difficulty in obtaining access to the records of BDUs in order to verify the number of subscribers that are receiving broadcasting services, in some cases, despite provisions in the contracts that require BDUs to provide such access. The CAB added that this information is necessary so that broadcasters may verify that they are receiving correct wholesale payments. In light of these concerns, the CAB submitted a ten-point "audit framework," and recommended that the DTH licensees be required to conform to this audit framework by condition of licence. In a letter dated 13 December 2003, the CAB recommended that its audit framework be incorporated into the Regulations as an obligation for all BDUs. In *Call for comments on a request to amend the Broadcasting Distribution Regulations to add provisions governing the audit of affiliation payments*, Broadcasting Public Notice CRTC 2004-20, 31 March 2004 (Public Notice 2004-20), the Commission has called for comments on whether it would be appropriate to establish an audit framework. The Commission further seeks comment on the CAB's proposal. The Commission will make its determinations on matters related to an audit framework following the completion of the proceeding initiated by Public Notice 2004-20.

### **Described video**

97. Section 3(1)(p) of the Act states that "programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose." Accordingly, it is the Commission's expectation that all broadcasters work toward improving the accessibility of their programming.
98. As a method of improving the accessibility of television programming for persons with visual impairments, the Commission has imposed requirements with respect to the provision of video description on the licensees of conventional and specialty television services. Video description, or described video, takes the form of a narrative description of a program's key visual elements, which permits the audience to create a mental image

of what is on the screen. It is often provided using the secondary audio program (SAP) channel. In their latest licence renewal decisions, major conventional television stations have been required by condition of licence to provide levels of Canadian programming with video description beginning at two hours per week, and eventually reaching four hours per week. Specialty service licensees have been encouraged to provide at least one hour per month of video description, increasing by an additional hour per month in each successive year of their licence terms.

99. ExpressVu indicated that it distributes all programming with video description that it receives and provides a special programming guide that indicates when such programming will be broadcast. Star Choice, however, indicated that it was currently unable to distribute video description due to the technical limitations of its set-top boxes. Star Choice indicated that it was exploring ways to provide video description by implementing software uploads or upgrades to its set-top boxes.
100. The Commission acknowledges that, for most BDUs, passing through video descriptions requires the resolution of technical problems that would incur considerable expense. The Commission, however, considers that it is important that those who receive television signals through BDUs are able to receive the programming with the video description that conventional and specialty television services provide.
101. The Commission acknowledges ExpressVu's performance in this regard, and encourages Star Choice to continue its efforts to surmount the technical problems associated with providing programming with video description.

### **Regulatory framework for DTH undertakings**

102. The CCTA, the Canadian Cable Systems Alliance (CCSA), Cogeco Cable and Rogers noted that there were differences between the regulatory obligations that apply to DTH undertakings and those that apply to cable BDUs. As an example, they noted that DTH licensees are not required to distribute the signals of local television stations in each market they serve, while each cable BDU must distribute the signals of all local television stations in its service area. The interveners submitted that the DTH licensees have become important players in the BDU industry and should not be regulated in a manner that is less stringent than that which is in effect for cable BDUs. In light of these concerns, the interveners submitted that the Commission should conduct an overall review of the regulatory frameworks for DTH and cable DBU licensees.
103. Pelmorex and the CBC were of the view that DTH undertakings should be subject to the same distribution and linkage rules that apply to Class 1 cable BDUs. They were concerned that the dual status specialty services that they operate continue to be distributed as part of the basic service offered by the DTH undertakings.<sup>7</sup> Under the

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<sup>7</sup> These dual status specialty services are The Weather Channel and MétéoMédia for Pelmorex, and CBC Newsworld and le Réseau de l'information (RDI) for the CBC.

terms of the Commission's *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2003-42, 29 July 2003, Class 1 cable BDUs must distribute the dual status specialty services on the basic service, unless the specialty service consents to its distribution on a discretionary tier.

104. The DTH licensees argued that the current regulatory framework has been successful in that it has allowed them to establish undertakings that compete effectively with cable BDUs. They noted, however, that neither DTH licensee has yet attained profitability. They therefore submitted that it was not appropriate to consider changes to the regulatory framework that applies to DTH undertakings at this time.
105. The Commission notes that the concerns expressed by the interveners related to the distribution by DTH undertakings of conventional television stations have been addressed in Public Notice 2003-37 and in Decisions 2003-257 and 2003-258, and that further clarifications have been set out in this public notice. With respect to dual status specialty services, the Commission has called for comments, in Broadcasting Public Notice CRTC 2003-59, 30 October 2003, on the appropriateness of its existing distribution requirements with regard to analog specialty services as part of its consideration of applications to change the distribution status of The Sports Network (TSN), Réseau des sports (RDS) and Country Music Television (CMT).
106. In light of the above, the Commission does not consider that it is necessary to conduct a review of the regulatory frameworks for DTH and cable BDU licensees.

Secretary General

*This document is to be appended to the licence of each of the DTH licensees. It is available in alternative format upon request and may also be examined at the following Internet site: <http://www.crtc.gc.ca>*