



Broadcasting Public Notice CRTC 2006-23

Ottawa, 27 February 2006

Digital migration framework

The determinations contained in this public notice constitute the framework that will guide the migration to a digital distribution environment of those pay and specialty services that were approved under the analog licensing framework. The new framework is the culmination of a public process announced in Determinations with respect to the establishment of rules to govern the distribution of specialty services on the basic service of fully digital cable undertakings; and call for proposals for a framework to guide the migration of pay and specialty services from analog to a digital distribution environment, Broadcasting Public Notice 2005-1, 7 January 2005.

A related Commission process has focused on the development of an approach to govern the licensing and distribution of high definition digital pay and specialty services. The Commission's proposals for such an approach were set out in Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services, Broadcasting Public Notice CRTC 2004-58, 6 August 2004. The Commission will issue its determinations on that process in a future public notice.

Introduction

1. The Commission's current licensing and distribution framework for those Canadian specialty and pay services approved under the analog licensing framework (the analog services) has ensured that these services obtain the broadest distribution possible, and thus the revenues they require to contribute to the achievement of the objectives of the *Broadcasting Act* (the Act) in accordance with their commitments and responsibilities. The analog framework includes a number of specific support mechanisms, including the access rules set out in sections 18 and 38 of the *Broadcasting Distribution Regulations* (the Regulations), and the distribution and linkage rules, which are incorporated by reference into the Regulations.¹ The access rules require certain broadcasting distribution undertakings (BDUs; distributors) to carry pay and specialty services under specific terms and conditions. The distribution and linkage rules govern how these services are carried and how they may be packaged with non-Canadian services.
2. As a result of their widespread distribution and reasonably stable revenues, the analog services have substantially increased the number and diversity of viewing options available to Canadians and have contributed significant resources to Canadian program

¹ Sections 20 and 40 of the Regulations refer to *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2005-119, 14 December 2005 and *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Broadcasting Public Notice CRTC 2005-120, 14 December 2005.

production, the development of Canadian talent, and the creation of employment in the broadcasting sector. For example, the 49 analog specialty services spent over \$665 million on Canadian programming in 2004, representing approximately one third of the contributions of all broadcasters to Canadian programming.

3. Although the analog licensing and distribution framework has evolved over time, the form it takes today remains largely a function of the cable television distribution technology in place at the time the specialty and pay services first emerged in the early 1980s, including the then relatively limited analog channel capacity of cable BDUs, and the dependence on negative traps to package and retail tiers of discretionary services.
4. The broadcasting system is now in transition from an analog to a digital distribution environment. In fact, several distributors, including direct-to-home (DTH) operators, multipoint distribution systems (MDS), and digital subscriber line (DSL) BDUs already distribute services on a fully digital basis. Larger cable operators provide a substantial array of digital services, including Category 1 and Category 2 pay and specialty services and non-Canadian services authorized for digital-only distribution, in addition to those services whose programming continues to be available only in analog form. Such systems or offerings are referred to as analog-digital hybrids. Quebecor Media Inc. (Quebecor), owner of Vidéotron Ltd. (Vidéotron), Cogeco Inc. (Cogeco) and Rogers Cable Communications Inc. (Rogers), are also distributing services to their subscribers on a fully digital basis, i.e., offering their subscribers a digital-only service option. Further, the pay and ethnic specialty services, having been the first services to migrate from analog, are now offered on a digital basis by many BDUs.
5. The transition to a fully digital distribution environment offers important opportunities for the Canadian broadcasting system. Digital technology will permit a significant degree of flexibility in the ways in which services are offered, allowing cable operators to respond to consumers' demands for increased choice and control. The shift to digital will also enable cable operators to free up capacity for the launch of new services, including high definition digital signals, new Canadian services and new non-Canadian services. Given these opportunities, the Commission considers it appropriate to assess the ongoing relevance and effectiveness of the existing analog licensing and distribution framework in a digital environment. At the same time, the very flexibility promised by digital technology poses risks for the analog services, including a significant degree of uncertainty for individual programming services, since adjustments to how they are packaged and offered to subscribers will result in changes to their penetration levels.
6. Accordingly, the Commission's goal has been to oversee the development of a framework that will ensure an orderly transition from the current highly structured technological and regulatory environment to an environment characterized by a more market-driven approach. Such an approach will maximize the benefits and encourage the rollout of digital technology, while ensuring that individual analog services are not unduly affected during the transition period and that they remain capable of making significant contributions to the broadcasting system.

7. The Commission's earliest efforts to resolve the issues surrounding the migration of the analog services to digital distribution were directed at developing an industry-wide consensus that would draw on the collective expertise and experience of both programmers and distributors. In *Establishment of an industry working group to examine the digital distribution of existing pay and specialty services*, Public Notice CRTC 2000-113, 4 August 2000, the Commission called on the industry to develop proposals to govern the migration of existing services from analog to digital distribution, taking into consideration the views and concerns of consumers. The Digital Migration Working Group filed its report in February 2001. As indicated in that report, distributors and programmers were unable to come to a consensus with respect to larger cable BDUs, and therefore set out their respective positions separately. However, the report did highlight some common ground with respect to the need for more flexibility for smaller cable BDUs, which prompted the Commission to call for comments on a framework for small systems in *Digital migration issues – Reconvening of working group regarding large cable systems; and Call for comments regarding small cable systems*, Public Notice CRTC 2001-58, 25 May 2001 (Public Notice 2001-58), which ultimately resulted in *Small cable systems – Digital migration policy*, Public Notice CRTC 2001-130, 21 December 2001 (the small cable digital migration policy; Public Notice 2001-130).
8. Public Notice 2001-58 also established a second process with respect to large cable systems, as elaborated on in *For the attention of the participants in the Digital Migration Working Group and other interested parties*, Circular No. 446, 2 November 2001. The reconvening of the working group did not result in any further consensus, and the working group was adjourned indefinitely in March 2003.
9. Due in part to these events, the Commission decided to call for proposals for a framework to govern the migration of analog pay and specialty services to digital distribution in a manner that would contribute to the attainment of the objectives of the Act and advance, rather than compromise, the transition to high definition digital technology. Accordingly, in *Determinations with respect to the establishment of rules to govern the distribution of specialty services on the basic service of fully digital cable undertakings; and call for proposals for a framework to guide the migration of pay and specialty services from analog to a digital distribution environment*, Broadcasting Public Notice CRTC 2005-1, 7 January 2005 (the 2005 call for proposals; Public Notice 2005-1), the Commission called on the industry to come forward with proposals for such a framework.
10. Specifically, the Commission called for comment on the various principles and requirements that might form part of such a framework, including whether prior programmer consent should continue to be required for the migration of analog services to digital distribution on all cable BDUs, whether there were circumstances under which programmers should be expected to provide such consent to cable BDUs, and whether it would be appropriate that wholesale rates for the digital distribution of analog pay and specialty services be set by negotiation between the parties. The Commission also specified that proposals should, among other things, comment on distribution and linkage rules for the migration of the analog services to digital distribution, and reflect the

continued relevance of a basic service that would include the signals of licensed, priority, digital television stations and be available to all subscribers. The Commission set a deadline of 7 March 2005 for the receipt of comments during the first stage of this proceeding. In the proceeding's second stage, parties were given until 29 March 2005 to submit replies commenting on the proposals filed during the first stage.

11. For the purposes of this public notice and the digital migration framework, the Commission has used the following definitions:

migration means the complete shift of a service, or tier of services, from analog to digital distribution by cable BDUs, i.e., the service or tier is no longer available on an analog basis;

duplication of a service, or tier of services, means that it becomes available as a digital offering on a cable BDU, but also remains available as an analog cable service offering; and

mirroring means the replication of an existing analog tier on a cable BDU as a digital package, whether via migration or duplication. When migrated, the tier would be made available on a digital basis, but would no longer be available on an analog basis; when duplicated, the tier of services would be available on both an analog and a digital basis.

Positions of parties

12. The Commission received comments from 24 parties in the first stage of the proceeding and 13 in the second. Comments representing the views of programmers, including the Canadian Association of Broadcasters (CAB), and producer representatives such as the Directors Guild of Canada (DGC), emphasized the successes of the traditional framework and the continuing importance of that framework to the ability of the analog services to continue to meet their programming commitments. In particular, they noted that the current regulatory obligations of the analog services are based on the realities of the analog distribution environment and regulatory framework, including the presence of large tiers and predictable revenues. They were concerned that a fully digital universe, with unlimited choice and flexibility in packaging, could result in fewer subscribers to individual services, with consequent reductions in both subscriber and advertising revenues, at the very time that programmers will need to increase their expenditures to finance the transition to high definition digital broadcasting. They also noted that any such reductions could have an impact on spin-off services, including Category 1 and Category 2 pay and specialty services.
13. Programmers thus generally supported the maintenance of the existing rules for cable in a digital environment, as well as the maintenance of the existing analog tiers. Some recommended that the rules be extended to DTH BDUs. Programmers also emphasized the importance of requiring cable BDUs to obtain programmers' consent prior to

distributing analog services on a digital basis. They further recommended that the Commission mandate the establishment of larger packages and that it prohibit stand-alone, or *à la carte*, distribution.

14. Astral Broadcasting Group Inc. (Astral) noted that the risks of the transition are even more pronounced for French-language services. Specifically, Astral noted the significantly smaller size of the French-language market, the fact that one BDU (i.e., Quebecor) controls a large proportion of the services' subscriber revenue, and the further fact that the number of French-language services is too small to permit the creation of large and attractive digital packages. Accordingly, Astral recommended the maintenance of the existing analog tiers in a digital environment, along with packaging that replicates the high penetration of the analog distribution environment.
15. Seven programmers, namely Astral, Alliance Atlantis Broadcasting Inc. (Alliance Atlantis), CHUM Limited (CHUM), Corus Entertainment Inc. (Corus), CTV Inc. (CTV), Global Television Network Inc. (Global),² and Rogers Broadcasting Limited, submitted with their comments a copy of a Memorandum of Understanding (the MOU) that they, as operators of a number of specialty services, had entered into with Rogers. The MOU sets out the terms and conditions that Rogers and the programmers are prepared to accept to govern the migration of English- and third-language analog services to digital distribution on the cable BDUs operated by Rogers. The MOU is predicated on the full duplication of the analog services in their existing tiers on a digital basis. The MOU provides that programmer consent would be required prior to the carriage of an analog service in digital theme packs, but sets out conditions under which such consent could not be unreasonably withheld. It also establishes a number of specific packaging, marketing and distribution rules designed to mitigate the possible negative impact of digital distribution.
16. With the exception of Rogers, distributors generally recommended a market-driven approach with minimal regulatory intervention, including few, if any, packaging or linkage rules, and no requirement for obtaining programmer consent prior to distributing analog services on a digital basis. Shaw Communications Inc. (Shaw) and the Canadian Cable Telecommunications Association (CCTA) argued that the benefits of digital distribution technology, including the control it would give consumers to choose the programming services to which they subscribe, will only be realized through such a market-driven approach. They stated that the traditional regulatory framework limits consumer choice, distorts competition and unnecessarily restrains cable BDUs. They further argued that sufficient intrinsic economic and commercial safeguards exist to protect Canadian programming services, and that the analog services no longer need the kinds of regulatory protection that have existed to date.

² On 1 September 2005, after the filing of its comments, Global Television Network Inc. amalgamated with Global Communications Inc., CanWest Media Inc. and certain other CanWest subsidiaries to continue under the name CanWest MediaWorks Inc.

17. Similar views were expressed in a submission filed jointly by TELUS Communications Inc., MTS Allstream Inc. and Saskatchewan Telecommunications (TELUS et al.). These DSL BDUs also recommended that the Commission ensure regulatory parity among fully digital BDUs. For its part, Quebecor argued that the digital migration framework should seek to balance cultural and economic objectives and advance the needs of consumers. With that goal in mind, and considering the specifics of the French-language market, Quebecor recommended greater flexibility in packaging, a small affordable basic service that includes public interest services, the mirroring or replication of the existing analog tiers on a digital basis, at least for a time, and the creation and marketing of larger packages rather than smaller ones.
18. Various BDU operators argued that the MOU represents a negotiated solution suited to the particular business requirements and competitive strategies of only one BDU, that being Rogers. The CCTA argued that the MOU would be unworkable for smaller cable BDUs, which may only have started to duplicate analog services on digital, have significant capacity constraints, or are faced with an entirely different competitive environment. Shaw and Cogeco also objected to the MOU being applied generally. Shaw added that the commercial arrangements set out in the MOU appeared to be extremely favourable to the programming services and, given the competitive, capacity, economic and other circumstances particular to a large number of its systems, would not be suitable for Shaw.
19. In the following sections of this notice, the Commission examines in further detail the arguments of the parties concerning various specific issues surrounding the migration of analog pay and specialty services to digital distribution. Based on its analysis of these comments, the Commission then sets out its determinations concerning the broad framework that will govern that migration.

Consent

20. As mentioned above, the Commission invited comment on whether programmer consent should continue to be required, and under what circumstances programmers should be expected to grant such consent to cable BDUs. Programmers generally recommended that cable operators be required to obtain consent prior to duplicating or migrating analog services. TV5 Québec Canada³ (TV5) noted that consent was the only way to ensure that negotiations occur. It stated that, without a requirement for consent, distributors would be free to package a service as they chose, without consideration for the subsequent impact on the service. CTV similarly noted that a consent requirement is the only way to ensure that programmers can negotiate appropriate safeguards. For its part, the CAB recommended that cable BDUs be required to obtain prior written consent⁴ in all circumstances, except those involving the complete duplication of an existing analog tier on digital, where no service in that tier is offered in any other digital packages, and where the analog tier is left intact for analog-only subscribers.

³ Formerly Consortium de télévision Québec Canada inc.

⁴ Such consent would take the form of an affiliation agreement or term sheet respecting the terms and conditions of digital distribution, including packaging and wholesale fees.

21. At the same time, most programmers indicated that consent would not be unreasonably withheld where the programmer and the cable BDU agree to terms for digital distribution that, from the standpoint of subscriber revenues received, would leave the programming service substantially no worse off than it was in the analog-only environment. The CAB also proposed a number of specific additional principles for the digital distribution of analog services, including certain packaging rules, as discussed further below.
22. Distributors other than Rogers generally argued that consent should not be required, and submitted that the requirement, as it currently exists, is stalling the transition. Shaw recommended that consent be a matter of commercial negotiation, and argued that, if a service has agreed to carriage on a fully digital system (e.g. DTH), it should not be able to refuse digital carriage by a cable BDU. Quebecor noted that it currently applies the existing general regulatory framework in the digital environment, and stated that it would not be practical to require consent prior to starting digital distribution. The CCTA argued that, just as consent has not historically been required for analog packaging and channel placement issues, aside from notice requirements, there should be no requirement for consent for carriage of analog services on a digital basis.
23. The Canadian Cable Systems Alliance (CCSA) described the consent requirement as the key obstacle to the migration of analog services to digital distribution, notwithstanding the flexibility introduced in the Commission's small cable digital migration policy. It recommended that:
 - systems with fewer than 20,000 subscribers be entitled to distribute, on a digital basis, and without the requirement for consent, services that they were not previously distributing on an analog basis;
 - all cable BDUs be entitled to *duplicate* services in digital without consent and without any requirement to ensure that the programmer will be substantially no worse off in terms of subscription revenues; and
 - systems with fewer than 20,000 subscribers be allowed to *migrate* services without consent.
24. The CCSA also raised concerns about the digital distribution of non-Canadian services. It noted that certain U.S. networks have denied authorization for the digital distribution of their signals and stated that this has become an increasingly serious obstacle to the ability of BDUs to present customers with complete, attractive digital channel line-ups. It recommended that the Commission expect non-Canadian services authorized for distribution in Canada by their inclusion on the eligible satellite services lists (the lists) to permit digital distribution as a condition of their continuing inclusion on the lists.
25. The Commission notes that the MOU contains a provision that, where a cable BDU has mirrored an existing tier through its duplication on digital, the cable BDU would have the right to sell the analog services in digital theme packs in addition to maintaining them in the existing tiers. The MOU also provides that programmer consent is required prior to

carriage by a cable BDU of an analog service in digital theme packs. Further, it contained provisions to ensure that such consent may not be unreasonably withheld. Specifically, under the terms of the MOU, it would be unreasonable for a programmer to withhold consent (and consent would thus be granted) where the cable BDU offers the programmer assurances that there will not be a significant decline in overall volume (number of subscribers) or penetration of an analog service as a result of its introduction into digital packages. Such assurances would consist of one of the following, at the programmer's option:

- agreement that the contract, including rates, will be renegotiated if penetration or volume falls by 5% or more from the date that one or more analog services are introduced in the theme packs; or
- prior agreement to a penetration- or volume-based rate card. The parties will negotiate appropriate terms having regard to market conditions as reflected in comparable agreements.

26. In addition, Rogers submitted that the requirement that cable BDUs obtain Commission approval prior to migrating analog services to digital would be too burdensome and uncertain. It therefore recommended an automatic process that would avoid a Commission process. Acknowledging the positions of programmers that services should not migrate to digital until the vast majority of subscribers have a digital set-top box, the MOU provides that cable BDUs would have a right to migrate an existing analog tier to digital only when 95% of the households that subscribe to the migrating tier have at least one digital set-top box in their homes.

Packaging and “mirroring”

27. Programmers generally argued in favour of detailed packaging requirements in the digital environment to ensure that the analog services are able to continue to meet their commitments. They noted the importance of the existing analog tiers to the financial success of the analog services, and the benefits of such tiers to consumers. Accordingly, they recommended that the existing analog tiers continue to be made available on a digital basis. In particular, several programmers expressed opposition to stand-alone, or *à la carte*, distribution, and pointed to a November 2004 study by the U.S. Federal Communications Commission, which concluded that packages have a greater value to consumers than services distributed on a stand-alone basis, and that larger packages have a greater value than smaller packages. Astral further noted that the stability afforded by the existing tiers is particularly important to French-language services, given the small size of the market in which they operate.

28. With the exception of Rogers and Quebecor, distributors generally opposed the retention of the existing tiers and the development of detailed packaging rules. They argued that the creation of the tiers was a result of the technical restrictions of analog trap technology and that, going forward, the Commission should establish a more market-driven approach, based upon increased competition among programming services. They recommended that matters related to packaging be left to negotiation and market forces

to ensure that cable BDUs have the utmost flexibility to respond to the demands and interests of their subscribers. BDUs also recommended that the Commission not interfere in matters it has typically, to date, left to negotiation by the parties. The CCTA, Shaw and the CCSA specifically opposed any requirement to mirror the existing tiers on digital. The CCSA further noted that duplication of the existing tiers, as contemplated by the MOU, is simply not possible for small cable systems due to capacity constraints.

29. Quebecor submitted that the existing tiers should be maintained for at least a limited period of time to minimize possible consumer disruption and/or confusion caused by the shift to digital distribution, and to provide a continued measure of support to the analog programming services.
30. The MOU identifies the maintenance of the existing tiers (described in the MOU as “Value Tiers”) as an essential pre-condition to the duplication and migration of the analog specialty services, and to their carriage in digital theme packs. The MOU specifies that the existing tiers may cease to be mirrored on digital three years following the date that all existing tiers are migrated, or 1 January 2013, whichever is the later date. The MOU also provides that Rogers would make the existing tiers its primary marketing focus. However, the MOU specifies that cable BDUs would not be prevented from adjusting the existing tiers as they are currently permitted to do, for example by replacing an existing U.S. cable service with another such service or with a Canadian specialty service, subject to existing affiliation agreements and regulatory policies.

Distribution and linkage rules

31. The distribution and linkage rules set out the terms under which non-Canadian services may be linked with Canadian pay and specialty services. The rules also require Class 1 BDUs to distribute specialty services having dual status as part of the basic service, unless the service agrees to be carried on a discretionary basis. Class 1 BDUs are also required to distribute specialty services that have modified dual status on a discretionary basis unless both parties agree to carriage of the service on basic.
32. Eight analog specialty services, namely MuchMusic, Newsworld, Le Réseau de l’information (RDI), TV5, Vision TV, VRAK-TV, The Weather Network/ Météomédia, and YTV, are currently licensed as dual status services. With the exception of the four French-language specialty services approved in 1999 and ARTV, which are subject to distribution and linkage rules specific to French-language markets, the remaining specialty services are licensed as modified dual status services. The ethnic specialty and pay services are discretionary services and, as noted above, are already broadly distributed on a digital basis.
33. In Public Notice 2005-1, the Commission noted that, in the context of *Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services*, Broadcasting Public Notice CRTC 2004-58, 6 August 2004 (Public Notice 2004-58), it had proposed a less restrictive set of distribution and linkage rules for high definition transitional pay and specialty services, particularly for cable BDUs. Specifically, the Commission had expressed the view that it may be appropriate to

eliminate the dual status and modified dual status rules, and to have those rules that currently apply to DTH BDUs apply to all large BDUs. Consistent with that proposal, in Public Notice 2005-1, the Commission invited parties to submit proposals that envisaged less restrictive distribution and linkage rules in a digital environment.

34. Programmers generally supported the status quo. They argued that the distribution and linkage rules are an important mechanism for ensuring fair negotiations between programmers and distributors. Some also recommended that the dual status and modified dual status provisions be extended to DTH operators. Several operators of dual status services, including the Canadian Broadcasting Corporation (CBC, licensee of Newsworld and RDI), TV5 Québec Canada (licensee of TV5), Pelmorex Communications Inc. (Pelmorex, licensee of The Weather Network/Météomédia), and Vision TV: Canada's Faith Network/Réseau religieux Canada⁵ noted that the dual status rules ensure that all subscribers have access to these important services. They argued that such status is vital to their ability to influence how their services are packaged and thus their ability to meet licensing requirements and contribute to the objectives of the Act. Accordingly, they recommended that the dual status rules be maintained in the digital environment.
35. Distributors submitted that the dual status and modified dual status provisions should be abolished. Bell Canada argued that dual status was artificial and no longer required. It stated that the provisions dilute customer choice and inappropriately favour older specialty services over services approved in more recent years, including the Category 1 and Category 2 services. Cogeco argued that the Commission should not be in the business of managing the composition of digital service packages or bundles. Quebecor submitted that, if the distribution of certain specialty services were to become mandatory on the basic service of all BDUs via orders under section 9(1)(h) of the Act, it would no longer be necessary to maintain dual status and modified dual status provisions.
36. Distributors also argued in favour of simplified linkage rules, and were generally of the view that the existing predominance rule, i.e., the obligation set out in section 6 of the Regulations that requires BDUs to ensure that a majority of the video and audio channels received by a subscriber, whether on an analog or digital basis, is devoted to the distribution of Canadian programming services, other than the programming distributed on program repeat channels, was sufficient.
37. The CCTA noted that the linkage requirements were initially introduced to support the development of Canadian pay and specialty services, but that such linkage with non-Canadian services is no longer critical to their success. Shaw proposed a modified predominance rule that would permit subscribers to choose at will, as long as the BDU offered a majority of Canadian services.

⁵ In *Transfer of assets*, Broadcasting Decision CRTC 2004-160, 23 April 2004, the Commission approved the transfer of the assets of Vision TV to a new corporation as part of an intracorporate reorganization. Faith and Spirit Media Inc. became the licensee of Vision TV following completion of the transaction in February 2005.

38. Under the MOU, the existing linkage rules would be maintained. The MOU is silent, however, on the continued appropriateness of the dual status and modified dual status provisions.

Provision of a basic service

39. Currently, the basic service includes priority over-the-air (OTA) signals, other services that the Commission has mandated for basic carriage via distribution orders under section 9(1)(h) of the Act (the 9(1)(h) services), and, for Class 1 BDUs, the dual status specialty services. BDUs have generally added other Canadian services that they consider appropriate to their markets and the U.S. 4+1 signals. The digital OTA framework, set out in *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61), also requires the carriage of the priority OTA digital signals on the digital basic service. In addition, in Public Notice 2005-1, the Commission clarified that the distribution and linkage rules apply to the distribution of dual status services delivered on a digital basis. It added that these rules would continue to apply until such time as it might rule otherwise. As a result, at the present time, dual status services must be offered as part of the basic service, even where a Class 1 cable BDU offers a fully digital service option, unless the service consents to discretionary distribution.
40. In the 2005 call for proposals, the Commission stated that the concept of a basic service available to all subscribers is of continuing relevance, whether in an analog or a digital distribution environment. Accordingly, it invited proposals that would reflect this continued relevance of a basic service.
41. Although parties to the proceeding generally supported the notion of a basic service on digital, their views differed with respect to its composition. Most submitted that the digital basic service should include, at a minimum, the priority OTA signals and the 9(1)(h) services. Some recommended that the digital basic service also include services that have a public interest mandate. Programmers also generally recommended that, in a digital environment, the basic service continue to include the dual status services, and some suggested that such a requirement should apply to both cable and DTH BDUs. Most parties suggested that the rules should be the same for all BDUs.

Wholesale rates

42. In the 2005 call for proposals, the Commission noted that the subscriber fees of relatively few BDUs remain rate-regulated. Apart from the constraints of a competitive marketplace, most BDUs are thus free to determine the retail rates charged to subscribers for basic service. The Commission further noted that, in such an environment, the wholesale rates set by the Commission for certain specialty services when distributed as part of the basic service can have only an indirect impact on the retail prices paid by consumers. Accordingly, the Commission invited comment on whether it would be appropriate for wholesale rates for the digital distribution of analog pay and specialty services to be set by negotiation between the parties.

43. Programmers generally recommended that the Commission continue to set basic wholesale rates for the digital distribution of the analog services. Many noted the importance of the regulated rate as a starting point for negotiations. The CAB, for instance, stated that a regulated digital basic service wholesale rate is a key component of the regulatory framework for digital migration, as it is an essential element of a service's overall business plan, and thus serves as a useful point of reference when negotiating distribution on a discretionary digital tier.
44. The CBC noted that introducing high definition programming will expand the operating costs of its specialty services, and that the existing revenue base may not be able to support those increased costs. The CBC thus submitted that there will be a continuing need for the Commission to play a role in regulating wholesale rates for specialty services in the digital environment as high definition programming is introduced. Pelmorex was of the view that, without regulated basic wholesale rates, some BDUs would use their position as gatekeepers to impose terms and conditions on pay and specialty services, particularly small, independent operators. Pelmorex added that regulated wholesale rates would ensure that Canadian subscribers pay a reasonable price, particularly when the service is offered as part of the basic service. Alliance Atlantis argued that, in the absence of a regulated rate, it would become increasingly difficult for programming services to avail themselves of the Commission's dispute resolution services if challenges were encountered in negotiating rates for their services on basic or in discretionary offerings.
45. Distributors were generally opposed to the regulation of wholesale rates for the distribution of analog services on digital. They suggested that rates be set through negotiations. The CCTA, however, recommended that the Commission continue to regulate existing wholesale rates on basic as long as the Commission retains the access rules, and the dual status and modified dual status provisions. Bell Canada disagreed with the notion that regulated basic wholesale rates should serve as an appropriate starting point in negotiating discretionary rates. TELUS et al. submitted that, in an environment where programming services have "must carry" status, BDUs are placed at a disadvantage in carriage negotiations. They also suggested that market forces, such as demand, have a very limited influence in such negotiations. In their view, the dispute resolution mechanisms contained in the Regulations may have an important role to play, and should thus remain available for use in cases where wholesale rate negotiation between a BDU and a "must carry" service prove unsuccessful.
46. Parties to the MOU supported continued basic wholesale rate regulation for the purpose of ensuring adequate revenues for pay and specialty services and to provide a starting point for wholesale rate negotiations for as long as cable BDUs are subject to access rules that require them to carry all services appropriate to the market.

Small cable systems

47. In its small cable digital migration policy (Public Notice 2001-130), the Commission set out measures to help ensure that small cable systems remain competitive during the transition to digital distribution. For that purpose, the Commission defined “small cable systems” as those cable systems that are not owned or operated, directly or indirectly, by Rogers, Shaw, Vidéotron or Cogeco.
48. Notwithstanding the flexibility introduced in the small cable digital migration policy, the CCTA and CCSA submitted that additional flexibility was required by smaller cable BDUs to facilitate the migration of analog services to digital. The CCTA submitted that these smaller BDUs operate under circumstances that differ significantly from those of larger systems, including the smaller size and scale of their operations, their more limited channel capacity and lesser ability to finance system upgrades, and the greater effect on their operations of competition from DTH and MDS BDUs. According to the CCSA, while the small cable digital migration policy has assisted with digital duplication and, to a lesser degree, with the launch of analog services on digital by cable BDUs that had not previously carried them, this regulatory framework has had little or no effect in enabling small cable systems to hasten the migration of analog services directly to digital. Specifically, the CCSA stated that the key obstacle to digital transition by small cable systems is the requirement for programmer consent.
49. As noted earlier, the CCSA was of the view that a cable BDU serving fewer than 20,000 subscribers should be permitted to distribute, in a digital format, and without the requirement for consent from the programmer, any analog service that had not previously been distributed on the system in analog format. It further suggested that the only condition for digital distribution, if any, should be a cable BDU’s compliance with applicable carriage requirements.
50. Both the CCSA and the CCTA considered that cable BDUs that serve fewer than 20,000 subscribers, should be able to migrate analog pay and specialty services now distributed on an analog basis to digital distribution without the requirement for consent from the programmer. The CCSA argued that limiting application of such a provision to cable BDUs having fewer than 20,000 subscribers would provide sufficient protection for the established analog services, since these BDUs exist outside of major urban markets and, collectively, serve only a small percentage of Canadian subscribers.

Commission’s analysis and determinations

Introduction

51. In designing a framework to govern the migration of the analog pay and specialty services from analog to digital distribution, the Commission has sought to achieve the following objectives:

- encourage the transition to digital and eventually high definition distribution;
- permit BDUs to take advantage of the flexibility of digital distribution technology, to the benefit of consumers;
- help ensure that, during the transition, analog programmers can reasonably expect to operate within their business plans, in order to continue to meet their programming obligations and the objectives of the Act, including objectives related to linguistic duality;
- design an approach that recognizes the unique challenges and characteristics of the French-language market and services;
- introduce a more simplified regulatory regime, where appropriate; and
- harmonize the obligations of different types of BDUs.

52. Having considered all of the comments received, the Commission sets out its framework below.

The MOU as a possible model for the digital licensing framework

53. In Public Notice 2005-1, the Commission encouraged the industry to bring forward balanced proposals for a digital migration framework that would take into consideration the overall business models of both programmers and distributors. In *Extension of deadline for submission of proposals*, Broadcasting Public Notice CRTC 2005-1-1, 1 March 2005, the Commission noted the efforts then underway to develop the MOU, and expressed the view that “the development of an industry-wide consensus would further the successful transition to digital distribution in a way that could best address the competing interests of the parties.” The Commission has accordingly given careful consideration to the MOU and whether it might serve as a model for the migration framework. At the same time, the Commission is mindful of the concerns expressed by the CCTA and various cable operators that, while the terms and conditions of the MOU negotiated by Rogers with certain programmers may be suitable to the business environment and other circumstances in which Rogers operates, it would not necessarily be suitable in the case of other BDUs. In particular, the Commission acknowledges that not all BDUs have the capacity to undertake full duplication of their analog cable line ups on a digital basis, a principle that underpins the MOU.
54. While the specific terms of the MOU may not be suitable to all BDUs, the Commission considers that it does provide a useful reference point. The Commission also considers that the MOU sets out a reasonable negotiated approach to digital migration, and commends it as a model for negotiations between individual programmers and BDUs.

Small cable systems

55. In its small cable digital migration policy, the Commission discussed the contribution that small cable systems make to the Canadian broadcasting system and the reasons why certain special measures were warranted to help ensure that these systems remain competitive during the transition from analog to digital distribution. Specifically, it stated the following:

The Commission considers that small cable companies make a significant contribution to maintaining a healthy level of competition in the distribution of programming. Competition, in turn, exerts downward pressure on rates, thus contributing to affordability of service. It also contributes to the delivery of a broad range of services to Canadians.

Moreover, the Commission considers that smaller systems, particularly smaller independent systems, face challenges above and beyond those faced by larger systems. These challenges include:

- a. smaller systems often have difficulties negotiating wholesale programming fees comparable to those available to larger systems; and
- b. many smaller systems have lower capacity than their competitors, and may thus find it difficult to offer service packages fully comparable to those offered by their competitors.

56. It has been more than four years since the release of the small cable digital migration policy. This period has given small cable systems an opportunity to apply the policy framework and to assess its effectiveness. As noted above, while the policy appears to have been helpful with digital duplication and, to some extent, with the launch on digital of previously unlaunched analog services, the record of this proceeding indicates that additional flexibility is required to enable small cable operators to complete the migration of analog services to digital distribution. Accordingly, in the sections that follow, the Commission sets out rules that will apply to all cable BDUs, with special provisions that will apply to small cable systems to afford them the additional flexibility they require.

Definition of small cable systems

57. As mentioned above, the Commission defined a “small cable system” in its small cable digital migration policy as one that is not owned or operated, directly or indirectly, by Rogers, Shaw, Vidéotron or Cogeco. In their comments in the present proceeding, the CCSA and the CCTA proposed that a small cable system be defined as one that serves fewer than 20,000 subscribers, and that such systems be granted even greater flexibility than that accorded under the existing policy.

58. The Commission notes that adopting the definition proposed by the CCSA and the CCTA would provide greater flexibility to certain systems that are owned or operated, directly or indirectly, by one or other of the four large companies noted above. However, it would exclude a number of the larger, independently owned or operated cable systems that are captured by the current policy. Further, based on information provided in the 2004 annual returns, the Commission notes that the CCTA and CCSA definition would encompass systems serving almost 2 million subscribers, or approximately 24% of all cable subscribers across Canada, whereas the Commission's existing definition encompasses just over 1 million, or approximately 14% of all cable subscribers. Any additional flexibility that might be extended to the cable systems that are captured by the definition proposed by the CCSA and the CCTA would thus have a more significant impact on the analog pay and specialty services than the impact that such additional flexibility would have under the existing definition of small cable system. Moreover, the Commission considers that the resources available to Rogers, Shaw, Vidéotron and Cogeco render unnecessary the flexibility that any of their cable systems with fewer than 20,000 subscribers would receive under the proposal of the CCSA and the CCTA.
59. Based on the above, the Commission is of the view that the definition adopted in the small cable digital migration policy remains appropriate. Accordingly, for the purposes of its digital migration framework, the Commission continues to define a small cable system as one that is not owned or operated, directly or indirectly, by Rogers, Shaw, Vidéotron or Cogeco, without regard to the number of subscribers.

Consent

60. In the small cable digital migration policy, the Commission stated that it "considers that consent for carriage generally is fundamental to the programmer's right and ability to control its product." It thus found that programmer's consent is required for the digital distribution of analog services. However, the Commission also specified certain circumstances in which programmers would be expected to consent to digital distribution on small cable systems. The circumstances under which the Commission stated it would expect consent were as follows:
- (a) for the digital distribution of a service that would normally have been entitled to analog distribution, but which has not yet been carried by a small system due to lack of capacity; and
 - (b) where the cable system undertakes that the programmer will be substantially no worse off, in terms of wholesale fees received, if it consents to duplication or migration.
61. Based on the record of this proceeding, the Commission remains of the view that the principle of programmer consent for digital carriage is an important aspect of the programmer's ability to control its product. However, in order to ensure that the transition to digital moves forward, the Commission considers that there are circumstances under which programmers should be expected to consent, as well as other circumstances under which consent should not generally be required.

62. With respect to the latter circumstances, the Commission is of the view that small cable systems should now have the flexibility to migrate analog services without consent, and be able to carry previously unlaunched analog services on digital without any further Commission process, subject only to the packaging and mirroring requirements discussed below.
63. For large cable BDUs (BDUs other than those defined above as small cable systems), the Commission agrees with the principle set out in the MOU and Rogers' submission that it would be appropriate to adopt an automatic threshold at which such cable BDUs might proceed with the migration of analog services to digital distribution, such that the service would no longer be made available on an analog basis, without the need to obtain either the prior consent of the programmer or the prior approval of the Commission.
64. The Commission considers that establishing such a threshold for migration by large cable systems would provide certainty and predictability for the industry, limit the potential for disputes, and reduce administrative burden. Further, establishing a threshold at which migration to digital-only distribution may occur without prior programmer consent or Commission approval would provide large cable BDUs with the ability to harvest analog capacity more quickly.
65. At the same time, in determining what would be an appropriate threshold, the Commission must be sensitive to the needs of programmers, since the loss of analog carriage could have a significant impact on their business plans and their ability to meet their regulatory obligations. More importantly, the Commission must ensure that subscribers are not unduly negatively impacted by the migration of programming services from analog to digital.
66. In Public Notice 2003-61, the Commission determined the following:

A BDU may submit an application requesting the Commission's approval to cease the carriage of analog signals once 85% of the BDU's subscribers have the ability to receive digital services by means of digital television receivers or set-top boxes. The Commission will determine at that time, the terms and conditions under which the analog services may be removed from the system.
67. The Commission is of the view that a similar threshold would be appropriate for the migration of the analog services by large cable systems. Given the mirroring requirement set out in the following section, a threshold of 85% of subscribers to any given tier would provide programming services with a reasonable measure of support since the services would continue to benefit from their distribution on an analog basis until that point is reached. Similarly, this threshold would ensure that a large proportion of analog subscribers continue to benefit from the analog distribution of the tiers, and that digital subscribers continue to have access to those services on an analog basis on their second or third television sets, at least for a period of time.

68. The Commission thus determines that large cable BDUs must obtain the prior written consent of a programmer before distributing the programmer's analog service on a digital basis, except where the existing analog tier that includes the service is duplicated on digital. Further, consistent with the approach set out above, in the case of large cable operators, programmer consent will not be required once 85% of the households that currently subscribe to the analog tier containing the service have at least one digital set-top box and are receiving one or more programming services on a digital basis, and the cable BDU has provided the programmer with a minimum of 120 days notice.
69. Consent will take the form of an affiliation agreement or term sheet respecting the terms and conditions of digital distribution, including packaging and wholesale fees.
70. Provided the packaging and mirroring requirements discussed below are respected, and apart from the usual negotiations as to terms and conditions of carriage, small cable operators will no longer be required to obtain the consent of the programmer for the digital distribution of the analog services.
71. The Commission is of the view that the approaches to large and small cable systems noted above reasonably balance the interests of programmers and distributors. The Commission is also confident that the competitive marketplace will ensure that cable BDUs, particularly smaller cable BDUs, adopt migration strategies that will be least disruptive to their subscribers.
72. In Public Notice 2001-130, the Commission noted that the access rules set out in section 18(5) of the Regulations have been interpreted as requiring analog carriage. As a result, the Commission specified that carriage by a Class 1 cable operator of an analog service on a digital-only basis, under either an initial launch or a migration scenario, would *prima facie* represent non-compliance with the access rules.
73. Subject to the mirroring requirements discussed in the following section, under the digital migration framework, a small Class 1 cable system will be able to satisfy the access rules set out in section 18(5) of the Regulations when it distributes an analog service on either an analog or a digital basis. Further, a large Class 1 cable system will be able to satisfy the rules in section 18(5) by distributing an analog service on a digital-only basis once 85% of the subscribing households to that service have at least one digital set-top box in their homes and are receiving one or more programming services on a digital basis.
74. The Commission confirms that the complete elimination of a cable operator's analog offering still requires the Commission's approval, as set out in Public Notice 2003-61. As a result, all cable operators will be required, at a minimum, to continue to offer subscribers an analog basic service unless or until otherwise authorized by the Commission.

75. For the purpose of the 85% threshold for large cable systems, the Commission intends to implement a third-party audit verification requirement similar to that adopted for the purpose of assessing when the preconditions have been met for the deregulation of the rates of Class 1 BDUs, pursuant to section 47 of the Regulations.

Packaging and mirroring

76. As mentioned above, the Commission considers it appropriate to define the circumstances under which programmers would be expected to consent to the distribution of their analog services on a digital basis by large cable systems before the 85% threshold for migration has been reached. In doing so, however, the Commission must take into account the fact that the manner in which the analog services are packaged in a digital environment will be a critical factor in their continued viability. More specifically, although the Commission has traditionally established very few specific rules regarding the packaging of specialty services, it is of the view that there are reasons for establishing certain packaging conditions in a digital environment, particularly during the transition period.

Mirroring of services currently offered in tiers

77. The composition of the existing discretionary analog tiers, particularly in the English-language market, is largely a function of the cable distribution technology in use at the time that the specialty services were launched, rather than the result of any particular regulatory requirement or marketing decision.⁶ Nevertheless, the composition of these tiers and their relatively high penetration levels have been important factors in helping to ensure the financial stability of Canadian specialty services. This, in turn, has supported their important contributions to the Canadian broadcasting system and to the attainment of the objectives of the Act. The beneficiaries have included Canadian artists, producers and others employed in the broadcasting system and, of course, the Canadian viewing public. The Commission is therefore of the view that, to provide programmers with some assurance that the penetration of their services will remain reasonably consistent with the penetration they achieve in analog distribution, the existing analog tiers should continue to be made available on digital during the transition period.
78. Consumers will also benefit from the continued availability of the existing analog tiers in a digital environment, as well as from the ability to access new packaging options. The analog tiers ensure affordable access to a wide range of services. Further, consumers have grown accustomed to the analog tiers and many will likely want to continue to have access to them in a digital environment. The continued availability of these tiers on digital will thus ensure minimum consumer disruption.

⁶ The composition of the analog tiers is not specifically a result of Commission policy and/or regulation. However, in the last few licensing rounds, the assumption has been that the services would most likely be offered together in tiers.

79. The Commission also notes that the interest that some consumers have in retaining access to the existing tiers provides an incentive to most cable operators to replicate the existing tiers, and thereby avoid consumer disruption. In addition, the Commission is satisfied that most of the affected BDUs will be able to meet the requirement to mirror the existing tiers in a digital environment with relative ease, since digital technology is fully addressable, and any costs would largely be related to marketing and customer service. Further, the Commission notes that mirroring is already a reality in much of Quebec, as both Cogeco and Vidéotron have duplicated and mirrored their analog offerings on digital. Rogers is also duplicating and mirroring its analog line-up in digital form.
80. Accordingly, the Commission will permit Class 1 and Class 2 cable BDUs, whether large or small, to distribute the analog services on digital, provided that, for the period specified below in paragraph 81, they mirror the existing analog tiers in their digital service offerings, and make those mirrored tiers available to digital subscribers on an optional basis. The Commission would also encourage Class 3 cable BDUs to mirror their analog offerings, to ensure the least disruption to their subscribers.
81. Taking into account the threshold for migration adopted above, the Commission has determined that the mirroring of the existing analog tiers should continue until at least 1 January 2010. Thereafter, a cable BDU must continue to mirror any given analog tier until 85% of subscribers to that tier have a digital set-top box and are receiving one or more programming services on a digital basis, or 1 January 2013, whichever occurs first. The Commission is satisfied that this approach will provide sufficient time to programmers and distributors to adjust their business plans, and will ensure that subscribers continue to have access to the tiers for a reasonable period of time.
82. As noted in the MOU, cable BDUs will continue to be permitted to make minor adjustments to their tiers, for example, by removing non-Canadian services and replacing them with Canadian services or other non-Canadian services, subject to existing affiliation agreements and existing regulatory requirements and policies.

Services currently carried on basic

83. Each of the analog specialty services is carried by at least some cable BDUs as part of the basic service, either because of the dual status designation of the service or as a result of negotiations with individual BDUs. The above requirement for the mirroring of analog tiers would not benefit specialty services in those markets where they are currently carried on analog basic. The risks associated with digital migration may be particularly pronounced for those analog services whose basic subscribers currently represent a large proportion of their subscriber base.
84. Accordingly, to provide some assurance that the penetration levels of these services will not suffer a precipitous drop during the transition period as a result of their distribution on a digital basis, the Commission considers it appropriate that individual cable systems offering a digital-only service option also mirror their basic service offering, just as they must mirror their analog tiers. At the same time, the Commission wishes to ensure that

any such mirroring requirement does not unduly restrict the flexibility of cable BDUs to design an attractive digital basic offering for their subscribers. In this context, the Commission notes that, while it has effectively mandated basic carriage for eight of the analog specialty services through their dual status designation, the distribution of any other analog specialty services on basic in any given market is not a Commission requirement, but the result of negotiation.

85. To reflect this reality, while ensuring that these services are able to benefit from mirroring over the transition period, the Commission considers that, in English-language markets, it would be appropriate to distinguish between those services that are now designated as having dual status and those services that are currently carried on basic as a result of negotiation. Given the smaller size of the French-language market, the greater risks associated with digital migration for French-language services, and the fact that there are fewer of them, the Commission has decided that such a distinction should not be made with respect to the distribution of any French-language analog specialty service that may be distributed on basic.
86. Accordingly, the Commission will require Class 1 and Class 2 cable BDUs, whether large or small, that operate in English-language markets, and that offer subscribers a digital-only service option, to distribute, as part of their digital basic service, those Canadian specialty services that are currently distributed as part of their analog basic service offering as of the date of this public notice, and that are currently designated as dual status services. This requirement will remain in place for the time period specified below in paragraph 89 unless, in the interim, the programming service agrees to carriage on another basis. The Commission notes that in accordance with section 5 of the Regulations, digital-only subscribers will have to subscribe to at least the mandated digital basic service before subscribing to any other digital services or packages, with the exception of the services of pay-per-view, video-on-demand or exempt programming undertakings.
87. The Commission, for the time period specified below in paragraph 89, will also require large and small Class 1 and Class 2 cable BDUs operating in English-language markets, and that offer subscribers a digital-only service option, to offer their digital-only subscribers the choice of subscribing to an optional “big basic” package that includes all of the mandatory basic services (including the specialty services as required above) and any other Canadian specialty services that are part of their analog basic service offering as of the date of this public notice, unless the programming service agrees to carriage on another basis.
88. In French-language markets, the Commission will require large and small Class 1 and Class 2 cable BDUs that offer subscribers a digital-only service option to distribute, as part of the digital basic service, all of the Canadian specialty services that are part of their analog basic service offering as of the date of this public notice. This requirement will remain in place for the time period specified below in paragraph 89 unless the

programming service agrees to carriage on another basis. As noted above, digital-only subscribers will have to subscribe to the mandatory digital basic service, in accordance with section 5 of the Regulations.

89. These mirroring obligations shall continue until at least 1 January 2010. Thereafter, and unless the programmer agrees otherwise, Class 1 and Class 2 cable BDUs must continue to mirror the services in the manner outlined above until 85% of the cable system's subscribers have a digital set-top box and are receiving one or more programming services on a digital basis, or 1 January 2013, whichever occurs first. After this time, the minimum mandatory digital basic offering will be as set out below. BDUs and programmers, however, will continue to be free to negotiate the distribution of other specialty services as part of digital basic. The Commission further notes that BDUs may continue to offer those non-Canadian services that currently form part of analog basic as part of their digital basic offering, but are not required to do so.

Stand-alone (à la carte) program offerings

90. Programmers were generally opposed to stand-alone, or *à la carte*, program offerings. Nevertheless, the Commission considers that such packaging approaches may be attractive supplemental offerings in a more market-driven broadcasting system, that BDUs should thus be free to distribute services on a stand-alone basis, and that consumers should be free to subscribe to them. Such options may indeed appeal to viewers who prefer to subscribe to just a few favourite services. The Commission notes in this regard that, in the past, the traps used by cable BDUs to distribute optional services only to those customers who subscribed to them effectively rendered impracticable the distribution of services on a stand-alone basis. With digital technology, however, cable and other BDUs are able to distribute stand-alone services with relative ease.
91. At the same time, to offset the potential negative impact on individual services when offered on such a basis, the Commission considers that programming services should also be offered in theme or larger "all-in packages."⁷ Such packaging should help to attenuate the risks of carriage on a digital basis for programming services. The availability of such packages would also be attractive to some consumers, and their creation would not be a significant burden for BDUs. Further, to the extent that the mirroring requirement will only be in place for the transitional period defined above, the additional obligation to offer programming services in theme or all-in packages would continue to provide a measure of support to the analog programming services in the future, once mirroring ceases. The Commission notes that French-language specialty services, in particular, would benefit from being placed in larger packages.

⁷ "All-in package" means one that includes a large number of services that are not necessarily related in terms of programming genre or language. It does not mean a package that would necessarily include *all* services, or even all specialty services, that are offered by a BDU.

92. Accordingly, under the digital migration framework, the distribution and linkage rule that currently applies to the packaging of Category 1 specialty services will apply to the packaging of analog specialty services when they are distributed on a digital basis. Specifically, Class 1, Class 2 and DTH BDUs will not be permitted to distribute an analog or a Category 1 specialty service on a stand-alone basis unless the specialty service is also distributed as part of a package.
93. The Commission has decided that, for the purpose of the above rule, and to address the concerns expressed by programmers regarding any packaging option that would permit subscribers to choose from a number of services in order to create their own package (the “pick-a-pack” option), such a packaging option would not satisfy the above requirement. Accordingly, in a digital environment, each specialty service will have to be offered in at least one theme package or an all-in package before it may be offered on a stand-alone or pick-a-pack basis.
94. Given the smaller size of the French-language market, and hence, the greater risks associated with the distribution of French-language services on a digital basis, the Commission will also impose specific packaging requirements for French-language services. In particular, the Commission will require BDUs operating in French-language markets to offer at least one large all-in package that includes all of the analog French-language specialty services (with the exception of those French-language specialty services that may be mandated for carriage on basic) before they may be offered in theme packages, or on a stand-alone or pick-a-pack basis, unless the programming service agrees to distribution on another basis.
95. With the exception of the requirement set out above concerning the packaging of French-language specialty services, the Commission will not mandate the size or composition of digital theme or all-in packages. However, the Commission notes the comments of the CAB and the proposals regarding the size and composition of packages set out in the MOU. It also acknowledges that digital packages may include combinations of English-, French-, and third-language analog, digital Category 1 and Category 2 services, and non-Canadian services authorized for either analog or digital distribution by the Commission, subject to any applicable linkage requirements.
96. The Commission expects all BDUs to promote and market their theme and all-in packages, and the mirrored versions of the existing tiers, at least as actively as they promote and market any stand-alone offering. With respect to the CAB’s concern that unaffiliated specialty services be treated no less favourably than BDU-affiliated specialty services, exempt services and non-Canadian services, the Commission notes that section 3(1)(t)(iii) of the Act⁸ and the undue preference provision set out in section 9 of the Regulations apply to the terms of carriage on a digital basis, including packaging. The Commission notes that pay and specialty services are subject to similar undue preference provisions in their respective regulations.

⁸ 3(1)(t)(iii) of the Act states that distribution undertakings should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

Distribution and linkage

Dual/modified dual status

97. The dual and modified dual status rules were established and have evolved over time, to provide a measure of support to specialty services in their negotiations with distributors, and to ensure a degree of financial stability for certain of these services. By requiring Class 1 BDUs to distribute certain specialty services on basic, and thus ensure that they reached 100% of a cable system's subscriber base, the Commission sought to ensure that these services were able to meet their programming obligations and commitments. Similarly the modified dual status designation was intended to ensure that a service having such status was not moved to basic at its regulated rate (which is often lower than the negotiated discretionary rate) without the agreement of the service provider.
98. In English-language markets, the designation of a service as having dual status or modified dual status was often a consequence of when a service was approved. In French-language markets, where the rules are slightly more elaborate, the designations were applied somewhat more deliberately. In any event, the Commission considers that these designations may now have served their purpose. Further, as argued by several parties, the existing designations do not necessarily reflect current priorities and may create competitive inequities between older specialty services and those, including Category 1 services that have been licensed in more recent years. At the same time, the Commission notes that there may be certain services for which basic carriage could be justified in a digital environment, as discussed in the following section.
99. Accordingly, the Commission has determined that, in a digital distribution environment, the dual status and modified dual status designations shall cease to apply to the distribution of specialty services on 1 September 2007, eighteen months from the date of this public notice, except as provided below. In coming to this determination, the Commission acknowledges that the mirroring requirements, as set out above, effectively ensure continued carriage on basic for certain services, at least over the transition period.
100. The Commission considers that this eighteen-month period will provide a sufficient period of adjustment. However, the providers of affected dual status services may apply for digital basic status, under the criteria set out in the following section of this notice entitled "Digital basic". If an affected service elects to apply for digital basic status, it must do so within six (6) months of the date of this public notice. Should such an application be denied, the affected service would cease to have dual status on digital effective 12 months following the date that the decision denying the application is published or eighteen months from the date of this public notice, whichever is the later date. After this transitional period, the dual status and modified dual status provisions will no longer apply to the digital distribution of the analog specialty services. They will, however, continue to apply to their distribution on an analog basis, unless or until the Commission determines otherwise.

The linkage (1:1 and 1:5) rules

101. In the past, the linkage of certain non-Canadian services with Canadian services has been viewed as enhancing the value of, and encouraging subscription to, those packages, thus contributing to the economic viability of the Canadian services. The existing linkage rules stipulate that each Canadian analog pay service may be packaged with no more than five non-Canadian services, and that each Canadian analog specialty service may be packaged with no more than one non-Canadian service. The 1:5 and 1:1 rules have ensured that non-Canadian services are packaged in a way that is most likely to support Canadian services and the objectives of the Act.
102. While BDUs generally supported a regime of simple predominance in their comments, the Commission is of the view that non-Canadian services can continue to serve as valuable packaging partners. Accordingly, the Commission considers that the 1:1 and 1:5 rules should apply in a digital environment.
103. Accordingly, the linkage rules governing the digital distribution of Canadian services with non-Canadian services, with the exception of non-Canadian third-language services, will be harmonized for all Class 1, Class 2 and DTH BDUs, save for the above-noted mirroring conditions, which are applicable to cable BDUs only.

Digital basic

104. The obligation that all BDUs have to offer a basic service ensures that all subscribers have access to a core group of services. Through the Regulations and its decisions regarding the basic service, the Commission has ensured that Canadians have access to priority television signals, together with other services that further important policy objectives under the Act, such as those addressed to the reflection of Canada's linguistic duality. In addition, requiring that certain specialty services be distributed as part of the basic service has ensured that such services have access to a reasonably reliable revenue stream, thereby enabling them to meet their programming obligations.
105. Given the Commission's determination to drop the dual status and modified dual status designations in the digital environment, it is appropriate that the Commission further consider the composition of the basic service in that environment.
106. In the Commission's view, the composition of the digital basic service should be informed by the policy objectives of the Act, with a view to ensuring that subscribers have access to a basic service that, among other things:
 - fosters the growth of Canada's cultural, social, economic and political aims;
 - is varied and comprehensive, providing a balance of information and entertainment programming, at an affordable cost;
 - is drawn from local, regional, national and international sources;

- includes educational and community programs; and
- reflects and contributes to Canada's linguistic duality and ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society.

107. To a significant extent, these objectives are achieved through the existing obligations under sections 17, 32 and 37 of the Regulations, including the obligation that cable and other terrestrial BDUs generally have regarding the distribution of priority signals, such as local and regional CBC television services, local and regional private television stations, and the services of provincial educational broadcasters. These obligations will continue in a digital environment. In addition, given the importance of the 9(1)(h) services (TVA, APTN, CPAC and VoicePrint) to the achievement of the objectives of Act, the Commission determines that BDUs shall be required to continue to include them in their basic service offerings, whether their system is analog, digital or a hybrid.

108. In addition to the services noted above, the Commission notes the possibility that certain specialty services may also warrant carriage on basic in a digital environment. Accordingly, the Commission is prepared to entertain, on an exceptional basis, applications for digital basic carriage. Such status would be accorded via distribution orders under section 9(1)(h) of the Act. Any applicant that wishes its service to be granted such carriage status would have to demonstrate that it meets the following criteria:

- the applicant must provide evidence demonstrating the exceptional importance of its service to the achievement of the objectives of the Act;
- the applicant must demonstrate that having digital basic status will enable its service to contribute in meaningful ways to fulfilling the policy objectives of the Act:
 - in particular, the applicant must demonstrate that the programming of its service makes a significant contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity;
 - the applicant must also demonstrate how the programming of its service contributes to the overall objectives for the basic service, as summarized above, and how it specifically contributes to one or more objectives of the Act, such as: Canadian identity and cultural sovereignty; ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society; service to and the reflection and portrayal of persons with disabilities; or linguistic duality (in the case of French-language services, this objective could be achieved, for example, through commitments to produce programming both inside and outside of Quebec);

- the applicant must demonstrate that its business plan and implementation of its specific commitments are dependent on receipt of broad national distribution on the digital basic service; and
 - the applicant must demonstrate that the wholesale rate it is proposing would not make its service unaffordable to consumers (in the case of French-language services, this could be achieved, for example, through a lower wholesale rate outside of Quebec).
109. The Commission emphasizes that, as noted above, applications by the licensees of existing dual status specialty services requesting digital basic service carriage should be filed in a timely manner, and in any event, no later than six (6) months from the date of this public notice, in order to ensure that the applications can be processed before the dual status designations cease to apply to the general distribution of analog services on a digital basis.
110. To ensure that French-language services continue to be available on the digital basic offering of cable BDUs operating in English-language markets, under the digital migration framework, the Commission will require Class 1 and Class 2 BDUs serving such markets to ensure that, on a system-by-system basis, the total number of French-language services offered by a cable BDU on its digital basic service is at least equal to the number offered on the analog basic service as of the date of this public notice.
111. During the transition period, some cable systems may provide a hybrid analog and digital service offering. On such systems, analog services, and in particular, the basic service, will largely continue to be made available on an analog basis, while digital packages will be add-ons made accessible via the digital set-top box. In such circumstances, the Commission expects cable BDUs to ensure that subscribers are not required to pay twice for any duplicated services.

Wholesale rates

112. Until recently, the Commission regulated the wholesale rates of specialty services when distributed as part of the basic service, as well as the mark-ups that a Class 1 cable company was permitted to charge its subscribers. The regulation of the wholesale rate and mark-up served several purposes. Most importantly, it helped to keep the cost of basic cable service affordable for subscribers.
113. With the growth of competition in the distribution environment, and the resultant deregulation of cable rates⁹, the vast majority of BDUs are now able to set their own retail rates. Thus, these BDUs can raise their basic or discretionary rates for reasons unrelated to the costs associated with the services in a package, subject only to the competitive pressures on rates brought to bear by other BDUs operating in the market.

⁹ By the end of August 2004, rate deregulated Class 1 undertakings accounted for approximately 93% of all Class 1 basic cable subscribers.

114. The Commission noted in the 2005 call for proposals that, in an environment where BDUs are largely rate deregulated, any wholesale rate established by the Commission can only have an indirect impact on the retail prices paid by consumers. Thus, regulated basic wholesale rates now have a lesser role to play in keeping the cost of cable service affordable.
115. The Commission does not regulate wholesale rates for discretionary carriage. In addition, the majority of Class 1 cable systems are already rate deregulated. The Commission considers that it would thus be appropriate, except as noted below, to discontinue wholesale rate regulation in the digital environment. At the same time, and as several programming services have pointed out, the regulated basic wholesale rates of specialty services have come to serve as reference points when negotiating their wholesale rates for distribution on a discretionary basis. The Commission expects that the historical wholesale rates will likely continue to serve as reference points for negotiations for some time, and could also be used as reference points in the resolution of disputes.
116. Notwithstanding the above determination, the Commission is of the view that regulated basic wholesale rates would still be appropriate for those services that the Commission mandates for basic carriage on a digital basis via 9(1)(h) orders, as a means to ensure that the cost of basic service remains affordable to subscribers. Regulation of the wholesale rates would also ensure that the operators of such services do not use their basic service status as leverage with BDUs in negotiating rates. In addition, to the extent that the Commission determines that these services fulfil important public policy objectives, and to the extent that they would unlikely be able to negotiate comparable rates on their own, a regulated rate would also assist in ensuring that they are able to fulfil those objectives.
117. Accordingly, the Commission will no longer regulate the wholesale rates for the digital distribution of the analog specialty services, with the exception of those services mandated for distribution on digital basic under section 9(1)(h) of the Act. The basic wholesale rates for these services will continue to be regulated. For other services, wholesale rates will be set via negotiations between the parties. During the transition period, the Commission will expect the licensees of services that are mandated for carriage on digital basic to ensure that their wholesale rate on digital reflects their analog wholesale rate.

Implementation

118. The Commission intends to issue for public comment proposed amendments to the Regulations and will also amend, as appropriate, the distribution and linkage rules in order to implement its digital migration framework.

Secretary General

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