



Broadcasting Regulatory Policy CRTC 2010-167

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Ottawa, 22 March 2010

A group-based approach to the licensing of private television services

In this regulatory policy, the Commission sets out its determinations on issues relating to a group-based approach to the licensing of large English-language private television ownership groups. The key areas addressed are the following:

- *Canadian programming expenditures;*
- *Canadian content requirements;*
- *programs of national interest;*
- *maintaining local programming;*
- *expenditures on non-Canadian programming;*
- *Canadian independent production;*
- *regional production;*
- *continuing application of social policies;*
- *ownership issues;*
- *administrative renewals; and*
- *appropriate length of licence term.*

The Commission also addresses the following issues relating to revenue support for English- and French-language conventional television broadcasters:

- *review of the Local Programming Improvement Fund; and*
- *proposed regime for value for signal and the question of the Commission's jurisdiction to be referred to the Federal Court of Appeal for expedited hearing and determination.*

Further, the Commission notes its determinations, set out in broadcasting regulatory policies to be issued shortly, relating to advertising on the video-on-demand platform and to the sale of commercial advertising in the local availabilities of non-Canadian specialty services. It also states its intention to conduct a review of its policies concerning direct-to-home (DTH) services prior to the next licence renewal proceedings for the two DTH undertakings currently in operation (Shaw Direct and Bell TV).

Finally, the Commission addresses various issues relating to the digital television (DTV) transition for English- and French-language conventional television broadcasters, including its revised list of mandatory markets, the date set for the DTV transition, and the operation of analog transmitters in and outside the mandatory markets.

A dissenting opinion by Commissioner Suzanne Lamarre is attached.

Introduction – Legislative context

1. Section 3(1)(s) of the *Broadcasting Act* (the Act) states that:
 - (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
 - (i) contribute significantly to the creation and presentation of Canadian programming, and
 - (ii) be responsive to the evolving demands of the public [...]
2. Further, section 3(1)(t) of the Act states that distribution undertakings:
 - (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
 - (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost [...]
3. In order to give effect to these and other objectives set out by Parliament in the Act, the Commission has developed and modified its policies and regulations in light of the broadcasting environment of the time.
4. For over fifty years, individual television broadcasting undertakings, in return for regulatory supports and protections, have been obligated to meet requirements for the exhibition of a diversity of Canadian programming. To ensure sufficient quality of that programming, expenditure requirements have been imposed where required.
5. This model has served Canadians and all of the other stakeholders in the Canadian broadcasting system well. Its application through the introduction of new services and new platforms has provided Canadian viewers with a world leading diversity of both Canadian and foreign content. This has been accomplished in the face of significant geographic, economic and linguistic challenges.
6. The advent of digital technologies for the distribution of broadcasting and for the broader exchange of all digital information has fundamentally changed the basis for existing approaches to television broadcasting regulation. The ownership structure of Canadian television has also changed with a relatively few large ownership groups now controlling the majority of services, audience share and revenues.

7. The Canadian broadcasting system will succeed or fail to the degree that Canadian creative talent, producers, broadcasters and distributors provide a quality Canadian television experience for the viewer. At the heart of this experience is the ability of the system to continually create attractive new Canadian programs.
8. There is significant opportunity to deliver programming from both within and outside the regulated broadcasting system. The Commission recognizes that models for distributing Canadian content to Canadians increasingly include non-linear platforms, such as video-on-demand (VOD) and the Internet. Canadians' expectations for the delivery of content have evolved considerably since the Act came into force in 1991. The desire to view content at any time on any platform is changing Canadians' viewing habits. Yet the Act clearly enjoins private networks and programming undertakings to be responsive to the public's evolving demands. Therefore, attractive Canadian content available at anytime and on any platform represents a goal towards which the Canadian broadcasting system should strive in order to remain not only responsive to the public's demands, but also relevant and competitive in the new digital era.
9. It is, in part, with a view to meeting the challenges of this new on-demand world that the Commission undertook the current revision of its regulatory policy with respect to television programming services. In its view, a shift in regulatory focus from program exhibition to program creation will help to ensure the continued presence of Canadian programming options for Canadians, however the broadcasting system may evolve.
10. Indeed, the process launched with Broadcasting Notice of Consultation 2009-411¹ sought to develop a new approach to the creation and distribution of Canadian programming in a new broadcasting landscape.
11. One of key features of the Canadian broadcasting system has been its openness to foreign television services. Broadcasting distribution undertakings (BDUs) have benefited from being able to offer subscribers diverse packages of Canadian and foreign services, and consumers have benefited from a significant degree of choice. On the other hand, the widespread availability of foreign services has fragmented the audience and revenues available to Canadian broadcasters.
12. The framework described in the new regulatory policy set out in this document recognizes both the increasing fragmentation of viewing audiences and the reality of corporate consolidation in the marketplace. Its intention is to remove unnecessary barriers to the continued viability of private broadcasters and to ensure that broadcasters are able to obtain, through market-based negotiations, fair value for the distribution of the programming they broadcast.

¹ Amendments to certain paragraphs of that notice of consultation were provided in Broadcasting Notice of Consultation 2009-411-3.

13. The Commission continues to recognize the importance of regulation to meet the objectives of the Act where the market cannot do so, but considers that, in a broadcasting environment characterized by ever increasing choice, the application of regulation must be directed towards the creation of quality Canadian content. This framework is an important and timely step in preparing the Canadian broadcasting system for its digital future.

Call for comments

14. In Broadcasting Decision 2009-279, the Commission set out its initial decisions regarding licence renewal applications for private conventional television broadcasters. In that decision, as well as in Broadcasting Notice of Consultation 2009-411, the Commission stated that it would hold a policy proceeding in the fall of 2009, the scope of which would include, but not necessarily be limited to, the following policy issues, as amended by Broadcasting Notice of Consultation 2009-411-3:
 - determining the modalities and conditions for group-based licensing to be employed at the 2010 public hearing;
 - providing revenue support for conventional broadcasters by i) investigating alternative support mechanisms for local programming; ii) protecting the integrity of Canadian broadcaster signals, and iii) considering whether or not a negotiated solution for the compensation for the fair value of local conventional television signals is appropriate;
 - elaborating further details regarding possible digital transition models; and
 - establishing whether regulatory restraints for expenditures on non-Canadian programming and on minimum levels of spending on Canadian programming by English-language television broadcasters are required and determining which regulatory mechanisms would be most effective.
15. In this regard, the Commission announced in that notice that it would hold a public hearing in the National Capital Region to consider the above-noted issues, and invited written comments and proposals, along with rationale and supporting evidence, on those issues. This hearing commenced on 16 November 2009.
16. In Broadcasting Notice of Consultation 2009-411, the Commission noted that the objective of that public process would be to establish an overall regulatory framework that would provide all television broadcast groups with the flexibility to adapt to the rapidly changing communications environment, while ensuring that the Canadian broadcasting system is distinctly Canadian in its content. The Commission argued that this objective can only be advanced if both it and stakeholders are mindful of the following:

- the important role of Canadian creative talent and production in the broadcasting system;
 - the different conditions under which English- and French-language television broadcasting operate and the different requirements that the two may have while sharing common aspects; and
 - the role of public and educational broadcasters in an evolving communications environment.
17. In the context of this proceeding, the Commission received comments from broadcasters, distributors, various associations and individuals. These comments can be found on the Commission’s website at www.crtc.gc.ca under “Public Proceedings.”
18. The present regulatory policy, which follows from that proceeding, is set out in four parts:
- Part 1 – Issues relating to a group-based approach to the licensing of large English-language private television ownership groups (paragraphs 22-131);
 - Part 2 – Revenue support for English- and French-language conventional television broadcasters (paragraphs 132-169)
 - Part 3 – Other issues relating to revenue support for English- and French-language conventional television broadcasters (paragraphs 170-177); and
 - Part 4 – Digital television transition for English- and French-language conventional television broadcasters (paragraphs 178-194).
19. The Commission notes that, as stated in section 3(1)(c) of the Act, English- and French-language broadcasters, while sharing common aspects, operate under different conditions and may have different requirements. Although the Commission considered, in the context of this proceeding, comments relating to both English- and French-language broadcasting in Canada, the group-based policies set out in Part 1 below will, with two exceptions, apply only to large, English-language private television ownership groups. The two exceptions relate to an amendment to the *Television Broadcasting Regulations, 1987* regarding Canadian content and a change to the Commission’s policy regarding licence-fee top-ups. The Commission intends to discuss with French-language television broadcasters, at their licence renewals, the most appropriate approach to take in regard to the issues discussed below. This is addressed in paragraphs 111 to 114.
20. With respect to the public broadcaster, the Commission considers that the flexible spending requirements set out in this group-based approach should not apply to the Canadian Broadcasting Corporation (CBC). The Commission has set out its rationale in this regard in paragraphs 116 to 118.

21. Prior to the issuance of Broadcasting Notice of Consultation 2009-411, the Commission issued calls for comments relating to proposed regulatory frameworks for VOD undertakings (see Broadcasting Public Notice 2008-101) and for the sale of commercial advertising in the local availabilities of non-Canadian specialty services (see Broadcasting Public Notice 2008-102). Comments received in regard to these two proceedings can also be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings." The Commission's determinations in this regard that are relevant to the present regulatory policy are set out in Part 3: Other issues relating to revenue support for conventional broadcasters. The balance of the Commission's determinations on these issues will be issued shortly.

Part 1 – Issues relating to a group-based approach to the licensing of large English-language private television ownership groups

22. The Commission regulates television programming services on an individual basis. Currently, where expenditure requirements have been imposed, they apply to a single service in relation to the financial situation of that service and without regard to the overall financial situation of the other television services controlled by a single ownership group.
23. The television programming services controlled by the largest ownership groups in broadcasting now account for the large majority of viewing to all Canadian television,² although this viewing is fragmented among multiple individual programming undertakings. These large, private broadcasting groups, by launching or acquiring multiple specialty services, have embraced the opportunity to offer a greater choice of programming to audiences.
24. As conventional television profitability is challenged by a downturn in advertising revenues and the fragmentation of those revenues, specialty services have demonstrated continued financial strength on the basis of their dual advertising/subscription revenue streams. This has contributed to the overall profitability of the large groups and their ongoing ability to contribute to the creation of high-quality Canadian programming.
25. In Broadcasting Notice of Consultation 2009-411, the Commission noted that the present proceeding would examine how to structure and conduct group-based conventional and specialty television licence renewals. The Commission sought to establish a comprehensive framework that would take into account systemic changes in the broadcasting industry, including those relating to the horizontal and vertical integration that has taken place.
26. Through group-based licence renewals, the Commission's objective is to provide private broadcasting groups with greater flexibility in the allocation of resources amongst their various television platforms. These groups require the flexibility to

² See CRTC Communications Monitoring Report 2009.

respond quickly to changes in viewer behaviour. Such an approach will allow the Commission to consider factors including, but not limited to, the total audience reached by a broadcasting group, the totality of its revenues and the totality of its programming commitments and obligations.

27. The greater flexibility that will result from a group-based approach should have a positive impact on the viability of the Canadian television industry. Further, it will permit the Commission to ensure continued support for the creation of Canadian programming, particularly in categories that continue to be under-represented in the Canadian broadcasting system, such as scripted drama and documentaries.
28. In the following sections, the Commission sets out its determinations on group-based requirements relating to the following issues:
 - Canadian programming expenditures (CPE);
 - Canadian content requirements;
 - programs of national interest;
 - maintaining local programming;
 - expenditures on non-Canadian programming;
 - Canadian independent production;
 - regional production;
 - annual reporting;
 - continuing application of social policies;
 - ownership issues;
 - administrative renewals;
 - appropriate length of licence term; and
 - application of the group framework – detailed determinations.
29. As noted in the above list, detailed determinations with respect to the application of the group framework are set out below. In short, the framework will apply, at the outset, to designated ownership groups (designated groups), that is, ownership groups that generate more than \$100 million in annual revenues from private, English-language conventional television stations and own at least one English-language specialty and/or pay programming service. The groups meeting the criteria at this time are CTVgm, Canwest and Rogers.

30. The Commission notes that the conventional television stations and each of the specialty and/or pay services that are part of a designated group will continue to have their own licences and that group requirements will be implemented by imposing conditions of licence on each service.
31. Further, the new policies set out in this section generally will apply only to television licensees controlled by the designated groups. However, the Commission notes that the new policies with respect to Canadian content levels for conventional television licensees and licence-fee top-ups will apply to all affected television licensees.

Canadian programming expenditures

32. CPE requirements by condition of licence are not uniform throughout the Canadian television sector. In the current regulatory framework, most specialty and pay services have CPE obligations, and VOD and pay-per-view (PPV) undertakings are obligated to make a contribution to programming funds. Conventional television services and Category 2 specialty services (to be known as Category B specialty services as of 1 September 2011), however, are not required to spend a minimum amount on Canadian programming.³
33. In Broadcasting Notice of Consultation 2009-411, the Commission set out a conceptual model establishing an overall group CPE requirement that would apply to conventional television services, and analog Category 1 (to be known as Category A as of 1 September 2011) and Category 2 specialty and pay services.
34. In that conceptual model, large ownership groups would be allowed to flexibly allocate the aggregate of their required CPEs across individual programming undertakings, while ensuring that the full aggregate amount is spent. In addition to encouraging effective business judgments, this would ensure that there is no reduction in overall spending on Canadian programming. In this regard, the Commission sought responses to the following questions:
 - Would it be appropriate to implement a single, flexible CPE requirement for integrated corporate undertakings? If not, what would be an appropriate minimum CPE for each service that makes up the group and should transferability be permitted among the services? Should there be exclusions when considering minimum spending levels (such as for sports or news services)?
 - If required, by what method could the Commission set such a CPE requirement for integrated corporate undertakings? If there is a need to transition VOD contributions from that of payments to programming funds to a new common CPE requirement, how should that be accomplished?

³ Conventional television services have not had a requirement for a minimum level of Canadian expenditures since the issuance of Public Notice 1999-97.

- What measures might be required under such a framework to ensure appropriate financial support for the production of programs of national interest, such as dramas and documentaries?

35. The Commission notes that various stakeholders, particularly representatives of the creative sector, have made a correlation between the removal of conventional television spending requirements in the Commission's 1999 Television Policy⁴ and a decline in the number of Canadian drama productions as well as a sharp rise in the proportion of expenditures devoted to non-Canadian programming. The Commission further notes broadcaster assertions that permitting greater flexibility to allocate CPE obligations across platforms could result in higher-budget productions that may attract larger Canadian audiences and may have significant export potential. Accordingly, the Commission examined how a single, group-based CPE requirement could be applied with flexibility to allocate expenditures across all platforms of integrated corporate undertakings.

A flexible Canadian programming expenditure requirement

Positions of parties

36. Larger conventional television broadcasters were generally supportive of a flexible group CPE approach. Canwest Television Limited Partnership (Canwest) supported the conceptual model proposed by the Commission but submitted that maintaining individual CPE conditions for each licence and allowing expenditures to be shared within a group would provide some certainty that spending on Canadian programs would continue at material levels during the next licence term, and would allow broadcasters to tailor their spending to their specific asset configuration. CTVglobemedia Inc. (CTVgm) also supported maintaining individual CPE levels with shared expenditures between entities under common control, noting that such an approach would create greater certainty for both the purchaser and vendor in the event an undertaking was sold. Canwest expressed concern that using historic CPE levels may be unrealistic due to regulatory changes and the economic situation, and recommended that the Commission give groups the opportunity to "zero-base" their CPE levels. CTVgm and Canwest supported a CPE requirement on conventional television stations conditional upon the introduction of a value for signal (VFS) regime. Neither CTVgm nor Canwest supported including Category B specialty services in a group obligation, whereas the CBC and Corus Entertainment Inc. (Corus) did.
37. Smaller broadcasters, including V Interactions inc. (V) and Pelmorex Communications Inc., as well as the Canadian Film and Television Production Association (CFTPA), expressed concern that the flexibility inherent in a group-based licensing approach could have the unintended effect of giving a regulatory-based competitive advantage to the largest ownership groups.

⁴ See Public Notice 1999-97.

38. BDUs generally supported a group CPE obligation; however, most of those that do not also operate broadcasting services did not provide specific comments or proposals. Rogers Communications Inc. (Rogers) supported a single, flexible group-based CPE requirement for all services controlled by ownership groups, which includes conventional television stations, and Category A and Category B specialty services (excluding VOD and PPV). Rogers recommended that CPE levels should be determined by the circumstances of the broadcast group and do not need to be uniform, but also stated that, for competitive equity across ownership groups, the Commission must establish a common approach to the calculation of the group-based CPE.
39. Unions, guilds, and associations supported a CPE obligation on conventional television stations, with the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Directors Guild of Canada (DGC), the Writers Guild of Canada (WGC), the CFTPA and the Saskatchewan Motion Picture Industry Association (SMPIA) also expressing support for a CPE obligation for Category B specialty services. The CFTPA submitted that the best option would be to maintain the existing regulatory framework for discretionary services – that is, keeping individual Canadian expenditure levels for each specialty and pay service. The CFTPA was also of the opinion that, if the Commission should decide to adopt a group-wide approach to CPE requirements, minimum safeguards, in addition to the overall group requirements, would have to be put in place. These would include establishing minimum Canadian programming and expenditure requirements for each service within a group, and excluding mainstream sports and national news specialty services from any calculations under a group-based framework.
40. Many parties, including the large broadcasting groups, supported a CPE based upon a percentage of revenues, whereas ACTRA, the DGC, the WGC, the CFTPA and the SMPIA recommended a CPE based upon a percentage of total programming expenditures.

Commission's analysis and determinations

41. The Commission must supervise and regulate the broadcasting system in order to fulfil the policy objectives of the Act. These include encouraging the development of Canadian expression; being readily adaptable to scientific and technological change; and ensuring that each element of the Canadian broadcasting system contributes in an appropriate manner to the creation and presentation of Canadian programming.
42. The Commission considers that these objectives, particularly the adaptability of the broadcasting system to change, are best met through a regulatory approach that recognizes the significant challenges to conventional television broadcasting and the stronger role that both regulated and unregulated, on-demand platforms are playing in providing Canadians with the television programming they need and want.

43. The Commission notes that there has been a significant shift in Canadians' viewing habits since the publication of the 1999 Television Policy.⁵ The subsequent widespread introduction of digital cable has rapidly brought Canadians a wide variety of programming choices, from both Canadian and non-Canadian sources. The availability of new services on conventional and specialty television platforms has been significantly augmented by content available from alternative, unregulated platforms.
44. The exclusivity of broadcasters' programming has eroded as a result of increased choice and increasing cost of foreign programming. This has resulted in a diminishing of the profits realized from the exhibition of popular foreign programming. The profitability of this programming has, in the past, provided conventional television broadcasters with the resources to spend on less profitable Canadian programming, such as programs of local reflection, local news, and especially high-quality scripted Canadian entertainment.
45. In the short and medium terms, because of their continued ability to attract mass audiences, conventional television broadcasters play a particularly important role in fulfilling the objectives of the Act. However, in the longer term, as audiences continue to move to other platforms, this role may become less important. As a step in adapting the broadcasting system to the digital age, the Commission considers it appropriate to pursue a new approach regarding the requirements for the exhibition and creation of high-quality Canadian programming.
46. First, in order to ensure that the designated groups continue to contribute to the creation of Canadian programming, the Commission will establish a minimum, aggregate level of spending on Canadian programs for each designated group.
47. Second, in order to permit the designated groups to adapt quickly to a changing environment, the Commission will provide them with the greatest possible flexibility so that they may allocate that spending among their various licensed undertakings. Since these ownership groups are not licensees of the Commission, this policy will be implemented through the imposition of conditions of licence on the relevant individual licensees controlled by the groups, as set out in detail below.
48. All qualifying specialty services controlled by a designated group will continue to have individual CPE requirements imposed by condition of licence (as is the current practice for Category 1 and analog specialty services). In addition, the Commission will impose, by condition of licence, a CPE requirement on the conventional television services controlled by the designated groups. These CPE requirements will be expressed as a percentage of the previous year's revenues.
49. The Commission has also determined that Category B specialty services controlled by a designated group and with more than one million subscribers will be subject to a

⁵ See *Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications*, available on the Commission's website under "Broadcasting Reports and Publications."

CPE requirement. This requirement will be determined at the licence renewal of these services, using as a base the actual spending by the services over the previous three years.

50. It is the Commission's preliminary view that the base spending level for each designated group, as an aggregate, should be a minimum of 30% of the group's gross revenues. The Commission considers that this is an appropriate level given the record of the groups' actual spending on Canadian programming in the years 2007, 2008 and 2009, and given the Commission's intention not to impose, at this time, additional obligations on the groups beyond their recent historical expenditures.
51. In order to establish the appropriate CPE for the conventional television services controlled by a designated group, the Commission will calculate the dollar amount of the CPE obligations for qualifying⁶ Category A and Category B specialty services. This amount will be subtracted from the dollar amount of the group's 30% CPE obligation. The difference will be the dollar amount of the CPE obligation for the conventional television services controlled by the group.
52. The difference established in the above paragraph, calculated as a percentage of the average of the previous three years' gross revenues for the conventional television services, will constitute the CPE for the designated group's conventional television services and will be imposed as a condition of licence on those services.
53. In order to permit the groups to adapt quickly to changing circumstances, qualifying specialty licensees within a designated group will have the flexibility to attribute 100% of their required CPE to any other qualifying specialty service, or to conventional television services, within the same designated group. Each licensee will be required to report annually the attributed amounts and each of the service(s) to which they were allocated.
54. Designated groups will also have flexibility to attribute a portion of the required CPE for the conventional television services controlled by that group. However, as the Commission attaches particular importance to CPE spending for conventional television services, this flexibility will be limited. Only a maximum of 25% of the required CPE for conventional television services may be attributed to any other qualifying specialty services within the same designated group. Each licensee will be required to report annually the attributed amounts and each of the service(s) to which they were allocated.

Canadian Media Fund licence-fee top-up

Positions of parties

55. Under its current policy, the Commission permits a television broadcaster subject to a CPE requirement to include, as an eligible CPE, monies paid by the Canadian Media

⁶ See section 4 of the appendix to this regulatory policy.

Fund (CMF)⁷ to independent producers, with respect to programs acquired by that broadcaster. These monies, paid by the CMF, are referred to as licence-fee top-ups and may be included in the calculation of eligible CPE.

56. Broadcasters that commented on this issue were generally in favour of maintaining the licence-fee top-up as an eligible expenditure. Canwest was of the opinion that the inclusion of licence-fee top-ups was appropriate and that the issue was not fully canvassed during the proceeding. Astral Media Inc. and Corus submitted that, if the licence-fee top-up payments were not included in the eligible CPE, the CPE obligations should be adjusted accordingly.
57. The guilds and unions were of the opinion that, in order to be transparent and non-discriminatory, licence-fee top-up payments should not be included in the calculation of eligible CPE. They noted that licence-fee top-ups are not actually funds spent by the broadcaster and that a particular group's ability to attract CMF support should not give it a regulatory advantage over its competitors. The coalition of the CFTPA, ACTRA, the DGC and the WGC supported giving each pay and specialty service an opportunity at its renewal hearing to indicate the extent to which the licence-fee top-up was crucial to their viability and to have the positions put forward taken into account in setting the relevant CPE.
58. Similarly, Rogers was of the opinion that licence-fee top-up payments should not count as an eligible expenditure for meeting CPE obligations, and expressed concern that the inclusion of licence-fee top-ups could give a competitive advantage to groups that have access to large amounts of CMF funding.

Commission's analysis and determinations

59. For the purpose of calculating eligible CPE, the Commission considers it appropriate to eliminate the practice of crediting, to a broadcaster, monies paid by the CMF as an eligible Canadian expense incurred by a broadcaster. CMF payments do not trigger corresponding obligations, and their inclusion may be a source of competitive inequity. Furthermore, the Commission considers that the elimination of CMF payments as eligible expenses will provide greater certainty and transparency within the system. The Commission notes that, in establishing its proposed group-based CPE requirements, it has excluded CMF licence-fee top-ups from the calculation of broadcasters' past spending on Canadian programming.
60. The Commission's elimination of the CMF licence-fee top-up as an eligible Canadian expense applies to all specialty services with CPE requirements. The Commission will, at the time of the licence renewals for all specialty services, consider requests to adjust required CPE levels in light of its decision to eliminate licence-fee top-ups as an eligible Canadian program expense. In light of this, the elimination will only take effect at licence renewal.

⁷ The Canadian Television Fund (CTF) will officially change its name to the CMF on 2 April 2010.

Canadian content requirements

Positions of parties

61. Currently, conventional television broadcasters are required to devote, by regulation, a minimum average of 60% of the broadcast year and not less than 50% of the evening broadcast period (6:00 p.m. to midnight) to the broadcast of Canadian programs. Further, Canadian content exhibition requirements for specialty services vary according to the nature of the programming provided. In Broadcasting Notice of Consultation 2009-411, the Commission sought comment on a conceptual model whereby each ownership group would be required to devote, across all of its services, not less than 55% of the programming broadcast over the broadcast year to Canadian programming and, on each specific service, not less than 35% of the programming broadcast over the broadcast year to such programming.
62. Although broadcasters were generally supportive of the conceptual model, many indicated that it would be inappropriate to establish a single Canadian content requirement at the group level. Most of the broadcasters stated that exhibition requirements should be tailored for specific types of services in order to reflect the particular character of each service. As well, many broadcasters supported the exclusion of an evening exhibition requirement.
63. Various parties representing the creative sector strongly discouraged the Commission from lowering the overall Canadian content level to 55%, while other parties indicated that the amount could be lowered if the Commission combined the exhibition requirement with an expenditure requirement. In addition, most parties from the creative sector argued for the maintenance of the evening Canadian content requirement on conventional television stations.

Commission's analysis and determinations

64. With respect to conventional television, the Commission recognizes the importance of providing maximum regulatory flexibility while ensuring the availability of Canadian programming during times when most Canadians are watching television. Accordingly, the Commission is of the view that, for conventional television stations, it would be appropriate to amend the *Television Broadcasting Regulations, 1987* so that a licensee is required to devote not less than 55% of the broadcast year while maintaining the current requirement of devoting not less than 50% of the evening broadcast period (6:00 p.m. to midnight) to the broadcast of Canadian programs.
65. As for the Canadian content requirements for specialty services, the Commission concurs with the position of most parties that exhibition requirements should be tailored to reflect the character of each service. Accordingly, the Commission will continue to impose Canadian content exhibition requirements for specialty services on an individual basis.

Programs of national interest

Positions of parties

66. Priority programs, as currently defined, are Canadian programs in the categories of drama, long-form documentary, music/variety, entertainment magazines and regionally-produced programs other than news and sports.
67. In Public Notice 1999-97, the Commission required the largest conventional multi-station ownership groups to broadcast, over the broadcast year, on average, at least eight hours per broadcast week of priority Canadian programs during peak time, which was defined as the period from 7:00 p.m. to 11:00 p.m.
68. In Broadcasting Notice of Consultation 2009-411, the Commission sought comment on how the current exhibition requirements for Canadian content and priority programs could be simplified, streamlined or amalgamated. Further, the Commission sought comment on the measures that might be required in a group-based framework to ensure appropriate exhibition of programs of national interest, such as dramas and documentaries.
69. There was general consensus among parties representing broadcasters and the creative sector that the concept of priority programming needed to be updated. Broadcasters, for the most part, proposed an expansion of the definition of priority programming to include additional categories, and proposed greater flexibility in how such programming could be exhibited. Conversely, producers and creators proposed a narrowing of the definition of priority programming to the difficult-to-finance categories of scripted drama and long-form documentaries, and children's programming.

Commission's analysis and determinations

70. The Commission recognizes that broadcasters require increased flexibility to program their various services in order to maximize audiences and revenues. However, such flexibility must be balanced with continuing support for the creation of programs that clearly serve the national interest. To achieve these two objectives, the Commission has deemed it appropriate to eliminate the current exhibition requirement for priority programming and replace it with an expenditure requirement that will apply to categories of programs that the Commission considers to be of national interest and that, in its view, require continued regulatory support.

Defining programs of national interest

71. The Commission considers that there is a continuing need for regulatory support for key genres of Canadian programming. The Commission notes that over 40% of all viewing to English-language television in Canada is to drama programs;⁸ drama is thus the genre of programming that Canadians choose to watch more than all others. Drama

⁸ See CRTC Communications Monitoring Report 2009.

programs and documentary programs are expensive and difficult to produce, yet are central vehicles for communicating Canadian stories and values. In addition, the Commission considers that programs that celebrate Canadian creative talent in English Canada, such as The Geminis, The Junos, The Giller Prize, The National Aboriginal Achievement Awards, The East Coast Music Awards, and The Aboriginal Peoples Choice Music Awards, promote Canadian culture and are also of national interest.

72. The Commission has therefore determined that the new designation of programs of national interest will consist of programs from program categories 7 Drama and comedy and 2(b) Long-form documentary,⁹ as well as specific Canadian award shows that celebrate Canadian creative talent, such as those noted above.
73. The Commission notes that programs directed to children are not considered to be a separate program category. Such programs may be categorized in a variety of program genres. Therefore, programs directed to children that are in categories 7 and 2(b) will also be considered programs of national interest.

Canadian programming expenditure requirements for programs of national interest

74. In order to ensure that programs of national interest are created and available on whatever platform Canadians choose to consume their media, the Commission will impose on each designated group, at the next licence renewals of their services, an expenditure requirement specific to the creation and acquisition of programs of national interest. Licensees will have the flexibility to attribute 100% of their required spending on programs of national interest to any qualifying specialty service or conventional television services within the same designated group so long as the aggregate group CPE is met.
75. The Commission does not, at this time, collect separate expenditure information for category 2(b) programs. Consequently, it is not possible to evaluate licensees' past expenditures in this category. Analyzing past expenditures for drama (category 7) only, the Commission has determined that group expenditures of at least 5% of gross revenues over the licence term is appropriate. The large groups will be required to file, as part of their renewal applications, their historical spending on long-form documentaries and award show programming. Based upon its analysis of these past expenditures, the Commission will establish, at licence renewal, a base level spending requirement for programs of national interest and determine whether any increases over the licence term may be necessary.
76. The Commission's view is that this approach, with its emphasis on the creation of programming, will best ensure that Canadian stories are told and made available to viewers in Canada and abroad, whatever the platform.

⁹ These program categories are set out in Public Notice 1999-205 and in Item 6 of Schedule I to the *Television Broadcasting Regulations, 1987*.

77. The Commission notes that, in order to ensure transparency and accountability, the manner by which the licensees report programming-related expenditures in their annual returns will require modification. Specifically, licensees will be required to report programming expenditures related to long-form documentaries (category 2(b)) and award programs as separate line items in their annual returns. This reporting modification will apply to all conventional, specialty and pay television programming undertakings.

Definitions of Canadian program categories

78. To ensure that the definitions of Canadian program categories described in Public Notice 1999-205 still accurately capture all of the types of programs enjoyed by Canadians, a follow-up paper process will be announced shortly. This process will specifically revisit, for both English- and French-language broadcasters, the definition of long-form documentaries (category 2(b)) and other program categories. It will also determine the appropriate procedure for identifying and updating the specific award shows that will be eligible as programs of national interest.

Discontinuation of time credits

79. In light of the new policy framework, the time credits for Canadian drama described in Public Notice 1999-97 will be discontinued when a broadcaster is included within the new group-based approach. The time credit for Canadian content will be discontinued for all English-language broadcasters.

Recalculation of tangible benefits thresholds

80. The Commission notes that, within the past three years, CTVgm, Canwest and Rogers have all been involved in transactions that have invoked the Commission's tangible benefits policy, and all three tangible benefits packages involved initiatives designed to create and support drama (category 7) and/or long-form documentary (category 2(b)) programming. In all cases, a threshold was established to ensure that these initiatives were incremental to the existing creation and support of programming from these program categories. The calculation of those thresholds was based on the Commission's approach to priority programming. Spending requirements relating to programs of national interest will be discussed and finalized at the time of licence renewals. It is the Commission's preliminary view, subject to further discussion at the time of licence renewals, that the spending requirements for programs of national interest will be reasonable thresholds on which to base the incrementality of tangible benefits.

Maintaining local programming

81. The approach to local programming for conventional television stations set out in Broadcasting Regulatory Policy 2009-406 did not form part of the discussion during the hearing. However, the Commission is of the view that it is important to ensure that all programming obligations – including local programming obligations – of services participating in the group-based approach be set out in one document.

82. Accordingly, the Commission reiterates that the approach to local programming for conventional television stations set out in Broadcasting Regulatory Policy 2009-406 is maintained, regardless of whether the stations are “stand alone” or form part of a designated group.

Expenditures on non-Canadian programming

83. In Broadcasting Decision 2009-279, the Commission considered the imposition on the licensees of conventional television stations of a 1:1 ratio requirement between Canadian and non-Canadian expenditures. In that decision, the Commission determined that, based on the record of that proceeding, the imposition of a 1:1 ratio requirement at that time would be impracticable and inappropriate. However, the Commission noted that the concerns it identified in Broadcasting Notice of Consultation 2009-70 remained and was of the view that a 1:1 ratio requirement, or some other regulatory measure to ensure that an appropriate proportion of the financial resources of English-language television licensees be devoted to Canadian programming, should be explored in the context of this proceeding.
84. The Commission notes that, although there was general agreement among parties that rising expenditures on foreign programming have significantly contributed to the current financial difficulties of English-language conventional television broadcasters, there was no general support for the imposition of a specific 1:1 ratio requirement between Canadian and non-Canadian expenditures.
85. The Commission considers that the new CPE requirements, in conjunction with the requirement that licensees make commitments to the creation of programs of national interest, will be a more effective regulatory measure to ensure that an appropriate proportion of the financial resources of English-language television licensees be devoted to Canadian programming.
86. Accordingly, the Commission does not consider it appropriate at this time to impose on English-language conventional television broadcasters a 1:1 ratio requirement between Canadian and non-Canadian programming expenditures.

Canadian independent production

Positions of parties

87. Section 3(1)(i)(v) of the Act states that “the programming provided by the Canadian broadcasting system should [...] include a significant contribution from the Canadian independent production sector.”
88. Over the years, the Commission has adopted several approaches for encouraging a significant contribution from the independent production sector to the Canadian broadcasting system, including:

- directing BDU contributions to independent production funds;
- expectations on exhibition from the larger ownership groups of priority programming;
- expectations, requirements, or commitments on programming expenditures;
- conditions of licence or encouragements for the use of regional independent productions; and
- approval of tangible benefits to be dispersed to the independent production sector.

89. As set out in Broadcasting Public Notice 2008-4, an independent production company is defined as a production company in which a television licensee owns or controls, directly or indirectly, less than 30% of the equity. For the purposes of the present regulatory policy, this definition will be retained. Currently, large English-language conventional television groups are expected to ensure that at least 75% of the priority programming they broadcast is produced by independent production companies. In addition, some specialty and pay services have obligations related to the broadcast of independent production and these requirements have been determined on a case-by-case basis.

90. The Commission is of the view that a balance needs to be struck between supporting the independent production sector, ensuring a diversity of creative voices, and providing broadcasters with the flexibility to acquire the rights to programming that they broadcast. With this objective in mind, the Commission sought comments on measures that would be appropriate in the context of the evolving broadcasting environment.

91. The Commission notes that broadcasters generally proposed an obligation whereby a portion of all programming aired must be produced by independent producers, while the creative sector proposed that, assuming an expenditure requirement related to programs of national interest, a portion of this programming should be reserved for independent production.

92. Members of the creative sector, as well as Bell Aliant/Bell Canada and the Ontario Media Development Corporation, also identified effective terms of trade agreements as one other measure by which to ensure a significant contribution from the Canadian independent production sector.

Commission's analysis and determinations

93. The Commission reiterates its expectation, set out in Broadcasting Regulatory Policy 2009-329, that the broadcasting and production sectors develop the appropriate frameworks from which to base individual negotiations respecting the ownership and

exploitation of digital rights. A uniform terms of trade agreement would identify those rights in independently-produced programs that will be sold to broadcasters, and those that will be retained by independent producers. With that issue defined, independent producers would be able to exploit those rights that they retained, and would thus be able to effectively plan and produce their programming. Broadcasters, in the same way, could focus on the exploitation of those rights that they had acquired. Flexibility and scope would be created for the development of Canadian programming on new platforms.

94. Nevertheless, while terms of trade remain unresolved and the impact of the CMF's new policies is yet to be known, the Commission remains obligated to ensure a significant contribution of programming from the independent production sector. In light of its decision to replace priority programming exhibition requirements with a group-based expenditure requirement for programs of national interest, the Commission considers that requiring a significant portion of programs of national interest to be produced by the independent production sector is the best way to fulfil the Act's objectives in this regard.
95. The Commission's view, therefore, is that designated groups should be subject to a condition of licence requiring that at least 75% of the spending requirement for programs of national interest be allocated to independently-produced programs. The appropriateness of the percentage will be discussed at the next licence renewals. This obligation will be monitored through the annual reports that broadcasters will be required to file with the Commission. Further, specialty services that currently have individual requirements relating to independent production will retain those requirements.

Regional production

96. In the last licence renewal decisions for the major television groups, the Commission stated that these groups, as national broadcasters, have a critical role to play in ensuring that all regions of the country are reflected in their programming.
97. The Commission continues to be of this view, and expects the major television groups to commission programs of national interest from all regions of Canada, engaging in levels of production activity that are commensurate with their presence in their respective markets.
98. Licensees will also be required to file annual reports on their regional production activities, as set out in the following section.

Annual reporting

99. To assess the effectiveness of the regulatory measures put in place to support the creation of programs of national interest and the independent production sector, and as an accountability mechanism, the Commission intends to impose, by condition of licence, a requirement that groups submit an annual report on their commitments related to programs of national interest.

100. This annual report will include data related to, although not limited to, the following:
- the titles of the programs that are created and the related expenditures;
 - a statement of whether the programming was regionally produced;
 - a statement of whether the programming was produced by an independent producer; and
 - an account of the service on which the programming was initially broadcast and when it was broadcast.
101. The format of these reports and the required details to be reported will be discussed with licensees at their next licence renewals.
102. The above annual reports are in addition to the annual returns already submitted by licensees to the Commission. The above annual reports are to be submitted on 30 November each year (i.e., three months following the end of the broadcast year), beginning at the end of the first year of the new licence term.

Continuing application of social policies

103. With respect to the Commission's various social policies – those governing accessibility, cultural diversity, and adherence to programming standards via regulations, industry codes and membership in the Canadian Broadcast Standards Council –, the Commission reiterates that the obligations related to these policies will continue under the group-based approach.

Ownership issues

104. In situations where a discretionary service is co-owned – that is, where control of a discretionary service is shared equally, or is unclear –, the licensee will be required to indicate, at the time of licence renewal, if that service is participating in the group-based approach and, if so, the designated group under which it will be participating.
105. In the case of changes in control of a service, including acquisitions and sales of assets, both parties will be required to demonstrate that each service has met its obligations, including its CPE conditions of licence, as may be affected by the flexibility afforded in the group-based approach.

Administrative renewals

106. To allow the broadcasting industry to adapt to both the new group-based approach set out in this regulatory policy and the Commission's determinations resulting from the additional proceedings announced herein, the Commission will renew, for a one-year

period ending on 31 August 2011, the broadcasting licences of all television licensees controlled by a designated group for which the licences expire 31 August 2010, under the same terms and conditions as those set out in the current licences, on an administrative basis. The Commission will be issuing administrative renewal decisions for these services prior to 31 August 2010.

107. In Broadcasting Notice of Consultation 2010-169, also issued today, the Commission is seeking comment on the appropriateness of establishing a trial market(s) for the digital television (DTV) transition. Should the Commission decide that the implementation of a trial market(s) is appropriate, it would not be the Commission's intention to renew the authorizations for the operation of analog transmitters in the selected trial market(s) beyond the date that is mandated for their transition.

Appropriate length of licence term

108. It is the Commission's intention, given the pace of change in the broadcasting environment and the desire to assess the impact of the new group-based approach, to impose a five-year, rather than a seven-year, licence term for licences controlled by the designated groups.
109. At the next licence renewal process, licensees will have an opportunity to comment on the appropriateness of a five-year licence term.

Application of the group framework – detailed determinations

110. A summary of the above determinations relating to the group-based requirements is set out in the appendix to this regulatory policy. Below, the Commission sets out qualifications on the manner in which the group-based approach will apply.

French-language broadcasters

111. The Commission notes that the group-based policies set out above, with two exceptions, apply only to large, private English-language ownership groups. The amendment to the *Television Broadcasting Regulations, 1987*, which lowers the minimum Canadian content requirements for conventional television stations from 60% to 55%, will apply to French-language conventional television licensees, as will the Commission's decision to no longer include licence-fee top-ups as eligible Canadian expenditures for the purpose of fulfilling CPE requirements. Although English- and French-language television broadcasters share common elements, the Commission has determined that the group-based approach put forward in this regulatory policy addresses issues that are of far greater relevance to the former than to the latter. The Commission further notes that it has the authority to impose different requirements on English- and French-language television broadcasters on the basis that they operate under different conditions and may have different requirements.
112. The Commission acknowledges that French-language conventional television broadcasters, although not currently subject to any expenditure requirement, already

allocate a large proportion of their expenditures to the creation and acquisition of Canadian programming. Furthermore, the Commission notes that the French-language television market continues to demand and support large quantities of original Canadian programming in all genres made in the French-language. Consequently, the Commission has determined that the imposition of a CPE requirement on French-language television broadcasters is neither necessary nor appropriate at this time.

113. While there are issues in the French-language television market relating to the creation of programs of national interest and to access to the broadcasting system by independent producers, the Commission considers that it would be more efficient to examine appropriate requirements for French-language conventional television broadcasters on a case-by-case basis at licence renewal. In this regard, as announced in Broadcasting Public Notice 2009-411, the Commission intends to hold a proceeding in 2011 to consider the next licence renewals for TVA Group Inc. (TVA) at the same time that it reviews the licence obligations of V (formerly known as TQS). The licence renewals of the CBC will be held in this time frame so that its important role in French-language markets can be evaluated.
114. The Commission intends to discuss the most appropriate approach to take in regard to these issues in order to meet the objectives of the Act, as well as the relevant obligations for French-language conventional television broadcasters and the relevance of a group-based approach, at the above-mentioned hearings.

Large ownership groups

115. The Commission considers that allowing greater flexibility to large ownership groups so that each may allocate its resources to the television services that are most effective in reaching audiences and generating revenues will benefit the broadcasting system as a whole. It is the Commission's determination that a group-based approach, at least initially, will be applied to private, English-language ownership groups that generate more than \$100 million in annual revenues from conventional television stations, and own at least one specialty or pay programming service (designated groups). Accordingly, as noted above, the groups meeting the criteria at this time are CTVgm, Canwest and Rogers.
116. The Commission recognizes the important role played by the public broadcaster towards the fulfillment of the objectives of the Act. The Commission also recognizes the continuing support provided by both the English- and French-language CBC to the creation of Canadian programming in both official languages. The CBC has never had difficulty in meeting its regulatory requirements with respect to Canadian programming or programs of national interest. In the period prior to 1999, when large private conventional television stations were subject to CPE requirements, no such requirements were imposed on the CBC.

117. Accordingly, the Commission does not consider that the flexible spending requirements set out in this group-based approach should apply to the CBC. Nevertheless, the Commission intends to review all of the CBC's conventional and specialty television licences at its upcoming licence renewal and will, at that time, determine whether any of the elements of the group-based approach are applicable to the public broadcaster.

Application to other ownership groups

118. In principle, the Commission considers that a modified group-based approach with the associated flexibility could apply to ownership groups other than designated groups. The Commission will consider applications for licence amendments from other ownership groups, including those controlling multiple specialty and pay services, to allow flexibility in the allocation of their services' CPE obligations.

Services in the same language for each group

119. Recognizing that the markets in each official language operate under different conditions and may have different requirements, the Commission will only consider an ownership group's services operating in the same language for the purposes of determining those services that should be included under an ownership group. In light of its determination to exclude French-language television services from its group-based approach, the Commission determines that services designated as bilingual will also be excluded from ownership groups for the purposes of the group-based approach.

Exclusion of mainstream sports and national news specialty services

120. In Broadcasting Public Notice 2008-100, the Commission stated its intention to introduce competition between Canadian services operating in the genres of mainstream sports and mainstream national news, and that it would be prepared to consider competitive applications in other genres should an applicant demonstrate that the genre met the criteria set out in that public notice. The Commission's approach to such services is to ensure that they are treated equitably and in a competitively neutral manner. The Commission has determined that it would be inappropriate to include these services in the group-based approach because the flexibility afforded by this approach would result in designated groups being able to direct significant amounts of spending into news or sports programming, which is already profitable. In addition, including these services in a group-based approach could afford a competitive advantage to large groups by providing them with further resources through flexible spending allocations and, thus, would be inconsistent with the intent of Broadcasting Regulatory Policy 2009-562.
121. Furthermore, mainstream sports and national news specialty services do not require regulatory support as these services currently have among the highest levels of CPE and exhibition of Canadian programming. The representatives from the creative sector expressed concern that a flexible CPE obligation could result in spending on

high-priced sports programming rights at the expense of independent production, Canadian drama, documentaries or children's programming.

122. Accordingly, competitive mainstream sports and mainstream national news specialty services will be excluded from consideration when determining the CPE requirements for designated groups.

Inclusion of Category B specialty services with one million or more subscribers

123. As noted above, on 1 September 2011, Category 2 specialty services will be re-designated as Category B specialty services. These services are licensed under an open entry approach and, as such, have limited Canadian content obligations because they are not assured distribution by BDUs and do not enjoy genre protection vis-à-vis other Canadian services. However, the Commission notes that these services enjoy genre protection from foreign services and considers that, as they become more popular and profitable, their contribution to the Canadian broadcasting system should be adjusted to reflect their new position in the system. The Commission considers that one million subscribers represents a significant market presence in the English-language market. Accordingly, Category B specialty services controlled by a designated group and with one million or more subscribers at the time of licence renewal will, as described in paragraph 49, be subject to a CPE requirement.

Exclusion of video-on-demand and pay-per-view undertakings

124. In Broadcasting Notice of Consultation 2009-411, the Commission envisioned that the framework developed would be applied to other groups that have a different combination of services, such as groups consisting of more discretionary services than conventional television stations or groups consisting of programming undertakings including VOD and PPV services.¹⁰ The Commission noted that it anticipates that VOD services, and in particular subscription VOD services that resemble linear television, will play an increasingly important role in the near-to-mid-term as their availability grows. Accordingly, the Commission specifically sought a response to the following question: If there is a need to transition VOD contributions from that of payments to programming funds to a new common CPE requirement, how should that be accomplished?
125. While the Commission did not pose any questions specific to PPV, the conceptual model presented within Broadcasting Notice of Consultation 2009-411 contemplated CPE requirements for both VOD and PPV, and inclusion in the group-based approach.
126. The parties that intervened on this issue, including most of the cable operators and the CFTPA, generally felt that neither VOD nor PPV services should be included in determining a group CPE obligation, either because it might be premature or because of the differences between such services and linear television. The CBC and the WGC, on the other hand, supported the inclusion of VOD in the group licensing framework

¹⁰ VOD and PPV undertakings are currently obligated to make a contribution to programming funds but do not have a CPE requirement.

and group CPE requirement. The WGC submitted that VOD and PPV should be included to the extent that these types of service operate in a manner analogous to linear broadcasting. Bell Canada/Bell Aliant supported the inclusion of subscription VOD services that are associated with a linear programming service, but not for the other types of VOD service. While ACTRA and the DGC were of the opinion that CPE levels should be set for subscription VOD services, they did not explicitly include them in a group CPE obligation.

127. Canadian audiences have begun to embrace VOD services and continue to consume PPV services. The variety and quantity of popular programming is increasing on the VOD platform, and represents an important opportunity to continue serving Canadians within the regulated television system.
128. Subscription VOD services that offer linear television programming in alternative ways are still nascent, and various business models and products are being offered through a variety of corporate partnerships. The outlook for the final form of these offerings is uncertain. To date, these services have little revenue. Accordingly, the Commission considers that the inclusion of VOD and subscription VOD services in the new group framework would be premature and would not contribute significantly to fulfilling the policy objectives of the Act.
129. As a result of the differences between PPV services and other linear programming services, the Commission is at this time excluding PPV services from the group-based approach.

Educational broadcasters

130. The Commission notes that educational broadcasters do not form part of a large group and as such will continue to be regulated on a stand-alone basis.

Part 2 – Revenue support for English- and French-language conventional television broadcasters

131. As noted in Broadcasting Notice of Consultation 2009-411, the Commission is confident that conventional television broadcasters can develop successful business models if supported by revenue streams that are predictable and that reflect the value of the programming they broadcast. The Commission sets out below its determinations on issues relating to the Local Programming Improvement Fund (LPIF) and on issues relating to VFS. These determinations apply to all licensed conventional television broadcasters.

Local Programming Improvement Fund

132. In Broadcasting Public Notice 2008-100, the Commission established the LPIF to support local programming in non-metropolitan markets. In that notice, the Commission established the level of BDU contribution to the LPIF at 1% of gross annual broadcasting revenues. Further, the Commission determined that access to the

fund would be conditional upon incremental spending on local programming by broadcasters. As a result of the impact of the economic downturn on conventional television broadcasters, the Commission reviewed the terms and conditions of the LPIF and, in Broadcasting Regulatory Policy 2009-406, as corrected by Broadcasting Regulatory Policy 2009-406-1, announced the provisional terms and conditions for the LPIF that would address the impact of the current economic situation. As part of this review, the requirement for incremental spending on local programming was suspended, and the required contribution by BDUs was raised to 1.5% of their gross revenues.

133. The Commission noted that these new terms and conditions were only intended to be in effect for the 2009-2010 broadcast year and that it was its intention to review the terms and conditions of the LPIF for implementation on a longer-term basis and determine whether it should revert to the initial terms and conditions set out in Broadcasting Public Notice 2008-100.
134. Broadcasters submitted during the public hearing that the LPIF, as currently defined with a contribution of 1.5% of gross revenues by licensed BDUs and without a requirement for incremental spending on local programming by broadcasters, has contributed to maintaining the operation of small market stations. Accordingly, the Commission determines that the LPIF, as it currently exists for English- and French-language, private and public conventional television stations, will be maintained.
135. However, it is the Commission's intention to conduct, through a public process, a comprehensive review of the LPIF in its third year of operation – the 2011-2012 broadcast year. This public process will seek additional evidence in order to determine whether the LPIF is fulfilling its objectives and whether its terms and conditions are appropriate. On the basis of this review, the Commission will determine whether the LPIF should be maintained as originally defined, modified or discontinued. This review would not preclude the Commission from making adjustments to the LPIF in the interim.
136. For the sake of clarity, the Commission notes that, although the requirement for incremental spending has been waived, it still expects recipients of LPIF monies to demonstrate, taking into consideration the indicators of success set out in paragraph 377 of Broadcasting Public Notice 2008-100, how these monies have been used to make measurable improvements to the on-screen local programming available to audiences in their local markets. The Commission expects recipients to provide such evidence in the LPIF annual reports that they are required to submit to the Commission, as well as in their licence renewal applications. Further, as part of their licence renewal applications, the Commission expects recipients of LPIF monies to demonstrate how they intend to integrate the above-mentioned indicators of success into their local programming strategies on a going forward basis. This information will also contribute to the Commission's analysis of the overall policy during the review of the LPIF in its third year of operation.

137. In addition, the Commission reiterates that LPIF payments will be calculated using a three-year average of a licensee's local programming expenditures net of monies that were received from the LPIF.
138. The Commission reminds all parties that, beyond the terms of this regulatory policy, the terms and conditions of the LPIF set out in Broadcasting Public Notice 2008-100, in Broadcasting Regulatory Policy 2009-406, as corrected by Broadcasting Regulatory Policy 2009-406-1, and in Broadcasting Information Bulletin 2009-686, remain applicable.
139. The Commission reminds all broadcasters receiving LPIF monies that the review of monthly television logs submitted to the Commission is one of the mechanisms it uses in order to determine compliance with local programming obligations and commitments, which are a condition for the release of LPIF monies. Failure to submit accurate television logs in the manner prescribed in section 10 of the *Television Broadcasting Regulations, 1987*, as amended from time to time, may impact the distribution of LPIF monies to otherwise eligible stations.
140. Furthermore, to ensure accountability and transparency, stations eligible to receive funds from the LPIF will be required, commencing with the 2009-2010 broadcast year, to submit a Statement of Direct Local Programming Expenses (the Statement) for each broadcast year. The Statement, to be submitted by 30 November, must be accompanied by the licensee's external auditor's report attesting to the fairness of the Statement, in accordance with the definition of "direct expenses" set out in paragraph 33 of Broadcasting Regulatory Policy 2009-406.

Value for signal

141. In Broadcasting Notice of Consultation 2009-411-3, the Commission brought forward for consideration the question of whether or not a negotiated solution for compensation for the fair value of local conventional television signals was appropriate.

Appropriateness of a value for signal regime

142. The larger conventional television broadcasters (i.e., CTVgm, Canwest, CBC, TVA and V) supported a VFS regime, arguing that conventional television broadcasters are facing an economic crisis. They submitted that conventional television broadcasters have access to fewer advertising dollars, their only source of revenue, than in the past, because of audience fragmentation, whereas specialty services, a key cause of that fragmentation, have access to both subscription and revenue dollars. They further argued that local television is not free for most consumers since the majority of Canadian households subscribe to a BDU and pay for stations through their monthly bill payments, and added that the BDUs do not pass a portion of those payments to local broadcasters. The broadcasters asserted that there was value in conventional television. V added that more than half of the viewing hours of BDU subscribers were to conventional television.

143. The broadcasters controlling mainly discretionary services expressed concern that BDUs would seek to recover any revenues directed to conventional television broadcasters from specialty and pay television services. They noted that the Commission would need to ensure that discretionary services do not suffer as a result of a VFS regime.
144. BDUs with the exception of Quebecor Media Inc. (Quebecor) were opposed to a VFS regime and submitted that broadcasters did not provide coherent, transparent and complete evidence in support of a VFS regime as required by the Commission in Broadcasting Public Notice 2008-100. As conventional television broadcasters' signals are available free over the air and increasingly on broadcasters' websites, the large BDUs argued that they should not have to pay additional compensation for the distribution of those signals. Quebecor, on behalf of its subsidiary Videotron Ltd., supported a negotiated VFS regime under the condition that compensation for conventional television broadcasters was achieved by a rebalancing between specialty/pay services and conventional television to avoid a rate increase for customers.
145. BDUs with the exception of Quebecor submitted that, while local conventional television broadcasters do not receive direct financial compensation from BDUs, they receive significant and valuable benefits from having their signals distributed by BDUs, including mandatory and priority carriage, simultaneous substitution, and the assurance that their programming services will be delivered to the entire subscriber base of a BDU with a quality that is superior to the over-the-air signals, making it more attractive to advertisers. They also noted the contributions that BDUs make to funds such as the CTF and to other independent production funds.
146. Those BDUs were of the opinion that the financial crisis facing conventional television broadcasters was a direct result of imprudent spending on American programming, specialty services, and, in some cases, non-broadcasting assets, and that a VFS regime would not save local television. They were of the further opinion that the conventional television broadcast groups were, in part, responsible for fragmentation as they own many specialty services, whereas the BDUs own very few specialty services. BDUs also argued that a VFS regime raises potential trade issues.

Implementation approach

147. If a VFS regime were to be implemented, the large conventional television broadcasters and the large BDUs supported negotiation versus an imposed fee. The smaller broadcasters and smaller BDUs, including MTS Allstream Inc. and Bragg Communications Incorporated, expressed concern over their lack of negotiating power and preferred a set fee. The smaller BDUs also submitted that both smaller BDUs and exempt BDUs (as per Broadcasting Notice of Consultation 2009-173) should be exempt from a VFS regime as they face additional challenges associated with carriage of services.

148. The conventional television broadcasters submitted that without mechanisms to protect signal integrity and program rights, such as simultaneous substitution and program deletion, it would be impossible to have fair negotiations. The conventional television broadcasters supported making carriage of the U.S. 4+1 signals¹¹ by BDUs contingent upon successful VFS negotiations. However, the BDUs opposed this view and submitted that the potential loss of U.S. 4+1 signals would likely result in consumer outrage. They submitted that fair market value could only be established if the conventional television broadcasters did not also have mandatory carriage. CTVgm explicitly supported a regime wherein conventional television stations could choose between mandatory carriage and VFS. The BDUs opposed VFS for stations that received LPIF or that were publicly funded. The broadcasters, however, submitted that the LPIF was not a replacement for VFS.
149. Quebecor was of the opinion that the entire industry needs criteria from the Commission to establish the basis for negotiating a rate. The CBC proposed a 9(1)(h) distribution order that would identify a minimum list of factors to be considered by parties in their negotiations, which both CTVgm and Canwest supported (with Canwest adding some additional factors). However, BDUs generally did not support “artificial constraints” or pre-conditions on negotiations. As well, Shaw Communications Inc. and Cogeco Cable Inc. submitted that such an order was inappropriate and would go beyond the legislative scope of section 9(1)(h) of the Act.
150. The large broadcasters supported the ability for either party to submit a request to the Commission for final and binding arbitration if the parties could not reach a deal. The CBC submitted that the Commission should prohibit withdrawal of a signal by either a broadcaster or a BDU, whereas CTVgm supported signal withdrawal, as long as program rights were respected if an agreement could not be reached. The large BDUs, including Quebecor, did not support binding arbitration, citing concerns that it would likely lead to a significant increase in signal compensation across the industry in a relatively short period of time, with a corresponding impact on consumers.

Commission’s analysis and determinations

151. In Broadcasting Public Notice 2008-100, the Commission considered whether or not to grant a fee for carriage to conventional television broadcasters, and elected not to do so. However, the question considered in the current proceeding is a substantially different one. In exploring the issue of a negotiated fair value for signals, the Commission is considering whether market forces can be invoked to resolve what has now become a long standing area of tension between conventional television broadcasters and BDUs.

¹¹ “U.S. 4+1 signals” refers to the set of signals that provide the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network.

152. In approaching the issue, the Commission has been guided by specific provisions of the Act. Section 3(1)(e) states that “each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming,” while section 3(1)(f) states that “each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian [...] resources [...].”
153. With respect to the public broadcaster, the Commission notes that section 3(1)(m)(vii) of the Act states that the programming provided by the CBC should “be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose.” As explained further below, the regime foreseen by the Commission would allow broadcasters to require program deletion when negotiating for a fair value for the distribution of their programming services. In light of the objective above, the Commission considers that it would be inconsistent to permit the CBC to require deletion of its programming from a BDU and hence prevent the public from receiving its programming. Moreover, during its appearance at the hearing, the CBC indicated that it fully understands the importance of its mandate and clearly agrees with the Commission’s position in that regard, as it spontaneously stated that it would not “play with threatening to pull our signal or having our signal not negotiated or not carried by the BDU.”¹² Accordingly, the Commission has determined that the market-based regime set out below will apply only to private local television stations. The distinctive situation and needs of the CBC will be addressed in the context of the public broadcaster’s next licence renewal.
154. The Commission reiterated in Broadcasting Public Notice 2008-100 that where regulation is necessary it should be as targeted as possible and impose the least burdensome constraints; that industry solutions should be preferred to regulatory intervention; and that the broadcasting system, as a whole, should be calibrated such that no single player or group of players can exercise undue influence.
155. The portion of this regulatory policy that has dealt with group-based licensing has focused on the effective continuation of vibrant and effective Canadian programming in the context of the larger groups that now make up the Canadian broadcasting landscape. It now remains to determine whether each element of the broadcasting system is contributing in an appropriate way, and whether, in light of the enormous and accelerating changes in the system, it is appropriate to view the relationship between BDUs and broadcasters in a way that differs from that which has become established.
156. In 1971 the Commission published its Policy Statement on Cable Television, entitled, appropriately, “Canadian broadcasting – ‘A single system’.” A key policy principle set out in that report was that “television stations are the suppliers, and cable television systems are the users. Thus the basic principle involved is: one should pay for what he uses to operate his business.” While this policy was not implemented for conventional television in 1971 or in the years following, the principle remains valid today.

¹² See lines 1955 to 1957 of volume 2 of the transcript for this proceeding, which is available on the Commission’s website at www.crtc.gc.ca under “Public Proceedings.”

157. The other policies adopted in the 1971 report and implemented in the context of the technology and industrial structure that then existed have formed the basis of the relationship between BDUs and broadcasters from that time forward. Forty years is a very long time in the broadcasting world. The concepts of mandatory carriage, preferential channel placement, community access, and simultaneous substitution were articulated in that statement and have been developed and modified thereafter.
158. But while some features have remained, enormous changes have also occurred, and continue to occur. Direct-to-home (DTH) satellite services were licensed in 1995 and 1996, with operations beginning in 1997. Specialty services were first licensed in 1984 and digital Category 1 specialty services in 2000. To protect and promote the growth of these nascent specialty services, they were licensed with “genre protection,” which ensured that they had their own space, essentially free of direct competition, in which to grow. They were also given guaranteed carriage by BDUs. Very significantly, they were granted the right to receive wholesale fees from the BDUs that carried them. The system thus moved into the multi-channel universe with different rules applying to different programming services depending, to a considerable degree, on when they had begun broadcasting. Category 2 specialty services, it is to be noted, were provided limited genre protection and were not given guaranteed carriage by BDUs, but were given the right to receive wholesale fees.
159. Many specialty services have enjoyed large popularity with Canadian audiences. As noted above, increasing fragmentation has had the obvious negative effect of reducing the profitability of conventional television broadcasters. Further, very large fragmentation continues as alternative new media platforms become widely adopted. Consequently, there has been a reduction in the ability of conventional television broadcasters to meet their obligations effectively, under the Act, to contribute to the creation and presentation of Canadian programming of a high standard.
160. While the recent economic climate, in which advertising revenues have suffered, has not been favourable for private conventional television broadcasters, BDU revenues have, since 1971, continued to grow at a far greater rate than those of television stations. In that year, private television revenues were \$115.8 million, which compared very favourably with cable revenues of \$66.6 million.¹³ In 2009, the positions had become reversed. Cable BDU basic and non-basic revenues were \$5.1 billion, and DTH and multipoint distribution system basic and non-basic revenues were a further \$2.2 billion, for a total of \$7.3 billion.¹⁴ Private television revenues trailed far behind at \$2.2 billion.¹⁵ Revenue figures do not tell the complete story, but the dramatic change in proportions indicates a significant shift in market positions.

¹³ See *Special Report on Broadcasting in Canada, 1968-1978*, Minister of Supply and Services Canada, 1978, page 88 (private television revenues) and page 93 (cable BDU revenues).

¹⁴ *Broadcast Distribution – Class 1, 2 and 3 Statistical and Financial Summaries 2005-2009* (<http://www.crtc.gc.ca/eng/stats1.htm>)

¹⁵ *Conventional Television Statistical and Financial Summaries 2005-2009* (<http://www.crtc.gc.ca/eng/stats.htm>)

161. A large piece of the puzzle is that private conventional television broadcasters, unlike specialties, are not paid for their signals by the BDUs that carry those signals. At the hearing, a frequently repeated position by BDUs was that, since they could now receive and disseminate those services for free, they had no intention of negotiating a fair value or paying for those services, notwithstanding that they constitute part of the single Canadian broadcasting system, as provided in section 3(2) of the Act. And, as noted earlier, private conventional television broadcasters pay large amounts, not just for Canadian programs, but for foreign programs as well. The Commission has repeatedly been told that broadcasting such foreign programs is essential to the financial viability of conventional television broadcasters, and has accepted that position.
162. When broadcasters acquire program rights, those rights are, almost invariably, territorial. That is, a broadcaster pays for the exclusive right to broadcast a specific program in a defined territory for a defined period of time. Of course, the terms of such agreements are the focus of strong commercial attention, and there is no uniformity of result. But whatever the terms negotiated by the broadcaster, BDUs are currently permitted to carry the broadcasters' programming services without paying for the right to distribute them. BDUs, however, are obligated to provide broadcasters with benefits such as priority carriage and simultaneous substitution. Nevertheless, the system is not working well in 2010 in ensuring that conventional television broadcasters have the means to continue to meet their obligations under the Act.
163. As noted above, as set out in Broadcasting Public Notice 2008-100, the Commission was not prepared to impose a fee for carriage. However, the Commission finds that, in order to fulfil the policy objectives set out in section 3(1) of the Act, the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. The system should be such that privately-owned broadcasters that own programs or have paid for the exclusive right to disseminate programs can negotiate for payment with BDUs, which, in turn, further disseminate those programs. By establishing a regime in which market forces can function effectively, the broadcasting system will benefit through the recognition of the fair value of programming services. This approach is consistent with the market-based negotiations that increasingly prevail on all other platforms, including discretionary services, VOD, and online and mobile platforms.
164. The regime that the Commission would propose to implement is set out below.
 1. Licensees of private local television stations would choose whether i) they will negotiate with BDUs for the value of the distribution of their programming services, failing which they will be able to require deletion of the programming they own, or for which they have the exhibition rights, from all signals distributed in their market, or ii) they will continue to benefit from existing regulatory protections.

2. Licensees of private local television stations would make their choice by a date set by the Commission, and this choice would be valid for a fixed term of three years.
3. If a licensee of a private local television station chose option i):
 - a) It would forego all existing regulatory protections related to the distribution of local television signals by BDUs, whether imposed by regulation or by condition of licence, including mandatory distribution and priority channel placement on analog basic, and simultaneous substitution.
 - b) BDUs would be required, at the request of private local television stations, to delete any program owned by the licensee of that local television station or for which it has acquired exclusive contractual exhibition rights.
 - c) Deletions would be exercised against the signal of any programming undertaking distributed by the BDU, whether foreign or domestic, affiliated or not, including that of the private local television station making the request.
 - d) It could negotiate with a BDU for a fair value in exchange for the distribution of its programming service in lieu of the deletion rights set out in b) and c). This compensation could be monetary, non-monetary (e.g., simultaneous or non-simultaneous substitution, carriage arrangements, marketing and promotion), or both, and could be negotiated on an individual station basis or as part of a broader negotiation with entire ownership groups.
 - e) Parties to the negotiation would be given a fixed period after the date on which the licensee of a private local television station chose option i) to conclude negotiations, during which the existing regulatory protections would continue to apply. This period could be shortened or extended by agreement between the parties.
 - f) The Commission would minimize its involvement in the terms and conditions of the resulting agreements, intervening only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request.
4. If the licensee of a private local television station chose option ii), all regulatory protections for private local television stations in force at the time the choice is made, and as amended during the term in which that choice is valid, would remain in force. These would include, where provided by regulation or by condition of licence: mandatory carriage, priority channel placement on analog basic, program deletion, simultaneous or non-simultaneous substitution, and any payments to individual stations or funds

approved by the Commission in lieu of these obligations, including payments for carriage of distant signals as provided for in Broadcasting Public Notice 2008-100.

165. There is, however, a significant potential impediment to the implementation by the Commission of this market-based resolution. In response to Broadcasting Notice of Consultation 2009-411, the Commission was presented with two legal opinions, both worthy of consideration. One submitted that the Commission had the requisite authority to introduce a regime of broadcast regulation that would have the effect of requiring appropriate negotiation, such as those described above, between broadcasters and BDUs; the other took the position that BDUs have a continuing right to disseminate the broadcaster's over-the-air signal without negotiation or remuneration by virtue of the provisions of the *Copyright Act*.
166. While the Commission has found that it is necessary to provide the licensees of private local television stations with the right to negotiate a fair value for the distribution of their programming services by BDUs, it recognizes that there is a valid dispute between parties over the Commission's legal authority to impose such a regime. Therefore, given the importance of the question to the ability of the Commission to ensure that the objectives of the Act are met, and given the continuing need for certainty in dealing with the approaching group licensing renewals, the Commission has decided to refer the question of its jurisdiction to the Federal Court of Appeal (the Court). The Commission will request disposition of the issue on an expedited basis.
167. The question to be put to the Court, in general terms, will be the following:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

168. In Broadcasting Order 2010-168, also issued today, the Commission refers this question to the Court for expedited hearing and determination.

Part 3 – Other issues relating to revenue support for English- and French-language conventional television broadcasters

Advertising on the video-on-demand platform

169. In Broadcasting Public Notice 2008-101, the Commission set out a preliminary view regarding advertising on the VOD platform, specifically, that it would be appropriate to eliminate all limits on advertising on that platform, provided that the programming is obtained from a Canadian rights holder. In that public notice, the Commission also called for comments on a proposed regulatory framework for VOD undertakings.

170. Broadcasting Regulatory Policy 2010-190, to be issued shortly, sets out the positions of the parties in regard to this issue. In that regulatory policy, the Commission, by majority decision, makes the following determinations relating to advertising on the VOD platform:

- VOD licensees may only advertise in programming for which the VOD rights have been acquired from (a) a licensed Canadian broadcaster unrelated to the VOD undertaking, or (b) a related broadcaster that has also acquired the linear rights to the program.¹⁶
- Advertising on the VOD platform shall not be restricted to new forms of advertising.

Sale of commercial advertising in the local availabilities of non-Canadian specialty services

171. In Broadcasting Public Notice 2008-100, the Commission considered that, in certain circumstances, revenues from the sale of advertising in the local availabilities of non-Canadian specialty services could provide a net benefit to the Canadian broadcasting system. It noted, however, that any new source of revenue should increase the funds available for the creation of new Canadian programming and accelerate the introduction of new forms of advertising that will benefit both broadcasters and BDUs.
172. In this regard, in Broadcasting Public Notice 2008-102, the Commission called for comments on a proposed framework for the sale of commercial advertising in the local availabilities of non-Canadian specialty services that are distributed across Canada by various BDUs.
173. Broadcasting Regulatory Policy 2010-189, to be issued shortly, sets out the positions of the parties in regard to this issue. In that regulatory policy, the Commission sets out its determination that, since a net benefit to the Canadian broadcasting system has not been sufficiently demonstrated, it is appropriate to continue its current policy with respect to the use of local availabilities, as set out in Broadcasting Public Notice 2006-69.
174. However, the Commission continues to be of the view that new forms of advertising have the potential to provide substantial benefits to both broadcasters and distributors and that accelerating their development would benefit the broadcasting system as a whole. Accordingly, the Commission will, in its examination of any future applications by BDUs with respect to the sale of commercial advertising in local availabilities, place significant emphasis on the degree to which the proposals put forward will advance or accelerate the evolution of new forms of advertising. The details of the Commission's determination on this matter will be set out in Broadcasting Regulatory Policy 2010-189.

¹⁶ The determination set out in (b) is by majority decision.

Direct-to-home policy review

175. In the context of this proceeding, the Commission heard a number of concerns from television station operators with respect to DTH services and, in particular, in relation to the distribution of additional conventional television stations and the performance of simultaneous substitution. The Commission anticipates that there will also be changes in the broadcasting industry over the coming years that will have an impact on the Commission's DTH policies as a result of the upcoming digital transition, the increase in high definition (HD) programming offerings, the introduction of a new DTH service, and the addition of new and increased satellite capacity by the existing DTH providers, as well other upcoming issues that will be before the Commission.
176. In light of the above, as noted in Broadcasting Regulatory Policy 2010-162, the Commission will conduct a comprehensive review of its policies for all DTH services prior to the next licence renewal proceedings for such services.

Part 4 – Digital television transition for English- and French-language conventional television broadcasters

177. Canadian television is in the process of converting its over-the-air transmitters from analog to digital. The transition to DTV will provide significant benefits to Canadians. In addition to providing television viewers with better picture and sound, including HD programming, the DTV transition will allow for more services through multiplexing.¹⁷ Government policy also requires that spectrum be made available for public safety uses and greater wireless competition and innovation through the repurposing of channels 52 to 69.

The mandatory markets

178. In Broadcasting Public Notice 2007-53, the Commission established 31 August 2011 as the date for the transition from analog to digital conventional television in Canada. Subsequently, in Broadcasting Regulatory Policy 2009-406, recognizing that the costs associated with the digital transition may make it impractical for some stations located in smaller markets to convert, the Commission established a baseline group of mandatory markets for transition to digital. These include the National Capital Region and all provincial and territorial capital cities, as well as markets either served by multiple originating stations (including CBC stations) or with populations greater than 300,000.
179. In light of comments received in this proceeding, the Commission considers that the markets of Lloydminster, Alberta; Thunder Bay, Ontario; and Rouyn-Noranda/Val d'Or, Quebec, should be added to the list of mandatory markets as multiple originating stations operate in those markets. A revised list of mandatory markets for the DTV transition is set out below.

¹⁷ Multiplexing is the use of one digital transmitter by one or more broadcasters to transmit several programs at the same time.

- **British Columbia:** Vancouver, Victoria
- **Alberta:** Calgary, Edmonton, Lethbridge, Lloydminster
- **Saskatchewan:** Regina, Saskatoon
- **Manitoba:** Winnipeg
- **Ontario:** Toronto (includes Barrie and Hamilton since their stations compete in the Toronto market), London, Windsor, Kitchener, Thunder Bay
- **Quebec:** Montréal, Québec, Trois-Rivières, Sherbrooke, Rivière-du-Loup, Saguenay, Rouyn-Noranda/Val d'Or
- **New Brunswick:** Saint John, Moncton, Fredericton
- **Nova Scotia:** Halifax
- **Prince Edward Island:** Charlottetown
- **Newfoundland and Labrador:** St. John's
- **Yukon:** Whitehorse
- **Northwest Territories:** Yellowknife
- **Nunavut:** Iqaluit
- **National Capital Region (Ottawa-Gatineau)**

180. At the 16 November public hearing, certain broadcasters submitted that it would be impractical or impossible to complete the DTV transition in all of the mandatory markets by the prescribed deadline. Others submitted that it would be preferable to adopt a staggered rollout of DTV in these markets that would extend beyond 31 August 2011.

181. The Commission notes that a number of digital transmitters are already operational, that many broadcasters intend to convert the majority of their transmitters in these markets by 31 August 2011, and that the transition has already been completed in the U.S. The Commission further notes that this date was first announced in 2007, fully four years in advance. In order to ensure that Canadians obtain the benefits of the transition, as noted above, and to ensure the competitiveness of Canadian telecommunications services, the Commission considers it important to maintain 31 August 2011 as the date for the transition to DTV for conventional television stations in the mandatory markets and to ensure that channels 52 to 69 are made available for new uses, as described above, by no later than that date. Consequently, the Commission does not intend to renew authorizations for full-power analog transmitters operating in the mandatory markets or on channels 52 to 69 outside the mandatory markets beyond 31 August 2011.

182. The Commission notes that it has recently streamlined its licensing framework for DTV transmitters with the issuance of Broadcasting Regulatory Policy 2010-69. Notwithstanding the significantly expedited licensing process, the Commission expects applications for post-transition DTV transmitters to be filed by the following dates in order to ensure an orderly transition.

- 31 August 2010 for the markets of Vancouver, Calgary, Edmonton, Winnipeg, Toronto, Ottawa-Gatineau, Montréal, Québec and Halifax; and

- 31 December 2010 for all other mandatory markets.

Outside the mandatory markets

183. The Commission is encouraged by the broadcasters that stated their intention to build digital transmitters outside the mandatory markets. Broadcasters should continue to explore opportunities such as multiplexing to ensure that Canadians continue to have access to free (over-the-air) conventional television services.
184. The Commission acknowledges, however, that some analog transmitters operated by broadcasters outside the mandatory markets may not be converted to digital, and that other broadcasters may cease operating over-the-air transmitters altogether. In order to maintain Canadians' access to these services, the Commission recognized, in Broadcasting Regulatory Policy 2009-406, the merits of permitting BDUs to provide a package of local and regional conventional television signals (a local package) at no charge.
185. Of the limited number of terrestrial and DTH satellite providers that have indicated an interest in offering a local package, most have linked the provision of such an offering to a number of regulatory concessions in order to partially offset the costs of providing the local package at no charge. The Commission notes that most stakeholders did not support the requested concessions, and that a number of parties questioned the necessity of the proposed local package altogether. The Commission is not persuaded at this time that it will prove necessary to grant the requested regulatory concessions.
186. However, the Commission remains supportive of initiatives intended to ensure that Canadians do not lose access to free conventional television services as a result of decisions it has been called upon to make in managing the digital transition. To this end, in Broadcasting Notice of Consultation 2010-169, the Commission is seeking comment on the terms and conditions associated with a general authorization, pursuant to Broadcasting Regulatory Policy 2009-546, that would grant BDUs an exception to section 5 of the *Broadcasting Distribution Regulations* so as to permit them to distribute a local package without having to provide subscribers with the full basic service.
187. Given their position regarding the construction of digital transmitters, a number of broadcasters submitted that analog transmitters outside the mandatory markets should be permitted to continue operating beyond 31 August 2011 unless they occupy spectrum that is to be re-assigned or they cause interference to digital stations.
188. In light of the above, provided that the technical requirements of the Department of Industry are met, the operation of an analog transmitter outside the mandatory markets on channels 2 to 51 may continue beyond 31 August 2011, except where its operation would prevent a digital transmitter from being implemented. In this regard, the Commission notes that, should a broadcaster outside the mandatory markets choose not to convert to digital, that broadcaster must either move its service to a channel outside the 52 to 69 range, or cease operations of its analog transmitter(s).

189. The Commission currently provides for the mandatory carriage and simultaneous substitution of digital signals of conventional television stations only in those markets in which the affected stations operate a digital transmitter. In Broadcasting Notice of Consultation 2009-411, the Commission sought comment on the regulatory privileges that should be granted to a station that does not operate an over-the-air transmitter, but provides its digital signal to BDUs via direct feed.
190. Broadcasters submitted that the construction of digital over-the-air transmitters should not be required in order for them to benefit from mandatory carriage and simultaneous substitution for these signals. Most BDUs supported the extension of mandatory carriage and simultaneous substitution to signals provided by direct feed.
191. The Commission has determined that it will also grant mandatory carriage and simultaneous substitution for a digital signal of a conventional television station that operates an analog over-the-air transmitter and provides the digital signal to BDUs by direct feed. This policy will take effect on 31 August 2011 and will be implemented through revisions to the *Broadcasting Distribution Regulations*.
192. As a result, a digital transmitter will not be required outside the mandatory markets in order to benefit from mandatory carriage and simultaneous substitution for digital signals. As analog transmitters will not be permitted to operate in mandatory markets following the digital transition, a digital transmitter will be required in these markets in order to benefit from these regulatory protections.
193. Finally, the Commission considers that additional information is required in relation to some important aspects of the DTV transition and that, consequently, there are certain matters that remain unresolved. Accordingly, in Broadcasting Notice of Consultation 2010-169, the Commission is also seeking information and comment with respect to the following:
 - the number of Canadians that could potentially lose service as a result of the transition to over-the-air DTV;
 - the size, type and manner of administering a subsidy program for over-the-air viewers, should such a program be authorized;
 - provision of a free package consisting of all local and regional conventional television signals;
 - possible regulatory measures to educate consumers regarding the DTV transition; and

- the implementation of one or more trial markets for DTV conversion.

Secretary General

Related documents

- *Call for comments on issues related to the digital television transition*, Broadcasting Notice of Consultation CRTC 2010-169, 22 March 2010
- *Reference to the Federal Court of Appeal – Commission’s jurisdiction under the Broadcasting Act to implement a negotiated solution for the compensation for the fair value of private local conventional television signals*, Broadcasting Order CRTC 2010-168, 22 March 2010
- *Distribution by direct-to-home services of stations from the major ownership groups in the Atlantic provinces and independently owned stations across Canada*, Broadcasting Regulatory Policy CRTC 2010-162, 19 March 2010
- *Revised licensing framework for over-the-air digital television services*, Broadcasting Regulatory Policy CRTC 2010-69, 10 February 2010
- *Local Programming Improvement Fund*, Broadcasting Information Bulletin CRTC 2009-686, 2 November 2009
- *Conditions of licence for competitive Canadian specialty services operating in the genres of mainstream sports and national news*, Broadcasting Regulatory Policy CRTC 2009-562, 4 September 2009
- *General authorizations for broadcasting distribution undertakings*, Broadcasting Regulatory Policy CRTC 2009-546, 31 August 2009
- *Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television – Notice of hearing*, Broadcasting Notice of Consultation CRTC 2009-411, 6 July 2009, as amended by Broadcasting Notice of Consultation CRTC 2009-411-3, 11 August 2009
- *Policy determinations resulting from the 27 April 2009 public hearing*, Broadcasting Regulatory Policy CRTC 2009-406, 6 July 2009, as corrected by *Policy determinations resulting from the 27 April 2009 public hearing – Correction relating to the allocation of Local Programming Improvement Fund funding*, Broadcasting Regulatory Policy CRTC 2009-406-1, 4 March 2010
- *Review of broadcasting in new media*, Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009

- *Renewal of the broadcasting licences for private conventional television stations considered at the 27 April 2009 Gatineau public hearing – Initial decisions and scope of subsequent policy proceeding*, Broadcasting Decision CRTC 2009-279, 15 May 2009
- *Call for comments on a proposed exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Notice of Consultation CRTC 2009-173, 1 April 2009
- *Scope of licence renewal hearings for private conventional television stations*, Broadcasting Notice of Consultation CRTC 2009-70, 13 February 2009
- *Call for comments on a proposed framework for the sale of commercial advertising in the local availabilities of non-Canadian services – Notice of consultation*, Broadcasting Public Notice CRTC 2008-102, 30 October 2008, as amended by Broadcasting Public Notice CRTC 2008-102-1, 23 December 2008, and Broadcasting Public Notice CRTC 2008-102-2, 12 January 2009
- *Call for comments on a proposed regulatory framework for video-on-demand undertakings – Notice of consultation*, Broadcasting Public Notice CRTC 2008-101, 30 October 2008, as amended by Broadcasting Public Notice CRTC 2008-101-1, 23 December 2008, and Broadcasting Public Notice CRTC 2008-101-2, 12 January 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Diversity of voices – Regulatory policy*, Broadcasting Public Notice CRTC 2008-4, 15 January 2008
- *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, 17 May 2007
- *Promotion of non-programming services using local availabilities*, Broadcasting Public Notice CRTC 2006-69, 2 June 2006
- *Definitions for new types of priority programs; revisions to the definitions of television content categories; definitions of Canadian dramatic programs that will qualify for time credits towards priority programming requirements*, Public Notice CRTC 1999-205, 23 December 1999

- *Building on success – A policy framework for Canadian television*, Public Notice CRTC 1999-97, 11 June 1999

This document is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site:
<http://www.crtc.gc.ca>.

Appendix to Broadcasting Regulatory Policy CRTC 2010-167

Summary of major group-based policies

1. Application

- The group-based policies apply to private, English-language ownership groups that generate more than \$100 million in annual revenues from conventional television stations and own at least one English-language specialty or pay programming service (designated groups). The groups meeting these criteria at this time are CTVgm, Canwest and Rogers.
- The new policies with respect to Canadian content levels for conventional television licensees and licence-fee top-ups will apply to all affected television licensees.
- The application of the group-based policies to the Canadian Broadcasting Corporation, French-language broadcasters and ownership groups, other than designated groups, controlling multiple specialty and pay services will be determined at the licence renewals of these undertakings.

2. Canadian content requirements

- The Commission will amend the *Television Broadcasting Regulations, 1987* so that a licensee is required to devote not less than 55% of the broadcast year while maintaining the current requirement of devoting not less than 50% of the evening broadcast period (6:00 p.m. to midnight) to the broadcast of Canadian programs.

3. Priority programming

- The existing conditions of licence with respect to priority programs will be removed for licensees controlled by the designated groups.

4. Canadian programming expenditures (CPE)

- The Commission will institute a group-based CPE of approximately 30% of a designated group's gross revenues. The final CPE percentage for each group will be established at licence renewal.
- Existing CPEs for specialty services will remain, subject to modification at their licence renewals.
- Competitive mainstream sports and mainstream national news specialty services will be excluded from consideration when determining the CPE requirements for a designated group.

- A CPE for Category B specialty services controlled by a designated group and with over one million subscribers will be imposed by condition of licence. This requirement will be determined at the licence renewal of these services, using as a base the actual spending by the services over the previous three years.
- A CPE for conventional television services controlled by a designated group will be imposed by condition of licence. This CPE will be arrived at by calculating the dollar amount of the CPEs for all qualifying specialty services. This amount will be subtracted from the dollar amount of the group's 30% CPE obligation. The difference will be the dollar amount of the CPE obligation for the conventional television services controlled by the group.
- Licence-fee top-ups will no longer be considered as eligible expenditures for the purpose of fulfilling CPE requirements.
- Specialty licensees within a designated group will have the flexibility to attribute 100% of their required CPE to any other qualifying specialty service(s), or to conventional television services, within the same designated group. Each licensee will be required to report annually the attributed amounts and each of the service(s) to which they were allocated.
- Conventional television licensees within a designated group will have the flexibility to attribute up to 25% of their required spending to any other qualifying specialty service(s) within the same designated group. Each licensee will be required to report annually the attributed amounts and each of the service(s) to which they were allocated.

5. Expenditure requirements for programs of national interest

- The Commission will impose, by condition of licence, a group expenditure requirement for programs of national interest.
- Programs of national interest are defined as Canadian programs from program categories 7 Drama and comedy and 2(b) Long-form documentary, and certain specific Canadian award shows, as well as programs directed to children that are in categories 7 and 2(b).
- The expenditure requirement for programs of national interest will be determined at the licence renewals and will be based upon average group spending in these categories over the past three years. The Commission considers that a minimum requirement of 5% of a designated group's gross revenues is appropriate.

- Designated groups will have the flexibility to attribute 100% of their required spending on programs of national interest to any qualifying specialty service or conventional television service within the same designated group.

6. Independent production

- The Commission will impose, by condition of licence, a requirement that at least 75% of a designated group's expenditures on programs of national interest be allocated to independently-produced programs. The appropriateness of this percentage will be discussed at the licence renewals.

7. Annual reports

- The Commission will require, by condition of licence, that each designated group submit an annual report setting out details with respect to its achievements regarding the creation of new programs of national interest.

Dissenting opinion of Commissioner Suzanne Lamarre

1. I agree with the majority's decision, except in terms of the approach relating to the digital conversion of television transmitters in mandatory markets, whereas I have concerns about the approach outside the mandatory markets.

Mandatory markets

2. No one can be expected to achieve the impossible. Based on the evidence on the public record, my intimate conviction is that it is unrealistic to think that all transmitters in all mandatory markets can be converted by 31 August 2011.
3. The evidence to that effect put on the record by broadcasters is clear, credible and uncontradicted.
4. Part of the problem with meeting this deadline stems from the financial difficulties of certain broadcasters. While I am aware of these difficulties, I must admit that, in my opinion, they are not relevant to the impossibility of meeting the 31 August 2011 deadline for all broadcasters in all mandatory markets. In fact, even if the financial constraints were removed, one physical constraint would remain.
5. Let us look closely at the physical constraint.
6. In the mandatory markets, there are a total of 174 transmitters to be converted.
7. In order for the conversion to be completed in mandatory markets by 31 August 2011, broadcasters are being asked to submit their applications by 31 August 2010 for the Vancouver, Calgary, Edmonton, Winnipeg, Toronto, Ottawa-Gatineau, Montréal, Québec and Halifax markets, and by 31 December 2010 for other markets.¹⁸
8. For the purpose of this exercise, let us accept the following extraordinarily optimistic hypotheses:
 - all applications filed by 31 August 2010 are approved by both the Commission and the Department of Industry by 1 September 2010;
 - all applications filed by 31 December 2010 are approved by both the Commission and the Department of Industry by 1 January 2011;
 - all digital transition transmitters currently on air in mandatory markets (a total of 25 according to Commission data) will require only minor modifications by 31 August 2011. They will therefore be considered as already completely converted.

¹⁸ See the complete list of mandatory markets in paragraph 179 of the present regulatory policy.

9. Consider that when we approve a **single** new broadcasting station for a broadcaster, we normally set an implementation deadline of two years; never mind the fact that it is not uncommon for us to have to approve extensions to that deadline.
10. Consider that a single broadcast site usually hosts several television and radio systems, none of which tolerate service interruptions, except between 2:00 a.m. and 6:00 a.m. generally – only four hours a day.
11. Even in the artificially optimistic conditions described above, how can we hope to simultaneously install 55 transmitters within one year in mandatory markets, and 94 others within eight months, with one deadline overlapping the other?
12. We have a presumption of facts that this will not be possible. This presumption could have been countered by a demonstration that the manufacturing industry, engineering consultants and installers could all meet these extraordinary and specific requirements in a concerted manner and in this short period of time. However, not even a shadow of such demonstration has been made.
13. To ensure that Canadians receive quality service, the Commission has the power and is justified to require broadcasters to convert their transmitters to the digital format in a timely manner.¹⁹
14. The Department of Industry is responsible for broadcasting certificates, without which a licence issued by the Commission is useless.²⁰ The Department of Industry controls the entire spectrum.
15. As such, the Commission cannot ignore the current position of the Department of Industry, specifically, that 31 August 2011 is a strict deadline.
16. In light of the above, and given that the evidence on the Commission's record combined with plain logic shows that not all broadcasters in mandatory markets can meet the deadline, on the morning of 1 September 2011, several television services that are part of the daily lives of many Canadians will disappear from the air. The Commission must therefore:
 1. inform the Department of Industry and the Department of Canadian Heritage of this critical situation;
 2. demand that the broadcasters concerned remedy the situation without further delay; and
 3. given its power, protect Canadian citizens from the expected loss of services.

¹⁹ *Broadcasting Act*, S.C. 1991 c. 11, section 3(d)(iv) and section 5

²⁰ *Broadcasting Act*, S.C. 1991 c. 11, section 22(3)

17. Allow me to be blunt.
18. This is not a case of endorsing here those broadcasters who have known about this deadline since 17 May 2004²¹ and who are still facing a difficult situation now. Nor is it a case of minimizing the effect of the delays incurred during the preparation and publication of the *Digital Television (DTV) Post-Transition Allotment Plan* and *BPR-10: Application Procedures and Rules for Digital Television (DTV) Undertakings*, two indispensable tools for preparing for the conversion to digital format: these delays were unavoidable given the complexity of coordinating and implementing the allotment plan. **This is a case of protecting Canadian citizens and ensuring that, during the conversion of television transmitters to digital format, they will continue to receive a service that is essential to safeguarding, enriching and strengthening the cultural, political, social and economic fabric of Canada.**²² In short, we need to protect a tool that is essential to democratic life. To achieve this goal, it is not enough to state that 31 August 2011 be the mandatory deadline. We need to be more proactive.
19. Taking into account the respective powers of the Commission and the Department of Industry under their respective enabling legislations, I believe that the Commission should do the following:
 - (i) Retain the 31 August 2011 deadline, but not set a strict deadline in all cases.
 - (ii) Require that broadcasters comply with the plans for 31 August 2011 that they have already announced and that have already been placed on the record of the proceeding. In these cases, 31 August 2011 would become a strict deadline.
 - (iii) Require conversion or otherwise the shutdown of analog transmitters in the mandatory markets of all transmitters currently operated on channels 52 to 69 inclusively by 31 August 2011. In these cases, too, that deadline would be strict.
 - (iv) Require, within 90 days of the issuance of this regulatory policy, that broadcasters who, for valid reasons related to the physical completion of the project, believe that they cannot meet the 31 August 2011 deadline, present the Commission with an application for an exemption that specifies the target date for implementing the digital transmitters and the target date for pulling the analog signal off the air.

These dates must be backed by an extensively detailed implementation plan, and cannot exceed 31 December 2012. The application must be supported by an account of the application made and discussions undertaken with the Department of Industry to obtain the same exemption for the renewal of the

²¹ *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, 17 May 2007

²² *Broadcasting Act*, S.C. 1991 c. 11 section 3(d)(i)

broadcasting certificates for the transmitters concerned, and by the result of the application for an extension. If the Department of Industry refused the exemption, the Commission would have no choice but to take note and act accordingly.

Notwithstanding the filing of an application set out in item (iv) above, applications for digital conversion post transition in mandatory markets must be filed on the dates set out in paragraph 182 of this regulatory policy.

20. I believe that such an approach would better serve Canadians while maintaining the Department of Industry's broadcasting spectrum reassignment objective, in spite of a delay that, in my opinion, is completely inevitable.

Outside the mandatory markets

21. Let us review paragraph 188 of this regulatory policy.

In light of the above, provided that the technical requirements of the Department of Industry are met, the operation of an analog transmitter outside the mandatory markets on channels 2 to 51 may continue beyond 31 August 2011, except where its operation would prevent a digital transmitter from being implemented. In this regard, the Commission notes that, should a broadcaster outside the mandatory markets choose not to convert to digital, that broadcaster must either move its service to a channel outside the 52 to 69 range, or cease operations of its analog transmitter(s).

22. It sets out that broadcasters outside mandatory markets may, under certain conditions, continue to operate their analog transmitters after 31 August 2011. Although I agree with the principle, I have reservations about the unforeseen impacts of its implementation.
23. First, note that the Department of Industry will need to set out methods for notifying broadcasters that still use analog transmitters and that will either experience interference from a digital signal or cause unacceptable interference to a digital signal.
24. Consider as well that the legitimate priority given to digital transmitters may, in some cases, have a domino effect on several analog transmitters and quicken both the conversion to digital format or shut down from the air, as well as the loss of service that the shutdown entails.
25. This decision by the Commission is the result of a request by broadcasters, and I agree with it. I have nonetheless noticed that no engineering study was tabled on the record of this proceeding to show the feasibility of analog and digital transmitters coexisting in such a context.
26. I therefore invite all broadcasters to exercise the necessary caution in the circumstances.