



CAB | ACR

Review of Regulatory Frameworks for BDUs and Discretionary Programming Services

Reply Comments

**Submission to the CRTC
by the Canadian Association of Broadcasters**

**Broadcasting Notice of Public Hearing CRTC 2007-10
February 22, 2008**

CAB Vision: The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

February 22, 2008

Via Epass

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

**Re: *Broadcasting Notice of Public Hearing CRTC 2007-10-4:
Review of the Regulatory Frameworks for Broadcasting
Distribution Undertakings and Discretionary Programming
Services***

The Canadian Association of Broadcasters (CAB) is pleased to offer the enclosed reply comments to the Commission on the above-noted matter. You will note that the Executive Summary has been translated and incorporated into the submission.

The CAB requests the opportunity to appear at the public hearing to be held commencing April 7, 2008. The CAB's participation in the oral phase of this proceeding will enable a full examination of the implications for the private conventional and discretionary television sector of the Commission's stated intention to "...take a revitalized approach ... that aims at reducing regulation to the minimum essential to achieve the objectives of the [Broadcasting] Act, relying instead on market forces wherever possible."

Sincerely,

Original signed by:

Glenn O'Farrell
President and CEO

TABLE OF CONTENTS

Sommaire exécutif.....	1
Executive Summary	6
I Introduction	10
II Discretionary services framework.....	21
III Authorization of non-Canadian services.....	24
IV VOD framework	25
V Basic service/priority carriage	27
VI Distant Canadian signals.....	29
VII Third-language services	29
VIII Small system exemption	31
IX Digital transition	31
X Conclusion.....	32
XI Appendices	35

Sommaire exécutif

1. En tant que porte-parole national des radiodiffuseurs privés du Canada, l'Association canadienne des radiodiffuseurs (ACR) est heureuse de soumettre les présentes répliques aux observations concernant l'audience déclenchée par l'Avis d'audience publique de radiodiffusion CRTC 2007-10.
2. L'ACR est d'avis que l'examen de l'éventail important d'enjeux soulevés dans le cadre de cette audience doit s'appuyer sur trois principes clés :

➤ **Il nous faut conserver un système solide de radiodiffusion canadien.**

Dans un milieu où le changement règne et la concurrence livrée par des sources réglementées et non réglementées atteint un niveau jamais vu jusqu'ici, il est essentiel que le système de radiodiffusion canadien s'adapte pour brancher les téléspectateurs au contenu canadien, peu importe la plateforme. Le système de radiodiffusion doit demeurer solide afin d'être en mesure de mettre en valeur la création et la présentation des émissions canadiennes qui s'articulent autour des objectifs de la *Loi sur la radiodiffusion*, plutôt que les intérêts restreints des parties prenantes individuelles.

➤ **Une mesure appropriée de réglementation est toujours nécessaire pour assurer l'existence d'un système solide.**

L'ACR est d'avis qu'il y a lieu de simplifier et d'actualiser le cadre de réglementation dans une certaine mesure et elle a formulé des propositions en vue d'atteindre cet objectif. En même temps, nous sommes également d'avis qu'une certaine mesure de surveillance réglementaire s'impose. L'ACR maintient que le marché des EDR est dominé par une poignée de distributeurs de grande taille qui font jouer leur pouvoir de négociation considérable lorsqu'ils traitent avec les services de programmation. Si l'on éliminait des mesures de réglementation clés, on céderait le contrôle effectif de notre système de radiodiffusion à ces distributeurs.

➤ **Un système solide de radiodiffusion canadien est un système qui établit un équilibre entre les intérêts opposés afin d'atteindre les objectifs de la *Loi*.**

Il est clairement indiqué, à l'article 3 de la *Loi*, que le législateur a des attentes quant à chaque secteur du système, aux services de programmation et aux distributeurs qui cadrent avec leurs ressources financières et autres ressources. Les observations des producteurs et des distributeurs ont l'effet de coincer les radiodiffuseurs entre l'arbre et l'écorce du point de vue de la réglementation, puisqu'ils doivent composer avec les demandes en vue d'apporter davantage de contributions, et les demandes qui portent atteinte au régime réglementaire qui a rendu possible la distribution à grande échelle sur laquelle s'assoit leur capacité de respecter leurs obligations.

3. Les EDR ont demandé plusieurs changements qui leur donneraient **davantage d'accès aux recettes publicitaires** grâce à plus de publicité sur les canaux communautaires, à davantage d'accès à la publicité par le biais des disponibilités locales des services américains, à l'accès à l'inventaire invendu des services canadiens et à la capacité de vendre de l'inventaire publicitaire par le biais de leurs services de VSD.
4. L'ACR est d'avis que le rôle principal des EDR est celui de distribuer des émissions et non de concurrencer avec les services de programmation pour des recettes publicitaires. Il serait injuste de s'attendre à ce que les radiodiffuseurs concurrencent pour la publicité locale ou nationale avec ceux qui distribuent leur programmation.
5. Dans le cas du VSD, les radiodiffuseurs sont disposés à collaborer avec les EDR pour trouver des nouveaux moyens de diriger la publicité ciblée vers les utilisateurs dans le cadre des émissions qu'ils les autorisent à distribuer en vertu d'une licence pour leurs services de VSD. Mais, le service de programmation doit alors conserver le contrôle du placement des messages publicitaires et des recettes qui en découlent.
6. L'ACR a proposé des changements notables au régime des services de télévision spécialisée et payante par exemple, l'élimination de toutes les règles d'assemblage et de distribution dans un contexte numérique et l'élimination de la règle du 5 à 1 concernant la distribution des services affiliés par opposition aux services non affiliés.
7. Il s'agit de changements importants qui impliquent des risques commerciaux de taille pour nos membres. Nous tenons à souligner que nous avançons nos propositions dans le contexte d'un ensemble de mesures réglementaires et qu'il ne s'agit pas de propositions indépendantes l'une de l'autre. Pour assurer la viabilité à long terme du secteur des services de télévision spécialisée et payante, ces propositions doivent s'exécuter dans un contexte qui comprend les aspects suivants :
 - **Le maintien des règles d'accès** – si l'on éliminait les règles d'accès, comme le préconisent la plupart des EDR, celles-ci seraient alors en mesure de menacer de retirer un service en place ou de refuser de distribuer un nouveau service comme moyen de négocier des paiements d'affiliation plus bas. Cela porterait gravement atteinte à la survie de ces services.
 - **Une règle de prépondérance valable** – dans le mémoire qu'elle a soumis lors de la phase 1, l'ACR a élaboré une proposition en trois volets dans le but d'assurer : (i) la prépondérance générale des services canadiens de télévision spécialisée, payante et à la carte et des services de VSD (à l'exception des signaux de la télévision en direct) que reçoit chaque abonné; (ii) la prépondérance des services canadiens dans chaque bloc de services offert aux abonnés; et (iii) la prépondérance des services facultatifs de langue française que reçoit chaque abonné dans les marchés de langue française. Suite à des consultations supplémentaires avec nos membres de langue française, nous avons décidé que ce dernier volet n'est pas nécessaire. Cependant, nous sommes d'avis qu'il faut

des règles d'accès pour faire en sorte que tous les services de langue française soient offerts dans ces marchés.

➤ **Renforcer les règles sur l'autorisation des services**

étrangers – les EDR ont demandé que ces règles soient assouplies de beaucoup. Si ce changement était apporté, les services canadiens se verraient obligés de concurrencer injustement avec des services offrant les mêmes genres de programmation qu'eux. De plus, ce changement mettrait le marché des droits canadiens en grave danger.

8. L'ACR suggère que ce contexte offre une occasion pour **simplifier la politique sur les genres de manière importante**. En vertu d'une politique révisée, les services seraient tenus de respecter leurs conditions de licence définissant la nature de leur service ainsi que les restrictions qui assurent leur créneau de programmation, mais ne seraient pas assujettis à des limites quant aux catégories de programmation desquelles ils tirent leur contenu de programmation, à moins que la nature du service ne soit précisément une catégorie de programmation, p. ex. les documentaires, l'animation ou les dramatiques.
9. Comme elle l'a déclaré dans son mémoire lors de la phase 1, l'ACR est en faveur d'une **politique souple en matière de VSD** qui tienne compte des réalités opérationnelles des entreprises. Pour ce qui est de multiplier l'accès au contenu non canadien, le Conseil doit cependant faire en sorte que les plateformes de VSD exploitées par les EDR ne servent pas de moyen détourné pour laisser entrer les services américains non autorisés, ce qui permettrait effectivement de contourner les politiques du Conseil concernant l'ajout de nouveaux services non canadiens à la liste des services par satellite admissibles. Et, comme nous le faisons remarquer plus haut, l'ACR appuie une politique révisée sur l'inclusion des messages publicitaires au VSD, à condition que le contrôle de cette publicité demeure dans les mains de l'entreprise de programmation.
10. L'ACR continue à appuyer la notion qu'il est nécessaire de conserver un **service de base**, tant en mode analogique que numérique. Cela comprend les éléments suivants :
 - Tous les radiodiffuseurs locaux, les services ayant des obligations en vertu de l'alinéa 9 (1) h) de la *Loi*, les services de radiodiffusion éducatifs à l'échelle provinciale et Radio-Canada/CBC.
 - Les SRD doivent être tenus de fournir l'équivalent d'un service de base dans chaque marché qu'ils desservent, y compris la distribution de la programmation de toutes les stations de télévision locales.
 - Nous sommes d'accord avec les EDR pour dire qu'il n'est pas nécessaire d'offrir le canal communautaire par le biais du service de base.
 - Nous nous opposons aux changements qui permettraient la distribution de séries supplémentaires de signaux américains 4+1 ou d'autres services additionnels par le biais du service de base.

11. L'ACR est d'avis que le **positionnement de canal et le regroupement des services** demeurent des notions importantes, tant dans le contexte analogique que numérique. Tant que la câblodistribution en mode analogique continuera, la distribution des signaux prioritaires devrait toujours être une exigence, et ce en commençant par la bande du service de base. On devrait accorder la priorité, sur la bande du service de base, aux nouveaux signaux canadiens de télévision en direct par rapport aux signaux étrangers. De plus, l'ACR maintient qu'il y a lieu de mettre en application des mesures de protection supplémentaires concernant la position relative des services prioritaires au regard des services non prioritaires qui sont distribués par le biais du service de base, afin d'assurer que les services prioritaires canadiens soient traités équitablement.
12. En ce qui concerne les **services en langues tierces**, l'ACR fait remarquer qu'on a déjà apporté des changements notables au régime de distribution et qu'elle s'oppose à davantage de changements.
13. Les radiodiffuseurs sont d'avis qu'il est important que le Conseil rétablisse l'équilibre qui existait auparavant en ce qui concerne la **distribution des signaux canadiens éloignés**. La distribution de signaux canadiens à l'extérieur des marchés pour lesquels ils sont autorisés a des conséquences fort nuisibles sur les recettes publicitaires de l'industrie. Dans un contexte de télévision en direct où les recettes stagnent, les coûts augmentent – la transition à la TVHD y compris – et les bénéfices diminuent, la distribution des signaux éloignés freine énormément les possibilités de gagner des revenus pour les stations de télévision locales.
14. Bell Canada a fourni les résultats d'une étude effectuée par la CMRI selon lesquels les dommages causés par les signaux éloignés sont minimes. Selon une analyse remise à l'ACR par Armstrong Consulting, l'étude de la CMRI se fonde sur une hypothèse incorrecte, à savoir que les annonceurs paieront volontiers, tant aujourd'hui qu'à l'avenir, pour l'écoute de leurs annonces par le biais de signaux éloignés lorsqu'ils achètent de la publicité réseau, alors qu'ils peuvent obtenir cette écoute gratuitement avec l'achat de publicité nationale sélective. Cette hypothèse mal fondée entraîne à son tour deux erreurs, notamment la sous-estimation de la valeur moyenne d'une heure d'écoute télévisuelle et le calcul de l'incidence des signaux éloignés sur la base de l'impact net. Une fois ces erreurs corrigées, la conclusion qui se dégage des données fournies par la CMRI est que le secteur de la télévision en direct est effectivement fortement frappé.
15. L'ACR ne voit aucune raison d'élargir la portée des **ordonnances d'exemption** en place. Mais si le Conseil décide qu'il y aurait lieu de songer à des ordonnances d'exemption supplémentaires, l'ACR maintient qu'on doit étudier le seuil approprié attentivement et que les petits systèmes exploités par des systèmes de câblodistribution multiples de grande taille, ainsi que les EDR des compagnies de téléphone devraient être formellement exclus des exemptions.
16. L'ACR fait remarquer que la **migration au numérique** coûtera très cher aux services de télévision en direct. Étant donné que ces dépenses ne présentent aucun avantage du point de vue de la rentabilité dans le cas des petits marchés, l'ACR

suggère que les services de télévision en direct dans ces marchés, qui ne convertissent pas leurs exploitations à la transmission en mode numérique, devraient conserver leur distribution prioritaire et leurs droits de substitution simultanée. Le Conseil devrait encourager les EDR et les radiodiffuseurs à négocier pour assurer l'alimentation directe en mode numérique de sorte que les téléspectateurs aient un signal de la meilleure qualité technique sans que les radiodiffuseurs aient à faire des dépenses en capital ruineuses.

17. L'ACR maintient qu'il y a lieu, pendant cette transition, de garder un cadre approprié en place pour régir la câblodistribution hybride (modes analogique et numérique), y compris le maintien de dispositions clés visant la partie analogique du service des EDR et aussi de principes concernant la conversion des services analogiques au mode de distribution numérique.
18. L'ACR maintient que le Conseil devrait conserver les règles sur le service de base analogique en ce qui concerne l'utilisation de la bande de base, les règles d'assemblage pour le service de câblodistribution analogique et des dispositions d'équivalence pour les modes analogique et numérique conformément aux principes établis sur la migration au numérique, et ce tant que les EDR par câble assurent un service de câblodistribution analogique.

Executive Summary

1. As the national voice of Canada's private broadcasters, the Canadian Association of Broadcasters (CAB) is pleased to file these reply comments in connection with the proceeding initiated by Notice of Public Hearing CRTC 2007-10.

2. The CAB believes that there are three key considerations that should govern the consideration of the significant range of issues raised in this proceeding:

➤ **We need to maintain a strong Canadian broadcasting system.**

In a changing environment with unprecedented competition from regulated and unregulated sources, it is essential that the Canadian broadcasting system adapt to connect viewers to Canadian content regardless of platform. The **broadcasting system must remain strong to promote the creation and exhibition** of Canadian programming that is focused on meeting the goals of the *Broadcasting Act*, not on the narrow interests of individual stakeholders.

➤ **An appropriate degree of regulation continues to be necessary to ensure a strong system.**

The CAB believes that some streamlining and updating of the regulatory framework is appropriate and we have made proposals to meet these goals. At the same time, we also believe that a degree of regulatory oversight is needed. The CAB submits that the BDU market is dominated by a handful of large distributors who wield considerable negotiating leverage in their dealings with programming services. Elimination of key regulatory measures will give these distributors effective control of our broadcasting system.

➤ **A strong Canadian broadcasting system is one that balances competing interests to meet the goals of the Act.**

Section 3 of the Act makes it clear that there are expectations placed on programmers and distributors consistent with their financial and other resources. Submissions by producers and distributors place broadcasters in a regulatory sandwich – with demands for greater contributions on one hand and requests to undermine the regulatory regime that has ensured widespread distribution that ensures our capacity to meet our obligations, on the other.

3. BDUs have requested a number of changes that would give them **increased access to advertising revenues** through increased advertising on the community channel, increased access to advertising on US services' local avails, access to unsold inventory on Canadian services and the ability to sell commercial inventory in their VOD offerings.

4. The CAB believes that the main role of BDUs is to distribute programming, not to compete with programmers for advertising revenues. It would be unfair for broadcasters to compete with those who distribute their service(s) for local or national advertising.
5. In the case of VOD, broadcasters would be willing to work with BDUs to find new ways to bring targeted advertising to users in the programs that they license to BDUs' VOD undertakings. But in this case, the control of the advertising placement and revenues must remain with the programmer.
6. The CAB has made proposals for significant changes in the regime governing pay and specialty services, for example the elimination of all distribution and linkage rules in a digital environment and the elimination of the 5:1 rule respecting the distribution of non-affiliated vs. affiliated services.
7. These are significant changes that carry significant business risk for our members. We must underline that our proposals are made in the context of a package of regulatory measures and are not stand-alone. In order to ensure the ongoing sustainability of the pay and specialty sector, these must be done within a context that includes:
 - **Maintenance of the Access Rules** - the elimination of access rules, as advocated by most BDUs, would provide BDUs with the ability to threaten removal of an existing service or non-carriage of a new service as a lever to negotiate lower affiliation payments. This would severely threaten the survival of such services.
 - **A meaningful preponderance rule** - the CAB's Phase 1 submission outlined a three-part proposal that would ensure: (i) an overall preponderance of Canadian specialty, pay, pay per view and VOD services (excluding OTA signals) received by each subscriber; (ii) a preponderance of Canadian services within each package offered to a subscriber; and (iii) a preponderance of French-language discretionary services received by each subscriber in francophone markets. After further consultation with our French-language members, we have realized that this third proposal has unintended consequences for the consumer. However, we believe that the access rules are needed to ensure that all French-language services are made available in these markets.
 - **Strengthening of the rules concerning the authorization of foreign services** - BDUs have requested substantial relaxation of these rules. Such change would result in Canadian services having to compete unfairly with competitors in their own genres of programming and put the Canadian rights market in serious jeopardy.
8. Within this context, the CAB suggests that there is an opportunity for **streamlining of the genre policy**. Under a revised policy, services would be required to meet

their nature of service conditions and restrictions to ensure the niche nature of their programming but would not be subject to limitations on the programming categories from which they draw their programming content, unless the nature of the service is precisely the programming category (for example, documentary, animation or drama).

9. As stated in our Phase 1 submission, the CAB supports the need for a **flexible VOD policy** that reflects operational business realities. With respect to increased access to non-Canadian content, however, the Commission must ensure that BDU-operated VOD platforms do not provide a “back-door” entry for unauthorized U.S. services, in effect circumventing the Commission’s policies respecting the addition of new non-Canadian services to the List of Eligible Satellite Services. And as noted above, the CAB supports a revised policy on the inclusion of advertising in VOD, where the control of such advertising remains with the programming undertaking.

10. The CAB continues to support the need for a **basic service** both in the analog and digital context. This entails:
 - Maintenance of existing requirements respecting all local broadcasters, section 9(1)(h) services, provincial educational broadcasters and CBC/Radio Canada.
 - DTH services must be required to provide the equivalent of a basic service in each market they serve, including carriage of all local television stations.
 - We agree with BDUs that the community channel does not need to be carried on basic.
 - We oppose changes that would allow additional US 4+1 or other services to be distributed on the basic service.

11. The CAB believes that **channel placement and service grouping** remain important concepts in both the analog and digital environment. For as long as analog cable distribution continues, the distribution of priority signals beginning with the basic band should continue to be a requirement. New Canadian OTA signals should have priority for carriage on the basic band over foreign signals. Furthermore, the CAB submits that additional safeguards respecting the relative position of priority services vis-à-vis non-priority services distributed on basic are appropriate to ensure equitable treatment of priority Canadian services.

12. With regard to **third-language services**, the CAB notes that there has already been significant change to the regime governing carriage and opposes any further changes.

13. Broadcasters believe that it is important that the Commission redress the balance that once existed with regard to the **carriage of distant Canadian signals**. Distribution of Canadian signals outside of the markets that they are licensed to serve has a substantial negative impact on the advertising revenues of the industry. In an OTA environment with flat revenues, increasing costs (including those relating to the transition to HDTV) and falling profits, distant signal carriage severely undermines the revenue potential of local television stations.

14. Bell Canada provided a study by CMRI which minimized the damage of distant signals. An analysis provided to the CAB by Armstrong Consulting demonstrates that the CMRI study is based on an incorrect assumption – that advertisers currently, and in the future, will willingly pay for distant viewing in the purchase of network advertising when they can obtain that viewing free of charge in the purchase of national selective advertising. This faulty assumption in turn leads to two errors – an underestimate of both the average value of an hour of television viewing and the calculation of the impact of distant signals on a net impact basis. Once these errors are corrected the data provided by CMRI lead to a conclusion of significant impact on the OTA sector.
15. The CAB sees no reason to broaden the scope of existing **exemption orders**. Nevertheless, should the Commission determine that there may be merit in considering further exemptions, then the CAB submits that the appropriate threshold should be carefully considered and small systems operated by the large cable MSOs and telephone company BDUs should be explicitly excluded from exemption.
16. The CAB notes that the **migration to digital** will be extremely expensive for OTA broadcasters. There is no business case for this cost in smaller markets and the CAB suggests that in such markets, OTA broadcasters who do not convert to digital transmission should continue to have priority carriage and simultaneous substitution rights. The Commission should encourage BDUs and broadcasters to negotiate to provide direct digital feeds that would ensure that consumers receive the best quality technical signal without occasioning ruinous capital spending for the broadcaster.
17. During this transition, the CAB submits that an appropriate framework needs to remain in place to govern hybrid analog-digital cable distribution, including the retention of key provisions for the analog portion of a BDU's service and digital migration principles respecting the conversion of analog services to digital distribution.
18. The CAB submits that the Commission should maintain analog basic service rules respecting use of the basic band, linkage rules for analog cable service and analog-digital mirroring provisions in accordance with established digital migration principles, for as long as an analog cable service is provided by cable BDUs.

I Introduction

1. The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.
2. The CAB is pleased to file these reply comments in connection with the proceeding initiated by Broadcasting Notice of Public Hearing CRTC 2007-10 *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (NPH 2007-10).
3. Since the release of NPH 2007-10, the Commission has expanded the scope of the proceeding to also encompass matters related to the charging of a fee for the distribution of over-the-air (OTA) television signals, including issues related to distant signals. As such, this proceeding is now reviewing matters of fundamental importance to discretionary television services, to conventional television services and to broadcasting distribution undertakings (BDUs). In effect, this proceeding has evolved into a broad structural review of the Canadian broadcasting system.
4. Before addressing some of the specific issues that have been raised in the Phase 1 and Phase 2 comments, the CAB believes that it is useful to take a step back and consider what it is we are collectively hoping to achieve in this fundamental structural review.
5. The CAB submits that there are three key considerations.

First, we need to maintain a strong Canadian broadcasting system.

6. In a changing environment with unprecedented competition from regulated and unregulated sources, it is essential that the Canadian broadcasting system adapt to connect viewers to Canadian content regardless of platform. The broadcasting system must remain strong to promote the creation and exhibition of Canadian programming that is focused on meeting the goals of the *Broadcasting Act* (the Act), not on the narrow interests of individual stakeholders.
7. In their submissions, the BDUs claim that their proposals are meant to provide consumer choice in service and pricing.
8. The CAB and its members agree with these general principles but disagree vehemently that deregulation to the extent proposed by some BDUs will further these goals. Rather the principal outcome of the BDU proposals would be to maximize the control that they have over choices in distribution. Moreover, the past behaviour of BDUs with regard to pricing, channel placement of Canadian services and choices in distribution all demonstrate clearly that giving the virtually unlimited

flexibility requested by BDUs will result in significant losses to Canadian services and consequently to Canadian programming.

9. The Commission has stated that a strong system is one that fosters two overriding policy objectives that flow from the the Act: the presence of Canadian content within the system; and access by Canadians to the system. As recently as December 4, 2007, in a speech to the Canadian Chapter Conference of the International Institute of Communications (IIC), the Chairman confirmed that the two key objectives of the Act are: (i) the predominance of Canadian content; and (ii) full access by Canadians to the system, as participants in the industry and as audiences.
10. Overwhelmingly, Canadians expect a strong broadcasting system and private broadcasters deliver on that expectation. In reviewing the Phase 1 comments filed in the current proceeding, it is clear that there is widespread support for the fundamental proposition that the Commission's current regulatory framework for the licensing and distribution of discretionary programming services has worked extremely well in creating a diverse and vibrant discretionary services sector that makes significant contributions to the achievement of the goals of the Act.
11. It is essential that the regulatory system continue to foster these successes and contributions.

Second, an appropriate degree of regulation continues to be necessary to ensure a strong system.

12. With the exception of BDU interests, which have seized on this proceeding to pursue, to differing degrees, a deregulatory agenda, parties have cautioned the Commission that in streamlining and simplifying the current regulatory frameworks, it must proceed carefully so as not to eliminate key measures that are central to continued attainment of the goals of the Act. There is broad consensus that an appropriate degree of oversight and regulation by the Commission is still essential. While the CAB believes that some streamlining and updating of the regulatory framework is appropriate and we have made proposals to meet these goals, we also believe that a degree of regulatory oversight is needed.
13. The CAB notes that the Commission shares this view. As stated by the Chairman in his speech to the Canadian Chapter Conference of the IIC:

Obviously, market forces alone cannot be relied upon to advance these objectives, so regulation will always be necessary. Yet we want any regulation to be smarter and lighter – regulation that is targeted and minimally intrusive. That being said, it should be clear that we will never compromise the central role of the broadcasting system: delivering Canadian content, expressing the diversity of our country, and allowing access to Canadian (services) both as audiences and as participants.
14. The CAB endorses this overall approach. We do not oppose the Commission's objectives in the current proceeding with respect to streamlining and simplification

of the existing frameworks, provided that the broadcasting policy goals of the Act remain paramount.

15. To this end, in our Phase 1 submission the CAB has proposed key changes to the current licensing and distribution framework for discretionary services, changes that respond to the Commission's wish to reduce regulation to the minimum necessary to achieve the objectives of the Act. These changes include the following:
 - the elimination of all distribution and linkage rules in a digital environment; and
 - the elimination of the 5:1 rule respecting the distribution of non-affiliated vs. affiliated services.
16. These are significant proposals and reflect the fact that the CAB's specialty and pay members are committed to a significant streamlining of the regulatory framework and to operating in a more competitive environment. These proposals represent significant business risk for our members.
17. The CAB does not propose any changes to the rules governing the distribution of ethnic services as they underwent significant modification in December 2004 and November 2005.
18. The CAB strongly opposes the complete deregulation of the distribution framework that is advocated by some BDUs, given the potentially devastating impact it would have on the ability of discretionary services to sustain their current high level of contributions to the Canadian broadcasting system. In this regard, the CAB submits that the Commission must assess the validity of key assumptions underlying the BDU positions.
19. Most importantly, the CAB submits that the core assumption that because BDUs are operating in a highly competitive environment they need to be freed from regulatory constraints is a false premise. Several parties in their Phase 1 comments, for example Canwest, have shown that the larger cable BDUs have been able to sustain and grow their businesses despite their claims of a fully competitive environment.
20. The CAB notes that there is little market discipline that limits the ability of BDUs to increase their rates. Most subscribers who wish to have access to digital services must purchase equipment and/or enter into contracts with BDUs that limit their ability to change providers without incurring significant financial loss or stranded investment. While the promise of deregulation in the BDU market was more flexibility in packaging and better pricing, most major BDUs have implemented regular rate increases with little loss in their subscriber base.
21. The CAB submits that, in fact, the BDU market is dominated by a handful of large distributors which wield considerable negotiating leverage in their dealings with programming services. They are the de facto "gatekeepers" of the Canadian broadcasting system.

22. The most extreme position flowing from the alleged competitive imperatives in the BDU marketplace is Shaw's argument that the *Broadcasting Distribution Regulations* (BD Regulations) should be eliminated and replaced by three rules – the provision of a basic service; a simplistic preponderance requirement; and an undue preference provision. The CAB believes that this would represent, to all intents and purposes, an end to any meaningful regulation of BDUs, founded on the misguided assumption that BDUs need total flexibility to serve customers and that market forces alone should be the only check on their behaviour. Further comments on the Shaw proposal, focusing on the research studies filed by Shaw in its Phase 1 submission, are provided in Appendix 1.
23. The CAB submits that the Commission should reject this and similar proposals for deregulation. An appropriate degree of regulation continues to be necessary to ensure a place for Canadian content and Canadian voices within the Canadian broadcasting system.

Third, a strong Canadian broadcasting system is one that balances competing interests to meet the goals of the Act.

24. The current regulatory frameworks were designed to foster a balance between competing interests, so that all sectors of the broadcasting system could contribute to the achievement of public policy goals in an appropriate manner. Today, increasing pressure from distributors and the creative community to advance their individual interests threatens to upset that balance.
25. In particular, the CAB submits that the following sections of the Act are of relevance to this policy review:
- 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;
 - Section 3(1)(s) states private networks and programming undertakings should, to an **extent consistent with the financial and other resources available** to them (emphasis added),
 - (i) contribute significantly to the creation and presentation of Canadian programming, and
 - Section 3(1)(t) states that distribution undertakings should:
 - give priority to the carriage of Canadian programming,
 - provide efficient delivery of programming at affordable rates, using the most effective technologies possible,
 - provide reasonable terms for the carriage, packaging and retailing of programming services where those services are supplied pursuant to contractual arrangements.
26. The ability of discretionary services to invest in Canadian programming has historically been supported by the broadest possible distribution of their services at

- reasonable wholesale rates. Increasingly, an added incentive is the ability to recoup that investment across multiple platforms. The distribution sector is applying pressure that would upset that balance, tilting it away from broad distribution without a corollary rebalancing in wholesale rates. Distributors argue that carriage privileges for programming services can be removed, without impacting the delivery of content. This agenda is leading towards narrower distribution, accompanied by attempts to retain or lower wholesale rates that were set on the basis of broad distribution.
27. On the other side of the equation, producers and the creative community are seeking increased content obligations, irrespective of the move to an increasingly deregulated carriage environment. This agenda is leading to more expensive programming obligations. The result is that broadcasters are placed squarely in the middle, caught between carriage rules that continue to erode and content obligations that continue to increase.
 28. In short, the system is out of balance. If distributors and producers are successful in their respective arguments, there will be increasing instability for broadcasters, leading to a weaker system for everyone.
 29. To reverse this course, to rebalance and strengthen the system, we need to recalibrate the current BDU framework. In the context of this proceeding, the CAB notes that the ability of Canadian specialty and pay licensees to make significant contributions to Canadian programming is closely tied to their ability to gain access to BDU distribution on reasonable terms. The objective of this proceeding should be to ensure that the regulatory framework supports this goal.
 30. The CAB submitted detailed proposals in Phase 1 of this proceeding with respect to the licensing and distribution of discretionary programming services. Our proposals reflected a continued commitment to the achievement of the goals of the Act, using new approaches where feasible in keeping with the Commission's desire for streamlining and simplification. These proposals represent a unified, comprehensive approach to the regulation of discretionary services going forward, not a laundry list of individual measures to be cherry-picked or discarded, one by one.
 31. Moreover, the CAB provided a plan for an orderly transition over the next few years from today's hybrid analog-digital distribution environment to a fully digital distribution universe. For the discretionary services sector, the CAB sees the completion of this transition occurring within a reasonable period of time (e.g. two years) after the shut-down of analog over-the-air television transmitters.
 32. In our Phase 2 submission, the CAB focused on OTA issues, making recommendations with respect to four key elements of the Commission's regulatory framework for conventional television – priority carriage; simultaneous substitution; maintenance of the Small Market Local Programming Fund; and a new approach to resolving the distant signals issue.

33. In these Reply comments, the CAB responds to the submissions filed by other parties in Phases 1 and 2 of this proceeding, focusing on selected key issues that are fundamental to attaining the two objectives of Canadian programming and access for discretionary and conventional television services.

Proposals for increased access to commercial advertising by BDUs

34. In their Phase 1 submissions, BDUs made a number of proposals that would permit them to generate a significant new revenue stream through direct access to advertising revenues. These fell into the following categories:
- a. access to the local avails in US satellite services;
 - b. the sale of unused inventory in Canadian specialty services;
 - c. unrestricted access to the sale of advertising on the community channel; and
 - d. the lifting of all restrictions on the sale of advertising in their VOD services.
35. The CAB strongly opposes BDU proposals for increased access to advertising revenues. We would note that these are broadcasting *distribution* undertakings, whose primary role is just that – to distribute broadcast services, not to compete with them or to draw advertising revenues from the system. We would note that the Commission has made it clear that this is the role of this sector. For example, in Decision 2005-195, the Commission denied an application by Shaw Cable and Star Choice to develop omnibus services, stating at paragraph 29: “The novel interpretation proposed by Star Choice would allow operators of BDUs to dismantle a broadcasting undertaking’s broadcast day and create new channels that have little resemblance to the ones received. This would defeat the BDU’s primary function in the Canadian broadcasting system as a receiver and distributor of broadcasting and undermine broadcasters’ ability to promote their brands and program schedules”. (emphasis added)
36. Licensed Canadian television, radio and specialty programming undertakings must retain the exclusive right to sell advertising within the regulated system. The CAB was somewhat surprised by the aggressive move by BDUs to have access to another stream of revenue when it is clearly not motivated by any concern about the consumer.
37. In our Phase 1 submission, the CAB pointed out the increased competition to the regulated broadcasters that has resulted in fragmentation of potential audiences. With a significant increase in the number of conventional and specialty stations in the system, as well as foreign services, there are more services available for viewers’ attention.
38. This fragmentation of viewing to licensed programming undertakings is compounded by the increasing impact of the Internet and new media, including VOD. The Armstrong Consulting Report appended to our Phase 1 comments demonstrated the exponential growth in the time that Canadians spend on the Internet. Streaming of on-line video, downloads of on-line programming and the use

of commercial avoidance technologies such as PVRs have meant increased fragmentation and smaller audiences to the advertising that broadcasters air.

39. Not only are audiences to individual services reduced, but many of these new choices also sell advertising. As the Armstrong Consulting Report pointed out, Internet advertising is increasing faster than any other kind of advertising, outstripping more traditional media. Advertisers have a myriad of choices as to where to put their advertising budgets. As such, the growth of advertising on regulated television undertakings is slowing to levels just beyond the rate of inflation.
40. The pressure on advertising is particularly, although not exclusively, felt in smaller markets. National advertisers are increasingly reluctant to place advertising in smaller markets, often relying upon the spill from larger market stations available via BDUs, the Internet or other sources. Spill essentially gives them more coverage with no increased cost. At the same time, local advertisers do not have radio budgets, television budgets, print budgets or new media budgets – they have advertising budgets.
41. There is also an increasing inventory of advertising spots in the regulated system. With the deregulation of conventional television services, they have increased amounts of inventory available for sale. Since conventional broadcasters devote a significant portion of their revenues to Canadian programming, any increase in revenues will have a positive impact on the production and exhibition of Canadian programming.
42. If the Commission permits an increase in the number of minutes per hour for specialty services, this too could result in an increase in advertising inventory.
43. Increasing the available advertising inventory for programming undertakings does not guarantee higher advertising revenues. It will provide increased flexibility for broadcasters in the placement of advertising and perhaps modest increases in their revenues, but the increase is not a bonanza for OTA broadcasters. Increasing inventory will put downward pressure on rates and the end result could well be little or no incremental increase in advertising revenues for either OTA or specialty broadcasters. In other words, the size of the advertising pie for regulated programming undertakings is finite. This is particularly true in the French-language market where the cost per thousand for advertising spots is substantially lower than that in the English-language market.
44. In this environment, increased availability of advertising inventory to BDUs, whether through the local avails of US services, unsold inventory in Canadian services, advertising on the community channel or advertising in the BDUs' VOD platforms, will put further pressure on advertising revenues available to licensed broadcasters. This pressure will be felt in a number of ways:
 - a. lost revenues to the new choices;

- b. downward pressure on rates. Since BDUs' offerings are financed, quite profitably, from subscriber revenues, they can offer lower advertising rates, since any revenues garnered in this way are "gravy"; and
 - c. increased loss of national advertising in smaller markets as there is increased spill from the use of local avails.
45. It should also be noted that in many cases, the BDUs are active operators of Internet portals and have other advertising platforms as well. They already benefit from access to advertising revenues through their unregulated and exempt services. With additional inventory available, they will have the opportunity to provide advertising packages with added value in a way that is not available to other broadcasters.
46. Increased revenues to BDUs will not translate into significant increased support for Canadian programs. While they must devote 5% of their revenues to Canadian content development and local expression, this is a far lower amount than the amounts spent by television broadcasters.
47. Increased revenues for BDUs due to advertising sales will bolster an already very profitable industry while resulting in only a minimal increased contribution to Canadian programming. It will also have a negative impact on the capacity of Canadian broadcasters to continue their strong level of programming contribution to the system. Broadcasters will be sandwiched by BDUs which are both their carriers and their competitors in the advertising market.

The use of local avails in US satellite services

48. The Commission has reviewed the question of the use of US avails on several occasions, including various proposals by BDUs and by 49th Media. In 1995, the Commission approved in part an application by Rogers Cablesystems to use the local avails of US services to add promotional messages, but rejected the request to run advertising in these periods. Specifically, the Commission noted interveners' concerns, stating that "[a]lso of concern was the possible impact on broadcasters and specialty services who rely on commercial revenues." (Decision CRTC 1995-12)
49. In Public Notice CRTC 2005-88, the Commission rejected a proposal for the expansion of the commercial activities of the local avails, based on the following rationale:

BDU licensees may also hold licences for programming services or operate exempt programming undertakings. They are not permitted, however, to generate revenues directly through the sale and distribution of commercial advertising on their BDUs, but rely instead on subscriber fees. Conventional broadcasters, on the other hand, essentially generate revenues through the sale of national advertising and, dependant upon their adherence to local programming requirements, of local advertising. Canadian specialty services generally earn revenues through a combination of subscriber fees and access to national commercial advertising... The Commission has determined that permitting cable BDUs to place commercial messages in the local availabilities would represent a fundamental change to this important aspect of the Canadian broadcasting system.

50. The Commission also detailed the following reasons for its decision to deny BDUs access to advertising revenues in the local avails:
- a. the cable industry did not demonstrate any economic need to justify access to a new revenue stream;
 - b. the impact on conventional television and specialty services: “It is the Commission’s view that approval of the CCTA’s proposal would result in broadcasters competing with BDUs and, indirectly, with U.S. satellite programming services, for local advertising revenues”;
 - c. the impact on the capacity of existing broadcasters to meet their Canadian content and service obligations;
 - d. the impact on new digital services that were being launched; and
 - e. a reduction of the number of opportunities for the promotion of Canadian programs in the local avails.
51. In Public Notice CRTC 2006-69, the Commission updated its policy with regard to the use of local avails and outlined once again its basic rationale for permitting the use of such opportunities, stating that “...*the Commission’s intent in granting permission to use local availabilities has always been to provide an additional means of promoting Canadian programming services.*”
52. As recently as 2007, the Commission once again dealt with the question of the use of local availabilities in considering an application by Only Imagine. In its denial decision, Decision 2007-169, it once again reiterated its policy approach to this matter, stating “*The Commission’s policy is intended to ensure that local availabilities be used for the benefit of the Canadian broadcasting system and primarily to promote Canadian programming services rather than for the direct financial benefit of any party.*”
53. The CAB would note that while the intent of the use of these avails was to provide promotion of Canadian programming services at cost, BDUs already use these opportunities as a revenue stream, charging significant rates for their use. The CAB urges the Commission to require BDUs to provide these spots without charge to licensed Canadian programming services in a fair manner.
54. The CAB does not believe that there have been any significant changes in the past year that would warrant a change to the Commission’s policy. In fact, the CAB submits that the rationale for not permitting BDUs access to local or national commercial revenues is even stronger today, given that the BDU industry continues to flourish with increasing revenues and profits, while the financial picture for conventional television has declined further.

The sale of unused inventory in Canadian specialty services

55. The CAB is also concerned by the proposal that BDUs could sell commercial messages in the unsold inventory of Canadian specialty services. At first glance, it would seem that the proviso suggested by some BDUs that this would only happen

- with the agreement of the specialty service would seem to limit the impact of this proposal. But our concerns are twofold here:
- a. Consent to use the unsold inventory may not be a matter of choice for some specialty services.
 - b. Even where there is true consent, BDUs would be able to enter the local advertising market to compete with broadcasters with their own inventory.
56. As has been documented elsewhere in this submission and in other submissions, the negotiating table is not level between BDUs and some specialty services:
- a. Category 2 services have no carriage rights at all and are wholly dependent on receiving carriage from the BDUs. Some BDUs make it a condition of the affiliation contract that the specialty services make available a certain number of minutes per hour for use by the BDU. In these cases, the specialty service may have already given the permission in order to secure carriage.
 - b. Even for Category 1 and analog services, BDUs have significant control over the packaging and promotion of the services and may be able to extract the permission through the use of their negotiating power.
57. In these cases, the broadcaster in question has been required to give up some of its inventory since it cannot sell minutes contractually bound to the BDU. And the BDU can then compete with it and other broadcasters to sell these minutes to national or local advertisers.
58. Moreover, even where permission is freely given with no pressure exerted, the sale of unused time may have relatively small impact on the service with the unused inventory but will have a significant impact on the system at large and particularly on local broadcasters. If the unused time is sold to national advertisers by the BDUs in question, these advertisers may well be in a position to by-pass or decrease their spending in some local markets knowing that spill will meet their goals in the market. If the Commission permitted BDUs to sell such advertising to local advertisers this would create a new source of local competition to local broadcasters.
59. As was noted earlier, BDUs are also in a position to undercut the market prices since they already are very profitable and receive a guaranteed revenue stream from subscribers.

Advertising on the community channel

60. At present, all BDUs are required to devote 5% of their revenues from broadcasting activities to the creation and distribution of Canadian programming and local expression. Larger cable companies are allowed to use 40% of this amount for the support of the community channel, and where they provide community channels in each official languages, they can use 80% of the amount to support the community channels. For smaller Class 1 systems, 100% of this contribution may be used to fund the community channel. Put differently, they are able to use subscriber revenues to support local expression.

61. In its Policy Framework for Community Based Media, PN 2002-61, the Commission set out an amended policy for such media, including the community channel. The new policy required larger cable companies to ensure a minimum of 30% access programming on the channels (leaving 70% for other kinds of programming). There has been an evolution of some of these community channels to much more competitive programming – including local sporting events, concerts and other materials that are attractive to broader audiences.
62. Moreover, cable companies clearly consider the channel as a competitive advantage versus satellite BDUs. PN 2002-61 permitted cable companies to air up to 2 minutes per hour of messages promoting cable packages and services. Of this, 25% may be used to promote related programming undertakings. They are able therefore to divert a significant portion of the contribution to Canadian programming to local expression, which serves an important local purpose but also serves to make them more competitive in their core business of distribution of signals.
63. At present, the BD Regulations limit the kind of commercial messages that BDUs can broadcast, with the focus being on acknowledging the contributions of advertisers to the production of the local programming but stopping short of local or national advertising spots. The Commission re-examined this limitation in the 2002 review of community-based media.
64. The limitation was amended to permit “sponsorship messages contained in community programs to include moving visual presentations and a limited description of their products or services. Such messages, contained in community programs, may consist of oral or written acknowledgements, including a moving visual presentation of no more than 15 seconds.”
65. No evidence has been provided by BDUs that would justify a change in this policy.
66. If current limitations are removed and BDUs are allowed to expand the nature of this activity, there will be two negative repercussions for local broadcasters: subsidized competition for advertising revenues to OTA broadcasters; and further changes to the nature of the programming on the community channel to a more commercial focus.
67. With revenues to the community channel from subscribers, any additional advertising revenue is over and above the channel’s current revenue base. Consequently, advertising can be sold at a lower cost than what local broadcasters, who do not have this alternative stream of support, can charge. This will put pressure on advertising rates, particularly in smaller communities.
68. The nature of advertising activity is to try to sell the largest audiences possible to the advertiser. This will inevitably put pressure on the nature of the programming to a more commercially-oriented type of programming. Rather than serving as the electronic equivalent of the “back yard fence” for an exchange of programming that is not commercially viable, the community channel will focus on higher audience

- potential programs. Most cable operators have already attempted to make the programming on their community channels more mass appeal – witness the promotion and marketing of Major Junior hockey on many of them.
69. These cable operators are already pushing the boundaries of the Act’s discussion of cable local programming in Section 3(1)(t)(iv) which states that they “may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.”
 70. An expansion of BDUs’ commercial activities will fragment local audiences to licensed television programming undertakings and also put more pressure on local broadcast revenues. It will also deprive those using the channel for more niche local messaging from this communication source.
 71. The Act recognizes three broadcast sectors: public; private; and community. With increased advertising and a change in the programming mandate of the community channel, the community sector will become less distinct from the private broadcasting sector.

Advertising on VOD platforms

72. The BDUs have requested that they be permitted increased flexibility in their VOD offering, including the insertion of advertising. Among their requests is that they be allowed to insert “dynamic advertising” and to charge subscribers for VOD programs provided by Canadian broadcasters where targeted advertising is included.
73. While the CAB does not oppose amending the regulatory framework for VOD services to permit more flexibility with respect to the types of advertising that may be contained in VOD programs supplied by licensed Canadian broadcasters, the sale of such advertising content and the receipt of the revenues of such sales must remain within the exclusive control of the broadcaster responsible for the overall content of the program. This is addressed further in the section of these comments concerning the VOD regulatory framework.

II Discretionary services framework

74. The current regulatory framework for the licensing and distribution of discretionary television services contains a number of key elements that are designed to foster the creation and exhibition of Canadian content. These include genre exclusivity, the right of access to distribution by BDUs, preponderance requirements, distribution and linkage rules, and so on.
75. Given the potentially disruptive nature of many of the proposals respecting the framework discretionary services, as outlined by the Commission in NPH 2007-10, it is not surprising that the Phase 1 comments in this proceeding have demonstrated great interest from all sectors of the industry: BDUs; integrated media companies;

- the creative community; various other interest groups; and members of the general public.
76. BDUs argue that most if not all measures governing the distribution of discretionary services under the current framework should be thrown out and replaced by reliance only on a simplistic preponderance measure. The CAB believes that such an approach would fail to meet key objectives of the Act.
77. Both Canwest and Stornoway, for example, have examined the consequences of moving to a preponderance-only regime in their Phase 1 submissions. As concluded by CanWest:
- ...any move towards a simple preponderance rule would have the effect of reducing overall diversity in the system; reducing viewing to Canadian programming services; reducing revenues generated by Canadian programming services; and consequently, reducing the ability of such services to contribute to the important cultural objectives of the Broadcasting Act.*
78. With regard to access rules, the CAB notes that virtually all BDUs, with the notable exception of TELUS, argue that existing access rules are unnecessary and should be eliminated. The only legitimate rationale for such a position would be a concern that capacity limitations would make it impossible for a BDU to carry all Canadian discretionary services that would otherwise be entitled to a right of access. The CAB believes that this concern is unfounded and is in fact a red herring in this debate.
79. We note, for example, that Rogers has made the following comments about the capacity of their BDU networks in this and other proceedings:
- The digital/ broadband delivery platform provides **almost limitless shelf-space for content** of all kinds and from all sources. The challenge is no longer to ensure sufficient access to scarce capacity for content creators. [Rogers' submission re Broadcasting Public Notice CRTC 2006-72, paragraph 2, emphasis added.]*
- Now that the industry has matured and there are numerous successful Canadian pay and specialty services, and in light of the **virtually unlimited capacity available for the distribution of programming services...** [Rogers' Phase 1 submission re NPH 2007-10, paragraph 95, emphasis added.]*
80. These statements make it clear that capacity is not a barrier to increased carriage of Canadian services on the platforms of digital cable. Indeed, they speak to the fact that capacity need not factor into access considerations at all. But despite the enhanced capacity for Canadian services, BDUs wish to eliminate the access rules. The elimination of these rules will give the BDUs even more control over rate and carriage negotiations than they already have.
81. Furthermore, in our Phase 2 submission filed on January 25, 2008, the CAB addressed satellite capacity issues with reference to information provided by the DTH licensees and by Telesat Canada. In particular, Telesat's Phase 1 submission

- pointed out that it will be authorized to develop three additional satellites for the Broadcasting Satellite Services (BSS) broadcasting platforms, and that there are ongoing discussions with Industry Canada regarding the use of the Extended Ku-band for DTH purposes on the Fixed Satellite Services (FSS) platform. Telesat also noted that the next generation of transmission and coding standards, MPEG-4 with DVB-S2, would help alleviate any capacity constraints.
82. Taking into account the statements made by Rogers and the information filed by Telesat, the CAB submits that there is no basis in fact for the concern that BDUs have, or will have, limited capacity to carry Canadian services. Capacity issues should no longer figure in the access debate.
 83. The real issue in this discussion is that the elimination of access rules, as advocated by most BDUs, would provide BDUs with the ability to threaten removal of an existing service or non-carriage of a new service as a lever to negotiate lower affiliation payments. The inevitable result would be lower revenues for discretionary services and lower expenditures on Canadian programming. Small independent specialty services are particularly vulnerable in this regard because of their lack of negotiating power compared to the large BDUs. The only option available for desirable service is lengthy and expensive arbitration since withdrawal of service is not permitted in the current regulatory context.
 84. Furthermore, in the absence of access rules, it would be difficult for the Commission to rationalize a regulatory framework where some discretionary services have significantly higher Canadian content and Canadian programming expenditures (CPE) obligations than others, but none has the right of access to BDU distribution. In this regard, the CAB agrees with the recommendation of the Dunbar-Leblanc Report that discretionary services with significantly higher obligations must have the right of access to distribution.
 85. In this proceeding, programming services have generally indicated a willingness to accept a significant simplification of the existing distribution and linkage rules, but this is conditional on maintaining two fundamental distribution measures:
 - a. The right of access to BDU distribution must remain a central element of the distribution environment. More specifically, as outlined in the CAB's Phase 1 submission, Class A specialty services (existing analog and Category 1 services) would have the right of access to BDU distribution in recognition of their high levels of contributions to Canadian programming, both in terms of exhibition and expenditures.
 - b. BDUs must be subject to a meaningful preponderance rule. The CAB's Phase 1 submission outlined a three-part proposal that would ensure: (i) an overall preponderance of Canadian specialty, pay, pay per view and VOD services (excluding OTA signals) received by each subscriber; (ii) a preponderance of Canadian services within each package offered to a subscriber; and (iii) a preponderance of French-language discretionary services received by each subscriber in francophone markets. After further consultation with our French-

language members, we have realized that this third proposal has unintended consequences for the consumer. However, we believe that the access rules are needed to ensure that all French-language services are made available in these markets.

86. Programmers do not support, however, the complete elimination of genre exclusivity as advocated by most BDUs.
87. In this regard, the CAB's membership is not opposed to streamlining the current domestic genre exclusivity regime to reduce the regulatory burden on all parties (including the Commission and Commission staff). Moreover, CAB's membership believes that added flexibility in this respect would allow for some appropriate evolution of the services in support of section 3(s)(ii) of the Act which states that "private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them . . . be responsive to the evolving demands of the public."
88. However, the CAB believes that any changes must ensure equitable treatment and not prejudice the capacity of existing services to meet their obligations. A number of conditions are necessary to allow this flexibility:
 - a. Maintenance of the Access Rules;
 - b. Strengthening of the rules governing the entry of foreign services so that Canadian services are not subject to competition that does not play by the same rules;
 - c. Services should be primarily governed by the nature of service element of their respective conditions of licence and restrictions to ensure the niche nature of their programming;
 - d. Where possible, conditions of licence regarding the categories of programming from which a service can draw its programming should be streamlined with a goal to permit some additional programming flexibility for each service (to this end, we note that some individual members have provided some ideas in their written filings), except for the few cases where the nature of service is actually defined by the programming categories permitted (e.g., documentary, drama or animation channels).

III Authorization of non-Canadian services

89. In its Phase 1 submission, the CAB proposed a new test for authorizing non-Canadian services that would seek to address the following questions: (i) does the non-Canadian service offer a diversity of programming that is not already available in the system? and (ii) will its authorization unduly impact existing commercial arrangements (e.g. program rights/supply agreements) between Canadian and non-Canadian services?

90. BDUs, on the other hand, proposed a radically different approach, favouring either the complete removal of any and all restrictions on the authorization of non-Canadian services, or a watering-down of the existing test and procedure to expedite the authorization of new services, to the extent that it would effectively render any meaningful assessment impossible to carry out.
91. The CAB takes strong exception to these and similar proposals. A relaxation or elimination of existing policies respecting the authorization of non-Canadian services, as proposed by many BDUs, would have the following unacceptable consequences:
- a. it would undermine program rights held by Canadian broadcasters and our ability to maintain a separate Canadian rights market and would jeopardize continued access by Canadian licensees to non-Canadian programming;
 - b. it would undermine current incentives for non-Canadian service providers to enter into alliances with Canadian broadcasters for the purpose of developing new Canadian-owned services; and
 - c. it would yield little contribution to diversity within the Canadian broadcasting system, thereby failing to provide any significant benefits to balance the harm that would be done to the interests of Canadian programming services.
92. The CAB draws the Commission's attention to the analysis in the CTV Phase 1 submission about the need to strengthen existing policies respecting the authorization of non-Canadian services and the importance of maintaining a separate Canadian rights market. As CTV has stated: "...how and under what circumstances non-Canadian services are authorized for distribution in Canada is a fundamental issue in this proceeding. Any decision on the Commission's part to deregulate parts of the Canadian regulatory regime must only be made if it is also prepared to simultaneously strengthen its policies relating to when non-Canadian services will be authorized for distribution."
93. In summary, the CAB submits that the Commission must firm up existing policies regarding the authorization of non-Canadian services, not relax them. A more rigorous, objective test, such as that proposed by the CAB in its Phase 1 submission, is needed.

IV VOD framework

94. In this proceeding, BDUs are seeking additional flexibility with respect to their VOD services in two areas: (i) increased access to non-Canadian content for their VOD platforms; and (ii) the elimination of advertising restrictions to permit the insertion of dynamic advertising.
95. As stated in our Phase 1 submission, the CAB supports the need for a flexible VOD policy that reflects operational business realities. With respect to increased access to non-Canadian content, however, the Commission must ensure that BDU-operated VOD platforms do not provide a "back-door" entry for unauthorized U.S. services,

- in effect circumventing the Commission's policies respecting the addition of new non-Canadian services to the Lists of Eligible Satellite Services.
96. The CAB supports additional flexibility with respect to the inclusion of advertising material in programs supplied by Canadian broadcasters. In our Phase 1 submission, we acknowledged that VOD operators and licensed Canadian programming services should be able to identify new business models for the exploitation of this platform, such as the insertion of dynamic advertising over commercial messages aired on the original linear broadcast.
 97. The key principle, however, is that the sale of advertising content must remain within the sole control of the programmer that is responsible for the overall content of the program. To implement this principle, the CAB proposed in its Phase 1 submission that any VOD program containing a commercial message must: (i) be obtained from a Canadian programming service; and (ii) be subject to, and in accordance with, the terms of a written agreement entered into with the operator of the Canadian programming service that broadcasts the program.
 98. The CAB also wishes to comment on a proposal submitted by A&E that the Commission should allow VOD programming containing commercial messages to be obtained from non-Canadian services on the Lists of Eligible Satellite Services. This issue was most recently addressed last year in the context of an application by Shaw Communications Inc. to amend the licence for its VOD service "Shaw On Demand" by, among other things, offering VOD programming including commercial messages obtained from non-Canadian sources. This aspect of Shaw's application was denied in Broadcasting Decision CRTC 2007-273.
 99. The CAB opposed Shaw's proposal last year, and similarly opposes A&E's proposal made in Phase 1 of the current proceeding, on the basis that such a change in the VOD policy framework would facilitate the increased distribution on the VOD platform of programming obtained directly from non-Canadian sources, with potentially significant implications for Canadian broadcasters.
 100. More specifically, in its intervention concerning Shaw's application, the CAB advanced the following arguments:

It could impact Canadian broadcasters who wish to acquire VOD exhibition rights for their programming and insert promotional spots or commercials cleared for VOD. For example, the value of the VOD rights for prime time episodic programming would be greatly diminished if Shaw were able to negotiate directly with non-Canadian services to acquire the same programming for its VOD platform. There would in fact be little incentive for a BDU to negotiate with a Canadian service to carry a particular non-Canadian program on a VOD basis if the identical program could be supplied directly by a non-Canadian service.

Ultimately, this would provide an incentive for U.S. studios, especially those vertically integrated with a non-Canadian service, to withhold VOD rights from Canadian

programmers where the same program airs on both a Canadian and a non-Canadian service.

In addition, the CAB submits that a non-Canadian service would expect to receive something of value in return for granting VOD rights to its programming, whether through increased subscriber fees or some other consideration. Thus, approval of Shaw's application would represent a new opportunity for non-Canadian services to benefit financially from their presence in the Canadian broadcasting system, without regard for any corresponding obligations.

The Shaw proposal could also impact the advertising revenues available to Canadian broadcasters. The provision of VOD programming with embedded commercials obtained from non-Canadian services would provide an additional vehicle by which multi-national advertisers could reach Canadian viewers, as an alternative to buying time on Canadian programming services.

Decima Research estimates that 2.6 million households already have access to some form of VOD, and as tuning measurement improves, the potential negative impact on the advertising market for broadcasters would be even greater.

Furthermore, the potential negative impact on the system would extend beyond Shaw's VOD service as the decision would be a precedent for other BDUs to amend their VOD licences.

In short, this application by Shaw has the potential to substantially alter the role of non-Canadian services in Canada, to the detriment of Canadian programming services, by giving their programming and commercial messages increased exposure to Canadian viewing audiences. Without a better understanding of the impact of authorizing Shaw to offer VOD programming with commercial messages sourced from non-Canadian services and a chance to debate it fully, the CAB submits that VOD offerings should be approved only within the current licensing framework.

101. These concerns are equally valid with respect to A&E's proposal and the CAB urges the Commission to reject it.
102. Finally, the CAB notes that, given the continued evolution of VOD away from its original emphasis on feature films towards a wide range of content provided by Canadian conventional, specialty and pay broadcasters, it may now be appropriate to revisit the basic service buy-through policy that allows VOD services to be offered as an exception without any requirement to take the basic service.

V Basic service/priority carriage

103. The Phase 1 comments demonstrated general agreement amongst most parties that there needs to be a basic service to ensure that all subscribers have access to a baseline set of Canadian services at the lowest possible cost.

104. The CAB opposes Bell's proposal to eliminate the buy-through requirement that requires subscribers to take the basic service before subscribing to discretionary services. The CAB strongly supports maintenance of the existing buy-through requirement, with the proviso that the Commission revisit the VOD exception to this requirement, as noted above.
105. With respect to basic service priorities, the CAB generally supports maintenance of existing requirements respecting OTA television services, section 9(1)(h) services, provincial educational broadcasters and CBC/Radio-Canada. The CAB agrees with BDUs that the community channel need not be part of the basic service.
106. Furthermore, as argued in our Phase 2 submission, the CAB believes that the Commission should establish a DTH priority carriage requirement similar to cable, i.e. DTH distributors should be required to distribute each OTA television station that originates local programming to all DTH subscribers located within the Grade B contour of the originating station, including any rebroadcasters.
107. Some BDUs have argued that they should have complete freedom to put any service, Canadian or non-Canadian, on the basic service. The CAB opposes this proposal. The Commission must continue to ensure that no non-Canadian services, other than a single set of US 4+1 signals, are permitted on the basic service. This is necessary to ensure that the focus of the basic service remains on Canadian services and to promote the affordability of the basic service for consumers.
108. Some cable BDUs have also proposed the elimination of existing rules respecting channel placement, i.e. use of the basic band, arguing that such rules are meaningless in a digital environment.
109. The CAB believes, however, that channel placement and service grouping remain important concepts, in both the analog and digital environment. For as long as analog cable distribution continues, the distribution of priority signals beginning with the basic band should continue to be a requirement. Moreover, new Canadian OTA signals should have priority for carriage on the basic band over foreign signals. Furthermore, the CAB submits that additional safeguards respecting the relative position of priority services vis-à-vis non-priority services distributed on basic are appropriate to ensure equitable treatment of priority Canadian services. The CAB refers the Commission to the Phase 1 submission of the Independent Specialty Services for a discussion of the importance of channel placement.
110. With respect to digital distribution, the concept of channel placement can be equated with the principle that the on-screen program guide should present groupings of like services on contiguous digital channels in a manner supportive of Canadian channels. This matter is discussed in more detail in the Phase 1 submissions of Canwest and APTN.

VI Distant Canadian signals

111. In our Phase 2 comments, the CAB discussed the distant signals issue at length, describing the serious deficiencies with the existing framework and quantifying the economic impact on private television broadcasters attributable to the virtually unrestricted distribution of distant signals by BDUs across Canada.
112. In light of these concerns with the current framework, the CAB proposed a new approach with respect to the distribution of distant Canadian signals that would give OTA broadcasters the ability to fairly negotiate terms for the distribution of their signals into distant markets.
113. The CAB is disappointed that BDUs are arguing for a continuation of the status quo with respect to distant signals. The CAB strongly believes that the status quo is unworkable, that it has resulted in undue and uncompensated economic impact on Canadian OTA broadcasters and, most importantly, that it does not address the underlying issue of protecting program rights. Arguments for continuation of the status quo must be rejected.
114. The CAB has taken note of Bell's Phase 2 submission, which includes a distant signals impact analysis prepared by Canadian Media Research Inc. (CMRI). This impact analysis purports to demonstrate that the value gained from national distribution of OTA signals balances any harm, and that no further compensation would be appropriate.
115. The CAB has commissioned an analysis of the CMRI Report by Armstrong Consulting, and this analysis is appended as Appendix 2.
116. Armstrong Consulting concludes that the CMRI Report is based upon an incorrect assumption – that advertisers currently, and in the future, will willingly pay for distant viewing in the purchase of network advertising when they can obtain that viewing free of charge in the purchase of national selective advertising. This faulty assumption in turn leads to two errors – an underestimation of both the average value of an hour of television viewing and the calculation of the impact of distant signals on a net impact basis.
117. Armstrong Consulting further concludes that, if these errors are corrected, the data used by CMRI would put the impact of distant signal viewing in 2006 at \$ 94.4 Million for conventional television in total and \$ 77.4 Million for private conventional television.

VII Third-language services

118. The CAB notes that BDUs are calling for removal of the rules governing access and distribution of analog and Category 1 third-language services. In support of this they cite the Dunbar Leblanc Report's mistaken contention that Internet services such as

- Jump TV are a threat to third-language services on traditional platforms, and therefore a threat to the financial health of BDUs and their contributions to Canadian content.
119. JumpTV calls itself an international Internet broadcaster with more than 300 channels as well as sports events. Nonetheless, it is far from successful, with fewer than 100,000 subscribers worldwide despite its global reach. It used to target the Latino population in the United States, Arab and South Asian population in Europe and various linguistic groups in Canada. However, it recently announced that it would focus on the Latino population and sports. JumpTV has seen its stock drop from \$9.75 a year ago to \$1.29 in February 2008, based on the company's disappointing performance. There is no evidence that JumpTV is gaining any market share in Canada, or that it will affect licensed Canadian BDUs.
 120. Like Dunbar Leblanc, the BDUs have failed to provide any consumer studies or economic analysis to support their recommendations regarding third-language services.
 121. The BDUs have failed to note that third-language services from foreign countries already have far more liberal access to Canadian distribution than French- or English-language foreign services, and that the careful compromise allowing a more relaxed approach to their entry was crafted in November 2005 following significant consultation and due process.
 122. The "buy through" rule for Analog and Category 2 third-language services covers only competing general interest services, and allows competing foreign niche services. Any further change would be premature, and harmful to Canadian services.
 123. Finally, Rogers has suggested that access and linkage rules governing third-language services distributed before December 2004 are no longer necessary given the "established brands and loyal audiences" of these services (Fairchild Television, Telelatino, Talentvision, South Asian Television and Odyssey). We submit that not one of these services can compete against a foreign service that has no obligations and that has recouped its costs in a much larger market. Foreign third-language services are generally recognized national brands, such as national broadcasters, in their country of origin.
 124. Other third-language Canadian services are not even protected by the buy-through provisions and have suffered subscriber and advertising revenue losses as a consequence. This also means that foreign programming that supports the provision of Canadian programs on the Canadian ethnic services may no longer be available for purchase by the Canadian service.
 125. The CAB submits that these services are the canaries in the coal mine that show the future of Canadian services if access and other rules are not maintained.

VIII Small system exemption

126. In their Phase 1 comments, cable BDUs such as Cogeco, Rogers and the CCSA advanced various proposals to exempt additional small cable systems from the requirement to hold a broadcasting licence. While the proposals varied in some of the details, it is the CAB's view that all exemption proposals are too broad in scope to warrant serious consideration.
127. Typically, these exemption proposals would take some one million subscribers out of the BDU licensing framework. Some of them would inappropriately exempt cable systems owned by the four largest cable MSOs.
128. The CAB sees no reason to broaden the scope of existing exemption orders. Nevertheless, should the Commission determine that there may be merit in considering further exemptions, then the CAB submits that the appropriate threshold should be carefully considered and small systems operated by the large cable MSOs and telephone company BDUs should be explicitly excluded from exemption.
129. Finally, any broadened exemption order should include criteria respecting the provision of the basic service and carriage on the basic band, a buy-through requirement, an effective preponderance rule, continuation of simultaneous substitution obligations in markets served by local television broadcasters and a requirement to carry all section 9(1)(h) services.

IX Digital transition

130. Many cable BDUs have called for the immediate elimination of analog distribution and linkage rules and digital migration provisions. The CAB submits that any such action is premature.
131. In our Phase 1 submission, we argued that, consistent with the approach adopted for OTA television, there needs to be an orderly and well-defined progression leading to the full conversion of discretionary programming services and the BDU distribution sector to digital distribution. We proposed that full conversion should follow the analog OTA conversion by a reasonable period of time, for example, two years.
132. It should be noted that the OTA conversion will be extremely expensive to undertake – evidence of the cost has been provided by a number of our members. There is no business case for this cost in smaller markets and the CAB submits that, in such markets, OTA broadcasters which do not convert to digital transmission should continue to enjoy priority carriage and simultaneous substitution rights. The Commission should encourage BDUs and broadcasters to negotiate to provide direct digital feeds that would ensure that consumers receive the best quality technical signal without occasioning ruinous capital spending for the broadcaster.

133. During this transition, the CAB submits that an appropriate framework needs to remain in place to govern hybrid analog-digital cable distribution, including the retention of key provisions for the analog portion of a BDU's service and digital migration principles respecting the conversion of analog services to digital distribution.
134. The CAB submits that the Commission should maintain analog basic service rules respecting use of the basic band, linkage rules for analog cable service and analog-digital mirroring provisions in accordance with established digital migration principles, for as long as an analog cable service is provided by cable BDUs.

X Conclusion

135. The CAB submits that sections 3(1)(e), (s) and (t) of the Act are particularly relevant to this proceeding. They call upon the Commission to:
- a. require contributions to the creation of Canadian programming from each component of the broadcasting system;
 - b. require such contributions from private programming undertakings and networks based upon their capacity to do so; and
 - c. require BDUs to give priority to the carriage of Canadian services and particularly local services; to provide efficient delivery of services at affordable rates; to provide reasonable terms of carriage for Canadian services; and to allow them to provide local programming, in particular for linguistic and ethnic minorities.
136. The CAB submits that the Commission must bear in mind the financial position in which the OTA sector finds itself. In our February 12th presentation to the hearing considering applications for new HD OTA services, we pointed out that this sector is in a weak position financially with revenues flat and profitability below acceptable levels that will generate new investment. Small market stations find themselves in a loss situation. And the sector faces a mandated expensive transition to HD within a very short timeframe. The Commission has noted the importance of the OTA sector in many of its policy pronouncements and the Act is clear that the provision of local programming is a strong priority.
137. While the bright light in broadcasting recently has been the specialty and pay sector, this has been to a significant extent because of a supportive regulatory environment. This supportive environment has enabled these broadcasters to make a strong contribution to Canadian programming.
138. The BDU sector has made claims of its need for increased flexibility in the provision of services based upon a supposed increase in competition in delivery. And while it is true that there are more carriers delivering to homes, it is also true that this has had little impact on either the price to consumers or the profitability of the BDUs:

- a. The price of basic service and of discretionary packages increases regularly with no apparent loss of subscribers. In fact, the total number of subscribers in the system has increased.
 - b. BDUs' operating margins on regulated service to basic and non-basic subscribers was a healthy 27.7% in 2006. This exceeded the operating margin for the pay and specialty sector in the same year (25.1%) and was almost four times that of the OTA television sector (7.8%).
139. At the same time, the production sector has requested increased contributions from the specialty sector which devoted 42.3% of its revenues to Canadian programming in 2006, including a very healthy contribution to the independent production sector.
140. The CAB has made a number of proposals to streamline the regulation of the pay and specialty sector and the BDU sector as well. These include a revised approach to genre exclusivity that will allow greater competition between Canadian services, a group licensing approach to specialty services, the elimination of tiering and linkage requirements and the elimination of the 5:1 rule concerning the carriage of affiliated services.
141. BDUs have presented an aggressive agenda of proposals whose results would effectively give them control over the broadcasting system through, amongst other things, the elimination of access rules, removal of the competitive test for the importation of foreign services, movement to a simplified preponderance rule and expansion of the small market exemptions. They also propose a significant move into the advertising market with proposals to allow advertising on the community channel, sale of advertising in the local avails of US services and of unsold inventory in Canadian services as well as expanded advertising in VOD.
142. Not only would these proposals weaken the capacity of services to ensure carriage and to develop meaningful business plans that can sustain their proposals for Canadian content, they would allow the BDUs to compete for advertising revenues against the broadcasters who make these contributions.
143. The CAB submits that it is also time to redress an historical mistake. At one time, broadcasters had control over whether their signals were carried outside of the markets for which they were licensed. This control was removed. BDUs now offer packages of Canadian distant signals at a price to consumers with no compensation to the signal originator. We believe that it is time for the Commission to end the unfair use of broadcasters' signals.
144. While some BDUs submitted a study from CMRI which attempts to argue that the importation of distant signals has little or no impact on broadcasters, we have submitted an analysis by Stephen Armstrong Consulting that demonstrates that the study was based upon a faulty premise. In fact, once the flawed assumption is corrected, the CMRI study demonstrates significant damage to broadcasters from distant signals.

145. We submit that the package of proposals that we have submitted strikes an appropriate balance between streamlining the system and maintaining a strong Canadian programming sector. The CAB's proposals will help redress some current imbalances within the system with no negative impact on the profitability of the BDU sector.

XI Appendices

1. CAB Comments re Shaw's Phase 1 Research Studies
2. Comments on the "The Effect of Distant TV Stations On TV Advertising Revenues" by Canadian Media Research Inc.