



January 24, 2008

via E-pass

**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
1 Promenade du Portage
Gatineau, QC K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Notice of Public Hearing CRTC 2007-17, Items 1 and 2: Application No. 2006-1658-4 by HDTV Networks Incorporated (“HDTV”) and Application No. 2007-1283-7 by YES TV Incorporated (“YES TV”), for licences to operate English-language high definition (“HD”) over-the-air (“OTA”) television services

1. The Canadian Association of Broadcasters (“CAB”) – the national voice of Canada’s private broadcasters, representing the vast majority of Canadian programming services, including private television and radio stations, networks and specialty, pay and pay-per-view television services – is pleased to submit this intervention in relation to the above-noted applications by HDTV and YES TV.
2. The CAB does not oppose the licensing of new HD services in general. However, we believe that these particular applications are both seriously deficient and ill-timed, given the current financial climate and regulatory environment. Specifically, the CAB opposes both of these applications on the following grounds:
 - a. Neither applicant would bring to sufficient benefits to the Canadian broadcasting system to merit their being licensed;

- b. Neither application meets the Commission’s traditional tests for competitive market entry (indeed, neither application even addresses the tests), nor does either applicant meet the requirement in the call for applications to prove a demand for its service;
- c. Licensing any new OTA services at this time could have a severely detrimental impact on the revenues of the existing conventional television sector, which is already in perilous financial condition; and
- d. It is premature in any event to consider these applications, given that we are in the midst of the transition to digital/HD and there is currently a proceeding underway which could significantly change the regulatory framework under which OTA stations operate.

Background

- 3. In Broadcasting Public Notice CRTC 2002-31¹ (“PN 2002-31”) the Commission established its policy framework for the broadcast of digital OTA services. In so doing, the Commission stated that it was satisfied that this framework, and its underlying principles, would serve the objectives of the *Broadcasting Act* (the “Act”).
- 4. Initially, the policy provided that the transition from analog to digital OTA television would not have a mandated deadline, but rather would be governed by market forces. Subsequently, in Broadcasting Public Notice CRTC 2007-53² (the “TV Policy Decision”), the Commission determined that a mandated shut-down date was required in order to ensure the timely transition from analog to digital OTA television (“DTV”).³ The deadline established by the CRTC is August 31, 2011, two years after the deadline for transition in the U.S.⁴
- 5. The policy framework established by the Commission in PN 2002-31 specifically dealt with the prospect of new OTA entrants being licensed on a digital basis. In PN 2002-31, the Commission stated that any new applications for a new television licence filed by prospective new entrants during the transition period, whether predicated on the use of digital or analog spectrum or both, would be considered by the Commission on a case-by-case basis. In the TV Policy Decision, the Commission stated that in addition to encouraging the transition of existing OTA broadcasters to

¹ *A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting*, 12 June 2002.

² *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, 17 May 2007 [hereinafter “TV Policy Decision”]

³ *Ibid.* at para. 61.

⁴ *Ibid.*

digital transmission, the Commission will continue to consider applications by new entrants who are prepared to construct digital only OTA broadcast facilities.⁵

6. In PN 2002-31, the Commission also noted that any new applications would be considered in accordance with existing policies, including those relating to market entry:

The Commission emphasizes that any application for a new television licence filed by prospective new entrants during the transition period, whether predicated on the use of digital or analog spectrum or both, will be considered by the Commission on a case-by-case basis and in accordance with its existing policies. These existing policies include those set out in *Building on success – a policy framework for Canadian television*, Public Notice CRTC 1999-97, 11 June 1999, and others related to such matters as market entry and the issuance of calls, where appropriate, for competing applications.⁶

7. As discussed in more detail at paragraphs 43-47 below, the Commission's traditional approach with respect to market entry of new OTA stations has been to consider the impact that a new service would have on the audiences and revenues of existing services, and the impact it would have on the ability of existing services to continue to meet their programming responsibilities.⁷
8. In the TV Policy Decision, the Commission recognized the financial plight faced by OTA broadcasters, as well as the fact that the transition to digital/HD raises a number of unanswered questions.⁸ The Commission also acknowledged both the centrality of the conventional television sector in meeting the objectives of the Act, and the significant challenges faced by the industry:

OTA television stations...play a vital role in the broadcasting system by providing local television programming that reflects the interests and needs of the communities they are licensed to serve.

Yet, in spite of its key role in the broadcasting system, this sector faces a number of challenges. With audience fragmentation and technological changes, OTA stations will

⁵ TV Policy Decision, para. 80.

⁶ PN 2002-31 at para. 20. The CAB notes that Public Notice 1999-97, *Building on success – a policy framework for Canadian television*, 11 June 1999, has since been superseded in several respects by the TV Policy Decision.

⁷ See, for example, Broadcasting Decision CRTC 2004-98, *Competing applications proposing the introduction of new, over-the-air television services at Edmonton and Calgary*, 26 February 2004 at para. 32.

⁸ Including, for example, disruption to viewers caused by the shut-down of analog OTA signals; the provision of HD services to remote and underserved areas; and the impact of the transition on Canadian consumers: TV Policy Decision at paras. 78-79.

continue to experience a decline in audience share, major changes in the form and delivery of advertising, and additional costs related to the digital transition. In the OTA Notice, the Commission expressed its concern that the higher costs associated with the conversion to digital/HD, combined with a possible reduction in advertising revenues, could result in the inability of OTA television licensees to increase their contributions to Canadian programming when it is important that the maximum investment possible be made in the production of high quality HD Canadian programming.⁹

9. Although it declined to implement compensation for carriage and retransmission consent in the TV Policy Decision, the Commission has re-opened these issues in the context of Broadcasting Notice of Public Hearing 2007-10¹⁰ (“BNPH 2007-10”), which proceeding is currently underway, and which also contemplates a near-complete review of the *Broadcasting Distribution Regulations* (the “BDU Regulations”).
10. It is clear from the above that the HD regulatory framework is still developing, and equally clear that HD is not fully deployed.

The Applications

11. In Broadcasting Public Notice CRTC 2007-62,¹¹ (“PN 2007-62”), the Commission announced that it had received an application for a new HD service and, consistent with its general practice, called for applications from other parties wishing to obtain a broadcasting licence (or licences) to provide an over-the-air digital/HD television service (or services) across Canada.
12. In its call, the Commission set out the factors that an application should address, namely:
 - a. The contribution that the proposed service will make to achieving the objectives established in the *Broadcasting Act* and, in particular, to the production of local and regional programming.
 - b. The expected audience of the proposed service.

⁹ TV Policy Decision, paras. 11-12.

¹⁰ Broadcasting Notices of Public Hearing CRTC 2007-10-3 and 2007-10-4, *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services - Expansion of scope, extension of filing deadlines and revised hearing date*, 5 November 2007 and *Clarification of the scope of the proceeding and revised process*, 30 November 2007.

¹¹ *Call For Applications For A Broadcasting Licence To Carry On An Over-The-Air Digital / High Definition (HD) Television Programming Undertaking To Serve Locations Across Canada*, 11 June 2007

- c. The proposed expenditures and the means by which the applicant will promote the development of Canadian talent, including local and regional talent.
- d. An analysis of the markets involved and potential advertising revenues, taking into account the results of any survey undertaken supporting the estimates.
- e. An indication of possible shared investment or co-operative program buying arrangements with Canadian or foreign broadcasters.
- f. Evidence as to the availability of financial resources consistent with the requirements established in the financial projections of the applicant's business plan.
- g. A detailed technical analysis setting out the channel that will be used for each market.
- h. An indication as to the amount of high-definition programming, and details with respect to local, regional, Canadian, and foreign programming.¹²

HDTV

- 13. HDTV is seeking OTA licenses in all 8 major English-language television markets: Toronto, Montreal, Vancouver, Ottawa, Edmonton, Calgary, Winnipeg and Halifax. However, unlike other OTA stations, HDTV will not provide original local programming in each of the markets it seeks to serve. Rather, it will be based in Vancouver with a self-described “national” approach to programming and advertising.
- 14. Although positioning itself as a national HD network, HDTV also proposes to provide an analog signal until the Commission’s mandatory shutdown date of August 31, 2011, unless the digital subscriber level of cable BDUs in the respective markets for which HDTV seeks carriage reaches 85% penetration by the time of HDTV’s launch.¹³ Accordingly, despite its purported emphasis on the delivery of digital OTA signals in its application, HDTV is in fact applying for both an analog and digital licence, and seeking must-carry status for both signals until the cut-off date.
- 15. The effect of licensing this application would be to create a national must-carry network available in all television households – in effect, a national network – despite the fact that HDTV has not, in fact, applied for a network licence. More importantly, as detailed below, HDTV has avoided undertaking any of the significant and costly

¹² *Ibid.*

¹³ HDTV Supplementary Brief, pp. 32-33.

obligations to provide local news and programming that are typically the regulatory quid pro quo for the privilege of holding an OTA licence in local markets.

YES TV

16. YES TV describes its proposed Toronto station as a “multi-platform service that is dedicated to youth empowerment with a strong focus on aboriginal and marginalized youth.”¹⁴ It targets an audience of young adults, aged 12-25, with what it calls a “regionally-focused High Definition channel”¹⁵ to serve the Greater Toronto Area (GTA). YES TV envisions an interactive service which takes content from the Internet and from its own network of mobile video booths and broadcasts it over the air via an OTA signal.
17. Based on the information provided, the CAB notes that the applicant plans to broadcast 28 hours per week of priority programming between 7 and 11 p.m. – in other words, all of its prime time hours for each year of the licence term.¹⁶ YES TV also states that it will feature a local daily newscast, approximately 30-40% of which will consist of user-generated content, and a minimum of three hours per day of locally-produced original programming.¹⁷
18. The applicant has confirmed that it is seeking mandatory distribution of the OTA signal as part of the digital basic service by Class 1, 2 or 3 distributors as well as by DTH distributors.¹⁸ However, it also confirmed that it envisaged that either the HD or standard definition signals would be distributed by either or both of the SRDU undertakings, inferring that it would be willing to be carried in standard definition as opposed to only in HD.¹⁹ As with HDTV, this could mean that the applicant’s proposal is not a full HD network.

Neither applicant brings sufficient benefits to the Canadian broadcasting system

19. After a careful review of these applications, the CAB concludes that neither applicant brings sufficient benefits to the Canadian broadcasting system to merit licensing at this time.
20. With respect to HDTV, its application is deficient on numerous grounds:
 - a. The provision of local news, information and reflection are defining characteristics of a conventional OTA broadcaster and play a key role in fulfilling the objectives of the Act. Yet, HDTV has proposed no

¹⁴ YES T.O. Supplementary Brief, p. 1.

¹⁵ *Ibid.*

¹⁶ YES TV response to deficiencies, 5 October 2007, p. 11.

¹⁷ *Ibid.*

¹⁸ *Ibid.* at p. 15.

¹⁹ *Ibid.*

commitments to local or regional programming at all, while at the same time proposing to establish itself in the largest, most profitable television markets in the country.

- b. HDTV's application for carriage as an analog as well as digital service makes it an analog wolf in the clothing of an HD sheep. Despite its self-promotion as a 100% HD service, it has made no firm commitment in the way of a condition of licence to true HD programming hours.
- c. HDTV's commitment not to solicit local advertising does not protect against local siphoning. If it is serious about not wanting to impact on the local advertising revenues of OTA broadcasters, it should offer to accept a condition of licence that it will neither solicit nor accept local advertising.
- d. HDTV's priority programming commitment, at 3 hours per week rising to 4 hours in years 4-7 of its licence term, is less than half that of the major station groups.

a. No local programming

- 21. The CAB notes that the very first criterion set out by the Commission for applicants in PN 2007-62 was “the contribution that the proposed service will make to achieving the objectives established in the *Broadcasting Act* and, in particular, to the production of local and regional programming.” However, HDTV has committed to no individual local programming in any of its markets. Rather, it explains “[o]ne of the most important differentiating features of our application is that we focus almost exclusively on national programming.”²⁰ Similarly, it trumpets a “unique” approach to news programming, in which the “news reported will be primarily national in interest, but it will contain some regional content.”²¹ In contrast, conventional OTA stations are the primary television sources of local news, information and reflection in their home communities.
- 22. One of the key objectives of the Act is the provision of local and regional programming. The Commission has placed considerable emphasis on the importance of local programming by OTA stations:

The Commission notes that over-the-air broadcasters, including television broadcasters, have traditionally been licensed with the expectation that they will provide audiences resident in their local service areas with programming that reflects their needs and concerns. In providing such programming, local licensees can make a significant contribution to the attainment of the objectives of the Broadcasting Act, and in particular that set out in section

²⁰ HDTV Supplementary Brief, p. 20.

²¹ *Ibid.*, p. 21

3(1)(i)(ii), which specifies that programming provided by the Canadian broadcasting system should be drawn from local, regional, national and international sources.²²

23. In particular, the Commission has repeatedly emphasized the importance of local news and information programming. Almost twenty years ago, the Commission stated: “Local news and information programs...establish a local station's identity within its service area and are the primary means by which a station reflects the nature and concerns of the community.”²³ In the introduction to the licence renewal decisions of the major English-language broadcasters in 1995, the Commission reiterated this, noting:

The Broadcasting Act...states that the Canadian broadcasting system should "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity". The primary contribution by local stations to this objective, within their own communities, is the local news and information programming they produce.

...

The Commission reiterates the importance of the principle of local reflection and reminds each television licensee that, over the new licence term, it will remain its responsibility to meet the particular needs and interests of the public residing within the geographic area it is licensed to serve.²⁴

24. In *Building on success – a policy framework for Canadian television*, Public Notice CRTC 1999-97 (“PN 1999-97”),²⁵ the Commission noted that at their next licence renewal, “all licensees will be required to demonstrate, in their applications, how they will meet the demands and reflect the particular concerns of their local audiences, whether through local news or other local programming.”²⁶ This policy was reiterated in the 2001 licence renewals of the major station groups.²⁷ And recently, in approving Rogers’ purchase of the former Citytv stations in September 2007, the Commission specifically explored the impact of the purchase on local and regional programming, and stated: “In light of Rogers Media’s statement that it will make

²² Broadcasting Public Notice CRTC 2003-37, *Direct-to-home (DTH) broadcasting distribution undertakings - simultaneous and non-simultaneous program deletion and the carriage of local television signals in smaller markets*, 16 July 2003 at para. 67.

²³ Public Notice CRTC 1989-27, *Local Television for the 1990s*, 6 April 1989

²⁴ Public Notice CRTC 1995-48, *Introduction to decisions renewing the licences of privately-owned English-language television stations*, 24 March 1995

²⁵ 11 June 1999

²⁶ PN 1999-97 at para. 44.

²⁷ See, for example, Decision 2001-457, *Licence renewals for the television stations controlled by CTV*, 2 August 2001 at para. 29.

"localness" a defining element of the programming offered by the Citytv stations, the Commission directs the applicant, at licence renewal, to review its strategy for local news on the Citytv stations in western Canada."²⁸

25. As the Commission noted in the recent Diversity of Voices decision:

It is from the local media that most Canadians receive the information that is critical to their understanding of local, regional, national and international issues. Local media help to shape Canadians' views and to equip them to be active participants in the democratic life of the country.²⁹

26. HDTV's application provides none of the local programming and offers none of the local or regional reflection that OTA services are expected to make in the markets they serve. Instead, HDTV has requested a licence in eight of the country's top television markets, without assuming any obligations to local or regional programming at all. Unlike CTV and CanWest, it will not serve any small or remote communities or provide regional service. And unlike the other conventional OTA stations in Canada, it does not offer original local news or programming commitments in every local market it seeks to serve. In fact, HDTV's plans for national news and no local news or information programming make its proposal more appropriate for a specialty licence than for a conventional licence. The CAB believes it is unacceptable for an OTA broadcaster – whether analog or HD – to receive the privilege of an OTA licence without assuming any of the local programming requirements that every other OTA licensee must fulfill in order to satisfy the objectives of the Act.

b. An analog wolf in an HD sheep's clothing?

27. HDTV proposes to provide an analog signal until August 31, 2011 (unless the digital subscriber level of cable BDUs in the respective markets for which HDTV seeks carriage reaches 85% penetration by the time of HDTV's launch.³⁰). As discussed earlier in this submission, Commission policies respecting the transition of OTA broadcasters to digital have been clear that the Commission would contemplate applications by new entrants for digital licences only – not hybrid analog/digital licences as contemplated by HDTV. In the CAB's view, the distribution of the service in analog or standard-definition format, when the proposal is predicated on the creation of a national HD service, is completely inappropriate and belies the notion that this is truly intended to be an HD service.

28. Moreover, the CAB notes that HDTV has not committed to making a percentage of its schedule "true" HD. HDTV claims that an increasing number of producers are

²⁸ Broadcasting Decision CRTC 2007-360, *Transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media Inc.*, 28 September 2007 at para. 23.

²⁹ Broadcasting Decision CRTC 2008-4, *Diversity of Voices*, 15 January 2008 at para. 57.

³⁰ HDTV Supplementary Brief, pp. 32-33.

generating HD content³¹ and thus by the time it launches “there will be no shortage of available HD programs for it to broadcast” from Canadian and foreign producers.³² HDTV also states that “we will seek to acquire programming created in HD. Regardless, we will have the capability to “up convert” standard definition programming if need be, but we don’t believe we will have difficulty acquiring HD content.”³³ However, while HDTV states that it will broadcast 18 hours of HD programming per day during the course of the licence term,³⁴ it does not state that it will accept this commitment as a condition of licence. Therefore, even the largest benefit that HDTV argues it will bring to the system – the provision of HD programming – is not guaranteed.

c. HDTV’s commitment not to solicit local advertising does not go far enough.

29. HDTV has stated that it will not solicit local advertising, but it is notably silent on whether it will accept local advertising. As discussed in more detail in paras. 48-58 below, revenues in the conventional sector are flat, and profitability is declining. Projections filed by the CAB in the current BDU Framework Proceeding show that profitability is projected to decrease further still in the next four years, particularly for English-language and small market conventional broadcasters. Those independent services that have been licensed in the last several years – Toronto One, for example (now SunTV) – have struggled financially, even as analog services with full access to local advertising revenues.
30. Accordingly, the financial impact that could be caused if HDTV were to siphon local advertising dollars in these major markets, along with the increased competition for national advertising dollars, would have an impact on existing local broadcasters in each of the markets HDTV proposes to serve. In the CAB’s view, if HDTV is serious about not wanting to impact on the local advertising revenues of OTA broadcasters, it should offer to accept a condition of licence that it will neither solicit nor accept local advertising.

d. Inadequate commitment to priority programming

31. Finally, HDTV proposes to air just three hours per week of Canadian priority programming between 7-11 p.m. in the first three years of its licence term, rising to four hours per week in years four to seven of the term. In contrast, almost all of the other conventional OTA stations have conditions of licence obligating them to provide eight hours per week of priority programming.³⁵ Indeed, priority

³¹ HDTV Supplementary Brief, p. 13.

³² HDTV Supplementary Brief, p. 15.

³³ HDTV response to deficiencies, April 13, 2007 at p. 6

³⁴ HDTV response to deficiencies, April 13, 2007 at p. 6

³⁵ See, for example, Decision 2001-457, *Licence renewals for the television stations controlled by CTV*, 2 August 2001 (Appendix 2); Decision CRTC 2001-458, *Licence renewals for the television stations controlled by Global*, 2 August 2001 (Appendix 2); Broadcasting Decision CRTC 2007-360, *Transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media Inc.*, 28 September 2007 (Appendix 1)

- programming represents 29% of the prime-time schedules for CanWest's Global and CH stations, and for CTVgm's CTV and A-Channel stations and 8 hours of priority programming for City TV.³⁶
32. The CAB notes that not only do OTA broadcasters currently offer far more priority programming than this applicant, but they are rapidly increasing the amount of their priority programming that they offer in HD. For example:
- a. approximately 90% of the Canadian drama programming on CanWest and 50% of its domestic documentary programming are in HD;
 - b. CanWest is also undertaking a very significant digital transformation of its local newsrooms across the country;
 - c. Approximately 95% of CTV's priority programming is in HD;
 - d. 100% of Citytv Toronto's news is in HD.
33. By the time the applicant is ready to launch the proposed service, existing OTA broadcasters will be providing even more priority programming in HD. Accordingly, with only three to four hours of priority programming per week, HDTV offers little benefit to the system in this respect.
34. In sum, HDTV is seeking an extraordinary and privileged regulatory position – an 8-station OTA network with 100% penetration in all major metropolitan markets - without any of the regulatory obligations that are shouldered by other conventional OTA stations, and without even committing to a minimum number of hours of true HD programming. For these reasons, the CAB does not believe this proposal contains sufficient benefits to the Canadian broadcasting system to merit the granting of an OTA licence.
35. As to YES TV, the CAB is of the view that its application lacks both a viable business plan and sufficient assurances as to quality of programming, putting in doubt the applicant's ability to bring any substantial benefits to the system. Moreover, like HDTV, it envisages that either its HD or standard definition signals would be carried by BDUs, raising the question as to whether it will be providing a true HD service.
36. As noted earlier, YES TV plans to air priority programming for all 28 hours per week of its prime time schedule for each year of the licence term.³⁷ In addition, it plans a local daily newscast, approximately 30-40% of which will consist of user-

³⁶ Currently, all major station groups are required to air eight hours of priority programming during "peak prime-time" (from 7:00 - 11:00 p.m. each night)

³⁷ YES TV response to deficiencies, 5 October 2007, p. 11.

- generated content, and a minimum of three hours per day of locally-produced original programming.³⁸
37. The CAB notes that YES TV's business plan puts the service's ability to achieve this ambitious schedule in doubt. First, YES TV plans to sell local advertising in Toronto – already the most competitive media market in the country, with nine existing OTA services – and predicts that 80% of its revenues will come from local advertising, with 20% from national.³⁹ The CAB is not convinced this is achievable by a new OTA service, particularly in light of the difficulties that have been faced by the most recent OTA licensee in this market, SunTV.
 38. Second, the Supplementary Brief, which consists of just one page, provides very little information as to what the service would offer, how it would be financed, and the value of the programming that it would add to the system. For example, the budgets for programming appear very low considering the amount of original content it proposes to provide, calling into question the quality of the programming which would be produced.
 39. Third, the application also relies to a large extent on user-generated content. One of the objectives of the Act is that “the programming originated by broadcasting undertakings should be of high standard.”⁴⁰ While reference is made to a committee that would subject user-generated content to a “strict review process” prior to airing it on newscasts, little information is provided about who would be on the review board or the criteria that would be used to ensure that this objective of the Act is met.⁴¹
 40. Fourth, there is no information on the principals behind the undertaking or on the other people or entities that are referenced as being involved. Although in the application the response to s. 3.2 states that “YES TORONTO is a new HD offering from YES TV”, no information is provided about YES TV. Similarly, no information is provided about Freedom Films Inc., which has apparently agreed to a \$500,000 per year payment in exchange for 6 hours per day of infomercial airtime,⁴² or about the Advisory Board, both of which are referenced in the applicant's response to deficiencies.⁴³
 41. Finally, the youth-oriented focus of the station and its emphasis on education and training would suggest that this service would be more appropriate as a Category 2 undertaking than a mainstream, OTA broadcaster, which is intended to target a broad demographic with general interest programming in its licensed area.

³⁸ *Ibid.*

³⁹ YES TV Application, s. 4.3

⁴⁰ s. 3(1)(g)

⁴¹ YES TV response to deficiencies, 5 October 2007 at p. 11.

⁴² *Ibid.* at p. 3.

⁴³ *Ibid.*

42. Given these deficiencies, the CAB does not believe that this applicant is either an appropriate candidate for an OTA licence or one that would bring sufficient benefits to the system to merit approval.

Neither application meets the Commission's tests for market entry or market demand

43. The CAB submits that neither applicant meets the Commission's traditional approach to assessing market entry of a new OTA station, nor did either applicant address the Commission's requirement, in PN 2007-62, that it prove demand for its service. Indeed, neither applicant made a serious effort to address the key issue of whether individual market conditions warrant new entry. When the relevant factors are considered, the CAB submits it is apparent that neither of these applications should be granted an OTA licence at this time.
44. As noted above, the Commission was clear in PN 2002-31 that any new applications for OTA stations would be considered on basis of existing policies, including policies respecting market entry. One of the key considerations that the Commission takes into account when considering whether to licence a new OTA station is the impact that a new station would have on existing services:

One of the issues that the Commission addresses in evaluating an application that proposes to introduce a new television service to a given market is the extent to which the service is likely to draw audiences and revenues away from the licensed services already operating in the market. In general, the Commission would not be prepared to license a new service where the expected impact of the new service may unduly affect the ability of existing services to meet their programming responsibilities.⁴⁴

45. Factors the Commission has traditionally examined in assessing the ability of a market to support new entry are:
- the current and projected economic health of the subject market;
 - current and projected PBIT margins in the subject market compared to average PBIT margins nationally;
 - the number of stations per capita in the subject market following licensing of a new entrant as compared to other markets;
 - the historic and current share of hours tuned of existing licensees prior to the licensing of a new entrant, and the impact that a new entrant will have on market share; and

⁴⁴ See, for example, Broadcasting Decision CRTC 2004-98, *Competing applications proposing the introduction of new, over-the-air television services at Edmonton and Calgary*, 26 February 2004 at para. 32.

- the impact that a new entrant would have on the cost of commercial inventory.
46. Neither applicant has addressed these factors – and if they had, they would not be able to meet them given that the sector is in decline.
47. Similarly, neither applicant has provided any detailed evidence of demand for its proposed service, nor has either applicant put forth any compelling evidence that approval of their applications will drive HD penetration. In PN 2007-62, the Commission stated: “Applicants will be required to provide evidence giving clear indication that there is a demand and a market for the station and the proposed service.” Although HDTV attached a survey looking at viewing trends and HD penetration levels, it did not conduct a survey to establish demand for its proposed service either on the part of consumers or advertisers.

The Conventional Sector is in Decline, and Faces Difficult Times Ahead

48. As the Commission noted in the Television Policy Decision, conventional television in Canada today faces numerous challenges, including audience fragmentation and technological changes, declining viewership, major changes in the form and delivery of advertising, and additional costs related to the digital transition.⁴⁵
49. The CAB does not agree with the rosy forecast for conventional television put forth in the HDTV application. Several stand-alone broadcasters have exited the system in recent years (including WIC, Craig and CHUM) and Montreal-based TQS has recently filed for protection from its creditors. Despite a booming Canadian economy, it is a matter of record that advertising revenues of private OTA stations have been essentially flat since 2003, and the profitability of the sector is at its lowest level since 1962. Research commissioned for the CAB by Stephen Armstrong (the “Armstrong Report”) for its submission to Broadcasting Notice of Public Hearing 2007-10⁴⁶ (the “BDU Framework Proceeding) demonstrated the bleak financial performance of conventional OTA television from 2002-2006. Figure 1 of the Armstrong Report showed that while the cumulative annual growth rate (“CAGR”) of revenues was 3.8% over that period, profits before interest and taxes (“PBIT”) sank from 9.4% in 2002 to 4.1% in 2006. This PBIT level represents a 15% decline from the year 2000, a 10% decline from 2005, and is the lowest that the conventional sector has experienced since 1962.
50. An examination of the French-language private conventional subsector shows a decline in PBIT from 11.1% in 2002 to 7.2% in 2006.⁴⁷ English-language private conventional stations performed more poorly, with PBIT levels dropping from 9%

⁴⁵ TV Policy Decision, para. 12.

⁴⁶ Appendix 4 to the submission of the CAB to Broadcasting Notice of Public Hearing 2007-10, *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, October 19, 2007 [hereinafter “Armstrong Report”]

⁴⁷ Armstrong Report, p. 10.

- in 2002 to 3.4% in 2006.⁴⁸ And increasing expenses for private small market conventional television broadcasters together with decreasing revenues over the period resulted in a precipitous drop in their profitability, from 10.6% in 2002 to -3.6% in 2006.⁴⁹
51. The projected scenario for 2007-2011 is even worse, with each of these subsectors projecting negative profitability. According to the Armstrong Report, advertising revenues are likely to experience a CAGR of only 2.4%,⁵⁰ while PBIT margins for the conventional sector overall are projected to decrease from 1.6% in 2007 to a negative projected margin of -6.2% in 2011. For English-language private OTA stations, PBIT levels are projected to fall from 0.9% in 2007 to -7% in 2011. Meanwhile, the profitability of the French-language private conventional sub-sector is projected to drop from 4.6% in 2007 to -3.0% in 2011.⁵¹ And small market stations are projected to suffer the most, with PBITs plunging from -4.5% in 2007 to -13.2% in 2011.
 52. Notably, the CAGR for programming expenses over the same period is projected to be 5.1%, more than double the growth rate of revenues. The projections in the Armstrong Report were generally based on the rate at which expenses and revenues increased in the preceding five year period. However, it should be noted that because programming expenses increased substantially in 2006, the projection of programming expenses in the CAB Report was based on the preceding period net of 2006.⁵² Should the programming expenses for 2006 not be unusual in this respect, profitability will be even lower than the Armstrong Report projects.⁵³
 53. The sharp escalation of programming expenses is expected by broadcasters to continue, due in part to the increased number of licensees competing for non-Canadian programming. In addition, programming costs will also rise due to broadcasters' transition to HD. The CAB notes that although HDTV acknowledges that HD programming is more expensive, it forecasts that these costs will drop. This may eventually be true, but it is not the case now. As existing broadcasters struggle to manage the capital and associated costs of the transition to HD, the programming costs of HD must also be factored in over the period between now and September 2011 and even more so after that date. Moreover, given the relatively limited supply of HD programming, adding two new licensees which would presumably compete for the same pool of HD programming (Canadian and non-Canadian) would also drive costs up, further lowering the profitability of existing licensees.
 54. Prospective competitors can have an impact on incumbents even before they launch. Incumbents rely on investors to finance both their existing operations and plans for

⁴⁸ Armstrong Report, pp. 8-9.

⁴⁹ Armstrong Report, p. 12.

⁵⁰ Armstrong Report, Figure 4, p. 5.

⁵¹ Armstrong Report, p. 11.

⁵² Armstrong Report, p. 3.

⁵³ Armstrong Report, p. 7.

- expansion. New entrants can prejudice the financial environment by, for example, positioning themselves as potential candidates for an initial public offering (“IPO”) down the line. Given the already existing challenges of the financial climate, this would have an adverse effect on the ability of incumbent OTA broadcasters to fulfill their obligations and make the transition to HD.
55. As noted above, neither applicant has addressed any of the Commission’s criteria for new market entry. There is no discussion of the minimum level of profitability in each market the applicants propose to serve, and no analysis of whether the applicant would affect the profitability of existing licensees: we have only HDTV’s unsubstantiated assertion that it will not compete for local advertising dollars and therefore will not be a competitive threat to local OTA stations.
 56. Similarly, neither applicant has examined the market’s ability to absorb a new entrant with respect to the share of tuning among the existing conventional licensees in each market. They have not addressed the number of private conventional stations per capita in each market; nor have they addressed in any material respect the impact that their new service would have, either on existing licensees in the major markets in which they are seeking licenses, or in other small or mid-sized markets that their stations may reach off air or through distribution as a distant signal.
 57. Either application, if granted, would result in a further fragmented marketplace; new bidders to increase the cost of programming, in a sector where revenues are flat or declining and programming costs are escalating; and a negative impact on the revenues of current licensees, who are already facing enormous costs associated with their own transition to HD.
 58. Clearly, this is not a sector that can support new entry, particularly where HDTV is proposing a de facto national network. To grant either application would be tantamount to giving a licence away without the in-depth examination of each affected market that has been a central part of the Commission’s licensing process in virtually every conventional licensing decision to date. At this critical point in the life of conventional private OTA stations, the sector needs regulatory support, not greater competitive pressure through overlicensing.

The Applications are Premature in Any Event

59. The CAB believes that it is premature for the Commission to licence any new OTA undertakings, not only because of the perilous economic conditions of the conventional industry, but also in light of the significant regulatory changes that are currently underway in the sector.
60. In the recent Television Policy Decision, the Commission put into place certain measures designed to assist the conventional sector, which it acknowledged was facing serious difficulty. It noted:

The Commission...recognizes that, for the foreseeable future, OTA television services will continue to provide the

largest audiences and make the most significant contribution to the production and exhibition of high quality Canadian programming, including local programming. Therefore, the Commission considers it essential that OTA broadcasters have the flexibility to maximize advertising revenues to respond to the negative impact of audience fragmentation.⁵⁴

61. Accordingly, the Commission took steps to ensure that OTA broadcasters have such flexibility, by removing non-traditional advertising from the calculation of the maximum number of advertising minutes that may be broadcast, and by increasing the 12 minute per hour limit on traditional advertising (to 14 minutes per hour in peak viewing periods effective 1 September 2007, to 15 minutes per hour for all viewing periods effective 1 September 2008, and eliminating the restrictions altogether as of 1 September 2009). As stated in the CAB first phase submission on the *Broadcasting Notice of Public Hearing CRTC 2007-10: Review of the Regulatory Frameworks for Broadcasting Distribution Undertakings and Discretionary Programming Services*, this increased flexibility should under no circumstances be seen as a measure to offset the negative impacts from competition or other regulatory measures designed to support broadcasting services.
62. Moreover, the deployment of HD is still in its infancy in Canada. As of July 2007, approximately 9% of subscribers to Canadian BDUs subscribed to HDTV packages.⁵⁵ This represents an estimated 982,111 households, of which almost two-thirds are cable subscribers and one third are DTH subscribers. As discussed above, conventional OTA broadcasters are adding increasing amounts of programming in HD, but the full scale transition to digital/HD is still three years away. In the CAB's view, it would be entirely premature to licence new HD OTA services until the regulatory framework is finalized and the deployment of HD has achieved critical mass.
63. The CAB also notes that in the context of the current BDU Framework Proceeding, the Commission is re-examining the issue of compensation for the carriage of local signals, as well as the issue of broadcaster consent for the retransmission of distant signals. Again, measures taken in respect of these issues could potentially have a significant impact on the sector which should be absorbed before any more OTA stations are licensed.
64. Finally, while OTA television is in the midst of a transition from analog to digital, the regulatory regime for distribution is also in the midst of a detailed review, with a hearing beginning on April 7, 2008. This proceeding involves a number of complex issues affecting OTA broadcasters and could result in major changes to the regulatory framework. In the CAB's submission, no new OTA licences should be issued in any market until such time as the issues of compensation for carriage and

⁵⁴ Television Policy Decision, paras. 42-43.

⁵⁵ Canadian Digital TV Market Monitor , May/June, 2007.

retransmission consent have been resolved, and certainly not until after the proceeding initiated by BNPH 2007-10 has been completed and the new regulatory framework has been put into place. Accordingly, the CAB strongly believes that it is wholly premature to be adding new conventional OTA licensees, HD or otherwise at this particular time. The Commission should allow time for all of these changes to be implemented in the market before adding any new competitors that could further destabilize the system at such an uncertain point in the development of the sector.

Conclusion

65. For the reasons outlined above, the CAB requests that these applications be denied. A copy of this intervention has been served on HDTV and YES TV.
66. The CAB requests to appear at the public hearing in order to expand upon these comments.

Yours truly,

Original document signed by

Glenn O'Farrell
President & CEO

cc: Michael Girard, YES TV (mgirard@cacounsel.com)
Stewart Lyons, HDTV (HDTV@obelysk.com)